



## POLICY ROUNDTABLES

# Remedies in Cross-Border Merger Cases 2013

### Introduction

The OECD Competition Committee discussed Remedies in cross-border merger cases in October 2013. This document includes an executive summary of that debate and the documents from the meeting, an analytical note by the OECD Secretariat, written submissions from Australia, Brazil, Canada, the European Union, Ireland, Japan, Korea, Mexico, the Russian Federation, Spain, Ukraine, the United States and BIAC and a summary of the discussion.

### Overview

The roundtable topic was agreed as a follow-up discussion to the approval by the Competition Committee of the implementation Report on the 2005 Recommendation on Merger Review [C(2013)72]. The discussion focussed in particular on the challenges for agencies when designing, enforcing and monitoring cross-border remedies, and on issues arising when such remedies may need to be revised.

Cross-border mergers raise specific challenges for the different competition authorities reviewing the transaction in multiple jurisdictions. This type of transactions requires a high degree of co-ordination and co-operation between the reviewing authorities in order to ensure consistent outcomes across jurisdictions. Co-operation benefits particularly the discussion on remedies.

Experience of competition authorities indicates that co-operation is more efficient (i) if the merging parties allow the agencies to engage in effective communication early on in the review process by granting confidentiality waivers, and (ii) if the timing of the different national merger reviews are aligned as much as possible.

### Related Topics

- Investigations of Consummated and Non-notifiable Mergers (2014)
- Definition of Transaction for the Purpose of Merger Control Review (2013)
- Impact Evaluation of Merger Decisions (2011)
- Economic Evidence in Merger Analysis (2011)
- Remedies in Merger Cases (2011)
- Cross-Border Merger Control: Challenges for Developing and Emerging Economies (2011)
- OECD Recommendation concerning Merger Review (2005)
- Merger Remedies (2003)

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Remedies in Cross-Border Merger Cases held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in October 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la détermination des opérations constituant des "fusions" aux fins de contrôle des fusions qui s'est tenue en octobre 2013 dans le cadre du Comité de la concurrence (Groupe de travail n° 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat\**

Considering the discussion at the roundtable, the Note by the Secretariat as well as the delegates' written submissions, several key points emerge:

- (1) *Cross-border mergers raise specific challenges for competition authorities reviewing the transaction in multiple jurisdictions. This type of transaction may require a high degree of co-ordination and co-operation between the reviewing authorities in order to ensure if not an identical outcome, certainly a consistent one. Co-operation benefits the discussion of and approaches to remedies in particular.*

Consultation and co-operation between authorities are crucial for designing and enforcing effective remedies in cross-border mergers. The remedy should address the concerns identified by the agency and at the same time it should be consistent with the remedies imposed by other jurisdictions. A lack of communication may result in different and sometimes conflicting outcomes, which may encourage the merging parties to adopt strategic behaviour aiming at striking an agreement on a remedy with one jurisdiction and leverage that agreement in the negotiations with other authorities. Co-operation can be very helpful even in cases in which the reviewing authorities reach different conclusions concerning the need for a remedy. While this is often due to differences in the contexts in which the merger is assessed, co-operation can ensure that the differences are justifiable.

- (2) *Experience of competition authorities indicates that co-operation is more efficient (i) if the merging parties allow the agencies to engage in effective communication early on in the review process by granting confidentiality waivers in appropriate cases, and (ii) if the timing of the different national merger reviews is aligned as much as possible.*

Today, an increasing number of notified mergers have a cross-border effect and are therefore subject to review in multiple jurisdictions. The risks and costs for businesses stemming from multiple regulatory reviews have increased exponentially. The main risk occurs when a remedy is necessary in more than one jurisdiction as it is imperative to ensure consistency of regulatory interventions. Agencies' experience indicates that in these situations communication and collaboration among competition authorities is most effective if it begins in an early stage of the investigation. Some agencies have also stressed that if another jurisdiction identifies a remedy which addresses satisfactorily the competition concerns of their jurisdiction, they may not necessarily need to take a remedial action. Co-operation can be instrumental in creating remedies that may address the concerns of multiple agencies.

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\* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

The lack of alignment of timing in parallel merger reviews can create difficulties for the reviewing agencies. Non-alignment can be inadvertent or the result of a strategic decision of the merging parties. While the merging parties have a concurrent interest in aligning the procedures to facilitate co-operation and avoid incompatible remedies, managing multiple reviews may lead inevitably to the staggering of notifications and to the non-alignment of the investigations. In practice, when authorities become aware of a merger that would be of concern to them, they should “encourage” the parties to time their filing obligations in the concerned jurisdictions in a way that allows for the reviewing agencies to cooperate at key stages of their reviews.. This allows co-operation to start in the early stages of the review process and to limit the risk of inconsistent outcomes later on.

- (3) *The level of co-operation between competition authorities in cross-border merger cases has increased significantly also thanks to the wide use of confidentiality waivers, which make the exchange of confidential information between enforcers possible. Another instrument which has facilitated co-operation is the appointment of common enforcement and monitoring trustees. This allows agencies to rely on a common set of information about the enforcement of the remedy and to avoid inconsistent approaches.*

Over the years co-operation between competition authorities in merger reviews has improved significantly. A wider use of confidentiality waivers played an instrumental role in this trend. Waivers can be particularly useful when agencies need to discuss remedies, as they allow for the exchange of confidential information and documents which are necessary to ensure that the remedies adopted in one jurisdiction are compatible with the remedies adopted by others. The use of waivers however has its limits. The target company in a hostile merger, for example, is unlikely to grant a waiver. Similarly, the incentives of third parties to grant waivers may not be as strong as those of the merging parties. Information provided by third parties, however, can be very important especially when designing an effective remedy package to address cross-border effects of mergers.

After an appropriate remedy is designed, authorities must determine the best means of monitoring its implementation by parties. Cross-border structural remedies are difficult to enforce (e.g. if assets are outside the jurisdiction, the national competition authority may not have the power to enforce the remedy in case of non-compliance or partial compliance). On the other hand, for behavioural cross-border remedies, the challenge lies in the access to information to monitor the on-going compliance with the behavioural commitment; this may require assistance from the local jurisdiction that may not have an interest to do it (e.g. it did not impose the remedy, hence has no monitoring obligations). The appointment of common enforcement and monitoring trustees may help authorities overcome some of these challenges. The use of a common trustee reduces duplication and allows the agencies to have the same information set when assessing the correct enforcement of the remedy.

- (4) *The degree to which competition authorities need to cooperate may vary according to the circumstances. In cases in which multiple jurisdictions are involved, close collaboration may only be required between those agencies whose jurisdiction is most directly affected by the merger.*

Jurisdictions where the merger has a greater likelihood of generating (anti)competitive effects are those that will likely engage in the more extensive review of the transaction. Those agencies will need to engage in much closer co-operation and possibly will need to help each other on the design and enforcement of the remedy package. The other jurisdictions can participate in this dialogue but this might not require a similar degree of co-operation. Experience shows that the key factor to ensure a smooth and effective co-operation process is establishing a good dialogue among sister agencies. This dialogue may have different intensities, and may include participating in joint conference calls with the parties or with third parties organised by other authorities, discussing the industry context and background, comparing substantive approaches to market definition and to the effects of the transaction, sharing and discussing documents and other information obtained from merging parties or from third parties, as well as coordinating on merger remedies.

- (5) *Designing appropriate remedies whose expected effects last over time can be difficult. Markets affected by the remedy evolve and it is possible that changes to the remedy might become necessary after the remedy has been agreed with the competition authority. For this reason remedies may need to be revised after a certain period of time to take into account any contingency or change of circumstances. If this occurs, it is very important to co-ordinate any amendment with the other agencies originally involved in the review of the merger, since the changes may have an effect on their remedies too.*

The roundtable indicated that it might be desirable to have some means of seeking the modification of a remedy, either to reflect changes in circumstances or problems in the initial design of the remedy. The importance of such mechanisms increases with the duration of the remedy. If the merger regime of a country does not provide for tools to revise remedies after the merger decision is taken, the possibility to include a “review clause” in the remedy package can be useful. Review clauses in remedy packages allow agencies to extend the periods specified in the commitments for the implementation of the remedy in case unforeseen circumstances affect the successful implementation of the agreed remedy. They also allow the agency to waive or modify the undertakings in case an unexpected change in market circumstances requires it. These clauses can also be relied upon by the merging parties if they can show good cause.





## BACKGROUND NOTE

*By the Secretariat\**

### 1. Introduction

“*Cross-border merger remedy*” is a situation where a competition authority is seeking a remedy in a merger case, but the merging parties and/or their assets are located abroad. These types of remedies require the sale of assets or certain conduct of the merged entity in another jurisdiction from the one that is deciding about the merger. In such cases, competition authorities may face considerable challenges in different steps of the remedy process:

- First, it is possible that two or more competition authorities reviewing the same merger reach conflicting conclusions concerning the need for remedies, especially if the “centre of gravity/nexus” of the merger<sup>1</sup> is located in a jurisdiction which has decided not to take action against the merger.
- Second, it is possible that two competition authorities could identify competitive concerns with respect to different aspects of the same merger, in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority, and they may be inconsistent with one another.
- Finally, even if the competition authorities involved agree on the competitive concerns raised by the merger, they may have different views as to how to address these concerns by way of a remedy.

In his letter of 26 July 2013 calling for country contributions (COMP/2013.133) the WP3 Chair suggested to focus the discussion on the monitoring and implementation of cross-border remedies, and on issues arising when such remedies may need to be revised. The issue of cross-border mergers has been discussed in several roundtables with respect to different aspects in recent years.<sup>2</sup>

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\* This Background Note was written by Fiorenzo Bovenzi and Anna Pisarkiewicz, Senior and Junior Competition Policy Experts, respectively, in the Competition Division of the OECD.

<sup>1</sup> The centre of gravity of the transaction may be determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales.

<sup>2</sup> See Merger Remedies in 2003 [DAF/COMP(2004)21], Cross-Border Remedies in Merger Cases in 2005 (documents are available only on OLIS), Cross-Border Merger Control: Challenges for Developing and Emerging Economics in 2011 [DAF/COMP/GF(2011)13], and Remedies in Merger Cases in 2011 [DAF/COMP(2011)13]. See also the 2012 OECD Competition Committee to the OECD Council on the 2005 Merger Review Recommendation [C(2013)72].

## 2. Cooperation and coordination: benefits and challenges

Over the last years, merger enforcement has become increasingly more cross-border, and which remedial actions should be taken to counteract the anti-competitive effects of cross-border mergers is a key element of the decision-making process. Conflicts can arise at all stages of the remedy process; from the decision on which remedy to impose (e.g. an agency may consider that it has not the power to order and enforce a remedy involving assets outside its jurisdiction) to its monitoring for compliance (e.g. an agency may not have the legal tools to require the information it needs to monitor the implementation and compliance with the remedy if the information is located outside its jurisdiction). Conflicts can also arise if remedies are changed or reviewed after the transaction has been approved by all reviewing jurisdictions. In this case, the potential modification of remedies in one jurisdiction can result in inconsistencies with remedies applied in another jurisdiction, especially if there is no need to review the remedies previously agreed in this other jurisdiction.

In cross-border merger enforcement, consultation and co-operation between competition authorities is crucial. Lack of cooperation and communication between enforcers who are reviewing the same transaction might lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions in which they are likely to be notified, potentially creating a chilling effect as pro-competitive and other efficient mergers are not proposed. Co-operation and co-ordination are also important in order to avoid strategic gaming by merging parties reaching a settlement with one authority and trying to use that commitment as leverage in settlement negotiations with other authorities. If the parties are aware that regular contacts between enforcers occur, it will be harder to play one authority against another.

Bilateral co-operation in these contexts brings a number of important benefits to both the competition authorities and the merging parties. The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case when co-operation enhances the prospects for effective design and implementation of a remedy in a particular case. Co-operation between competition authorities in the remedies phase is, therefore, of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussions at the OECD and elsewhere have considered different options<sup>3</sup> for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities.

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<sup>3</sup> The ICPAC Report in 2000 examined the possibility of work sharing arrangements in the remedies phase in great detail and concluded that employing these cooperative approaches more frequently could have significant benefits. It considered different scenarios in which these arrangements could be used: (i) joint negotiation, where each interested jurisdiction would identify its concerns regarding the likely anti-competitive effects of a proposed transaction, and separately implement jointly negotiated remedies; and (ii) designating one jurisdiction as “lead jurisdiction” which negotiates remedies with the merging parties that will address the concerns of the “lead jurisdiction” as well as other interested jurisdictions. The second case can include a situation in which the competitive concerns of all jurisdictions involved in the review are identical, but also a situation in which the “lead jurisdiction” seeks remedies that go beyond what is necessary to satisfy its own concerns in order to address competitive concerns of other cooperating jurisdictions. ICPAC was the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust. It was formed in November 1997 to address the global antitrust problems of the 21st century and concluded its works in June 2000. The ICPAC recommendations and conclusions are included in a report published on 28 February 2000. The full report is available at <http://www.justice.gov/atr/icpac/finalreport.html>.

Over the years, co-operation between competition authorities in merger investigations has increased significantly, due to the increasingly more common practice of merging parties granting waivers allowing for the reviewing authorities to share information (including confidential information) and discuss the merits of the case. The increased use of waivers has certainly helped agencies coordinating remedies in a cross-border context. When WP3 was dealing with Information Exchanges in International Cooperation in Merger Investigations in May 2003, it found that very few jurisdictions had had experience with waivers. Most of the jurisdictions had no experience at all with waivers and only the United States reported use of waivers to have been “common practice”. However by 2011, most OECD jurisdictions reported using waivers regularly.

#### **Box 1. Possible questions for discussion**

(1) Please briefly describe a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another authority).

(2) Have you had any diverging views concerning the need for remedies with the jurisdiction that can be considered as the centre of gravity for the transaction?

(3) Please share your agency’s experiences coordinating and cooperating with any other agencies in connection with these remedies, particularly with respect to:

- Whether waivers were obtained from parties, and if not, why;
- Coordination/cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;
- Identifying or evaluating assets to be divested;
- Evaluating potential acquirers and market testing the proposed remedy;
- Designing behavioural remedies, if any: and
- Using or selecting divestiture/hold separate/monitoring trustees, including utilising a common trustee reporting to both agencies.

### **3. Monitoring and implementation of cross-border remedies**

After an appropriate remedy is designed, authorities must determine the best means of monitoring its implementation by parties. Trustees and third party stakeholders can be called upon to assist in ensuring compliance with merger remedies. Monitoring the implementation of remedies also differ according to the type of remedy. Merger remedies are generally classified as either *structural*, if they require the divestiture of an asset or licensing of intellectual property rights, or *behavioural* (or conduct), if they impose an obligation on the merged entity to engage in, or refrain from, a certain conduct.

For structural remedies, the use of hold separate arrangements and monitoring trustees, fix-it first remedies, upfront buyer requirements and crown jewel provisions has helped the timely implementation of the remedy. For behavioural remedies, which require an on-going monitoring effort, the use of arbitration clauses has proved useful in certain jurisdictions to alleviate the cost of monitoring the implementation. When a dispute on the implementation of the remedy arises, the arbitration panel is empowered to grant the aggrieved party private law remedies, while the authority maintains the power to impose sanctions such as fines. The possibility to resort to arbitration offers all potential beneficiaries an incentive to ensure the

accurate implementation of the remedies by the merged entity. This could potentially be more effective than any monitoring activity by the competition authority.

Cross-border structural remedies are difficult to enforce (e.g. if assets are outside the jurisdiction, the national competition authority may not have the power to enforce the remedy in case of non-compliance or partial compliance). On the other hand, for behavioural cross-border remedies, the challenge lies in the access to information to monitor the on-going compliance with the behavioural commitment; this may require assistance from the local jurisdiction who may not have an interest to do it (e.g. it did not impose the remedy, hence has no monitoring obligations).

**Box 2. Possible questions for discussion**

(4) What challenges can arise in the design or implementation of cross-border remedies, and how have agencies, on their own or through cooperation or coordination with one or more agencies, overcome them?

(5) When it comes to implementation and monitoring, which type of remedy (structural or behavioural) is preferable in the case of cross-border mergers?

**4. Revision of agreed remedies because of unforeseen circumstances or subsequent developments**

It is possible that changes to the remedy might become necessary after the remedy has been agreed with the competition authority. When remedies are changed or reviewed after a cross-border merger has been approved by all reviewing jurisdictions, conflicts could arise. The potential modification of remedies in one jurisdiction could result in inconsistencies with remedies applied in another, especially if there is no need to review the remedies previously agreed in this other jurisdiction.

As a general principle, it is desirable for a competition authority as well as the parties to have some means of seeking the modification of a remedy either to reflect changes in circumstances or problems in the initial design of the remedy.<sup>4</sup> The importance of such mechanisms increases with the duration of the remedy. If the merger regime of a country does not provide for tools to revise remedies after the merger decision is taken, the possibility to include a “review clause” in the remedy package can turn useful.

Review clauses in remedy packages allow agencies to extend the periods specified in the commitments for the implementation of the remedy in case unforeseen circumstances affect the successful implementation of the agreed remedy. They also allow the agency to waive or modify the undertakings in case an unexpected change in market circumstances requires it. The clauses can be relied upon by the merging parties if they can show good cause.<sup>5</sup>

<sup>4</sup> See the 2005 ICN report on Merger Remedies Review Project.

<sup>5</sup> The European Commission Model Texts for Divestiture Commitments includes the following review clause:

“34. The Commission may, where appropriate, in response to a request from [X] showing good cause and accompanied by a report from the Monitoring Trustee:

- (i) Grant an extension of the time periods foreseen in the Commitments, or
- (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Some agencies can review the remedy package by amending the original merger decision. In this case, however, the authority's discretion on how to shape the revised remedy will be limited. Third parties opposing the decision must normally be consulted and the notifying parties will have the burden of proof to justify that circumstances have changed to such a degree that an amendment of the whole merger decision is required. Considering these difficulties, this option is rarely followed.

**Box 3. Possible questions for discussion**

(6) Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?

(7) In your agency's view, are there any legal/practical obstacles that hinder your ability to review a remedy after a transaction is approved?

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Where [X] seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall [X] be entitled to request an extension within the last month of any period."



## AUSTRALIA

### Background

On 26 July 2013 Bill Baer, Chairman of the Working Part No. 3 on Cooperation and Enforcement, posed the following questions to guide submissions on the subject ‘remedies in cross-border merger cases’:

1. Please provide a short description of a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another competition authority).
2. Please share your agency’s experiences coordinating or cooperating with any other agencies in connection with these remedies, particularly with respect to:
  - whether waivers were obtained from parties, and if not, why not;
  - coordination/cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;
  - identifying or evaluating assets to be divested;
  - evaluating potential acquirers and market testing the proposed remedy;
  - designing behavioural (conduct) remedies, if any; and
  - using or selecting divestiture/hold separate/monitoring trustees, including utilising a common trustee reporting to both agencies.
3. To the extent not already described, please tell us what challenges have arisen in the design or implementation of cross-border remedies, and how your agency, on its own or through cooperation or coordination with one or more agencies, overcame those issues.
4. Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?

This submission addresses the above issues from the perspective of the Australian Competition and Consumer Commission (ACCC), and expands on additional observations arising from the ACCC’s experiences in cross-border remedy negotiations.



## **1. Key cross-border merger remedy matters for the ACCC**

The following global merger matters for the ACCC involved cross-jurisdictional remedies. These matters also gave rise to a number of important lessons for the ACCC, which are also outlined below.

### ***1.1. Pfizer Inc. acquisition of Wyeth Corp (2009)***

In mid-2009 the ACCC commenced a public review of a proposed acquisition by Pfizer Inc. of Wyeth Corp. Pfizer and Wyeth were both global pharmaceutical companies that competed in a number of human and animal health markets in Australia. Both companies were based overseas.

In Australia, Pfizer's operations were conducted by Pfizer Australia Pty Limited (Pfizer Australia) and covered prescription medicines, animal health and research and development. Pfizer Australia offered a broad range of animal health products to dairy, beef, pork and sheep producers, as well as vaccines and pharmaceutical products to veterinarians for companion animals. Pfizer Australia had a manufacturing facility for animal health products located at Parkville, in Victoria. The plant manufactured both viral (the viral antigens were imported from Pfizer's viral facility in New Zealand) and bacterial vaccines as well as pharmaceuticals for companion and livestock animals. Pfizer Australia also imported some of its animal health products into Australia.

In Australia, Wyeth's human health business was operated by Wyeth Australia Pty Ltd and its animal health business was operated by Fort Dodge Australia. Fort Dodge Australia supplied a broad range of pharmaceutical products and vaccines for both companion and livestock animals. Fort Dodge Australia had its manufacturing site located in Penrith New South Wales. This plant produced livestock products and bacterial vaccines for livestock animals. Fort Dodge also imported a number of animal health products into Australia.

The proposed acquisition was also considered by the FTC, Canadian Competition Bureau, New Zealand Commerce Commission (NZCC) and other competition agencies in Switzerland, Mexico and other Latin American jurisdictions.

The ACCC concluded that the proposed acquisition would likely result in a substantial lessening of competition in a number of animal health markets in Australia. To address these competition concerns, in September 2009 the ACCC accepted a remedy from Pfizer and its Australian subsidiary. The aim of the remedy was to maintain competition by creating or strengthening a viable, standalone, independent and long term competitor to Pfizer in the relevant markets.

One part of the remedy required Pfizer to divest (up-front) its Fort Dodge companion animal vaccine business to the approved purchaser, Boehringer Ingelheim Vetmedica Inc. The divestiture in Australia included all necessary trademarks and other intellectual property rights relating to the marketing and/or sale in Australia of the divested products. The companion animal vaccine manufacturing facilities were located in the US. With no companion animal vaccine manufacturing facilities in Australia, the same purchaser had to be approved by both the ACCC and FTC, to ensure continuity of supply and avoid the situation where an Australian purchaser had to enter into an indefinite supply agreement with a US purchaser.

Within Australia, Pfizer also undertook to divest, within four months of completion, Fort Dodge's livestock business to a purchaser to be approved by the ACCC. This part of the remedy was an Australia-specific commitment. The 'livestock business' was defined in the remedy to include all tangible and intangible assets that would enable the approved purchaser to manufacture, market and sell the livestock vaccines and the Cydectin endectocides for sheep and cattle in Australia, and included Fort Dodge's manufacturing plant located in Penrith.

Pfizer also undertook to divest the livestock business on terms which included interim arrangements for the supply or toll manufacturing of the Cydectin injection and long acting injection for cattle, and the relevant active pharmaceutical ingredient (moxidectin).

An independent manager was appointed to manage both the companion animal vaccine business and the livestock business until they were divested. Pfizer's compliance with the remedy (in respect of the ongoing supply agreement on the Cydectin injection) continues to be monitored by an independent auditor.

### ***1.2. Merger of Agilent Technologies Inc. and Varian Inc. (2009)***

In 2009 Agilent and Varian sought the ACCC's clearance of the merger of their respective companies. Each company was based in the United States (US). Agilent designed, developed, manufactured, sold and serviced electronic and bio-analytical measurement products. The products Agilent sold in Australia were imported. Varian was a worldwide supplier of scientific instruments, and operated manufacturing facilities in a number of jurisdictions including Australia.

Agilent and Varian were two of a small number of significant suppliers of laboratory gas chromatographs, micro-portable gas chromatographs, triple quadrupole gas chromatograph mass spectrometers and inductively coupled plasma mass spectrometers in Australia. The transaction was also considered by the European Commission (EC) and US Federal Trade Commission (FTC), in addition to competition regulators in a number of other jurisdictions. Throughout its review of the proposed acquisition, the ACCC liaised closely with the EC and the FTC.

In order to address competition concerns identified by the EC, Agilent agreed to divest its global micro-portable gas chromatography business and Varian's global laboratory gas chromatography, triple quadrupole gas chromatograph mass spectrometry and inductively coupled plasma mass spectrometry businesses.

The ACCC identified a number of scientific instrument product markets where divestitures were required to address competition concerns. To address the ACCC's competition concerns, the parties agreed to provide a remedy which gave effect to the global divestitures in Australia. The remedy provided for upfront ACCC approval of the proposed purchasers of the global businesses to be divested – Inficon Inc. as purchaser of Agilent's global micro-portable gas chromatograph business and Bruker Inc. as purchaser of Varian's global laboratory gas chromatograph, triple quadrupole gas chromatograph mass spectrometer and inductively coupled plasma mass spectrometer businesses. In the event that Agilent failed to complete divestitures to Inficon or Bruker, the remedy required Agilent to obtain ACCC approval of any alternative purchasers.

In March 2010 the ACCC accepted the remedy and cleared the merger.

### ***1.3. Nestlé S.A. acquisition of Pfizer Nutrition (2012)***

In 2012 Nestlé proposed to acquire Pfizer Nutrition, a global infant nutrition business, from Pfizer Inc. At the time, Nestlé and Pfizer Nutrition were two of the three largest suppliers of infant formula and toddler milk in Australia. The ACCC did not oppose the acquisition subject to remedies given by Nestlé and Pfizer.

The merger raised concerns in several jurisdictions and the parties made merger control filings in Brazil, China, Colombia, India, Indonesia, Ireland, Italy, Mexico, Pakistan, Portugal, South Africa and Turkey.

The ACCC consulted with the South African Competition Commission in the negotiation of the remedy package and in relation to the purchaser (Aspen) which, for several years, had been the exclusive licensee of Pfizer's infant formula products in South Africa.

The remedy given by Nestlé required it to license Pfizer Nutrition's Australian infant nutrition business' brand portfolio to an independent purchaser on an exclusive basis for ten years, followed by a further ten year 'black out' period in which Nestlé would not be permitted to re-enter the markets with Pfizer's brands. The remedy required Nestlé to obtain ACCC approval for the independent purchaser.

The aim of the licence was to allow the purchaser to successfully transition and re-brand Pfizer Nutrition's S-26/SMA brand portfolio to its own proprietary brand over a number of years. This would ensure the pre-merger level of competition in the relevant markets would be maintained through the creation of a strong third major supplier of infant formula and toddler milk in Australia.

In the specific circumstances of this transaction, the ACCC decided that a permanent divestiture of the brands would not be required and that the licence and re-branding remedy appropriately addressed the ACCC's competition concerns.

Pfizer Australia Pty Ltd also provided a remedy to the ACCC to provide transitional services and transfer key employees to the approved independent purchaser.

#### ***1.4. Baxter International Inc. acquisition of Gambro AB (2013)***

In March 2013 Baxter sought the ACCC's clearance of its proposed acquisition of Gambro. At the time of the review both were global companies, with Baxter based in the US and Gambro based in Sweden. Each company distributed their medical products within Australia, and Baxter also operated a manufacturing plant in Sydney.

The transaction was also considered by regulators in the US, Canada, European Union, New Zealand, China, Turkey, Ukraine, South Korea and Brazil.

Baxter offered to divest its global continuous renal replacement therapy (CRRT) operations to address competition concerns expressed by regulators including the ACCC during their review. The ACCC worked closely with the EC and the NZCC during its review of the proposed acquisition and during the negotiation of the global remedy with Baxter. The ACCC's close coordination with the EC and NZCC arose due to the similar competition issues identified across the three jurisdictions. In addition, key physical assets were located in Europe and Baxter's Australian and New Zealand businesses had a number of linkages including that Baxter transported fluids produced at its Australian facility to New Zealand (and other neighbouring countries); and that Baxter's Australian and New Zealand businesses were managed by Baxter as an integrated business.

In addition, the ACCC's liaison with the NZCC on the proposed acquisition and remedy was even closer as a result of Commissioner cross-appointments between the two agencies. NZCC Commissioner Mark Berry attended the ACCC's commission and merger review committee meetings considering the merger and the ACCC's Commissioner Jill Walker attended the NZCC's division meetings and participated in their decision-making.

In September 2013 the ACCC accepted a remedy from Baxter that it would comply with commitments that it provided to the EC to divest the global CRRT divestiture business. This was on the basis that the majority of Baxter's CRRT assets were located outside of Australia, including the manufacturing and supply arrangements for products supplied within Australia, and the divestiture transaction was occurring in Europe. The ACCC obtained a separate remedy in Australia so that the ACCC

could enforce Baxter's commitments in the event Baxter breached the remedy with respect to the relevant Australian operations. Further, in order to mitigate purchaser risk in Australia, the remedy required Baxter to divest its global CRRT business to an ACCC-approved purchaser.

## **2. General comments on global remedies**

Australia is a relatively small jurisdiction in terms of global commerce. A global merger may affect Australia, but supply arrangements and the transaction itself are likely to be focussed in other larger jurisdictions. As a result, the ACCC's experience in global remedies usually involves extensive coordination with other regulators including larger regulators such as in the US and Europe.

The ACCC is conscious that the effectiveness of the remedies it obtains from merger parties is often dependent on remedies obtained by the lead regulator. A lead regulator is generally the regulator in the jurisdiction in which the relevant key merger and divestiture assets are based, or in which the transaction will have the greatest competitive impact (noting it may not always be possible to identify a lead regulator). In a global merger matter where a remedy is offered, it is crucial that the ACCC identify the lead regulator and work closely with them, in order to obtain a remedy that addresses competition concerns in both jurisdictions.

While some global mergers can have significant impacts on markets in Australia, parties in global mergers often focus their efforts on the larger jurisdictions, where the parent companies are located and notification is mandatory. Australia does not have a compulsory notification regime. As parties are not under any statutory obligations to notify the ACCC of a proposed acquisition, parties may not notify the ACCC or may provide notification at a late stage. Late notification can result in merger parties putting unreasonable pressure on the ACCC to complete its review in unrealistic timeframes.

Under section 50 of the *Competition and Consumer Act 2010* (the Act), acquisitions are prohibited if they would have the effect, or are likely to have the effect, of substantially lessening competition in a market in Australia. The ACCC can accept a court enforceable remedy offered by parties under section 87B of the Act if it addresses the ACCC's competition concerns.

## **3. Use of waivers**

The ACCC generally obtains confidentiality waivers from relevant parties in any matter where the ACCC wants to discuss a transaction with other agencies and the information to be discussed may be protected. In the majority of global transactions the ACCC considers, the ACCC requires confidentiality waivers from the parties in order for the ACCC to discuss protected information with other regulators. Typically, the ACCC waiver will provide that the ACCC will not disclose confidential information provided by another agency to the ACCC to a third party without first obtaining consent from the source, unless required by or permitted under applicable domestic law including section 155AAA of the Act.

Each jurisdiction is subject to different laws so a waiver that is acceptable in a jurisdiction outside of Australia may not be acceptable to the ACCC. The ACCC will generally not accept a restriction on internal use, including future use, that the ACCC may make of the confidential information consistent with its statutory functions. Where the ACCC has communicated with regulators before a waiver was in place, staff liaised with those regulators in general terms about the ACCC investigation and did not share specific confidential information. In Nestlé/Pfizer the ACCC also liaised with the EC in relation to the EC's experience with a previous EC remedy that was similar to the one proposed. These discussions occurred before a waiver was in place, however, there was no need to disclose confidential information in relation to that issue.

In addition to waivers, the cross-appointment arrangement between the ACCC and the NZCC permits that the associate members have full access to all of the confidential information of the other agency (since they are officially appointed as an associate member of the other agency).

#### **4. Identifying and evaluating divestiture assets**

##### **4.1. Considerations for the ACCC**

Often the key divestiture assets in a global merger matter are not located in Australia. In such matters the ACCC needs to work very closely with other competition regulators and the parties to ensure that the assets put forward for divestiture sufficiently address the Australian competition concerns. For example, in Pfizer/Wyeth it was very important that divestiture assets for the companion animal vaccine businesses in the US and Australia would be sold to the same purchaser, given the relevant products were manufactured in the US. If the assets were not sold to the same purchaser in both countries, purchaser risk for Australia would have been significant. Separate purchasers could have compromised the independence and long-term viability of the Australian purchaser, as it would have been dependent upon the US purchaser for continuity of supply.

Although evaluation of a remedy package is done in consultation with other regulators, the ACCC recognises that there may be different concerns in relation to divestiture assets and the choice of purchaser in individual jurisdictions. For example, in Pfizer/Wyeth the ACCC shared many of the FTC's competition concerns but also had additional concerns in relation to Australian markets. As outlined above, there was a close relationship between production facilities in the US and supply in Australia and this resulted in a requirement on Pfizer to divest Fort Dodge's companion animal business to the same purchaser who was approved in Australia and in the US. In addition, the ACCC obtained a remedy involving divestiture of part of Pfizer's business in Australia that was not divested in other jurisdictions - Fort Dodge's range of livestock vaccines and manufacturing facility in Penrith, NSW- to a purchaser that was approved by the ACCC at a later date (Virbac).

The ACCC strongly encourages merger parties not to approach remedy negotiations as an iterative process. Rather, the ACCC prefers that parties propose the best possible remedy from the start. The importance of this is highlighted in the ACCC's experience in Pfizer/Wyeth, where Pfizer put forward multiple divestiture proposals with progressive improvements. This resulted in significant delays by Pfizer before submitting a draft remedy which satisfactorily addressed the ACCC's concerns in each of the relevant markets. In fact, Pfizer did not propose divestitures in a number of markets in which competition concerns were raised until a late stage in the review.

##### **4.2. Remedy structure**

In some matters a remedy is offered to another regulator (particularly the lead regulator) that largely mirrors a remedy that the ACCC would have otherwise sought. In this circumstance, the ACCC must still consider whether a separate Australian remedy is required so that parties provide a direct commitment with respect to Australia.

This occurred in Baxter/Gambro and Agilent/Varian. In those matters the parties' commitments to the EC were considered sufficient to address competition concerns in Australia. However, in order to mitigate purchaser risk with respect to Australia, the remedies given to the ACCC in those matters required the parties to sell the relevant divestiture businesses to purchasers that were approved by the ACCC. In each matter, there were purchasers proposed by the parties who did not have a local presence in Australia but who distributed their products through third party distributors (Nikkiso in Baxter/Gambro and Inficon in Agilent/Varian). The purchaser approval processes within the ACCC's remedies enabled the ACCC to test

whether these proposed purchasers had the incentive and commitment to continue to operate and grow the divestiture businesses in Australia.

Obtaining a separate set of Australian commitments also provides the ACCC with a way of enforcing the remedy, for example in relation to breaches of transitional arrangements.

## **5. Evaluating potential purchasers and market testing proposed remedies**

When considering potential purchasers of a divestiture business in a global merger matter, many of the issues in the above section relating to identifying and evaluating divestiture assets also apply.

### **5.1. Issues relating to potential purchasers**

In the ACCC's experience (and as discussed above), when evaluating possible purchasers in global remedies two different issues may arise.

Firstly, a possible purchaser that is being considered by the merger parties may be suitable in one jurisdiction but may pose potential competition concerns in another jurisdiction due to competitive overlap.

Secondly, if a potential purchaser does not have direct operations or presence in Australia, then the ACCC may have questions about that purchaser's incentive or commitment to continue to operate the Australian portion of the divestiture business. In particular, if the Australian portion of the divestiture business is relatively minor (in terms of revenue), the purchaser may not have an incentive to maintain the divestiture business in Australia in the long term.

If from an early stage parties engage with all relevant competition regulators and regulators collaborate closely, parties may be more inclined to propose remedies and purchasers of divestiture businesses that suit multiple jurisdictions. For example, in Baxter/Gambro a potential purchaser initially considered by Baxter was likely to have satisfied the ACCC's competition concerns, but potentially raised concerns in the European Union due to competitive overlaps. Equally, the fact that the EC was the lead regulator and Australia was a smaller market for Baxter could have resulted in a global remedy that did not sufficiently address Australia's competition concerns. However, with close cooperation between the EC, NZCC and ACCC, a purchaser was put forward by Baxter that was ultimately suitable in all relevant jurisdictions.

The ACCC has not yet encountered a situation where it has formally been presented with a proposed purchaser that was likely to create competition concerns in Australia but would have been suitable in other jurisdictions, or vice versa. It would be interesting to see whether any other regulators have had this experience and if so, how the situation was resolved.

### **5.2. ACCC process for evaluating potential purchasers**

Separate to market enquiries during a merger review, the ACCC will generally conduct market testing on proposed remedies. The ACCC seeks comment with a range of market participants including customers, competitors and suppliers. It is also useful to discuss the suitability of potential purchasers with other relevant regulators, particularly if a potential purchaser is based in their jurisdiction. In Nestlé/Pfizer, discussions with the Competition Commission of South Africa provided the ACCC staff with useful background on possible purchasers and their ability to run the business. The divestiture business was ultimately sold to a manufacturer in South Africa which, for several years, had been the exclusive licensee of Pfizer's infant formula products in South Africa.

If market participants raise concerns with a proposed remedy, these issues are put to the parties and a revised remedy may be submitted to the ACCC. The ACCC prefers to keep the number of times it approaches the market to a minimum, in order to avoid inefficient and time-consuming consultation on numerous amended remedies.

## **6. Designing behavioural remedies**

The ACCC has a preference for structural remedies such as divestitures, but has accepted behavioural or quasi-structural remedies in certain matters.

In Nestlé/Pfizer, a quasi-structural remedy was accepted whereby Pfizer undertook to license a number of assets for a set period to another entity in order to provide an environment where that entity would be able to enter and compete in the infant formula markets. The ACCC had not previously accepted this type of remedy. In considering whether to accept the remedy, the ACCC sought the views of counterparts in the EC on its experiences with similar remedies and the Competition Commission of South Africa particularly in relation to the proposed purchaser. These discussions led to an improved remedy in Australia and South Africa with the same remedy being accepted in both jurisdictions.

In addition, the Nestlé/Pfizer remedy also involved a range of behavioural elements. These included a 'black out' period following the licence period where Nestlé was not to re-introduce any of the relevant infant nutrition brands or formulations into Australia and a commitment not to disparage the approved purchaser. The ACCC considered these additional commitments were required in order to give effect to the quasi-structural remedy.

The ACCC is aware that some regulators are unable to accept behavioural remedies.

Using and selecting divestiture/hold separate/monitoring trustees, including using common trustees

If the remedy requires a separate Australian commitment, such as the divestiture of a business or the transfer of a long term licence, as occurred in Pfizer/Wyeth and Nestlé/Pfizer, then the ACCC will require that the parties appoint an ACCC-approved auditor in Australia to monitor the parties' compliance with the remedy. This includes monitoring the parties' compliance with obligations to divest the business or assets, to hold separate or maintain the business pending divestiture and where relevant to provide the transitional supply of inputs or services to the purchaser. In some circumstances, for example where asset risk is high, the ACCC will also require that an ACCC-approved independent manager is engaged by the parties to manage the divestiture business pending the divestiture (this was the case in Pfizer/Wyeth).

However, in Baxter/Gambro and Agilent/Varian the ACCC decided to rely on the EC to approve the appointment of the monitoring trustees as in each case the remedies with respect to Australia relied on the commitments to the EC. In both matters, the EC was already approving the appointment of monitoring trustees who were located in Europe (and who were monitoring obligations that were being effected in Europe). Therefore the ACCC considered the EC was best placed to approve these appointments and did not see a need for separate local approval processes. However, the ACCC's remedies in these matters did include requirements that the parties procured that the Monitoring and Divestiture Trustees provide the ACCC with copies of the reports provided to the EC. This ensured that the ACCC had visibility over any issues that were identified during the course of the divestiture.

## **8. Challenges in the negotiation or implementation of cross-border remedies**

In addition to those described above, the ACCC has also identified a range of other challenges in negotiating and implementing cross-border remedies.

### **8.1. *The importance of communication***

Early and ongoing communication and collaboration between competition regulators is very important in global remedy matters. Communication from the beginning of a matter will provide case teams with greater understanding of other regulators' processes, timing pressures and competition issues.

Sharing information provided by parties on issues such as market definition and parties' commercial considerations will provide a complete global picture of the proposed acquisition. It will also combat the situation where merger parties may attempt to leverage some regulators off other regulators by providing different information.

It is important to establish up-front each regulator's stance on particular issues and why they have come to this view. This provides an opportunity to discuss any differences in views and learn from the past experience of other regulators. It is possible that an issue of concern for one regulator is not of concern for another regulator; for example the ACCC may have concerns about the concentration of a certain market in Australia, while in other (often larger) jurisdictions that same market may be more competitive.

To the greatest extent possible, competition regulators should ensure that counterparts in other jurisdictions are aware of matters relevant to their jurisdiction. The ACCC has most often worked with the EC (Baxter/Gambro, Agilent/Varian), FTC (Pfizer/Wyeth, Novartis/Alcon) and NZCC (Baxter/Gambro, Scandinavian Tobacco Group/Swedish Match) in cross border remedy matters. However, the ACCC also recognises it should maintain awareness of any other competition regulator that is (or should be) considering a proposed merger. An example is Nestlé/Pfizer, which was also considered by the South African Competition Commission. Likewise, as outlined above the ACCC could be considered a smaller regulator in large global transactions, and may not be approached by merger parties to clear a merger that may nevertheless affect Australia, or may be approached at a late stage given the ACCC's voluntary notification regime.

### **8.2. *Differences in processes***

When working with other competition regulators it is useful to be aware of each regulator's internal processes. Given process often drives the timing of a matter and timing also has a tendency to change, the ACCC has found it is equally important to continue to clarify matters of process throughout a matter. For example, in Baxter/Gambro the ACCC did not fully appreciate the EC's timing pressures in Phase I of its review process, which resulted in the ACCC being unclear as to the EC's reasons for certain recommendations.

The ACCC is aware that some regulators such as the EC and NZCC are subject to statutory timeframes. This may give rise to an expectation amongst merger parties that regulators must make a decision within a certain period. However, parties may not be aware that the ACCC is able to suspend its reviews and seek a remedy from parties not to complete the transaction until a review is completed, which may include negotiation of an appropriate remedy. The ability to suspend consideration of a matter generally reduces the amount of pressure parties can exert on the ACCC to speed up its review. This may in turn lead to parties being more willing to engage with the ACCC where previously Australia may not have been considered a key jurisdiction in which to obtain regulatory approval.

Where a global merger raises competition issues in Australia that are of a global nature and not unique to Australia, the ACCC may delay its review until other regulators have formed a view on key issues, in order for the ACCC to determine the best possible remedy for Australia. This course of action may be appropriate if the ACCC is confident that the global remedy is likely to adequately address the competition concerns in Australia.



Despite having relatively flexible processes, the ACCC's timing in a matter may still be influenced by the timing of the lead regulator, which may also be guided by the parties' timeframes. For example, in Baxter/Gambro, the NZCC and ACCC communicated closely with the EC as the lead regulator to align timings for market testing and final decisions.

Timing pressures may also prevent the ACCC from approving related transaction agreements, resulting in ACCC reliance on negotiations between the lead regulator and merger parties. This occurred in Baxter/Gambro, where no formal requirement was included in the remedy for the ACCC to approve the related agreements. Nevertheless, the ACCC was able to review the agreements prior to making a final decision and put questions to the parties and the EC where the agreements raised areas of concern.

Different competition regulators may also have different standard rules for remedies. For example, some regulators may prescribe longer or shorter divestiture periods. In order to ensure regulators working together have similar expectations as to process and competition issues, the ACCC seeks to confirm other regulators' approaches throughout a review. This may be particularly useful where process timelines are fixed.

### **8.3. *Jurisdiction and enforcement***

While the competition effects of a merger and associated remedy may affect Australia, the ACCC may nevertheless face difficulties in asserting jurisdiction or putting in place appropriate enforcement mechanisms under sections 50 and 87B respectively of the Act.

In circumstances where parties are based outside Australia, the ACCC's jurisdiction under the Act is limited to where the parties are either incorporated or carrying on business in Australia, unless parties voluntarily submit to the ACCC's jurisdiction. This may pose difficulties where, for example, one or more merger parties are not present in Australia and do not supply products and services directly to Australian consumers, but instead operate through a distribution agreement with another company. Where jurisdiction may be difficult to establish, some international parties may decide not to submit to the ACCC's jurisdiction.

Even where the ACCC has jurisdiction to seek an injunction to stop the merger from proceeding in Australia, this may not be the preferred course of action. This is because opposing the merger would not necessarily address the competition issues in Australia if the global transaction still proceeds. For example, in Pfizer/Wyeth, Nestlé/Pfizer, Baxter/Gambro and Agilent/Varian, the ACCC had jurisdiction as the parties were carrying on business in Australia. However, if an Australian court had granted an injunction to prevent the merger from being completed in Australia the court action would have been unlikely to adequately address the ACCC's competition concerns, due to the integration between the Australian parts of the businesses and their overseas parents, particularly in relation to supply. In addition, the proposed commitments provided a broader remedy than would have likely been obtained from an Australian court should the matter have been litigated.

## **9. *Revised cross-border remedies***

The remedy obtained in Nestlé/Pfizer subsequently required a variation due to issues with ongoing contracts between the parties that needed to be resolved before the ACCC could approve a purchaser and the sale agreements.

In addition, further to a request from the approved purchaser, the remedy obtained in Pfizer/Wyeth was varied to remove the obligations on Pfizer relating to the transfer of one part of the divestiture business to the approved purchaser.

The ACCC did not need to liaise with other regulators in relation to these variations as they were specific to the Australian parts of the remedies.

#### **10. Suggestions for improvement**

Given the importance of cooperation and coordination between competition regulators in global remedy matters, the following are recommendations for how regulators can learn from each other's experiences and better understand different processes.

- It may be useful to conduct a debrief with case teams in other competition regulators following a specific matter, to reflect upon what worked well and what could have been improved.
- Outside specific matters, case teams could continue to strengthen the relationships with other regulators, especially those with whom they often work. The ACCC is aware that many regulators already engage with other regulators in this way.
- It may be useful for regulators to share experiences, on an ongoing basis, on the development of different remedies. This could include discussing novel remedies so that other case teams could consider these remedies in future matters. Groups such as the Working Party No. 3 or the ICN International Cooperation Project would be a suitable forum for these discussions.



## BRAZIL

### 1. Introduction

A new Competition Law took effect in Brazil on 29 May 2012 (Law no. 12,529 of 30 November 2011). The new legislation brought significant changes to the structure of the governmental agencies charged with the enforcement of competition law in Brazil, specifically for merger control, unilateral conduct and antitrust sanctions within administrative level.

The most relevant change delivered by the new Law concerns the adoption of a pre-merger control regime in Brazil. This means that, in the previous law, the Administrative Council for Economic Defense<sup>1</sup> would usually analyse cases after their approval by other jurisdictions, considering that Brazilian System was set for post-merger review. With the institution of the pre-merger analysis, CADE follows the best international practices in the field of competition law enforcement, thus being able to examine mergers and possible remedies at the same moment that most competition agencies around the world do so.

CADE now has a specific deadline to render a decision on a merger case. If this time period elapses without a decision, the transaction will be considered automatically approved. Such time alignment conveyed a novelty for CADE in the field of International Cooperation for merger analysis. The Council is now able to discuss case analysis with its sister agencies around the world and even impose remedies in a coordinated manner. As the new law comes to its first anniversary, cooperation in merger analysis has demonstrated to be not only feasible but also a very important tool when dealing with transnational firms.

In the first year alone, CADE has had two very successful cooperation cases in the analysis of transnational mergers. This might seem as a slim number if compared to the 262 mergers that were notified to the Council in that period. Nonetheless, CADE's new Law establishes a fast track procedure that guarantees a faster course of action to simpler cases, hence out of those 262 notified mergers, only 12 were sent to the Tribunal for second analysis and final decision – what leads to the significance of those two cases, which were amongst that slim number of 12. Both cases will be analysed later in this paper.

One conclusion may be that CADE has had a 10% rate of transnational cases, considering the total of “complex mergers” notified under the provisions of the new legislation. It is important to highlight that CADE has been able to keep close contact to its international counterparts in order to guarantee that the most efficient practices are used in its decision in a coordinated manner.

### 2. Fomenting Collaboration

With the new pre-merger control regime, CADE envisaged the opportunity to exchange views and coordinate measures with many competition authorities worldwide. This was done both before and after the enactment of the new law.

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<sup>1</sup> CADE, for its acronym in Portuguese.

First, benchmarking and management research were developed in order to identify best practices. The main purpose was to structure an efficient pre-merger review regime, considering many inefficient aspects related to the former post-merger control system. As methodology to achieve this goal, surveys were sent to several competition authorities as well as international bodies with questions related to the management of pre-merger systems. Moreover, some key-countries were visited to further this benchmarking exercise, which were essential to the current design of CADE's General Superintendence, its lower body responsible for merger review, as well as anticompetitive practices in general.

Then, after the new law took effect, the collaboration with sister agencies continued in different ways.

With European counterparts, including DG Competition and other European national competition agencies, CADE efforts intended to cultivate old and create new relationships from the old continent. In sight of this innovation and trying to prepare for such, CADE has brought 12 European officials from different jurisdictions to discuss cooperation with its officials in a three-day Workshop that took place in May 2013, in Brasilia. The event brought participant jurisdictions closer to CADE by fostering international cooperation, particularly in the field of merger control, and by promoting trust and the exchange of ideas between Brazilian and European officials.

Close collaboration has also been developed with American counterparts. Both Federal Trade Commission and Department of Justice have been extremely important during merger investigations, in particular in sharing specific market experience and fast proceedings know-how.

In addition, CADE has welcomed and encouraged a series of Institutional visits from a variety of countries with the end of promoting collaboration and experience exchange between our officials. In the last year, CADE welcomed visits from: the Chinese Ministry of Commerce and the State Administration of Industry and Commerce, signing a Memorandum of Understanding with the last and negotiating one with the first; a Mercosur delegation, interested in fomenting competition protection in other countries of the group; officials from American Federal Trade Commission (FTC) and British Office of Fair Trading; and from neighbouring countries such as Ecuador, with whom a memorandum of understanding is being negotiated.

During those institutional visits, CADE's officials had a chance to understand foreign work and experiences. At the same time, visitors were introduced CADE's new facilities, to our personnel and most importantly to understand and trust our brand new legislation.

Aside from the initiatives mentioned above, CADE has established agreements with a variety of competition agencies in the world with the focus on fomenting cooperation and exchanging experiences in the field of Competition Defense. The complete list of CADE's agreements is available in CADE's website.

Finally, considering legislation changes, CADE prepared a bilingual (Portuguese/English) model of Waiver of Confidentiality based on OECD best practices and ICN models, in particular the American and European experiences. The model was created as a draft to be distributed to lawyers and companies when convenient during the investigations of transnational mergers. Shortly after the model waivers were produced, the two cases explained below used those waivers as base for the beginning of a close work between CADE and its sister agencies.

### 3. Case Analyses

Recently, CADE has analysed two international mergers with intense cooperation with DG-Competition. The first case concerned the acquisition of *Mach* of Luxembourg by *Syniverse* of the US. The merger has been recently approved by both CADE and DG-Comp subject to conditions.<sup>2</sup> The second case that also illustrates a “new Era” of competition enforcement in Brazil, in particular for merger review concerned the proposed merger between the Swedish company *Munksjö AB* and the Finish *Ahlstrom Corporation*.<sup>3</sup>

#### 3.1. *Purchase of Mach of Luxembourg by Syniverse of the US*

The purchase of *Mach* of Luxembourg by *Syniverse* of the US represents the union of two main players in two highly concentrated markets. In Brazil, despite the possible competitive effects in those markets, investigation lead to doubts over the conditions for entrance of new companies to those markets and the remaining rivalry due to the massive market power of the Company to be created.

During the first review phase, at CADE’s General Superintendence, it was found that the transaction would result in high concentration in the Global System for Mobile (GSM) data clearing and Near Real Time Roaming Data Exchange (NRTRDE) markets, which are technology services provided to mobile telecommunication companies related to roaming. The companies are the two largest providers of these services in Europe and worldwide.

To remedy the competition concerns, *Mach* and *Syniverse* proposed the signing of a Merger Control Agreement (“ACC”, for its acronym in Portuguese), through which they undertake certain obligations to remove any anticompetitive harms of the transaction. The exact content of the agreement is confidential, but in general the companies proposed to divest certain assets related to the GSM and NRTRDE business of *Mach* in the European Economic Area to a third company. The new company includes assets and employees needed to guarantee the success of the divestment business in both markets.

CADE’s General Superintendence understood that the terms of the proposed ACC were enough to mitigate any competition concerns and sent the case for trial before CADE’s Tribunal.<sup>4</sup> The merger was approved by CADE’s Tribunal on 22 May 2013 and by DG Competition on 29 May 2013. It was not by chance or coincidence that the cases were decided almost on the same day. In fact, CADE and DG-Comp had a permanent dialogue during the review of the transaction, based on a Waiver of Confidentiality given by the companies for this specific purpose.

The Waivers were produced by the companies based on a request from CADE and DG Competition and in accordance to the basic model provided by CADE. The dialogue between the two agencies was done mostly through conference calls held during the investigation. In those calls, Brazilian and European Officials were able to exchange confidential information on the case and ideas on how each agency analysed each specific piece of information. That partnership guaranteed that all technical information, such as relevant market definition, market power and entrance analysis, were aligned in both merger analysis and that there was not any detail left out of the investigation. Considering that the relevant market was worldwide, it was also important to cross reference and validate information given by the company to each agency. Finally, the agencies exchanged information on similar cases that had been analysed previously by each agency, as a way to speed the best analyses of the matter.

<sup>2</sup> Merger file no. 08012.006437/2012-13.

<sup>3</sup> Merger file no. 08700.009882/2012-35.

<sup>4</sup> General Superintendence’s Official Opinion no. 125/2013 from 2 May 2013.

The close contact with DG-Competition certainly assured a faster and more effective decision from CADE. At the end of the day, it also had a positive outcome for the concerned companies, considering they had to wait for the “green light” to implement their transaction.

### **3.2. Merger between the Swedish company Munksjö AB5 and the Finish Ahlstrom Corporation**

The operation aimed the creation of a new company, to be called NewCo, after a series of operations involving the LP Business of Ahlstrom and Munksjo. By the end of a four stage business transactions, NewCo would hold 100% of the LP and Munksjo shares.

The operation was notified to CADE on 19 November 2012 and to DG Competition on 31 October 2012. It was also notified to the Turkish Competition Authority, which cleared the merger without any restrictions.

On 25 April 2013, CADE’s General Superintendence sent the case to trial before CADE’s Tribunal through its Official Opinion.<sup>6</sup> The document affirmed that the operation produced horizontal overlapping in the following markets: pre-impregnated decorative paper (PRIP), bases for abrasive heavy paper, bases for abrasive light paper, and impregnated electrical technical impregnated by oil paper.

More specifically, CADE’s General Superintendence concluded that the merger would result in high concentration in the PRIP market, which is used in indoors furniture as kitchens, bedrooms and offices, and in the heavy abrasive paper market (used to manufacture abrasive coating, and to polish materials operations in many industrial sectors), with no prospects of new entrants in the sector nor of sufficient firms able to compete in these markets. The world market for PRIP currently has only one player aside from the merging companies, which is Technocell. The geographic dimension of the relevant market for PRIP was defined as global, with the exclusion of China.

Given the competition concerns, the companies proposed remedies and the signature of a Merger Control Agreement (“ACC”, for its acronym in Portuguese), through which *Ahlstrom* engaged itself to sell certain assets. In general terms, the proposal is a desinvestment of a PRIP producer plant located in Osnabruck, Germany, to a third party. That initiative should eliminate the horizontal overlapping and the buyer should act as a competitor to NewCo in that specific market.

CADE and DG-Comp also developed strong cooperation during the review of this case, which was as well assured by the signature of a Waiver of Confidentiality for this purpose. In total, the Brazilian and the European case handling teams held 5 conference calls for discussions of general aspects and constant update of each other’s steps during their analysis.

CADE’s decision took place at the same judgment session as the previous case, that is 22 May 2013, while DG-Comp issued its decision on 24 May 2013. The remedies imposed by both CADE and DG-Comp are similar. However, considering that structural remedies were to be implemented outside of Brazilian territory, a Brazilian subsidiary of Ahlstrom also signed the Merger Control Agreement in order to remain responsible for fulfilment of the agreement’s provisions. This was important for enforcement purposes in Brazil.

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<sup>5</sup> Company that belongs to the investment fund EQT III, private equity (EQT).

<sup>6</sup> General Superintendence’s Official Opinion no. 109/2013 from 25 April 2013.

#### 4. Conclusion

CADE presents these two successful cases of cooperation and understands that in the globalised economy of nowadays, cooperation is a primordial tool to correctly handle transnational merger cases. There is a pressing need for competition authorities to coordinate analysis in a parallel manner so to improve antitrust enforcement considering the experience of other authorities and time constraints.

In this regard, CADE is trying to establish a continuous flow of information and experience exchange with its counterparts, thus encouraging cooperation. Also, considering the changes and improvements in the Brazilian System of Competition Defense and its legislation within the last year, it is important to ensure international recognition of our System as being safe and effective, thus inducing trust among similar organisms abroad.

As demonstrated in the cases above, International Cooperation between agencies made it possible that CADE and DG Competition reached analytical methodology of market comprehension for the operations that included confidential information from each agency, through the grant of Waivers of Confidentiality. The improvement in the analyses helped better evaluate operation effects on both cases and, most importantly, it assisted the agencies in the search for suitable remedies. Moreover, it also assured a faster outcome of decision, which is important for the involved companies, considering the need of prior approval to implement the transactions.

The new obstacle of Competition authorities within International Cooperation lies on monitoring the effectiveness of those decisions, especially on what concerns remedies proposed by the companies. It is important to secure that agreements are fulfilled in order to maintain the respect for competition agencies' work worldwide. One may notice that the companies did not have assets in Brazil that could impose a problem of enforcement to CADE's decision in the case of lack of international cooperation.

In conclusion, we must point out that those experiences send a message to global business, including those taking part in the Brazilian market that competition agencies are communicating, in order to synchronize procedural calendars and coordinate remedies.





## CANADA

### 1. Introduction

Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee Working Party No. 3 roundtable on "Remedies in cross-border merger cases". The Bureau, headed by the Commissioner of Competition ("Commissioner"), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the *Competition Act* (the "Act")<sup>1</sup> and certain other statutes. The Mergers Branch of the Bureau is responsible for conducting merger reviews to determine whether a merger is likely to lessen or prevent competition substantially. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

Recognising the importance of international cooperation to the fulfilment of the Bureau's mandate in an increasingly globalised economy, the Bureau has sought to further develop its formal and informal framework for international cooperation in reviewing mergers, which is discussed further below. This submission also describes the Bureau's experience in several recent merger reviews that involved significant cooperative efforts between the Bureau and its foreign counterparts and that led to the implementation of important remedies to preserve competition in Canada and other jurisdictions.

### 2. Framework for International Cooperation in Reviewing Mergers

There are a number of agreements and arrangements that provide a framework for engaging in international cooperation in the enforcement of competition laws.<sup>2</sup> In the context of civil enforcement (including merger review), these include nine free-trade agreements; four state-to-state cooperation agreements; five agency-to-agency cooperation agreements; and two memoranda of understanding. Together, all of these forms of agreement facilitate the formal exchange of information with seventeen foreign jurisdictions.<sup>3</sup>

In addition to these agreements, the Act also sets out a framework for treating confidential information that guides how the Bureau interacts with foreign competition agencies. In particular, the Act requires that all information provided to or obtained by the Bureau, including the identity of any persons who have provided it, remain confidential. The Act contains exceptions that allow the Bureau to communicate such information to a Canadian law enforcement agency, or for the purposes of the administration or enforcement of the Act.<sup>4</sup> Where the communication of confidential information to a

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<sup>1</sup> The Act is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

<sup>2</sup> Although cooperation agreements are not a prerequisite to cooperation, they provide a transparent and predictable framework for cooperation.

<sup>3</sup> A list of Canada's international instruments relating to cooperation in the enforcement of competition law is available online at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00128.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html).

<sup>4</sup> Section 29 of the Act provides: (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act (a) the identity of any person from whom information was obtained pursuant to

foreign counterpart would advance a specific investigation, such communication would be considered for the purpose of the administration or enforcement of the Act.

It has been the Bureau's experience, however, that where the Bureau is seeking to engage in discussions with foreign agencies that would involve the exchange of confidential information, the foreign agency must first receive the appropriate form of waiver from the merging parties and/or affected third parties.<sup>5</sup> In the vast majority of instances, such waivers are readily provided upon request.

The Bureau often cooperates extensively with foreign agencies throughout significant multi-jurisdictional merger reviews, including:

- participating in joint conference calls with the parties and third parties;
- discussing industry background and dynamics, approaches to market definition and competitive effects analyses;
- sharing and discussing documents and other information obtained from merging parties and third parties; and
- coordinating on merger remedies.

The Bureau will coordinate with other competition authorities on remedies when a multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar or related to those that are likely to result in other jurisdictions. Consistent and coordinated remedies help avoid potential friction stemming from situations where a remedy in one jurisdiction may not be acceptable in another, and can lead to more efficient and effective resolution than would be attained through independent enforcement action.<sup>6</sup>

To resolve competition concerns within Canada, the Bureau may either take specific action or it may determine that action taken in a foreign jurisdiction is sufficient to resolve any Canadian competition concerns.<sup>7</sup> Examples of cases in each of these categories are discussed later in this submission.

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this Act; (b) any information obtained pursuant to section 11, 15, 16 or 114; (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; (d) and information obtained from a person requesting a certificate under section 102; or (e) any information provided voluntarily pursuant to this Act. (2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorised by the person who provided the information. For more information, please see the Information Bulletin on the Communication of Confidential Information under the Competition Act, Competition Bureau (Oct. 10, 2007), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html>.

<sup>5</sup> Such waivers allow for the exchange of confidential information from foreign competition agencies to the Bureau, which would otherwise be prohibited by law in the respective foreign jurisdictions.

<sup>6</sup> For more information see the Information Bulletin on Merger Remedies in Canada, Competition Bureau (Sept. 22, 2006), paragraphs 75-80, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html>.

<sup>7</sup> See supra note 6, paragraph 78: "While enforcement decisions are made on a case-by-case basis, the Bureau is more likely to formalize negotiated remedies within Canada when the matter raises Canada-specific issues, when the Canadian impact is particularly significant, when the asset(s) to be divested reside in Canada, or when it is critical to the enforcement of the terms of the settlement. In contrast, the Bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the asset(s) that are subject to divestiture, and/or conduct that must be carried out as part of a behavioural remedy, are primarily located outside of Canada. However, the Bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada."

Our ability to coordinate merger reviews with foreign agencies was significantly enhanced in 2009 as a result of substantial amendments to the merger provisions of the Act. Among other things, the amendments introduced a two-stage merger review process that has more closely aligned the timing and conduct of our merger review process with those of our major trading partners, particularly the U.S. Increasingly, parties are commencing the merger review process in Canada at the same time as in other jurisdictions, in particular the U.S., which facilitates increased collaboration among agencies throughout the merger review process.

### **3. Increased Collaboration in Reviewing Mergers**

The increased importance of international coordination to achieving desirable outcomes for Canadians has prompted the Bureau to engage in a broad array of activities to enhance collaboration with its foreign counterparts, particularly those agencies with which the Bureau interacts regularly. The Bureau works cooperatively with both domestic and international enforcement partners at all levels, in order to increase the effectiveness of our enforcement activities, and the enforcement activities of our partner agencies at home and abroad, and to build a more effective and efficient effort in competition enforcement both within Canada and globally.<sup>8</sup>

A great deal of valuable cooperation can take place informally, without the exchange of confidential information. The Bureau engages in informal cooperation through participation in bilateral meetings with many of its foreign counterparts where senior managers discuss case-related issues such as investigative steps, timing, and settlement approaches. Further, the Bureau has found that developing strong working relationships with other competition agencies through multilateral organisations, such as the International Competition Network and the OECD, has had a positive impact on our ability to cooperate when cases of mutual interest arise.<sup>9</sup>

Given Canada's close and integrated economic relationship with the U.S., the Bureau often consults with the U.S. agencies where there appear to be similar, if not the same, competition issues arising from a particular merger. For this reason, our relationships with the U.S. Federal Trade Commission ("U.S. FTC") and the Department of Justice Antitrust Division ("U.S. DOJ") are well established.

In 2010, with a view to further deepening relationships between the mergers staff at the three agencies, the Bureau, U.S. FTC and U.S. DOJ established a mergers working group. In bringing together team leaders from the three agencies, the goal of the group is to enhance working relationships and improve the understanding of the merger review process in both countries by discussing lessons learned from past cases and strategies for addressing common challenges. The group has met three times to date, and a fourth meeting has been scheduled. Topics of discussion, which are set by the team leaders, have included: the use of supplementary information requests and second requests; the use of timing agreements; document review strategies; and the use of economic and industry experts. The sharing of best practices has allowed team leaders at each agency to learn from others' approaches to merger review and their experiences dealing with novel issues. Initiatives are also underway to deepen relationships with colleagues at the Competition Directorate of the European Commission ("EC") and the United Kingdom's Office of Fair Trading ("OFT").

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<sup>8</sup> Remarks by John Pecman, Commissioner of Competition, 2013 Canadian Bar Association Competition Law Spring Forum, Toronto, Ontario (May 28, 2013), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03571.html>

<sup>9</sup> Remarks by Melanie L. Aitken, former Commissioner of Competition, 2012 NYSBA Summer Merger Forum, Merger Enforcement in the Americas, New York (July 17, 2012), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03494.html>.

A number of recent staff exchanges within the Mergers Branch have further deepened our understanding of merger review and relationships with staff in foreign jurisdictions. The Mergers Branch recently welcomed staff from the U.S. FTC and the Korea Fair Trade Commission, and has sent officers on secondment to the U.S. FTC and the OFT.

These efforts to enhance relationships with colleagues around the world are having a tangible positive impact on cross-border and multi-jurisdictional cases, ultimately facilitating more efficient and stronger reviews.

#### **4. Important Merger Reviews Involving Cross-border Remedies**

The following is a discussion of the Bureau’s experiences on a number of important merger cases from the last five years where the Bureau collaborated closely with its foreign counterparts to resolve competition concerns through remedies. As mentioned above, in some of these cases, the implementation of a remedy in another jurisdiction was determined to be sufficient to address Canadian concerns, such that there was no need for a consent agreement in Canada. In addition to the obvious benefits to merging parties, it is a sensible and constructive approach to the Bureau’s use of scarce resources.<sup>10</sup>

##### **4.1 UTC/Goodrich (2012)**

In September 2011, United Technologies Corporation (“UTC”) and Goodrich Corporation (“Goodrich”) announced that they had entered into an agreement whereby Goodrich would become a wholly-owned subsidiary of UTC. UTC and Goodrich, both American companies, were engaged in the manufacturing and supply of various aviation parts and components to aircraft manufacturers around the world. The Bureau found that the transaction would likely have resulted in a substantial lessening of competition in the manufacture and sale of certain aircraft products, resulting in harmful downstream effects in Canada. In July 2012, the Bureau announced that it had concluded its review and had relied on remedial orders issued by the U.S. DOJ and EC to resolve its concerns. The fact that no Canadian assets were involved was an important factor the Bureau considered in determining that it did not require a consent agreement with the parties.

The Bureau cooperated closely with both the U.S. DOJ and EC throughout all phases of the review. The merging parties provided the U.S. DOJ and EC with waivers, which removed the barriers to the sharing of confidential information. Because the agencies determined that the relevant aviation product markets were mostly global in scope, international cooperation was particularly fruitful.

Throughout the review, the three agencies jointly conducted a large number of market contacts, which was of significant benefit to the Bureau. In reviewing mergers where a significant volume of the assets and business activity – sometimes referred to as the “centre of gravity” of a transaction – is outside of Canada, the Bureau derives a particularly significant benefit from collaboration with foreign agencies. Without collaboration on this case, it might have proved challenging for the Bureau to adequately engage with third parties outside of Canada, particularly those that had already cooperated extensively with other jurisdictions.

The U.S. DOJ and the EC ultimately came to agreements with the parties whereby UTC would divest assets related to Goodrich’s engine generators business and engine control systems, as well as agree to certain other commitments. The Bureau engaged with the U.S. DOJ and EC in discussions related to these remedies, including identifying assets to be divested. Each agency acknowledged in its press release, issued on the same day, the extensive cooperation between the three agencies that resulted in a coordinated

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<sup>10</sup> See supra note 8: “[t]his is not deference, it is a sensible and constructive approach to our use of scarce resources in a context where we have deep and trusting relationships with our counterpart agencies.”

remedy to preserve competition.<sup>11</sup> The Bureau was not directly involved in the process of identifying a buyer of the divested assets and no monitor was appointed in Canada.

#### 4.2 *Novartis/Alcon (2010)*

The Bureau determined that the proposed acquisition by Novartis AG (“Novartis”) of control of Alcon, Inc. (“Alcon”) was likely to result in a substantial lessening of competition in Canada for the supply of certain ophthalmic products; namely, multi-purpose solution contact lens cleaners/disinfectants; injectible miotics; and ocular conjunctivitis drugs. To remedy these concerns, the Bureau entered into a consent agreement with the parties,<sup>12</sup> which required Novartis to sell the assets and associated licenses related to the sale in Canada of three of its products to a third party purchaser.<sup>13</sup>

Over the course of the review, the Bureau collaborated with the U.S. FTC and the EC. The U.S. FTC and EC obtained the appropriate waivers to allow the sharing of confidential information. The U.S. FTC began its review earlier than the Bureau, and ultimately negotiated a remedy that required Novartis to divest its injectible miotic drug to a third party.<sup>14</sup> The U.S. FTC did not have concerns with respect to any other products.

The Bureau determined that the geographic markets for the problematic assets were national in scope and found that competitive conditions differed across jurisdictions. The EC came to the same conclusion with regards to various European markets. The Bureau and the EC, therefore, identified additional markets of concern beyond those addressed by the U.S. FTC and engaged in further remedy discussions with the merging parties. The merging parties proposed remedies, and the Bureau and the EC collaborated in the evaluation of those proposals. Ultimately, in addition to requiring the same divestitures as the Bureau, the EC required that Novartis divest a number of other products across its Member States.<sup>15</sup>

In this case, because markets were national and competitive conditions differed in each jurisdiction, it was necessary for the Bureau to enter into a consent agreement with the parties to address competition concerns with regards to the activity in Canada.

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<sup>11</sup> Press Release, European Commission, Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions (July 26, 2012), available online at: [http://europa.eu/rapid/press-release\\_IP-12-858\\_en.htm](http://europa.eu/rapid/press-release_IP-12-858_en.htm); Press Release, U.S. Department of Justice, Justice Department Requires Divestitures In Order For United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation (July 26, 2012), available online at: [http://www.justice.gov/atr/public/press\\_releases/2012/285420.pdf](http://www.justice.gov/atr/public/press_releases/2012/285420.pdf); Press Release, Competition Bureau, Competition Bureau Statement Regarding United Technology Corporation’s Acquisition of Goodrich Corporation (July 26, 2012), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

<sup>12</sup> Consent agreements registered with the Competition Tribunal are available online through the Competition Tribunal’s website at: <http://www.ct-tc.gc.ca/Home.asp>.

<sup>13</sup> Press Release, Competition Bureau, Competition Bureau Secures Divestitures in Novartis’ Acquisition of Alcon (Aug. 9, 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03274.html>.

<sup>14</sup> Press Release, Federal Trade Commission, FTC Order Protects Consumers in U.S. Market for Eye Care Drug Used in Cataract Surgery (Aug. 16, 2010), available online at: <http://www.ftc.gov/opa/2010/08/novartis.shtm>.

<sup>15</sup> Press Release, European Commission, Mergers: Commission clears planned acquisition of Alcon by Novartis, subject to conditions (Aug. 9, 2010), available online at: [http://europa.eu/rapid/press-release\\_IP-10-1042\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1042_en.htm).

The Bureau and the EC collaborated to identify a joint purchaser of some of the divested assets.<sup>16</sup> Where appropriate, it can be very efficient when agencies work together to appoint a single purchaser to operate divested assets across jurisdictions.

The Bureau and the EC each appointed the same monitor in this case. The monitor was initially proposed by the parties and ultimately approved by both agencies. The monitor, who also acted as a divestiture trustee, identified a proposed purchaser of the assets that was also approved by both agencies. In this case, as well as in other recent cases,<sup>17</sup> the Bureau has found the use of the same monitor across jurisdictions to be efficient and effective.

#### **4.3 Ticketmaster/Live Nation (2010)**

In February 2009, Ticketmaster Entertainment, Inc. (“Ticketmaster”), the world’s largest provider of ticketing services, and Live Nation, Inc. (“Live Nation”), the largest promoter of live events globally, announced their intention to merge. Prior to the proposed merger, Live Nation had also intended to enter the Canadian ticketing services market in direct competition with Ticketmaster. The Bureau conducted an in-depth review, working closely with the U.S. DOJ to coordinate parallel reviews of the proposed merger. In January 2010, the Bureau and the U.S. DOJ announced on the same day that they had reached a mutually acceptable resolution that would resolve competition concerns in both jurisdictions.<sup>18</sup> The set of structural and conduct remedies agreed to by the merging parties were memorialised in Canada through a consent agreement with the parties as well as through a consent decree in the U.S.

In this case, the willingness at the team level to engage in extensive cooperation from the outset of the review proved instrumental in developing the trust required to design and implement a mutually agreeable set of robust remedies. In addition to detailed discussions on the industry in each jurisdiction, relevant product market, and potential competitive effects, the teams were able to benefit from aligned document review given the significant overlap in document productions made to both agencies. The extensive cooperation between the Bureau and the U.S. DOJ throughout this case, including in the negotiation of remedies, has been referred to publicly on numerous occasions by both agencies as an example of how effective cooperation can lead to mutually agreeable resolutions.<sup>19</sup>

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<sup>16</sup> On March 10, 2011, the Bureau announced it had identified purchasers of the divested assets in Canada: Press Release, Competition Bureau, Competition Bureau Approves Divestitures in Novartis Acquisition of Alcon, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03356.html>.

<sup>17</sup> For example, the same monitor was appointed in Canada pursuant to its consent agreement with Coca-Cola in respect of its 2010 acquisition of its primary bottler, Coca-Cola Enterprises Inc., as was appointed in the U.S..

<sup>18</sup> Press Release, U.S. Department of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger With Live Nation Inc. (Jan. 25, 2010), available online at: [http://www.justice.gov/atr/public/press\\_releases/2010/254540.htm](http://www.justice.gov/atr/public/press_releases/2010/254540.htm); and Press Release, Competition Bureau, Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition (Jan. 25, 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html>.

<sup>19</sup> Remarks by Melanie L. Aitken, former Commissioner of Competition, 2010 Competition Law and Policy Conference, Keynote Dinner Address, Cambridge, Ontario (3 Feb. 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03205.html>. Former Commissioner Aitken described the Bureau’s experience on Ticketmaster/Live Nation as a “shining [example] of how regular contact and deep trust between the U.S. Department of Justice/Federal Trade Commission and the Bureau, on multiple levels, can lead to settlement that works on both sides of the border and to the definite benefit of Canadians.”

#### 4.4 *Nufarm/A.H. Marks (2010)*

In March 2008, Australian chemical company Nufarm Limited (“Nufarm”) completed the acquisition of United Kingdom-based A.H. Marks Holding Limited (“A.H. Marks”). Later in 2008, the Bureau and the U.S. FTC initiated parallel reviews of the transaction and ultimately determined that it raised significant competition concerns in the sale of certain raw herbicides to agricultural formulators, retailers and farmers. On July 28, 2010, the U.S. FTC announced it had reached an agreement with Nufarm whereby Nufarm would sell the rights and assets associated with two herbicides to competitors, and modify agreements with two other companies to allow them to compete in the market.<sup>20</sup> On the same day, the Bureau announced that the consent decree between Nufarm and the U.S. FTC, along with written commitments made by Nufarm to abide by the same terms in Canada, adequately resolved competition concerns in Canada.<sup>21</sup>

Collaboration between the Bureau and the U.S. FTC throughout the review was extensive. Among other things, the agencies shared economic analysis, conducted joint interviews with third party market participants, negotiated remedies with the merging parties, and jointly contacted potential purchasers of divested assets.

The Bureau and the U.S. FTC worked together to design remedies that would resolve competition concerns in Canada and the U.S. Both agencies were involved in the negotiation process that led to the formalisation of the U.S. FTC’s consent decree. A unified approach to the negotiation of remedies was efficient and effective for the agencies and the merging parties.

While the Bureau’s collaboration was mostly with the U.S. FTC, the Bureau also discussed the transaction with the OFT and Competition Commission in the United Kingdom and the Australian Competition and Consumer Commission.

## 5. Challenges

The Bureau’s recent experience in collaborating with its foreign counterparts in the design and implementation of remedies has been overwhelmingly positive. In each of the cases discussed in this submission, Canadian consumers and businesses have benefited from the resolutions achieved through collaboration. The Bureau has, however, encountered some general challenges in the context of cross-border merger reviews that it has sought to address with recent initiatives, including enhancing working relationships at the staff level.

### 5.1 *Timing*

The Bureau recognises that, more often than not, Canada is perhaps the net beneficiary of its collaboration with foreign jurisdictions in the review of cross-border mergers. This flows naturally from the reality that the centre of gravity of a multi-jurisdictional merger is more often in the U.S. or Europe than in Canada. While this has many benefits for the Bureau,<sup>22</sup> it can also present certain challenges, particularly related to timing.

<sup>20</sup> Press Release, U.S. Federal Trade Commission, FTC Order Restores Competition in U.S. Markets for Herbicide Products (July 28, 2010), available online at: <http://www.ftc.gov/opa/2010/07/nufarm.shtm>.

<sup>21</sup> Press Release, Competition Bureau, Competition Bureau Requires Divestitures in Herbicide Merger (July 28, 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03264.html>.

<sup>22</sup> Collaboration with foreign jurisdictions in these cases allows Canada to obtain information and conduct a more thorough review than it would have otherwise, and to more efficiently design and implement robust remedies.



Although concurrent filings in Canada and other jurisdictions have become more frequent since the 2009 amendments to the Act, on occasion, merging parties will provide their formal notifications to the Bureau after filing in other jurisdictions. This can limit to some degree the mutual benefits to cooperation among agencies. When jurisdictions are able to closely align the timing of their reviews on mergers where the same or similar issues or concerns are being examined, agencies are more likely to have the incentive to develop a collaborative approach to the investigation and ultimately the negotiation of remedies.

## **5.2      *Waivers***

In recent years, it has been the Bureau's experience that where waivers are required by a foreign agency to facilitate cooperation on a parallel merger review, such waivers have been readily provided by merging parties and third parties. However, in certain cases, waiver delays have limited two-way communication in the initial stages of a review. As is demonstrated by the case examples above, cooperation early in the review can be important to the development of an effective parallel review, leading to the design and implementation of mutually agreeable remedies in later stages.

For this reason, the Bureau believes international cooperation would benefit from parties providing waivers immediately upon notification for those more complex transactions that are notifiable in multiple jurisdictions. In addition, the Bureau believes that the inclusion of information gateway provisions in competition legislation, such as section 29 of the Act, would allow for greater reciprocity in information exchange.

## **5.3      *Building and Maintaining Relationships***

Successful cooperation depends on the willingness of staff to engage with colleagues at other agencies and devote the necessary resources to achieve mutually beneficial cooperation. This is true regardless of the extent to which formal policies and procedures are in place to facilitate international cooperation. This is one of the reasons informal cooperation, whether through multilateral organisations, bilaterals, or staff-level initiatives like the team leader meetings described above among the Bureau, U.S. FTC and U.S. DOJ, have been instrumental in facilitating stronger multijurisdictional reviews and important coordinated remedies.

## **6.        *Conclusion***

This submission provides an overview of the Bureau's experience designing and implementing remedies in tandem with its foreign counterparts on recent cross-border merger reviews. Collaboration is often critical to conducting efficient reviews and achieving effective remedies, and the Bureau is open to working with other jurisdictions to address challenges raised at this roundtable.

The Bureau's framework for international cooperation continues to evolve to facilitate stronger multi-jurisdictional reviews. Recent convergence in legislation has aligned the Bureau more closely with its major trading partners, and more informal initiatives like the mergers team leader meetings will continue to deepen our understanding of the practices of our foreign colleagues and strengthen staff relationships at the team level.

## EUROPEAN UNION

### 1. Introduction

The European Commission (“Commission”) cooperates in its assessment of mergers with other competition agencies which are reviewing the same transaction. Such cooperation is essential for a consistent treatment of cross-border cases and for achieving non-conflicting remedial outcomes across different jurisdictions. The Commission has been engaged actively in cooperation with competition authorities of many countries, and cooperation with a number of them is based on bilateral agreements dedicated to competition<sup>1</sup>, or on detailed Best Practices.<sup>2</sup>

Cooperation typically occurs for cases where the geographic markets are global, when more authorities assess the same markets, but a remedy in one jurisdiction may have an impact on the assessment in other jurisdictions, even if markets are not wider than the respective jurisdiction. This for example occurs when global brands, or manufacturing plants used in multiple jurisdictions are involved. Cooperation does not necessarily mean same outcome in terms of remedies packages, as assessment depends on market structure in each jurisdiction. Remedies may not be necessary in every jurisdiction, and remedies may be different for different countries to address the specific competition problems.

Cooperation between different authorities in merger proceedings is recommendable throughout the procedure. It may be helpful at the stage of assessing the competitive effects, but it is essential when it comes to remedy design and implementation for cross-jurisdictional mergers, in order to avoid conflicting remedies.

In the Commission's experience, it is very important to coordinate the respective authorities' time lines within the remedies process. If time-lines of the respective steps linked to the remedies' design of purchaser approval are not aligned, it can be challenging to find solutions which do not risk leading to divergent outcomes. Both the merging parties and agencies should strive to align the timing of their respective procedures.

For a substantive coordination of merger process in general, and remedies in particular, it is very helpful to exchange information on the basis of waivers to allow for an efficient dialogue. Coordination of the remedies process allows agencies to both find a common understanding as to the design of the appropriate remedy (including for example an identification and evaluation of assets to be divested), and in relation to key issues of the remedy implementation (such as the evaluation of suitable purchasers, and appointment of common trustees).

A number of recent case examples demonstrate how cooperation helps overcoming divergent outcomes and fostering coherency in the treatment of cross-border merger cases.

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<sup>1</sup> See overview of EC's bilateral agreements with non-EU countries on <http://ec.europa.eu/competition/international/bilateral/index.html>.

<sup>2</sup> See the [US-EU Best Practices on Cooperation in merger investigations](#).

## **2. Key Coordination issues with remedies in cross-border merger cases**

### **2.1 *Waivers allowing for a more efficient remedies coordination***

Waivers are very useful for cooperation on remedies, allowing for an exchange of confidential information and documents. For example, waivers allowed the Commission to exchange detailed information and share its assessment of the proposed assess with other authorities. This proved to be very helpful to form a coherent view of the authorities as to the design and the details of the remedy package. Equally, confidential information about purchasers and remedy implementation issues may be important for an efficient alignment of processes. It should be in the interest of the merging companies to provide waivers to the different authorities in order to minimize the risks of incoherent remedies, and the Commission encourages the use of such waivers.

Cooperation between different agencies without waivers is also possible, but inherently less efficient due to confidentiality constraints. Absent of confidentiality waivers, only general issues can be discussed without entering into details which often involve business secrets. Nevertheless, contacts between different competition authorities are always welcome in the remedy process, even if they are done on a general level. As mentioned above, general issues like timing can be key for the coordination of the respective procedures, and a dialogue between agencies is certainly beneficial.

### **2.2 *Coordination in remedies design – evaluation of assets***

One of the key issues in the design of structural remedies is to evaluate assets to be divested. In the EU merger control process, it is up to the merging companies to propose appropriate remedy packages, including assets, which the Commission must evaluate as to their suitability to remove the identified competition concerns and as to their viability. Cooperation with other reviewing agencies in the identification or evaluation of assets is crucial to ensure a consistent remedy outcome. On the basis of waivers, the Commission has in the past exchanged information with other reviewing agencies about the proposed assets and their detailed assessment. Coordination with other authorities also included detailed arrangements surrounding the remedy packages. Remedies often entail very detailed obligations which need to be consistent across jurisdictions to be workable.

### **2.3 *Remedies implementation - evaluation of potential purchasers and use of common trustees***

If same divestment assets form the remedy in several jurisdictions, it is essential that agencies align their views on the suitability of potential purchasers. Rejection of a potential purchaser by one authority effectively means that this potential purchaser is prevented from acquiring the divested assets, regardless of the other authorities' views. Such situations can happen for example if the company proposed as a purchaser would seem acceptable only in certain jurisdictions. In the Commission's experience, it is important that agencies keep each other informed about the status of the purchasers' evaluations, so that purchasers are not accepted if there is a high risk of them being rejected in another jurisdiction.

The Commission routinely appoints monitoring trustees to oversee the implementation of remedies. In a number of cases, it was possible to appoint a common trustee with other agencies, which helped reducing the complexity of arrangements between the companies and agencies involved. This is in particular relevant if the same remedies are agreed to in the various jurisdictions. In some cases it may not be possible to appoint the same trustee, for example if a trustee does not have local capabilities necessary in all jurisdictions. However, arrangements between trustees such as sub-contracting may be in some cases helpful to ensure cooperation between the respective trustees.

### 3. Case examples of cross-border remedies cooperation

The *Western Digital/Viviti Technologies* case concerning a merger of two hard disk drives producers active on a worldwide market is a very good example of close case cooperation with various competition authorities which were analysing the same transaction. Taking the cooperation with the US FTC as an example, the case cooperation spanned all phases of the case through regular phone calls and document exchange. The cooperation was particularly close in relation to the design and implementation of the remedies. The case teams discussed the remedy package in detail, identifying and evaluating the assets to be divested in a bid to ensure that the commitments would eliminate the competition concerns and ensure the divestiture of a viable business. The two authorities accepted the same trustee for the purposes of monitoring implementation of the commitments and the same purchaser for the divestment business. Close cooperation in the process of evaluating and approving the purchaser was important in ensuring that risks to viability of the divestment business would be averted and that the remedy would indeed meet the objective of eliminating the competition concerns identified by the Commission and the FTC. The cooperation with the FTC took place on the basis of waivers from the parties and third parties and in implementation of the principles reflected in the Best Practices covering cooperation between the two authorities.

In the *Pfizer/Wyeth* case concerning a merger in pharmaceutical sector, the Commission has cooperated closely with foreign agencies, in particular with the FTC. Both authorities had waivers allowing them to exchange confidential information. To address different competition concerns arising in the separate US and EU national markets, two sets of divestment packages were designed. The Commission and the FTC exchanged information on the parties' assets and closely coordinated the set-up of the US and EU divestment packages. No single purchaser was found for both packages, so two different purchasers were approved by the respective authorities, and the divestments were monitored by two different trustees. However, a useful way of cooperation between the trustees was found, whereas one trustee would subcontract on an ad-hoc basis the other trustee to have his advice on specific technical issues. An interesting cooperation challenge in the implementation of remedies arose in relation to securing a transitional supply of a product divested in the EU package by its manufacturing in the premises divested in the US package. The issue was solved by an arrangement by which the new purchaser of the US package would manufacture and supply the respective product to Pfizer, who would then subsequently supply the product to the purchaser of the EU package. The transitional supply agreements were included in the contractual set-up of the US package. This was helpful in order to secure the supply of the respective product for the purchaser of the EU package during a transitional time until which the EU package was equipped with the appropriate manufacturing lines.

The *Panasonic/Sanyo* merger concerning re-chargeable batteries is another case of a very fruitful cooperation between the Commission and other authorities. Apart from the EU, the merger was reviewed by the JFTC, FTC and MOFCOM. The cooperation with the JFTC and FTC was based on confidentiality waivers allowing for an exchange of detailed information on the substance of remedies. As the time-lines were not aligned, there was an increased risk of divergent approaches. However, an excellent cooperation helped to arrive at a consistent outcome for the three authorities, both in terms of assets selection and purchasers. For example, one proposed purchaser did not meet the suitability criteria in the EU, whereas it may have been potentially suitable for the FTC. A coordination of both authorities helped to accept a purchaser suitable in both jurisdictions. Similarly, the Commission and the JFTC managed to find a coherent solution concerning the divested assets, and the two authorities also used a common monitoring trustee.

In *UTC/Goodrich*, a merger case in the aircraft industry, an intense cooperation in particular with the DOJ and the Canadian Competition Bureau (CCB), helped to ensure a close alignment of both substantive points and timing. All three authorities issued their decisions on the same day – the DOJ and the Commission accepting remedies, and the CCB issuing a no action letter as the remedies imposed by the two other authorities allowed dispelling the potential competition problems in Canada. The US and EU remedies were largely identical in terms of substance, and the two authorities also closely aligned their commitment texts. A common monitoring trustee was used, and coordination also helped to approve the same purchasers.

#### **4. Conclusion**

Cooperation between competition agencies in merger cases becomes increasingly important as both businesses and competition enforcement are becoming more and more global. In the Commission's experience, coordination of the respective proceedings in relation to remedies is a key element allowing for an efficient and consistent process.

## IRELAND

### 1. Introduction

This submission has been prepared by the Irish Competition Authority (“Competition Authority”) for consideration at the OECD Competition Committee Working Party 3 meeting on Tuesday 29 October 2013. It is our understanding that the meeting will discuss both cross-border merger remedies and the definition of confidential information with reference to the questions annexed to the Chairman’s letter of 26 July 2013.

Section 2 below outlines:

- the relevant sections of the Competition Act, 2002;
- the Competition Authority’s experience of cross-border mergers;
- the Competition Authority’s experience of cross-border merger remedies;
- the Competition Authority’s answers to the questions posed in relation to cross-border mergers.

### 2. Cross-Border Merger Remedies

#### 2.1. *The Competition Act*

The Competition Authority’s (the Authority’s”) merger review function is set out in Part Three of the Competition Act 2002 (“the Act”). The Act requires mandatory notification of a merger or acquisition if either:

- the relevant turnover thresholds are met, as specified in section 18 of the Act; or
- the merger is classified as a media merger, in which case mandatory notification is required irrespective of the turnover of the parties.

The Authority applies the substantial lessening of competition (“SLC”) test. Section 20(1)(c) of the Act states that, in respect of a notification received by it, the Authority:

*“shall form a view as to whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State.”<sup>1</sup>*

The Act does not make any distinction between cross-border mergers and purely domestic mergers (i.e. involving parties not economically active outside of Ireland) – and by implication makes no distinction in the application of remedies to cross-border mergers and purely domestic mergers.

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<sup>1</sup> Elsewhere in section 18 of the Act the mandatory notification requirements refer to undertakings carrying on business in any part of the island of Ireland.

The Competition Authority's general approach to remedies is unchanged from that presented in its submission of June 2011.<sup>2</sup> Within the context of Irish merger review remedies can be summarised as follows:

- Remedies seek to modify a merger notified to the Competition Authority by removing anti-competitive, and retaining pro-competitive elements, within Ireland.
- Remedies are applied *ex ante* to prevent harm within Ireland rather than *ex post* as a corrective measure,<sup>3</sup> consistent with Irish competition clearance being required prior to a proposed merger being put into effect.<sup>4</sup>
- The beneficiaries of a remedy are consumers within Ireland, rather than any or all of the merging parties or their competitors.

## 2.2. *Cross-Border Mergers*

The Competition Authority has significant experience in the analysis of cross-border mergers. Many of the mergers notified to the Authority involve one or more parties active in multiple jurisdictions. A cross-border merger does not, however, necessarily imply a greater likelihood of competition concerns within Ireland. The Authority has experience with cross-border mergers whose competitive effects are most apparent: in Ireland only; in Ireland and elsewhere; and, outside Ireland.

Two recent cross-border mergers where competitive effects were most apparent within Ireland were:

- M/11/022 - Musgrave/Superquinn;<sup>5</sup> and
- M/12/031 - Top Snacks/KP Snacks.<sup>6</sup>

Two recent cross-border mergers where competitive effects were apparent both in Ireland and other jurisdictions were:

- M/10/043 - Stena/DFDS;<sup>7</sup> and
- M/10/040 - Unilever/Alberto Culver.<sup>8</sup>

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<sup>2</sup> Ireland – DAF/COMP/WP3/WD(2011)45 – ENG.  
See <<http://tca.ie/images/uploaded/documents/Remedies%20in%20Merger%20Cases.pdf>>.

<sup>3</sup> That is, the remedy is applied before rather than after any substantial lessening of competition and harm to consumers occurs.

<sup>4</sup> Section 19(1) of the Competition Act 2002.

<sup>5</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Musgrave--Superquinn.aspx>>.

<sup>6</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Top-Snacks--KP-Snacks.aspx>>.

<sup>7</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Stena--DFDS-.aspx>>.

<sup>8</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Unilever--AlbertoCulver.aspx>>.

Two recent cross-border mergers where competitive effects were more apparent in jurisdictions outside of Ireland were:

- M/12/007 – Nestle/Pfizer Nutrition,<sup>9</sup> and
- M/13/001 – Blackrock – Credit Suisse ETF.<sup>10</sup>

### 2.3. Remedies for Cross-Border Mergers

The Authority has relatively little experience with cross-border merger remedies, particularly within the five year period specified in the Chairman’s letter of 26 July 2013. The Authority, does, however some experience in cross-border mergers that raised significant competition concerns within Ireland.<sup>11</sup>

M/04/032 IBM/Schlumberger<sup>12</sup> involved a proposal by IBM Corporation to buy the global continuity business of Schlumberger. The Authority ultimately prohibited the implementation of the deal through the local affiliates of the merging entities, i.e., the prohibition related only to Ireland and the other aspects of the deal were put into effect.

M/03/035 – Stena/P&O<sup>13</sup> involved an acquisition of the assets of a competitor by one of three ferry companies operating on key freight routes between the UK and Ireland. The parties ultimately withdrew from the deal and in addition the Authority and the UK Competition Commission both accepted binding commitments from the buyer (Stena) to provide notice of any future intention to acquire the target company (P&O) in the following ten years. The case is a good example of close cooperation between the Authority and the Competition Commission.

In M/06/098 - RHM/Premier Foods<sup>14</sup> both parties were active in Ireland, the UK and continental Europe in the supply of various grocery products. The Authority expressed competition concerns, particularly with respect to gravies. The parties proposed, and the Authority accepted, the divestment of the entire Erin-brand business (comprising soups, dry sauces, soup, marrowfat peas, gravies, and casseroles), which was present only in Ireland.

In M/07/040 – Communicorp/Scottish Radio Holdings<sup>15</sup> both parties were active in radio broadcasting, including advertising within Ireland. Of particular concern to the Authority was the overlap within the greater Dublin regions of two closely competing stations: Communicorp/Scottish Radio Holdings Communicorp-owned 98FM and SRH-owned FM104. The merging parties proposed, and the Authority accepted, the divestment of FM104 as a remedy.

<sup>9</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Nestl--Pfizer.aspx>>

<sup>10</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/BlackRock--CS-ETF-Business.aspx>>.

<sup>11</sup> The Authority discussed two of the following cases at the Working Party 3 in 2005. See <[http://www.tca.ie/images/uploaded/documents/2005-02-15%20Presentation%20\(E.H.\).pdf](http://www.tca.ie/images/uploaded/documents/2005-02-15%20Presentation%20(E.H.).pdf)>.

<sup>12</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M04032--IBM--Schlumberger.aspx>>.

<sup>13</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M03035--Stena--PO.aspx>>.

<sup>14</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M06098--Premier-Foods-RHM.aspx>>.

<sup>15</sup> See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M07040--Communicorp-SRH.aspx>>.



The Authority has no more recent examples of mergers where it has cleared a cross-border merger with remedies. The absence of further examples is due in part to Ireland's membership of the European Union. For mergers with a European dimension (i.e., which meet the relevant financial thresholds), it will normally be the European Commission rather than the Competition Authority which has responsibility for merger review. In these cases the Competition Authority, as with any Member State, has an input into the analysis of a merger including remedies.

Issues have arisen where Ireland represents a small part of a multinational transaction. Section 19 of the Act states that any merger notified to the Authority cannot be implemented until it has been cleared by the Authority.

*“Any such merger or acquisition which purports to be put into effect, where that putting into effect contravenes subsection (1), is void.”*

Challenges are especially likely because the UK, with which Ireland shares a border, does not have a pre-notification system that would make it easier to coordinate reviews.

Further, the Act does not provide for the separating out of an Irish element of a cross-border merger. Rather, the Act indicates that no part of the merger notified to the Authority may be put into effect, in any part of the world, until it has been cleared by the Authority. Merging parties have objected and claimed that the Authority lacks jurisdiction over aspects of a transaction that they claim are outside Ireland.

On a couple of occasions parties to cross-border mergers have breached section 19 of the Act by implementing the transaction in part or in whole prior to Authority clearance. Examples include M/04/032 IBM/Schlumberger, M/10/043 - Stena/DFDS and M/12/031 - Top Snacks/KP Snacks. In such instances the transaction is void but the Authority nonetheless has proceeded to evaluate the merger as if it were still a pending transaction.

The full consequences of such a transaction being void have not been developed. The Authority has recently announced that in future cases where, in its opinion, there has been a purported implementation of a notified merger prior to clearance, the Authority will normally issue a press release to that effect that the merger is void, without waiting for the conclusion of the merger investigation.<sup>16</sup>

#### **2.4. Answers to questions on Cross-Border Merger Remedies**

**Question 1:** *Please provide a short description of a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another competition authority).*

The Authority has not been involved in the implementation of cross –border remedies as described above within the last five years. Please see preceding discussion for examples of earlier cases.

**Question 2:** *Please share your agency's experiences coordinating or cooperating with any other agencies in connection with these remedies, particularly with respect to:*

- whether waivers were obtained from parties, and if not, why not;
- coordination/cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;

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<sup>16</sup> See <<http://www.tca.ie/images/uploaded/documents/Communications%20Policy%20July%202013.pdf>>.

- identifying or evaluating assets to be divested;
- evaluating potential acquirers and market testing the proposed remedy;
- designing behavioural (conduct) remedies, if any, and
- using or selecting divestiture/hold separate/monitoring trustees, including utilising a common trustee reporting to both agencies.

As stated above the Competition Authority has little experience in applying cross-border remedies. Where coordination was necessary – with the UK Competition Commission – the process worked well. Further to our response to Question 1, the Authority does have experience in the context of mergers reviewed by the European Commission rather than Member State competition authorities. As the relevant Irish agency the Authority provides comments to the European Commission including comments on remedies.

***Question 3:** To the extent not already described, please tell us what challenges have arisen in the design or implementation of cross-border remedies, and how your agency, on its own or through cooperation or coordination with one or more agencies, overcame those issues.*

To date no such challenges have arisen.

***Question 4:** Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?*

The Competition Authority has not, to date, encountered any such situations.



## JAPAN

### 1. Introduction

In Japan, it is necessary to notify the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) of mergers<sup>1</sup> that fall under certain requirements by 30 days before the implementation of such mergers. If the effect of a merger may be substantially to restrain competition in a particular field of trade, the merger in question shall be prohibited. (Articles 10, 15, 15-2, 15-3, and 16 of the Antimonopoly Act, hereinafter referred to as the “AMA”.) Furthermore, the JFTC may, pursuant to the procedures provided in the AMA, order the party in question to dispose of all or some of its shares, transfer a part of its business or take any other measures necessary to eliminate such acts in violation of the AMA (Article 17-2 of the AMA).

On the other hand, even though the effect of a merger may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the party concerned. In response to the remedies proposed by the party, the JFTC will allow the merger when the JFTC concludes that the effect of the merger may not be substantially to restrain competition in a particular field of trade on condition that the proposed remedies are implemented.

The JFTC explains the basic principles of the remedies in the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations<sup>2</sup>” (the JFTC, 31 May 2004) and introduces on the JFTC’s website merger cases in which the JFTC determined that the mergers have no competition concerns conditional on the implementation of remedies.

### 2. Basic Principles of Remedies

Appropriate remedies should be considered based on the facts of individual cases. However, the remedies should, in principle, be structural measures such as the transfer of business and should basically be those that restore competition lost as a result of the merger in order to prevent the merging party from controlling the price and other factors to a certain extent. However, in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioural measures.

In addition, the remedies should be completed before the implementation of the merger in principle.

Even if the remedies are to be taken without fail after the implementation of the merger, then an appropriate and definite deadline for the remedies should be imposed. Moreover, to transfer all or part of the businesses as remedies, for example, it is desirable to select the transferee of the business in advance of the merger. Otherwise, the parties may be required to obtain permission in advance from the JFTC with respect to the transferee.

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<sup>1</sup> Hereinafter, “mergers” refer to all forms of business combination including “acquisitions of shares”, “mergers”, “joint incorporation-type splits”, “absorption-type splits”, “joint share transfers”, and “acquisitions of business”.

<sup>2</sup> [http://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.files/110713.2.pdf](http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/110713.2.pdf).

Based on a request from the party, when the necessity of continuing the remedies is assessed in light of changes in the competitive conditions after the merger, if it is determined that the effect of the merger may not be substantially to restrain competition, the party is sometimes permitted to change or terminate the remedies.

### **3. Remedies against companies located in foreign countries**

In the last 5 years, there are 3 cases the JFTC determined that the effects of the mergers would not be substantially to restrain competition conditional on the implementation of the remedies against companies located in foreign countries. In the following, we will introduce the short descriptions of each case.

#### **3.1 *Merger between Varian, Inc. and Agilent Technologies, Inc. (2010)***<sup>3</sup>

##### *3.1.1 Outline of the case*

Agilent Technologies, Inc. (headquartered in the United States; hereinafter “Agilent”), which manufactures and distributes analytical instruments etc., plans to acquire all of the shares of Varian, Inc. (headquartered in the United States; hereinafter “Varian”), which also manufactures and distributes analytical instruments etc., thereby to make Varian a wholly owned subsidiary.

The parties distribute analytical instruments all over the world, and they also distribute their products in Japan through their Japanese affiliates etc.

Among various types of analytical instruments, the proposed merger would have significant impact on competition in the fields of trade regarding 3 products: Micro/portable gas chromatograph (Micro/portable GC), Triple quadrupole gas chromatography-mass spectrometry (Triple quadrupole GC-MS), and Inductive coupled plasma-mass spectrometry (ICP-MS). Regarding these 3 products, the proposed merger did not satisfy the safe harbour requirements for horizontal mergers.

##### *3.1.2 Contents and assessment of the remedies*

Before the JFTC reached conclusion, the U.S Federal Trade Commission (hereinafter “US-FTC”) and the European Commission (hereinafter “EC”) pointed out to the Parties in their investigation processes that the proposed transaction might bring serious adverse effects on competition in some relevant markets including those of the above-mentioned 3 products. Accordingly, the parties proposed several measures including (1) to sell Micro/ portable GC business owned by Agilent to INFICON Holding AG (headquartered in Switzerland; hereinafter “INFICON”) and (2) to sell Triple quadrupole GC-MS business and ICP-MS business owned by Varian to Bruker Corporation (headquartered in the United States; hereinafter “Bruker”). The US-FTC and the EC reached a conclusion that the proposed transaction would not violate competition laws subject to the proposed remedial measures.

Agilent offered to the JFTC to take the same remedial measures. With these measures, there would be no increment of market shares caused by the transaction.

Since both INFICON and Bruker distribute analytical instruments etc. all over the world and have been distributing their products in Japan through their Japanese affiliates over a certain period, they are considered to have acquired sufficient management know-how and have developed distribution channel in Japan. Consequently it is expected that INFICON and Bruker, through their Japanese affiliates, continue and develop each business transferred from the parties to become strong competitors in Japanese markets.

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<sup>3</sup> <http://www.jftc.go.jp/en/pressreleases/yearly-2010/jun/individual-000018.html>.

The JFTC concluded that, with the remedial measures, the merger would not substantially restrain competition in any particular fields of trade.

### 3.1.3 *Coordination or cooperation with any other agencies*

The JFTC had conducted the review of this case while exchanging information with US-FTC about the schedule of the reviews and contents of remedies and so on, with waivers from parties.

## 3.2 ***Proposed Mergers of Hard Disc Drive (HDD) Manufacturing and Sales Entities (2011)***<sup>4</sup>

### 3.2.1 *Outline of the case*

Upon the receipt of the notifications of the following plans concerning proposed mergers, the JFTC has reviewed the plans.

- (Western Digital Ireland, Ltd. (headquartered in the Cayman Islands of the British Overseas Territory; hereinafter “WDI”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs, planned to acquire all the shares of Viviti Technologies Ltd. (headquartered in Singapore, formerly known as Hitachi Global Storage Technologies Holdings Ltd.; hereinafter “HGST”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs.
- (Seagate Technology International (headquartered in the Cayman Islands of the British Overseas Territory; hereinafter “STI”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs, planned to acquire the HDD business of Samsung Electronics Co., Ltd. (headquartered in Korea; hereinafter “SEC”), which engaged in the business of manufacturing and selling HDDs.

The JFTC defined 5 products in the entire world as relevant markets. Regarding 2 products out of these five -- 3.5-inch PC/CE (personal computer and consumer electronics devices) HDDs and 2.5-inch PC/CE HDDs --, neither the WDI-HGST merger nor STI-SEC merger satisfied the safe harbour requirements for horizontal mergers. Also regarding 3.5-inch business critical HDDs, the WDI-HGST merger did not satisfy the safe harbour requirements for horizontal mergers.

The JFTC reviewed these 3 products individually from various perspectives including competitive situations, excess capacity of competitors, entry pressure, competitive pressure from neighbouring markets, and competitive pressure from users. Regarding 3.5-inch PC/CE HDDs, it was judged that the mergers may be substantially to restrain competition in a particular field of trade.

### 3.2.2 *Contents and assessment of the remedies*

In consequence, the JFTC explained to WDI and STI that the proposed mergers would substantially restrain competition in the market for 3.5-inch PC/CE HDDs. WDI then proposed the following remedies.

1. WDI’s facilities for manufacturing the volume of 3.5-inch PC/CE HDDs corresponding to approximately 10 % of its market share in 2010 will be divested in terms of transfer.
2. WDI will make it possible for the transferee to use the intellectual property required for the manufacture and sale of 3.5-inch PC/CE HDDs.

<sup>4</sup> <http://www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000460.html>.

3. Complying with the request of the transferee, WDI will supply HDD components to the transferee at competitive prices for a certain period of time.
4. The transferee will be selected based on criteria, including but not limited to, independence from the group of combined companies that belongs to WDI, sufficient financial resources, expertise and incentives to maintain and develop the transferred business. Regarding the actual transferee, WDI will report to the JFTC, upon the conclusion of a transfer agreement with the transferee, by submitting a copy of the transfer agreement.
5. The deadline for the closing of the transfer will be no later than 3 months from the date when the copy of the transfer agreement is submitted to the JFTC. If, upon the conclusion of the transfer agreement, a copy thereof is not submitted to the JFTC, the merger will not be implemented.

Given these remedies proposed by WDI, the merger will satisfy the safe harbour requirements for horizontal mergers.

Regarding the transferee, it is considered that it will become a strong independent competitor in the market for 3.5-inch PC/CE HDDs, if the requirements stated in (4) above are met. Whether or not the actual transferee satisfies the said requirements will be judged by the JFTC following the receipt of a copy of the transfer agreement from WDI.

Even if the transfer of business is implemented after the merger, the deadline for the closing of the transfer will be no later than 3 months from the date when the copy of the transfer agreement is submitted to the JFTC. Considering this, the deadline for the implementation of the remedies is appropriately and clearly determined.

Based on the above and given the remedies, it was judged that the merger would not substantially restrain competition in a particular field of trade.

As for the STI-SEC merger, the JFTC reviewed it again, considering these remedies by WDI would be taken. Consequently, the JFTC found that the merger would not substantially restrain competition in the particular field of trade.

### 3.2.3 *Coordination or cooperation with any other agencies*

The JFTC had conducted the review of this case while exchanging information with US-FTC, EC and Korea Fair Trade Commission (hereinafter “KFTC”) about the schedule of the reviews and contents of remedies and so on, with waivers from parties.

## 3.3 ***Proposed Merger between ASML Holdings N.V. and Cymer Inc. (2012)***<sup>5</sup>

### 3.3.1 *Outline of the case*

ASML US Inc. (headquartered in the United States; hereinafter “ASML US”), the subsidiary of ASML Holdings N.V. (headquartered in the Netherlands; hereinafter the said group of combined companies whose ultimate parent company is ASML Holdings N.V. shall be collectively referred to as “ASML”) that runs business of manufacturing and selling lithography systems used in the front-end process of semiconductor manufacturing, is planning to acquire all the shares of Cymer Inc. (headquartered in the United States; hereinafter the said group of combined companies whose ultimate parent company is

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<sup>5</sup> <http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.html>.

Cymer Inc. shall be collectively referred to as “Cymer”) which runs business of manufacturing and selling light sources composing an important part of the lithography system.

In manufacturing lithography systems, ASML procures light sources from Cymer. Therefore, the merger falls under the category of vertical merger in which a market of manufacturing and selling light sources is defined as the upstream market and a market of manufacturing and selling lithography systems is defined as the downstream market.

Concerning the Deep Ultraviolet Light source in which the parties make transactions can be divided into KrF (krypton and fluoride) light source and ArF (argon and fluoride) light source, the JFTC defined KrF light source and ArF light source in the entire world as relevant markets (upstream markets) respectively. Concerning the lithography systems which can be divided into KrF lithography systems, ArF lithography systems and ArF immersion lithography systems, the JFTC defined these 3 products (KrF lithography systems, ArF lithography systems and ArF immersion lithography systems) in the entire world as relevant markets (downstream markets). Regarding any of the relevant markets, the merger did not satisfy the safe harbour requirements for vertical mergers.

### 3.3.2 *Contents and assessment of the remedies*

#### 3.3.2.1 *Refusal of sale, etc. of light sources transaction*

After the JFTC explained to ASML US as saying that such input foreclosure might be a point potentially to argue in the review of the merger, ASML US has proposed that it would take the following measures against the concern of the input foreclosure.

1. With respect to Deep Ultraviolet Light sources, Cymer will continuously do business with Company X (downstream company) and Company Y (downstream company) under fair, reasonable and non-discriminatory (FRAND) terms of trade as well as in the manner of paying regard to and being consistent with the existing agreements. Moreover, with respect to Extreme Ultraviolet Light sources, after the merger, Cymer will do business with Company X and Company Y under FRAND terms of trade as well as in the manner of paying regard to and being consistent with the industry standard.
2. Cymer will implement joint development activities with Company X and with Company Y under reasonable terms of trade. With respect to Deep Ultraviolet Light sources, Cymer will implement it in the manner consistent with the existing agreements.
3. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
4. The report mentioned (3) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

These measures proposed by ASML US are interpreted as follows: Cymer will continuously deal with Company X and Company Y in a manner consistent with the terms of trade equivalent to that of prior to the merger. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and Cymer will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured. Moreover, there is competitive pressure from chipmakers to a certain degree.

Therefore, taking the measures proposed by ASML US, etc. into consideration, the merger will not cause the input foreclosure.



*3.3.2.2 Refusal of purchase, etc. of lithography systems transaction*

After the JFTC explained to ASML US that such customer foreclosure might be a possible issue in the review of the merger, ASML US has proposed that it would take the following measures against the concern of the customer foreclosure.

1. When ASML develops in partnership with Cymer or Company A (upstream company) and places orders for products, parts and services of light sources to them, ASML will determine the supplier based on objective and non-discriminatory criteria, such as quality, logistics, technology, cost and chipmakers' preferences etc.
2. ASML will continuously permit chipmakers to choose light sources of their choice, and not unduly exert influence on the decision of chipmakers with respect to the choice of light sources.
3. ASML will substantially simultaneously provide both Cymer and Company A with information which is necessary in research and development of light sources and order placements for light source products, parts and services.
4. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
5. The report mentioned (4) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

These measures proposed by ASML US represent its promise that after the merger, ASML will continuously deal with Company A in a manner consistent with the terms of trade equivalent to that of prior to the merger. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and ASML will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured. Moreover, there is competitive pressure to a certain degree from chipmakers.

Therefore, taking the measures proposed by ASML US etc. into consideration, the merger will not cause the customer foreclosure.

*3.3.2.3 Access to confidential information*

After the JFTC explained to ASML US that handling confidential information of competitors might be a possible issue in the review of the merger, ASML US has proposed that it would take the following measures against the handling of confidential information.

1. Directors/employees of Cymer who are responsible for the confidential information of Company X (downstream company) or Company Y (downstream company) will be prohibited from providing the confidential information to directors/employees of ASML and enter into a non-disclosure agreement.
2. Directors/employees of ASML who are responsible for the confidential information of Company A (upstream company) will be prohibited from providing the confidential information to directors/employees of Cymer and enter into a non-disclosure agreement.
3. To comply with (1) and (2) above, the parties will create a protocol of information blackout for its employees.

4. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
5. The report mentioned (4) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

These measures proposed by ASML US represent its promise that after the merger, the parties implement measures to prevent disclosure of confidential information which includes their directors/employees to enter into a non-disclosure agreement. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and ASML will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured.

Therefore, taking the measures proposed by ASML US, etc. into consideration, the merger will not raise an issue of access to confidential information of competitors.

### *3.3.3 Coordination or cooperation with any other agencies*

The JFTC had conducted the review of this case while exchanging information with U.S Department of Justice and KFTC about the schedule of the reviews and contents or necessity of remedies and so on, with waivers from parties.

In addition, although the JFTC and Taiwan Fair Trade Commission (TFTC) had not obtained the waiver from the parties, the JFTC exchanged information with TFTC about schedule of the review and so on under regulated conditions.

## **4. Conclusions**

As these recent cases suggest, cross-border mergers involving Japanese firms and/or affecting Japanese markets have been increasing and are expected to increase further. Accordingly, there is an increasing need for international cooperation such as information exchange on the schedule of review processes and remedial measures. The JFTC intends to make further efforts to enhance international cooperation with foreign competition authorities by means of contributing to activities of the OECD and the ICN, and developing bilateral cooperative relationship.



## KOREA

### 1. Overview

Article 7-1 of the Monopoly Regulation and Fair Trade Act (hereinafter refer to as the MRFTA) stipulates that no one shall substantially minimize competition in a particular business area by conducting practices falling under the combination of enterprises. In addition, the Article 12 under the same Act specifies that any company which falls under the standard set by the pertinent law shall report to the Korea Fair Trade Commission (hereinafter refer to as the KFTC). Based on the larger amount between assets and a total amount of sales, the one with more than sales or assets of 200 billion won or the other with more than 20 billion won of parties taking part in the combination of enterprises shall notify to the KFTC. In case of foreign corporations, if an acquiring company and an acquired company are foreign corporations, the companies taking part in the combination of enterprises whose total sales exceed 20 billion won (which is about \$ 20 million) respectively in the Korean market are liable to report.

Cross-border merger means cases in which companies taking part in the combination of enterprises are based in two different countries, therefore markets more than two in different nations are affected by the merger. Merger reviews are the procedures to estimate changes of competition environment in a market, so competition analysis can be differ from which material is examined under which perspective, and unlike other competition enforcement merger reviews have no limit in types or levels of remedies thus in turn having various tools. Therefore, international coordination is greatly needed in order to secure consistent level of reviews and remedies among competition authorities.

Making consistent decision and imposing remedies through international coordination among competition authorities bring the following benefits. First, if different decision or remedies is applied by each competition authority, merger-involved firms need to respond to the competition authorities one by one and put many efforts and costs in separately implementing various remedies issued as many as the number of the authorities. Remedies with consistency would help merger participating companies to secure the right to defence and reduce administrative costs. Second, competition authorities can enhance companies' acceptance rate of remedies by insuring objectivity. Conversely when decisions are made differently among competition authorities, companies taking part in merger would face difficulties in proceeding with the combination of enterprises and sources of disputes would arise among competition authorities. Therefore, competition authorities need to figure out ways for coordination in investigation against cross-border merger cases which include common issues related to competition.

### 2. Cases of remedies on cross-border remedies

The KFTC has been notified of and reviewed more than 50 merger cases between foreign corporations annually since 2004. Among those cases remedies were imposed due to the anti-competitiveness on followings including: 1) establishment of a joint venture between BHP Billiton and RIO TINTO; 2) Western Digital's acquisition of stocks from Hitachi GST; 3) MediaTek's acquisition of stocks from MStar; and 4) Cymer's stocks acquired by ASML. The followings are brief explanations of those cases.

### **2.1 *Establishment of a joint venture between BHP Billiton and RIO TINTO (Oct 2010)***

A case where BHP Billiton, the largest Australian iron ore producer in the world, established a joint venture with RIO TINTO was simultaneously reported to the regulatory authorities in Korea, Japan, EU, China, Germany, and Australia. The KFTC sent review report (statement of objection) on the case containing opinions prohibiting the establishment since the case strengthens market power of the ore producer and possible abuse of the power and also increase the possibility of coordinated effects through the joint venture and as a result of the opinion the corporation taking part in the combination of enterprises withdrew its notification.

However, as the companies taking part in merge were both based in Australia, there came an issue of securing implementation of the remedy. Therefore in order to address this issue, regulatory authorities in the KFTC put efforts to proactively coordinate with its counterparts in Japan, EU, and China who share similar interest concerning the issue. Each made similar conclusion with each other through sharing various opinions by communicating regularly with emails and having face-to-face meeting when necessary. Especially with Japan, the KFTC had cooperated by having working level meetings and high-level talks between competition authorities throughout the entire hearing process so that same remedies would be imposed as the final conclusion.

### **2.2 *Western Digital's acquisition of Hitachi GST***

A case where Western Digital, the world's second largest HDD manufacturer, acquires 100% of Hitachi GST's stocks, reported to competition authorities in Korea, US, Japan, EU and China. The KFTC determined that the combination of enterprises would eliminate the strongest competitor and then lead to oligopoly thus limiting competition, thereby the Commission imposed structural remedies and behavioural remedies including divestment of major factories to the third party, related intellectual property rights, and imposing mandatory of Supply Agreement.

From the earlier phase of its investigating process, the KFTC actively pushed for international coordination with its counterpart agencies in US, EU, Japan. The Commission had exchanged information by e-mails and had in-depth negotiation by visiting competition authorities in US, and EU in the early stage. The Committee exchanged opinions with US regarding securing evidence materials and discussed the contents of remedies with EU through conference calls in the decision making phase for the remedies. Little differences exist in the remedies issued by each authority since the combination of enterprises has impact on the Korean market which is different from that of other countries'. The KFTC excluded relevant product with little impact on the Korean market from others subject to the remedy, and limit the scope of relevant product subject to selling off as those assets having huge impact on the Korean market.

### **2.3 *MediaTek's acquisition of stocks from MStar***

This was a case in which MediaTek Inc., the world's second largest provider of System on a Chip (SoC) for digital television, acquires 48% of MStar Semiconductor's stocks and merges it. The case was notified to competition authorities in Korea, Chinese Taipei, and China at the same time, and had less international coordination compared with the above two cases. However in the early stage the Commission received the information from its counterpart in Chinese Taipei on market definition and established channel for consultation with the Chinese competition authority and then proceeded with the investigation.

In case of Chinese Taipei, the authority imposed obligation of prohibition on general behaviours limiting competition. Meanwhile, the KFTC issued orders including price cut and of endowing written contract to a customer company as it concerns possible damages on buyers due to the monopolisation by the SoC manufacturer.

## **2.4 *Cymer's stocks acquired by ASML (May 2013)***

This was the case where ASML, world's No.1 enterprise of lithography system for the semiconductor process, acquires 100% of Cymer's stocks, the largest manufacturer of light source which is the important raw material of lithography system. The case was reported to competition authorities in Korea, Japan, US, Israel and Chinese Taipei. In particular the KFTC realised that it has similar perspectives with its Japanese counterpart regarding this case. Therefore it was able to closely coordinate with the Japanese authority from the start to the end of the investigation such as market definition, discussions on anti-competitiveness, mutual information sharing, and forwarding the press material after the final remedy is issued.

Most contents of remedy issued by authorities in different nations were almost similar, but Korean competition authority additionally took into consideration of the existence of strong buyers in the semiconductor equipment market. In order to prohibit the unilateral effects and coordinated effects through vertical merger, the KFTC imposed behavioural remedies including independent management of sales division, instalment of firewall preventing sharing of confidential information, and mandatory compliance of FRAND (Fair, Reasonable and Non-discriminatory) commitment.

## **3. Mechanism of international coordination**

### **3.1 *Discussions in the OECD***

“Recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade” announced in 1995 is a significant standard that forms the basis for international coordination regarding ways to cooperate in terms of information sharing, negotiation, adjustment among competition authorities.

Entering the year 2000 there have been gradual increase of cross border merger between global enterprises, therefore active discussions were made among competition authorities regarding the issue. Especially during the meeting held in June 2011, the importance and usefulness of the competition authorities' cooperation in the course of investigation on proposed merger were reinforced by using the example in which 25% of merges subjected to the imposition of remedies from 2009 to 2010 by the European Committee were proceeded through cooperation and coordination with other countries' competition authorities.

By using the result of polls, conducted by the OECD in 2011 on international cooperation, as a reference, formal ways of coordination include FTA competition chapters, bilateral or multilateral competition agreements, the mutual legal assistance treaty, high-level talks between competition, and working level meetings. Informal ways include conference call, and communication via emails.

### **3.2 *Steps of the KFTC's international coordination***

First the commission decides whether a cross border merger, drawing much attention from people internationally, needs coordination with other competition authorities. When the coordinated effort is required, system for coordination should be established. The system considers nations to coordinate, level of coordination system, and the scope.

For sharing confidential information with a nation under a coordination system, the commission receives waiver from a complainant. The waiver does not have typical form, and can use forms in “ICN's Waivers of Confidentiality in Merger Investigation(2009)” and those used by competition authorities in the US, and EU as references.

Case handlers regularly communicate via email to select subject for discussion and discuss when to coordinate with each other. Coordination on decisions on anti-competitiveness or level of remedies other than just simple information is done in the high-level meetings.

It is needed to notify to the counterpart competition authority in every major steps including start of investigation, forwarding of investigation report, and issuance date of a remedy. Especially with the country where the respondent is based, it is favourable to give notice to the country's competition authority according to the OECD recommendation in 1995 regardless of whether there is bilateral agreement or coordination system in place or not. Otherwise if there is an established mutual coordination system for individual cases, it is required to notify major schedule regarding the cases to the counterpart authority.

Before giving notice on the final decision regarding anti-competitiveness to the party, the commission can mutually exchange the major grounds for decision making. When close coordination system established and the two countries have similar market condition, sharing final rulings can increase accuracy and credibility of the investigation.

#### **4. Coordination experiences**

##### **4.1 *Requesting waivers of confidentiality***

In investigating cross border M&A cases including the BHPB & Rio-Tinto case, before starting coordination effort, the commission was submitted waiver (documents of consent on competition authorities' sharing of confidential information submitted by the companies involved) from companies taking part in the merger. Submission of waiver should be decided by the merger participating companies and it is not mandatory. Even if the companies submit waiver, they can ask exclusion of certain part from the information sharing, and the excluded part cannot be shared among competition authorities. Fortunately, the KFTC received waiver in cross border M&A cases without any difficulties therefore had no issues in sharing the information. In the working level there were no problems raised regarding the contents of waiver since the shared information was mainly about the result of decision making on major points in competition analysis or remedies, not about individual information or numerical figures.

##### **4.2 *Selecting assets subject to divestiture***

When structural behaviour, especially an order of divestiture, is imposed on cross border merger cases, selecting assets to be sold off is all the more important issue. That's because of the possibility in which each competition authority would make different decisions on which assets to be sold off among total assets owned by the parties, and if so it can be a huge burden on the company. Thereby when a remedy on the international M&A is an order to sell off assets, there will be more needs for international coordination.

An order of divestiture was only imposed on the case of Western Digital. As there were concerns raised over possible anti-competitiveness in the 3.5-inch HDD market, assets subject to selling off were selected as follows according to the standard of imposing remedies.

The KFTC considered first hand business units, which are independently viable in the pertinent market and prove themselves to have capability to compete, in selecting assets to be sold off. It is because selling one big-sized factory is more efficient than selling off small factories located in different regions. Thereby the KFTC selected the biggest factory owned by Hitachi GST, the acquired company, as an asset to be sold and limited the scope of the assets as those related to 3.5-inch products having potential anti-competitiveness.

### **4.3 *Reviewing purchaser acquiring the Divestment Business***

In evaluating bidders for acquisition, the commission especially considered which company would get into the market fast and then compete with other companies and facilitate competition. In the above merger case of Western Digital, Toshiba was the only bidder for acquisition. As Toshiba is not a market participant in the 3.5-inch HDD market for desktop and CE(Consumer electronics), the company falls under the newly entering companies therefore the commission decided that Toshiba will not bring big changes to the market's competition.

### **4.4 *Simultaneous imposition of behavioural remedies***

The commission considered simultaneously imposing behavioural remedies along with structural remedies, since the authority views issuing an order of divestment of production plant without other remedies would make the acquiring company hard to get into the competition in the market. Therefore in order to make the company to compete as fast as possible after acquiring assets under the order to sell off, the commission have the company to maintain the existing supplying contract and upon the request from the acquiring company the commission have the supply of key components such as head of HDD to be maintained for at least 3 years.

### **4.5 *Trustee system***

Lastly, in order for effectiveness of remedies, trustee system can be considered as a way to monitor the implementation of remedies, but now the KFTC does not have the trustee system in place in its regulations concerning M&A.<sup>1</sup> The commission decided that its monitoring of implementation goes well without the trustee system as competition authorities in the US and EU, in imposing similar remedies, have put in place measures in which the monitoring results are reported to them through the trustee system.

## **5. *Additional issues related to the remedies***

When M&A cases are simultaneously investigated by many competition authorities, decisions they would make can be different with each other, and if so there are always possibilities of that the objectivity of investigations and acceptance rate of the merger involved firms would fall. Therefore it is important to have consistent decisions made through coordination, but there comes an issue arising from different procedures and competition environments in each nation.

### **5.1 *Difference in procedure for imposing remedies***

First, there are procedural issues. Most competition authorities are employing the form of Consent Decree when dealing with cases of anti-competitive M&A, but the KFTC in general takes administrative actions.<sup>2</sup> By taking the form of Consent Decree, competition authorities can easily express their opinions on concerns over anti-competitiveness and according to this the competition authority and complainant can try to find a way to dismiss the concerns of anti-competitiveness in its early phase by having consultations. Meanwhile, in case of taking the form of administrative action, the KFTC's Secretariat presents the case as an agenda before the commission, the final decision-making body, after the secretariat completes the review of all issues including decision making on issues concerning anti-competitiveness, and efficiencies.

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<sup>1</sup> There can be many reasons for that the trustee system has not been implemented yet in Korea, and the major reasons for that is there is no consensus formed regarding who will pay the cost and the scope of the payment.

<sup>2</sup> The consent decree system was recently implemented in Korea (in Nov 2012) but up until now actions under the system have not been issued against cases.



Before tabling the agenda, it is difficult to have formal consultation with the complainant on the level of remedies to dismiss concerns of anti-competitiveness.

Owing to the differences in procedures or forms, remedies are issued faster in countries employing the form of Consent Decree. Therefore the KFTC taking the form of administrative action can consider other countries' remedies, but there is always possibility of having minor differences in final remedies comparing with those of other countries' authorities.

Concerning the above, the complainants in cases of Western Digital and ASML wanted the KFTC's imposition of remedies to be similar to the remedies determined by consent decree and issued by competition authorities in other countries. As a result contents of the remedies are practically the same but minor differences exist.<sup>3</sup>

## **5.2 *Differences in competition environments by countries***

Next there are issues of different competition environments by countries. In analysing anti-competitiveness, a competition authority has no choice but to consider its country's standpoint, and for this reason remedies have inevitable differences. One of the examples includes the ASML case where a biggest buyer of semiconductor manufacturing equipments is a Korean company and Japanese enterprise is a supplier of the equipments. In the ASML case, companies taking part in the vertical merger between companies in the upstream or the downstream market were based in the U.S., but competitors in the upstream or downstream markets were Japanese companies. Therefore in Japan the authority focused on competition constraints in the semiconductor manufacturing equipment market, but the KFTC needed measures to prevent suppliers' abusive behaviour against buyers after the combination of enterprises. After all, as the KFTC wanted, measures to prevent abusive behaviour were included in the remedy. As you can see in the above example, issues caused by differences in competition environments by countries cannot be solved through international coordination, accordingly there can be limits in making identical remedies.

## **5.3 *Making changes in remedies according to altered situations***

What needs to be considered more regarding remedies including selling off assets is a case when the issued remedy cannot be implemented due to changed situations. It needs to be prepared for a situation where a respondent cannot carry out the remedy due to the radical changes in market conditions comparing with the conditions considered at a time when firstly imposing the remedy. The KFTC contains paragraphs of allowing request for redemption, modification and substitution of one or more actions in its remedy as a preparation for such changes in situations. As a reference, even though it is not the case solved through international coordination after Korea was defined as the relevant geographical market, but there is a relevant example in which remedy was modified when Owens Corning in the U.S. acquires Fiber Glass Reinforcements (FGR) business division of Compagnie de Sanit-Gobain Vertrotex in France in 2007.

Original remedy was a structural measure containing orders of selling out merger-involved firms' relevant business units in Korea to the third party, but about a year later the respondent requested modification of the remedy for changed market situations, failure of selling out and the KFTC accepted the request. Major reasons the commission took into consideration for the modification were radical changes in the market caused by dramatic increase in imported volume of the product; and 4 times of failed trial for bid for sale to sell off assets subject to disposition. There can be many reasons for those failures but the

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<sup>3</sup> In the Western Digital case, remedies issued by other countries' competition authorities have a paragraph allowing the remedies to be changed when radical changes occurred in the market, but the paragraph was excluded from a remedy decided by the all-members meeting in the KFTC. And in the ASML case orders considering competition environment in Korea was added on the remedy.

biggest cause was that competitors in the relevant market did not make attempts to take over since they saw that not much synergy will be generated from acquiring the assets. In turn the modified actions changed the structural remedy into the behavioural remedy which includes prohibition on price increases.

For reference, currently actions are being implemented on cases of MediaTek and ASML whose actions were recently imposed. And by now the measure is not likely to change according to possible modifications of situations. However, considering that the implementation period of the measure is relatively long, there are possibilities of that countries have different standpoints regarding modification of measures in the future and also how to narrow them can be critical to dealing with cross-border M&A through international coordination.

## **6. Creating the manual for international coordination mechanism**

The KFTC established and is currently managing “the manual for joint investigation of cross-border M&A” in order to investigate combination of enterprises through international coordination. The manual was established in Dec 2012 to reinforce efforts of international coordination after the importance of international coordination with other competition authorities abroad was recognised while dealing with the BHBP & Rio-Tinto case. The manual is developed further from “the EU-US best practice on merger cooperation” and it includes ground for international coordination, the scope, attentive points in steps of process, and letter forms to be used when asking coordination to counterpart authorities.

Especially the operation process was recorded as logbook so that the start and conclusion of international coordination in cases can be understood at once. After setting up the manual, investigations on cross-border M&A have been done following the manual.

## **7. Conclusion**

The KFTC has over 30 years of experience in investigating merger cases, but started actively putting brakes on anti-competitive M&A cases since the late 1990. And it’s been just a couple of years since the commission started investigating more actively against overseas M&As affecting the Korean market. The KFTC will reinforce its investigation on overseas mergers affecting the domestic market and expand its coordination effort with other competition authorities to secure effectiveness of the law enforcement.



## MEXICO

1. **Please provide a short description of a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another competition authority).**

Please see answer below.

2. **Please share your agency's experiences coordinating or cooperating with any other agencies in connection with these remedies, particularly with respect to:**
  - whether waivers were obtained from parties, and if not, why not;
  - coordination / cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;
  - identifying or evaluating assets to be divested;
  - evaluating potential acquirers and market testing the proposed remedy;
  - designing behavioural (conduct) remedies, if any; and
  - using or selecting divestiture/hold separate/monitoring trustees, including utilising a common trustee reporting to both agencies.

The Mexican Federal Economic Competition Commission (Commission or CFCE for its acronym in Spanish) cooperates internationally in enforcement matters to increase the effectiveness of its actions and with the aim of reaching consistent decisions with other jurisdictions. The latter is particularly relevant in merger review where the Commission's cooperation focuses on reaching better decisions and preventing consumers' harm.

The Federal Law of Economic Competition (FLEC) does not allow coordination of cross-border remedies between the CFCE's Directorate-General for Mergers and other authorities' technical areas due to the fact that remedies are decided by the CFCE's Plenum. This approach makes the analysis and decision process in complex cases less flexible because even though the Commission's technical area could discuss common remedies with other agencies, it is not their role to make the final decision.

The following two cases are mergers that were notified in different jurisdictions and where the Commission cooperated with other agencies through informal channels and through formal mechanisms.

## 2.1 *Nestlé / Pfizer Inc. global infant formula nutrition business*<sup>1</sup>

In June 6, 2012, Nestlé notified to the Commission its intention to acquire Pfizer Nutrition, a global infant nutrition business. The transaction consisted in the acquisition of Pfizer's Mexico infant formulas division, including shares, assets and trademarks. The merger was part of a global deal where Nestlé acquired the worldwide infant nutrition business of Pfizer Inc.

In Mexico, in November 2012 the Commission challenged the merger on the basis that the transaction would substantially lessen competition in the Mexican market of infant milk formulas. In particular, the entity merged would hold a market share of approximately 71% to 88% of the volume sold in the infant formula markets for babies aged zero to 36 months, in a market with high barriers to entry. The transaction would likely result in higher prices on this type of formulas.

Given the Mexican market structure, it was necessary for Nestlé to design a remedy to avoid anticompetitive effects. The Commission's Plenum reached a settlement that required the divestment to a third party (without any relation with the parties) of all assets necessary to maintain Pfizer infant formulas division presence in the Mexican market as a viable and independent competitor. That is, Nestlé was required to divest Pfizer's manufacturing plant of infant formulas and the sales force and operational staff. Similarly, this company was required to grant exclusive licenses in Mexico over Pfizer's brands related with infant formulas during a 10 years period and allow a black out period for other 10 years. The Commission considered that this settlement, which prevented the merger of Nestlé and Pfizer infant formulas businesses in Mexico, ensures competition in this market, to the benefit of consumers.

The transaction was notified in different jurisdictions, including Chile and Colombia. To facilitate the Commission's cooperation particularly with the latter two Latin American countries, both merging parties, Nestlé and Pfizer, granted confidentiality waivers.

With respect to confidential information obtained from the firms<sup>2</sup>, this can be exchanged with other jurisdictions when the firm has granted a waiver for such purpose. The agencies that receive the information granted by the waiver shall keep the confidentiality nature of the information.

In this regard, given the existence of the confidentiality waivers, when different information requests were made by the Superintendencia de Industria y Comercio (SIC) from Colombia and by the Fiscalía Nacional Económica (FNE) from Chile, the Commission was able to exchange via conference calls information related to the transaction under analysis and to share the merger's resolution with the SIC and the FNE.

The Commission also exchanged non-confidential information and officers' experience with these jurisdictions, which contributed to better understand the case and to take better strategic decisions, complementing formal procedures.

In both countries, Colombia and Chile, the competition authorities imposed remedies to lessen the negative impact of the transaction on competition. As noted above, these remedies were not coordinated with the Mexican authority.

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<sup>1</sup> File CNT-035-2012.

<sup>2</sup> Article 31 bis of the Federal Law of Economic Competition (FLEC) [http://www.cfc.gob.mx/images/stories/Leyes/compendionormativo/2013/Compendio\\_CFC\\_mayo\\_2013.pdf](http://www.cfc.gob.mx/images/stories/Leyes/compendionormativo/2013/Compendio_CFC_mayo_2013.pdf).

## 2.2 *Anheuser-Busch /Grupo Modelo*<sup>3</sup>

In August 7, 2012, Anheuser-Busch Inbev (ABI) notified to the Commission its intention to acquire all of the shares of Grupo Modelo that it did not already own, through a public tender.

The Commission cleared the proposed acquisition of Grupo Modelo by ABI, as the transaction was a consolidation of shares by ABI in Grupo Modelo, in which ABI already was a shareholder.

The Commission considered that ABI did not produce or distribute its products in Mexico due to the fact that Grupo Modelo distributed ABI products in the country. Additionally, ABI's products had a marginal presence in the beer Mexican market.

As regards as the effects of the transaction on other related markets such as operation of convenience stores; production and distribution of bottled water and manufacturing of glass containers, the Commission did not identify any adverse effects on competition.

The Commission therefore concluded that the proposed transaction did not raise competition concerns.

In the United States, Anheuser-Busch Inbev proposed the acquisition of total ownership and control of Grupo Modelo. In January 31, 2013, the Department of Justice (DOJ) filed a civil antitrust lawsuit challenging the transaction. According to the DOJ, "the \$20.1 billion transaction would substantially lessen competition in the market for beer in the United States as whole and in 26 metropolitan areas across the United States, resulting in consumers paying more for beer and having fewer products from which choose"<sup>4</sup>.

In April 19, 2013, the DOJ reached a settlement with both parties that required the divestiture of "Modelo's entire U.S. business – including licenses of Modelo brand beers, its most advanced brewery in Mexico: Piedras Negras, its interest in Crown Imports LLC and other assets – to Constellation Brands Inc., in order to go forward with their merger"<sup>5</sup>. According to the DOJ the settlement would maintain competition in the beer industry in the U.S., benefitting consumers.

In this case, the authorities of both countries, U.S. and Mexico, had conference calls to discuss the case in general terms and also to explain notification procedures, and deadlines. Due to the flexibility of the U.S. procedure's timetable to review the transaction, the U.S. authority challenged the merger after the Mexican authority's decision was released.

Cooperation among agencies was useful to understand the procedural phases of the jurisdictions. Cooperation was also important to gauge possible effects of an authorities' decision in other jurisdictions.

As mentioned before, cooperation and information exchanges in both transactions, Nestlé/Pfizer and ABI/Grupo Modelo were subject to national provisions on confidentiality of information and public records produced by courts in formal proceedings.

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<sup>3</sup> File CNT-052-2012.

<sup>4</sup> DOJ Press Release: Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo, January 31, 2013.

<sup>5</sup> DOJ Press Release: Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case: April 19, 2013.

- 3. To the extent not already described, please tell us what challenges have arisen in the design or implementation of cross-border remedies, and how your agency, on its own or through cooperation or coordination with one or more agencies, has overcome those issues.**

A system of mutual recognition of decisions of other antitrust enforcers would make cross-border enforcement more efficient and less burdensome. However, under the current Mexican legal framework, any attempt to enforce decisions locally based on a resolution by a foreign authority would be contested in the judiciary by the parties involved. Without a doubt, the courts would grant the parties involved the right to contest a decision of such nature, complicating the Commission's work.

In addition, the Commission faces legal constraints for formal international cooperation in merger review because of the stringency of the procedure outlined by the Federal Law of Economic Competition (FLEC). For example, the law does not allow for, among other things, synchronising the timing of the merger review process, which could help to issue concurrent resolutions. Furthermore, the procedures outlined in the FLEC do not contemplate the possibility of "stopping the clock" once a review has started.

- 4. Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?**

N/A.

## RUSSIAN FEDERATION

Chapter 7 of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition" (hereinafter – Law on protection of competition) is devoted to the state antimonopoly control over economic concentration transactions.

**Under this Chapter, subject to state control are transactions, other actions with assets of Russian financial organisations and fixed production-related assets and (or) intangible assets located in the Russian Federation, or with voting stocks (shares), the rights in regard to Russian commercial and non-commercial organisations, as well as foreign persons and (or) organisations supplying goods to the Russian Federation for over one billion Rubles within a year proceeding the date of the transaction, another action subject to state control.**

Foreign persons that don't own the Russian assets and don't supply goods to the territory of the Russian Federation (or supply such goods in the sum of less than one billion rubles) don't come within the Law on protection of competition even in case transactions or actions in relation to them are made by Russian legal persons or individuals.

Criteria for consideration of transactions (actions) as jural facts being subject to the state control are a size of assets of the persons participating in the transaction (action) (should exceed 7 billion rubles), or a size of their aggregate revenues (should exceed 10 billion rubles), as well as participation in the transaction (action) of the subject included in the **Register of economic entities (except financial organisations) that has over thirty five percent share of the particular goods market.**

Thus, thresholds specified by the antimonopoly legislation of the Russian Federation in the form of sizes of assets and revenues are determined totally by groups of persons, economic entities that are participants of the relevant actions and (or) transactions of economic concentration. In this regard, it should be noted that a group of foreign economic entities may include Russian legal persons with an aggregate value of the assets or revenues reaching the thresholds specified by the Law on Protection of Competition, which will lead to necessity to get a prior approval of the relevant actions or transactions by the antimonopoly authority as these actions or transactions may affect competition in the relevant market.

State control of economic concentration is mainly exercised in the form of consideration of pre-merger notifications submitted by interested persons for getting a preliminary consent of the antimonopoly body for transactions, other actions that are subject to state control.

In considering a pre-merger notification the competition authority has the right to extend the term of its consideration if there is some need in additional information for the competition authority to make a final decision upon results of considering the application in case the competition authority establishes that the transaction declared in the application, other action may lead to restriction of competition, including as a result of emerging or strengthening of a dominant position of the person (a group of persons).

These powers allow the antimonopoly authority to carry out an analysis of statement of competition in the relevant commodity market where a transaction takes place, including a cross-border transaction. Regarding cross-border transactions, to make a decision on admissibility of approval of the transaction



being made by a foreign person or in relation to a foreign person, there may be some need in interaction with antimonopoly authorities of other states.

Possibility and a procedure of interaction of the antimonopoly authorities of member-states of the Customs Union and Common Economic Space, including exchange of information among them, implementation of proceedings upon instruction are specified in special provisions of Articles 24, 25 of the Agreement on the Common Principles and Rules of Competition.

At the same time, we believe that interaction of antimonopoly authorities of different countries can be built on the basis of international treaties, as well as on the basis of the principle of reciprocity and achievement of common goals on protection of competition.

In 2009 the FAS Russia interacted with the European Commission on the merits of consideration of a transaction on acquisition of the Sun Microsystems Company by Oracle Corporation. Pre-merger notifications on conducting that transaction were submitted for consideration to competitive authorities of many countries in the world, including Russia, as well as the European Commission. Considering world experience in the field of cooperation of foreign competition authorities in consideration of transactions which may affect the competition in the markets of several countries, the FAS Russia organised the specified consultations.

According to rules of the European Commission, a preliminary condition for carrying out similar consultations is a receipt from the company that is a subject of consultation of the official letter of refusal from confidentiality (a waiver) with which the company confirms its consent to carry out consultations between the European Commission and competition authorities of other countries in regards to the transaction with possibility of exchange of confidential information presented by this company to the relevant competition authorities. Within consultations conducted between the FAS Russia and the European Commission, the European Commission carried out the specified procedure of receiving a waiver.

It should be noted that the FAS Russia for the first time became a participant of process of use of the specified mechanism that has to become the most acceptable form of the settlement of question arising when it is impossible to exchange confidential information according to the national legislation of the parties in investigation of specific cases on violation of the competition legislation and control over transactions with participation of economic entities of Russia and EU.

As for the antimonopoly control over economic concentration transactions with participation of cross-border companies, as a whole it is possible to give some examples of enforcement practice.

#### **1. Example: dairy products market**

Recently the most significant processes of economic concentration took place in the dairy market. As a result of merge of assets of the Danon Company and YuNIMILK JSC, as well as acquisition by Pepsi-Cola Company the control over Wimm-Bill-Dann Foods, JSC two groups of companies were formed in the Russian dairy products market, with market power considerably exceeding the market power of other entities of the market.

High market potential of these persons, being characterised with existence of uniform infrastructure and possibility of manoeuvre (capital, capacities, raw materials and production streams) promotes reduction of specific expenses in production and leads to increase in sales, volumes and profit rates.

Vertical integration of enterprises entering into the specified group has competitive advantages on enterprises of specialised type as it allows increasing in efficiency of functioning of these enterprises and their survival in competitive activity. Balance of sales in maintenance of line of goods is also an advantage.

A distinctive feature in the dairy products market affecting conditions of the goods circulation and statement of the competition environment in the market of production and sale of milk and dairy products is its seasonality. Price volatility is generally caused by seasonality of supply and demand on dairy raw materials.

However, a high market potential allows the joint company ‘Danon-Yunimilk’ and ‘Wimm-Bill-Dann, JSC’ to influence the general conditions of the circulation of goods in the commodity market by reducing or raising the prices of purchase of crude milk for agricultural producers regardless of a season.

Within consideration of pre-merger notifications, a number of possible negative consequences for the market were revealed, in particular:

- reduction in economic entities which weren’t entered into one group of persons carrying out activity in the markets of milk and dairy production;
- emergence and strengthening of a dominant position of the joint groups of persons generally in the regional markets, probability of establishment of monopoly low prices for purchased crude milk and monopoly high prices for sold dairy products, creation of discriminatory conditions for economic entities;
- increasing possibility of conclusion of anti-competitive agreements between economic entities or concerted practices by economic entities in the commodity market;
- unreasonable reduction or cessation of production of dairy products, including withdrawal cheap dairy products intended for low-income groups from the dairy product line to be sold.

Considering these possible negative consequences for the market, upon results of consideration of pre-merger notifications some instructions on actions directed at ensuring the competition were issued. Those instructions, in particular, provided control over pricing on milk and dairy products, ensuring of non-discriminatory access of suppliers of crude milk to processing services.

## **2. Example: oil market**

At the end of 2012 by results of consideration of a pre-merger notification ‘Rosneft, JSC’ on acquisition of a group of persons ‘TNK-BP Holding, JSC’, the Federal Antimonopoly Service made a decision to issue an instruction to ‘Rosneft, JSC’ and persons entering into its group of persons on implementation of action directed at ensuring the competition:

- upon a receipt of offers from economic entities that don’t enter into a group of persons of ‘Rosneft, JSC’ and ‘TNK-BP Holding, JSC’, possibility of conclusion by them of direct contracts on wholesale of automobile gasolines and diesel fuel on non-discriminatory conditions in comparison with the economic entities entering into a group of persons of Rosneft, JSC and TNK-BP Holding, JSC should be provided.
- enterprises of oil products supply that enter into a group of persons of ‘Rosneft, JSC’ and ‘TNK-BP Holding, JSC’ in case of presence of offers from the third parties (owners of oil products) or persons authorised by them, and if there is a technical possibility should not allow unreasonable refusal of conclusion of contracts for rendering services of oil products storage, should sign contracts for rendering services of oil products storage on conditions not allowing the unequal position of these economic entities in comparison with organisations belonging to a group of persons of ‘Rosneft, JSC’ and ‘TNK-BP Holding, JSC’ in regions where enterprises of oil

products supply entering into a group of persons of “Rosneft, JSC” and “TNK-BP Holding, JSC” hold a dominant position in the markets of oil products storage.

- to provide sale at a commodity exchange at the volume not less than 10% of monthly output for domestic market of the Russian Federation of automobile gasoline, diesel fuel, fuel for jet engines and black oil of a group of persons of “Rosneft, JSC” taking into account the “Criteria<sup>1</sup> of a regularity and uniformity of sale of goods at the exchange for the separate commodity markets in which oil and (or) the oil products circulate”.

Within three months from the date the transaction comes into effect to submit for getting the FAS Russia’s approval the "Procedure of pricing and the general principles of sale of automobile gasolines and diesel fuel in the wholesale markets in the territory of the Russian Federation" of “Rosneft, JSC”’s groups of persons (further – the Procedure), based on the following principles:

- primary satisfaction in oil products needs in domestic market of the Russian Federation, fairness and equal conditions of transactions for all contractors;
- a pricing procedure that is uniform for all contractors;
- publicity and availability of information on a pricing procedure;
- inadmissibility of economically and (or) technologically unreasonable refusals to conclude contracts with buyers.

Before the Procedure is approved, an application of the “Procedure of pricing and the general principles of sale of automobile gasolines in the wholesale markets in the territory of the Russian Federation" by TNK-BP Holding, JSC, approved by “TNK-BP Holding, JSC” of 07.06.2012, and the "Procedure of pricing and the general principles of sale of diesel fuel in the wholesale markets in the territory of the Russian Federation", approved by “TNK-BP Holding, JSC” should be provided (should not be interfered).

Within 2 months from the date of the transaction of Rosneft, JSC it is necessary to contact the FAS Russia for the purpose to obtain information regarding regions of the Russian Federation in which by results of the transactions declared in the pre-merger notification the aggregate share of sales volumes of automobile gasolines and diesel fuel of a group of persons of Rosneft, JSC and a group of persons of TNK-BP Holding, JSC exceeded 50%.

Within one year from the date of obtaining the above information, auctions on sale of gas stations for the purpose of reduction in an aggregate share by sales volumes of automobile gasolines and diesel fuel to the level which doesn’t exceed 50% should be held in the specified regions, thus, preservation of an aggregate share of sales volumes of automobile gasolines and diesel fuel of a group of persons of Rosneft, JSC and a group of persons of TNK-BP Holding, JSC and the size of Rosneft JSC’s share which existed at the moment of the transactions declared in the pre-merger notification, irrespective of its size, is allowed.

Not later than 6 months from the date of the transaction of "NK Rosneft, JSC", a methodology that defines the order of conduct of organisations entering in a group of persons of "NK Rosneft, JSC" and engaged in sales of petroleum products, separate accounting of costs and revenues by type of sales (wholesale and retail), and the main types of oil products (motor gasoline, diesel fuel etc.) should be developed and submitted to the FAS Russia for approval.

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<sup>1</sup> Approved by the Resolution of the Government of the Russian Federation No. 1035 of 11.10.2012.

Not later than 6 months from the date of approval by the FAS Russia of procedures specified in the order, the implementation and use of the procedures should be ensured by economic entities entering in a group of persons of "NK" Rosneft, JSC".

Ensure compliance with previously issued by the FAS Russia's orders in relation to "TNK-BP Holding, OJSC " and economic entities entering in its group of persons, including after implementation of activities on re-branding of "TNK-BP Holding, JSC" economic entities entering in its group of persons.

In conclusion it is necessary to pay special attention to implementation by foreign investors or a group of persons of investments in the form of acquisition of shares (stocks of shares) making authorised capitals of economic entities having strategic value for ensuring national defence and state security as well as to making other transactions as a result of which a control by foreign investors or a group of persons over such economic societies is established is subject to legal regulation according to the Federal Law of 29.04.2008 No. 57-FZ "Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defense and State Security".



## SPAIN

The following merger, reviewed by the Spanish Competition Authority, is succinctly described as an example of a case that involved cross-border remedies:

### 1. C/0410/10 VERIFONE/HYPERCOM<sup>1</sup>

Verifone Systems Inc. (Verifone) is a global leader in secure electronic payment solutions, and Hypercom Corporation (Hypercom), a high security electronic payment and digital transactions solutions provider. In 2010, Hypercom and Verifone announced an agreement under which Verifone would acquire Hypercom in an all-stock transaction.

The merger met with the requirements for referral to the European Commission, as it was notifiable in Spain, Portugal and the United Kingdom. However, the notifying party opted for a strategy of “forum shopping”, notifying firstly in the national jurisdiction with fewer competition concerns, Portugal, where three players remained after the merger.

Once authorised in that jurisdiction, Verifone pre-notified the merger in Spain, where the proposed acquisition was subject to mandatory scrutiny.

In analysing the operation, the Spanish Competition Authority realised that market share thresholds were also met in United Kingdom, where the operation also involved the creation of a duopoly. The Spanish Competition Authority contacted the British Competition Authority to inform of this matter and to coordinate a joint analysis. Nevertheless, due to the fact that the British Competition Authority does not have a system of mandatory *ex ante* notification nor strict deadlines like the CNC, coordination was not tight as it would have been desirable.

In Spain, given the competition concerns the merger aroused, the parties tried to avoid a merger control by selling Hypercom’s assets related to the marketing of electronic payment terminals in Spain (and UK) to a private equity firm, Klein Partners, just before the acquisition of Hypercom by Verifone. From the parties point of view, this transaction eliminated any overlap between Verifone and Hypercom in Spain, and therefore, this transaction could not be reviewed by the Spanish Competition Authority.

Nevertheless, the Spanish Competition Authority considered that the Hypercom/Klein Partners deal did not lead to a permanent change of the control structure of the Spanish market share of Hypercom, as Klein Partners would not be able to maintain Hypercom’s competitive level on the Spanish market and its market share would eventually fall back to Verifone.

The Spanish Competition Authority believed the licenses of Hypercom technology to Klein Partners limited its ability to compete outside Spain and the United Kingdom and, as a result, would bar its capacity to achieve enough economies of scale and scope to remain as a competitive player in the market.

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<sup>1</sup> <http://www.cncompetencia.es/Default.aspx?TabId=116&Numero=C%2f0410%2f11&ambito=Concentraciones>.

Therefore, the Spanish Competition Authority informed Verifone that it had to notify its planned acquisition of Hypercom for approval, as it fell under the merger notification thresholds even if the divestiture of Hypercom's assets to Klein Partners was taken into account.

In November 2011, the Verifone/Hypercom deal was finally notified to the Spanish Competition Authority.

Verifone presented commitments to eliminate the Spanish Competition Authority's doubts. In particular, the license and technical assistance agreements for Hypercom's products already signed with Klein Partners were modified in order to enable Klein Partners to market Hypercom's products, during a period of five years, in a geographical area that covered the whole European Union. Moreover, the implementation of those agreements could be enforced by the Spanish Competition Authority if Verifone did not respect them.

This improved Verifone's initial proposition and allowed Klein Partners to become an effective player in the market, as it would be feasible to obtain the necessary economies of scale and scope in the European Union.

On December 2011 the Spanish Competition Authority finally authorised the merger subject to the commitments presented by Verifone. In particular, the remedies would enable Klein Partners to replicate the competitive pressure that existed in the Spanish market before the concentration took place.

In this particular case, the divestiture of the IP rights was not possible, because the companies operate in a global market with the same products, and the Spanish Competition Authority had to ensure the proportionality of the remedies in order to solve the competition concerns raised by the merger in Spain. Therefore, Verifone retained ownership of Hypercom's IP rights, while granting a license to Klein Partners effective in the whole European Union.

As a result, the commitments offered by Verifone are also effective outside Spain, in particular in the United Kingdom, despite the fact the British Competition Authority considered that the Verifone / Hypercom merger, as initially presented with the prior divestiture of the British assets, could not be reviewed by the British Competition Authority.

## UKRAINE

Summary information on commitments at international mergers:

- 1. Please provide a brief description of several important mergers which were considered in your office for the last 5 years and which have cross-border liabilities (for example, liabilities that include the sale of the property or activities beyond your jurisdiction, or involve the investigation materials of other competition authorities).**

- 1.1. Brief description of case number 1**

The Antimonopoly Committee of Ukraine examined the application of companies' Sanivers Holdings, Inc. "(Tampa, USA) and" VP Roaming III S.a.r.l. "(Kontern, Luxembourg) for authorisation of" Sanivers Holdings, Inc. "to purchase shares of" VP Roaming III S.a.r.l. " ensuring the excess of 50 per cent of votes in the top management body.

The entities linked by a control relationship with the participants of concentrations operating in the same market, namely: services of interoperate payments for international roaming, including: clearing data within the network in GSM standard. Since the parties' combined share on a certain market within the territory of Ukraine in 2010-2011 years was 100 per cent, in 2012 - 80 percent the Committee commenced an in-depth investigation of the merger under the consideration.

These companies operated in Ukraine under contracts with Ukrainian mobile operators (mobile) communication.

By results of hearing it was revealed that since June 1, 2013 the combined share of merger participants will be 25 per cent, thus the indicated concentration does not lead to monopolisation or substantially restriction of competition in product markets of Ukraine. Consequently, the Committee has granted the permit to the specified concentration.

However, since the market is very dynamic, and the number of customers it is insignificant, that can lead to an increase or decrease in the share of access for new contracts , the decision of the Antimonopoly Committee of Ukraine has been provided behavioural commitments in order to correct the negative impact of the concentration on competition.

- 1.2. Brief description of case number 2**

The Antimonopoly Committee of Ukraine considered a joint application of "Anheuser-Busch InBev S.A. / NV." (Brussels, Belgium) and of "Grupo Modelo Es.A.Be. de. Si.Vi. "(Mexico City, Mexico) about granting the permit to the company" Anheuser-Busch InBev S.A. / NV. " to purchase shares of" Grupo Modelo, Es.A.Be. de. Si.Vi. " which ensures the excess of 50 percent in the highest governance body of the company.

The concentration was the acquiring shares of the company "Grupo Modelo, Es.A.Be. de. Si.Vi. "by the company"Anheuser-Busch InBev S.A. / NV." at amount of 100 percent in the highest governance body.



The concentration occurred in the national market of alcoholic beverages (beer).

In Ukraine Abe InBev Group is represented by only 4 entities – the residents and non-residents of Ukraine engaged in the production and sale of alcoholic beverages (beer under the brands "Chernigov", "Rogan", "Amber», «Stella Artois», «Beck's »,« Budweiser »,« Leffe »,« Hoegaarden »,« Klin "and" Siberian Crown ".

The share of Group Abe InBev on the national market alcoholic beverages (beer) during 2010, 2011 exceeded 35 percent, and for 10 months of 2012 was 33.4 percent.

"Grupo Modelo" does not sell their products in Ukraine independently. The company "HModelo Europe S.A.U." (Guadalajara, Spain) signed a license agreement with the company «Carlsberg» (Copenhagen, Denmark), which sells alcoholic beverages (beer under the brands «Corona Extra» and «Negra Modelo ») through its subsidiary - a resident of Ukraine.

Taking into consideration that:

Abe InBev Group's share in the national market of alcoholic beverages (beer) during 2010, 2011 exceeded 35 percent, and for 10 months of 2012 was 33.4 percent.

There is a probability of independent entering "Grupo Modelo " the Ukrainian market of alcoholic beverages (beer), which may lead to an increase in market share of participants in the relevant market; the indicated concentration may have a negative impact on competition in the national market of alcoholic beverages (beer), which in its turn the certain obligations may not be fulfilled by members of the concentration concerning , inter alia: prices, conditions of products supply (to avoid restriction of supply of alcoholic beverages (beer) without economically justified reasons if it could harm Ukrainian consumers of the above products produced by the participants of the concentration; do not set such prices or other conditions of alcoholic beverages (beer) distribution, which would be impossible under conditions of existing competition in the market of alcoholic beverages (beer): to avoid restricting access to the national market of alcoholic beverages (beer) for other businesses, customers, vendors) and so on.

Therefore, after consideration of the above cases of concentration and due to the fact that the indicated concentration does not lead to monopolisation or substantial restricting competition in product markets of Ukraine, Antimonopoly Committee of Ukraine decided to permit the company "Anheuser-Busch InBev C .A. / NV. " to purchase shares of" "Grupo Modelo, Es.A.Be. de. Si.Vi. "

### **1.3. Brief description of case number 3.**

The Antimonopoly Committee of Ukraine considered a joint application of «TAKEDA PHARMACEUTICAL COMPANY LIMITED» (Osaka, Japan) and the company «NYCOMED A / S» (Copenhagen, Denmark) on granting permission to «TAKEDA PHARMACEUTICAL COMPANY LIMITED» for purchase of shares «NYCOMED A / S», which ensures exceeding 50 percent in the highest governance body.

The concentration was to acquire the shares of «NYCOMED A / S» by the company «TAKEDA PHARMACEUTICAL COMPANY LIMITED» in amount of 100 percent of the charter capital.

Nycomed Group operates in Ukraine through two entities – the residents and non-residents of Ukraine, engaged in wholesale pharmaceuticals of entities manufacturing that are the art of Nycomed registered in Ukraine , namely: otological drugs and other drugs used in otology (A- Tserumen) immunostimulants (Avoneks) drugs that affect the digestive system and metabolism (Actovegin); highly active diuretics (Britomar), calcium supplementation (Calcium D3 Nycomed), psychostimulants , agents

used at syndrome of attention violation and hyperactivity disorder (adhd), and nootropic agents (Tserakson, entsefabol), beta-blockers (Concor), drugs acting on the respiratory system (Kurosurf); drugs for system application with obstructive respiratory diseases (Daksas) , antiadrenergic drugs with the peripheral mechanism of action (Ebrantyl); combination therapy of ACE inhibitors (Eneas), thyroid-stimulating agents (Eutyroks), hypoglycemic drugs , except insulin (Glyukofazh, Hlyukovans), drugs used in gynecology (Hinipral); drugs effecting the nervous system (Istenon, Keltikan, Kestin), antithrombotic agents (Cardiomagnyl, warfarin), decongestants and other drugs for topical application in diseases of the nasal cavity (Marymer , Nazyvin, Zykomb), vitamin B1, including in the combination with vitamins B6 and B12 (Neyrobion); contrast agents for NMR imaging , radiopaque iodine-containing drugs (Omnipakb, Vizipak) inhibitors " proton pump " (Pantoprazole , Kontrolok , flow control), vitamin K and other hemostatic agents (Tahosyl, Tahokomb); antithyroid drugs (Torozol); immunosuppressants (Tizabri), non-steroidal anti-inflammatory and anti-rheumatic drugs (Ksefokam).

By results of 2009, 2010 years in Ukraine Nycomed Group has signs of monopoly (dominant) position in certain segments of the Ukrainian national market of pharmaceuticals, namely, the shares that excess 35%: drugs that influence the digestive system and metabolism, calcium supplements; drugs affecting the respiratory system; antithyroid drugs N03V.

The Takeda Group operates in the production and sale of pharmaceuticals, namely drugs used in the treatment of metabolic and cardiovascular (e.g., obesity, diabetes and atherosclerosis) disease, drugs used in the treatment of cancer and diseases of the central nervous system; reactants and products for clinical diagnostics and chemical products.

The Takeda Group does not undertake activities on manufacturing, purchase and sale of goods in the territory of Ukraine.

Taking into consideration that:

The position of the company «NYCOMED A / S» taking into account the relationship of control in certain segments of the Ukrainian national pharmaceutical market shows signs of monopoly (dominance) ;

The company called «TAKEDA PHARMACEUTICAL COMPANY LIMITED» taking into account the relationship of control is a major global manufacturer and supplier of pharmaceuticals;

There are pharmaceuticals, namely: anti-ulcer agents where are generally intersection in the product range of Takeda and Nycomed Group;

After the stated concentration there is a probability for Groups Takeda access Ukrainian national market of pharmaceuticals, including through the limited liability company "Nycomed Ukraine" (Kyiv) that is a part of Nycomed;

Ukrainian national market of pharmaceuticals is socially important market where there are price fluctuations; the indicated concentrations may have an adverse effect on competition in the national market of pharmaceuticals, which consequently may keep from fulfilment of certain obligations by parties to the concentration, in particular: do not set prices or other conditions of pharmaceuticals purchase, namely: drugs affecting the digestive system and metabolism, calcium supplements, drugs effecting the respiratory system and antithyroid drugs that would be impossible to set under conditions of substantial competition in the market of pharmaceuticals; do not to create obstacles to access to market of pharmaceuticals or taking buyers away from the market.

Therefore, after consideration of the above cases of concentration and due to the fact that the indicated concentration does not lead to monopolisation or substantial restricting the competition in product markets of Ukraine, Antimonopoly Committee of Ukraine has decided to grant permission «TAKEDA PHARMACEUTICAL COMPANY LIMITED» to purchase shares of the company «NYCOMED A / S».

#### **1.4. Brief description of case number 4**

The Antimonopoly Committee of Ukraine has considered the joint application of the company «SSL International Plc» (London, UK) and the company «CCD Estate Limited» (Nicosia, Cyprus\*) on granting the permit to the company «SSL International Plc» for the indirect acquisition of shares of the company «Gainbridge Investments "(Nicosia, Cyprus) which ensures the buyer to exceed 50 percent of the votes in the supreme governing body of the company.

The Concentration was acquiring the company «Gainbridge Investments» by the company «SSL International Plc» [through its subsidiary «Sonet Scholl Overseas Investments Limited» (London, UK)] at the amount of 100 percent of the authorised (charter) capital.

The concentration occurred in the national market of shell contraceptives.

In Ukraine Group of SSL operates exclusively through the entity – the resident of Ukraine that is engaged in sales of shell contraceptives under the brand name «Durex».

The Group SSL in the relevant market shell contraceptives in 2008 and the first half of 2009 did not exceed 5 percent.

In Ukraine the company «Gainbridge Investments» operates exclusively through the entity – the resident of Ukraine which has the relations of control and which operates with wholesale of shell contraceptives under the brand names: «Contex», «Husarskye», «Durex», «Wild cat», «Silk», «Erotica» and «SOBLAZN».

The share in the wholesale market of shell contraceptives in 2008 exceeded 35 percent, and in the 1st half of 2009 it did not exceed 28 percent.

Taking into the account the significant market share in wholesale of shell contraceptives, as well as a significant difference in the proportion in 2008 and 2009, which is an indication of the unstable situation in the relevant market, the indicated concentrations may have an adverse effect on competition in the national market of shell contraceptives, which in turn may keep from fulfilment of certain obligations by parties to the concentration, in particular: to prevent the company «SSL International Plc» from discriminatory conditions on sale of shell contraceptives to entities which are not engaged in a control relationship with the company «SSL International Plc»; to avoid restrictions from the side of «SSL International Plc» to distribute (sell) shell contraceptives by entities that do not have a control relationship with the company

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\* "Footnote by Turkey: The information in this document with reference to « Cyprus » relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Footnote by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus."

«SSL International Plc»; do not change wholesale prices for shell contraceptives more often than once a year without objective reasons, including : changes in world prices for latex, packaging, transportation and significant fluctuations in the local currency and inflation in Ukraine.

Therefore, after consideration of the above cases of concentration and due to the fact that the said concentration does not lead to monopolisation or substantial restricting the competition in product markets of Ukraine, Antimonopoly Committee of Ukraine has decided to grant the permit to «SSL International Plc» for acquisition of the company «Gainbridge Investments».

**2. Please, share your department experiences in coordinate or cooperate with any other agencies in connection with this obligation**

**2.1. Answer to question 2 on case №1**

The merging parties agreed to cooperate with the Antimonopoly Committee of Ukraine in the abovementioned merger cases because these companies are international, therefore interested in preserving their reputation and resolving this issue without violating the Ukrainian legislation on protection of economic competition;

Moreover, the applicants proposed their own model of structural commitments related to the sale of assets that would reduce the parties' market share in the relevant market. However, the Committee imposed behavioural obligations during its study of the situation.

**3. In addition which was not described, please tell us what was the problems arisen in the development and implementation of cross-border liabilities, and how your department, independently or through collaboration or coordination with one or more institutions was decided these questions:**

**3.1. Answer to question 3 on case №1**

During the said case investigation a major problem was to determine the territorial and product boundaries of the relevant market, in which the merger participants operate. Thus, a survey of market participants, experts and merger parties was conducted. After having received the information from market participants, the merging parties were given behavioural obligations. In turn, the applicants agreed to the commitments and agreed to meet them in full.

**3.2. Answer to question 3 on cases № 2, № 3, № 4**

During the case investigation № 2, № 3, № 4 on the concentration there was interviewed consumers, businesses competing participants concentrations, expert institutions, authorities, in order to study their opinions on the effects of concentration on commodity markets, which are the above entities.

Which regards to fulfilment of obligations of parties to the concentration, the Antimonopoly Committee of Ukraine receives from members of the above reports on the concentrations of these commitments which were given to them in the above decisions of the Committee.

**4. Have you encountered with the situations where cross-border liabilities had to be revised due to unforeseen circumstances or subsequent events? How was held a cooperation and coordination in these cases?**

**4.1. Answer to question 4 on cases № 1, № 2, № 3, № 4**

The Antimonopoly Committee of Ukraine is not faced with situations where international obligations had viewed.

## UNITED STATES

### 1. Introduction

The Antitrust Division of the U.S. Department of Justice (“DOJ”) and the U.S. Federal Trade Commission (“FTC”) (collectively, the “Agencies”) interact with their international counterparts in merger investigations on an increasingly frequent basis. The Agencies fully support international cooperation and have consistently strived for non-conflicting and coordinated remedies in a number of cross-border matters.

### 2. Over the past few years, the Agencies have reviewed several mergers that have involved cross-border remedies.

This paper will discuss cases in which remedies were cross-border because they either involved divestitures of assets or imposed restrictions on conduct outside the United States. It also will discuss key cases in which the Agencies cooperated with mature and newer international counterparts, but for which the remedies themselves were not cross-border. In some of those cases, differing competitive effects in different reviewing jurisdictions led the United States and non-U.S. reviewing agencies to reach different resolutions. In other instances, the Agencies have taken into account remedies obtained by non-U.S. competition authorities and have not sought remedies of their own.

#### 2.1. *Divestitures/Conduct outside of the United States*

*General Electric/Avio* – In a settlement, the FTC required a cross-border remedy to resolve its concerns with General Electric’s (“GE’s”) acquisition of the Aviation Business from Italy’s Avio S.p.A. (“Avio”).<sup>1</sup> The FTC complaint alleged that GE’s acquisition of Avio would substantially lessen competition in the market for the sale of engines for Airbus’s A320neo aircraft, likely resulting in higher prices, reduced quality, and engine delivery delays for A320neo customers. The acquisition would have given GE the ability and incentive to disrupt the design and certification of a key engine component, the accessory gearbox or AGB, designed by Avio for the Pratt & Whitney (“P&W”) PW1100G engine used on Airbus’s A320neo aircraft. P&W and GE, through its CFM joint venture with France’s Snecma S.A. are the only two suppliers of engines for the A320neo. The settlement would prevent GE from interfering with P&W’s engine by building on a commercial agreement that GE, Avio, and P&W recently negotiated, as well as P&W’s original contract with Avio. Portions of these two contracts relating to the design and development of Avio’s AGB and related parts for the PW1100G engine are incorporated into the order, and a breach by the combined firm of those aspects of the relevant agreements would violate the FTC’s consent agreement.

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<sup>1</sup> Press Release, U.S. Federal Trade Commission, FTC Approves Final Order Settling Charges that General Electric’s Acquisition of Avio Aviation’s Business Would be Anticompetitive in Market for Airbus’s A320neo Aircraft Engines (Aug. 30, 2013), available at <http://www.ftc.gov/opa/2013/08/ge.shtm>.

In addition, the order prohibits GE from interfering with Avio's staffing decisions as they relate to its work on the AGB for the PW1100G engine and allows Pratt & Whitney to have representatives at the GE/Avio facility. If Pratt & Whitney terminates its agreement with Avio post-merger, GE must provide transitional services to help Pratt & Whitney manufacture AGBs and related parts for its PW1100G engine. The order also prevents GE from accessing P&W's proprietary information about the AGB that is shared with Avio. Finally, the order provides for a monitor to oversee GE's compliance with its obligations.

Throughout its review of the matter, the FTC worked closely with the European Commission ("EC"). The FTC and the EC investigated in parallel how GE's acquisition of Avio would change its commercial relationships with GE's rival aircraft engine manufacturers. Both agencies recognize that the commercial agreement GE entered with P&W during the course of the investigation creates protections for future competition. Once GE and P&W reached their private agreement, the EC closed its investigation, and the FTC required an order to ensure effective compliance with regard to the terms of the agreement.<sup>2</sup>

*Western Digital/Hitachi* – The FTC required a cross-border remedy to resolve its concerns with Western Digital's acquisition of the Hard Disk Drive business from Hitachi Global Storage Technologies.<sup>3</sup> The FTC's complaint alleged that the acquisition would have substantially lessened competition in the markets for 3.5 Inch Hard Disk Drives ("HDD") in desktop computers, leading to price increases to consumers. Throughout its review of the matter, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of remedies. The parties granted waivers on a jurisdiction-by-jurisdiction basis. Throughout the review, FTC staff and staff of each of the non-U.S. authorities worked together closely, on a bilateral basis, which included coordinating remedies that addressed competitive concerns in multiple jurisdictions. Of note, only a limited number of cooperating agencies on the matter took formal remedial action, including the FTC, as discussed below; the EC, which approved the acquisition on the condition that Western Digital divest Vivit's 3.5 inch HDD production; China's Ministry of Commerce ("MOFCOM"), which approved the acquisition subject to the divestiture of production assets and several behaviour remedies, including a two-year hold-separate; the Japanese Fair Trading Commission ("JFTC"), which approved the acquisition subject to Western Digital's agreement to divest certain disk drive assets; and the Korean Fair Trade Commission ("KFTC"), which conditionally approved the acquisition with remedial conditions similar to those imposed by the EC.

The FTC issued its complaint in March 2012, along with a proposed settlement, which required Western Digital to divest a package of production assets to Toshiba, to replicate Hitachi's position in the HDD market. The remedy in this matter is cross-border because it covers assets, including multiple production lines of Hitachi, mainly located in China, and includes provisions to allow Toshiba to hire former Hitachi employees at those plants. In addition, the EC concluded that the Western Digital/Hitachi transaction would raise problems in an additional European product market for "business enterprise" HDDs, and required divestiture of those European assets as well. As part of MOFCOM's remedial package, Western Digital agreed to hold the Hitachi HDD business separate for at least two years in China.

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<sup>2</sup> Press Release, U.S. Federal Trade Commission, General Electric Agrees to Settlement with FTC That Allows the Purchase of Avio's Aviation Business (19 July 2013), available at <http://www.ftc.gov/opa/2013/07/generalelectric.shtm>.

<sup>3</sup> Press Release, U.S. Federal Trade Commission, FTC Issues Modified Final Order Settling Charges that Western Digital's Acquisition of Hitachi Global Storage Technologies Was Anticompetitive in Market for Desktop Hard Disk Drives (9 May 2013), available at <http://www.ftc.gov/opa/2013/05/westerndigital.shtm>.

*ABI/Modelo* – DOJ required a cross-border remedy in connection with its challenge to the proposed acquisition by Anheuser-Busch InBev SA/NV (“ABI”) of the remaining interest in Grupo Modelo S.A.B. de C.V. (“Modelo”).<sup>4</sup> In January 2013, DOJ filed a lawsuit against ABI and Modelo alleging that ABI’s acquisition of the remaining interest in Modelo that ABI did not already own would substantially lessen competition in the market for beer in the United States as a whole and in at least 26 metropolitan areas across the United States, resulting in consumers paying more for beer and limiting innovation in the beer market. In April 2013, DOJ and the parties reached a settlement that required the parties to divest Modelo’s entire U.S. business – including licenses of Modelo brand beers and its most advanced brewery, located in Mexico, as well as other assets – to Constellation Brands Inc. in order to go forward with the merger.<sup>5</sup>

This remedy is cross-border because the brewery required to be divested is in Mexico, close to the U.S. border, and some of the brands to be licensed were previously only produced and sold only in Mexico. DOJ worked with the Mexican Federal Competition Commission (“CFC”) throughout the course of its investigation. The merger did not raise competitive concerns in Mexico, where ABI’s share was very small, but the CFC did review and approve the proposed sale to Constellation.<sup>6</sup>

*Johnson & Johnson/Synthes* – The FTC required a cross-border remedy to resolve its concerns with Johnson & Johnson’s 2012 acquisition of Synthes, Inc.<sup>7</sup> The FTC’s complaint alleged that the acquisition would substantially lessen competition in the market for volar distal radius plating (“DVR”) systems, which are implanted surgical plates used to correct serious wrist fractures, and lead to price increases among other effects. The FTC issued its complaint in June 2012, along with a settlement to divest J&J’s United States DVR assets to Biomet, Inc.

The remedy is cross-border because the EC, in a parallel review, concluded that the acquisition would create competitive problems in a broader trauma product market and, in a coordinated divestiture package, the EC required commitments to divest all of J&J’s “trauma portfolio,” including the U.S. assets and additional European assets.

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<sup>4</sup> Press Release, U.S. Dep’t of Justice, Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev’s Proposed Acquisition of Grupo Modelo (31 Jan. 2013), available at [http://www.justice.gov/atr/public/press\\_releases/2013/292096.htm](http://www.justice.gov/atr/public/press_releases/2013/292096.htm); Complaint, U.S. v. Anheuser-Busch InBev et al., No. 13-cv-00127 (D.D.C. 31 Jan. 2013), available at <http://www.justice.gov/atr/cases/f292100/292100.pdf>.

<sup>5</sup> Proposed Final Judgment, U.S. v. Anheuser-Busch InBev et al., No. 13-cv-00127 (D.D.C. 19 Apr. 2013), available at <http://www.justice.gov/atr/cases/f296000/296044.pdf>.

<sup>6</sup> Press Release, ABInBev, Anheuser-Busch InBev Announces Agreement with DOJ and Filing of Proposed Final Judgment with Court (19 Apr. 2013), available at [http://www.ab-inbev.com/press\\_releases/hugin\\_pdf%5C557340.pdf](http://www.ab-inbev.com/press_releases/hugin_pdf%5C557340.pdf); Press Release, Constellation Brands, Constellation Brands Receives DOJ Clearance to Proceed with Acquisition of Group Modelo’s U.S. Business (19 Apr. 2013), available at <http://www.cbrands.com/news-media/constellation-brands-receives-doj-clearance-proceed-acquisition-grupo-modelos-us-business>.

<sup>7</sup> Press Release, U.S. Federal Trade Commission, FTC Approves Final Order Settling Charges that Johnson & Johnson’s Proposed Acquisition of Synthes, Inc. was Anticompetitive in Market for Treating Traumatic Wrist Injuries (7 Aug. 2012), available at <http://www.ftc.gov/opa/2012/08/jjsynthes.shtm>.



*UTC/Goodrich* – In July 2012, DOJ required a cross-border remedy in connection with its challenge to the proposed merger of UTC and Goodrich, the largest merger in the history of the aircraft industry.<sup>8</sup> As originally proposed, the merger would have led to competitive harm in the markets for several critical aircraft components, including generators, engines and engine control systems.

DOJ, the EC, and the Canadian Competition Bureau (“CCB”) cooperated closely throughout the course of their respective investigations with frequent contact among the agencies. In addition, DOJ had discussions with other competition agencies, including the Mexican CFC and the Administrative Council for Economic Defense in Brazil (“CADE”). This close cooperation resulted in a coordinated resolution that will preserve competition in the United States and elsewhere.

This transaction had potential competitive effects in many countries. The cooperation between the various investigating agencies enabled the achievement of the non-conflicting remedy of divestitures of assets located in the United States, Canada, and the United Kingdom. Cooperation ensured that the conditions imposed were consistent across jurisdictions and did not impose conflicting obligations on the merged entity. The same day the United States announced its resolution and consent decree, the EC and the CCB issued statements regarding their investigations.<sup>9</sup>

## 2.2. *Ticketmaster/Live Nation*

In January 2010, DOJ required both structural and conduct remedies that allow Ticketmaster Entertainment Inc., the world’s largest ticketing company, to proceed with its proposed merger with Live Nation Inc., the world’s largest promoter of live concerts.<sup>10</sup> At the time of the merger, Live Nation had recently entered the U.S. market for ticketing, and was planning to enter into the ticketing market in Canada. DOJ worked closely with the CCB throughout the course of its investigation, and the agencies obtained the same relief in both countries. The remedy eliminated the anticompetitive effects of the acquisition by establishing two independent ticketing companies capable of competing effectively with the merged entity.<sup>11</sup>

*Agilent Technologies/Varian, Inc.* – The FTC required cross-border remedies in a number of markets involving chromatographic testing equipment, to resolve its concerns with Agilent’s 2010 acquisition of Varian.<sup>12</sup> The FTC’s complaint alleged that the acquisition would substantially lessen competition in three scientific measurement instruments: 1) Micro Gas Chromatography (“Micro GC”) instruments; 2) Triple

<sup>8</sup> Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with its Acquisition of Goodrich Corporation, (26 July 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/285420.htm](http://www.justice.gov/atr/public/press_releases/2012/285420.htm).

<sup>9</sup> Press Release, European Commission, Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions (July 26, 2012), available at [http://europa.eu/rapid/press-release\\_IP-12-858\\_en.htm](http://europa.eu/rapid/press-release_IP-12-858_en.htm); Press Release, Canadian Competition Bureau, Competition Bureau Statement Regarding United Technology Corporation’s Acquisition of Goodrich Corporation (26 July 2012), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

<sup>10</sup> Press Release, U.S. Dep’t of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to its Merger with Live Nation Inc. (25 Jan. 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/254540.htm](http://www.justice.gov/atr/public/press_releases/2010/254540.htm).

<sup>11</sup> Final Judgment, U.S., et al. v. Ticketmaster Entertainment, Inc., et al., No. 10-cv-00139 (D.D.C. 30 July 2010).

<sup>12</sup> Press Release, U.S. Federal Trade Commission, FTC Order Preserves Competition Threatened by Agilent’s Acquisition of Varian (14 May 2010), available at <http://www.ftc.gov/opa/2010/05/agilent.shtm>.

Quadrupole Gas Chromatography-Mass Spectrometry (“3Q GC-MS”) instruments; and 3) Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”) instruments. The FTC’s Order required divestiture of all the assets, including intellectual property and manufacturing assets related to all three products. The Micro GC instrument business was divested to Inficon, and the 3QGC-MS and ICP-MS instrument businesses were divested to Bruker.

Throughout the review, FTC staff cooperated closely with staff of the competition agencies in Australia, the EC, and Japan to coordinate their respective reviews of the merger. This international cooperation resulted in coordinated and cross-border remedies because manufacturing and sales assets of the various instrument businesses were located around the world, including Australia, Singapore, Europe, and the United States. The EC negotiated commitments requiring the above divestitures, as well as instruments in a fourth market, for Lab Gas Chromatographs. Further, the EC and the FTC worked together to choose a monitor – Grant Thornton consulting group, with personnel in Europe, United States, Australia, and Asia.

As part of the cooperation, the JFTC closed its investigation after concluding that remedies the FTC and the EC obtained were sufficient to resolve any competitive concerns in Japan. The merging parties facilitated international cooperation between the FTC and the international agencies by granting waivers of confidentiality that allowed for more informed communications among agencies and kept the investigations on parallel tracks.

*Panasonic/Sanyo* – The FTC’s settlement involved a cross-border remedy to resolve the FTC’s allegations that Panasonic’s acquisition of Sanyo would substantially lessen competition in markets for several sizes of portable nickel metal hydride (“NiMH”) re-chargeable batteries.<sup>13</sup> The consent order required Panasonic and Sanyo to divest Sanyo’s production facilities in Takashima, Japan and provide the supply of certain sizes of NiMH batteries not produced in Takashima from Sanyo’s production facility in Suzhou, China.

The remedy is cross-border because the essential production facilities were located in Japan and the supply agreement relates to products produced in China. The JFTC and the EC conducted parallel investigations, and all three agencies cooperated throughout the matter. The EC and the FTC required similar NiMH remedies (the JFTC and EC also required additional remedies with respect to markets for which the FTC found no competition concern in the US). The EC and FTC used the same monitor, ING Capital, to monitor Panasonic’s completion of the required Takashima divestiture. Waivers from the parties allowed the agencies to share confidential information. The JFTC approved the acquisition on the condition that Panasonic divest manufacturing facilities of a certain type of manganese dioxide lithium battery to a third-party manufacturer of batteries.

*BASF/Ciba* – The FTC required cross-border remedies in two high-performance pigments markets (Indanthrone Blue and Bismuth Vanadate) that are used to provide colour to a large number of products across the U.S. economy, including cars, building materials, construction equipment, inks, and plastics, in order to resolve competitive concerns with BASF’s acquisition of Ciba Holdings in 2009.<sup>14</sup> The FTC’s complaint alleged that BASF’s acquisition would substantially lessen competition in those two markets, and reduce innovation and increase prices to consumers. The FTC’s consent order required divestiture of

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<sup>13</sup> Press Release, U.S. Federal Trade Commission, FTC Approves Final Consent Order in Matter of Panasonic Corporation/Sanyo Electric Co., Ltd. (8 Jan 2010), available at <http://www.ftc.gov/opa/2010/01/sanyo.shtm>.

<sup>14</sup> Press Release, U.S. Federal Trade Commission, FTC Approves Final Consent Order in Matter of BASF and Ciba Specialty Chemicals (26 May 2009), available at <http://www.ftc.gov/opa/2009/05/basf.shtm>.

all assets, including the intellectual property related to the two pigments to a Commission-approved buyer within six months. Divestiture was completed to Dominion Colour Corporation, a Canadian company.

The remedy is cross-border because, following the FTC and EC's coordination, the single remedial package required the divestiture of assets that were located in Europe. In addition to the divestiture, the EC also reviewed and approved the buyer for the pigments. The FTC and EC also worked together to pick a monitor – PriceWaterhouseCoopers, with personnel in Europe and the United States.

### **2.3. *Taking into account remedies obtained by another agency***

*Cisco/Tandberg* – In 2011, DOJ investigated the proposed merger of Cisco, a U.S. firm and the leading provider of high-end telepresence videoconferencing products, and Tandberg, headquartered in New York City and Norway and a leading provider in the broader videoconferencing products market, with a growing presence in telepresence. The merger, as originally planned, would have reduced competition in videoconferencing equipment in the United States and Europe.<sup>15</sup> DOJ worked closely with the EC from the opening to the closing of the two agencies' investigations. In deciding to close its investigation, DOJ took into account commitments that the parties gave the EC to facilitate interoperability. The remedy in this matter is cross-border because the behavioural commitments ensuring interoperability involve intellectual property used worldwide.

*Agilent/Varian* – As discussed above, cooperation between the reviewing agencies in this matter included the JFTC closing its investigation after concluding that remedies that the FTC and EC obtained were sufficient to resolve any competitive concerns in Japan.

## **3. The Agencies cooperated with non-U.S. counterparts in almost all cases involving cross-border remedies, and relied on waivers of confidentiality.**

### **3.1. *Cooperation with other agencies can be enhanced when entities grant waivers to enable sharing of confidential information between agencies.***

In each of the matters discussed above, the Agencies' cooperation efforts benefited from entities' grant of waivers of confidentiality (which in some cases were offered by the parties and in other cases were requested by the Agencies), allowing the Agencies to share information with their international counterparts and work together to craft merger remedies.

The extent of cooperation on a particular investigation depends in part on parties' willingness to allow the agencies to exchange information. Confidentiality rules,<sup>16</sup> including those found in the Hart-Scott-Rodino ("HSR") Act, which governs the Agencies' review of reportable merger, prohibit the Agencies from disclosing information obtained from entities during a merger investigation, which includes not only entities' confidential business information provided in a filing or in response to a document request, but also the very fact of filing an HSR notification. Therefore, to enable agencies to engage in more complete communication, cooperation and coordination, entities can provide the agencies with a waiver of the statutory confidentiality protections afforded the entities. This includes the HSR restrictions applicable to

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<sup>15</sup> Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (29 Mar. 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm).

<sup>16</sup> For a broader discussion of the confidentiality rules that protect information submitted to the Agencies, see U.S. Dep't of Justice and Federal Trade Commission, Model Waiver of Confidentiality for use in civil matters involving non-U.S. competition authorities, Frequently Asked Questions (25 Sept. 2013), available at <http://www.justice.gov/atr/public/international/docs/300916.pdf> and <http://www.ftc.gov/oia/waivers/index.shtm>.

mergers, thus allowing the agencies to discuss and share documents, statements, data and information, as well as the agencies' own internal analyses that contain or refer to the parties' materials.<sup>17</sup>

The value of providing waivers is maximised when they are provided at an early stage of the investigation. Waivers, especially when provided near the outset of an investigation, allow the investigating staff of the FTC or DOJ and one or more non-U.S. competition authorities to better explore theories of competitive harm as well as to discuss what remedies, if any, may resolve each agency's concerns in a coordinated manner. While waivers were relatively infrequent a decade ago, they are now routine. Waivers are particularly beneficial when agencies are negotiating remedies. Discussions of confidential information allow the Agencies to narrow the focus of potential assets to be divested, review likely acquirers for the business to be divested, and sometimes use the same divestiture monitor, all of which reduces costs to parties and the possibility of conflicting outcomes. Waivers also help facilitate coordination on timing of reviews and decisions.

### **3.2. *Cooperation and coordination can also be achieved even where waivers were not available.***

It is important to note that the Agencies can and do cooperate with their counterparts absent a waiver. In matters in which entities grant waivers on a jurisdiction-by-jurisdiction basis, as in the FTC's review of the *Western Digital/Hitachi* matter discussed above, the extent of cooperation between the Agency and each non-U.S. counterpart agency may vary depending on the nature of the particular competitive effects in the jurisdictions and whether waivers are granted. Without a waiver, the discussions must be more general, but can include timing, relevant market definition, theories of harm, and potential remedies.

In addition, the Agencies engage in cooperation that is not case-specific through informal discussions with international counterparts. This kind of cooperation occurs frequently, can be done based on publicly available and "agency non-public" information, and is particularly helpful where one agency has accumulated a great deal of experience in a sector while the other agency is dealing with an issue in that sector for the first time. This kind of cooperation enables agencies to move up the learning curve in a short time.

## **4. Cooperation leading to cross-border remedies involves considering competitive conditions in multiple jurisdictions and working with counterparts on several key issues.**

The Agencies use their best efforts to inform cooperating non-U.S. counterparts of other relevant developments with respect to remedies. When waivers are in place, the Agencies can share draft remedy proposals and participate in joint discussions with the merging parties regarding assets to be divested. Cooperation on the design of a remedy can result, in appropriate cases, in a single proposal for a global package, including divestitures, interim supply relations with the parties, or other interim safeguards.

### **4.1. *Identifying and evaluating assets to be divested***

In any case, effectively preserving competition is the key to an appropriate merger remedy.<sup>18</sup> Effective merger remedies typically include structural or conduct provisions, or both. Structural remedies generally

<sup>17</sup> The Agencies recently issued a joint model waiver of confidentiality for individuals and companies to use in merger and civil non-merger matters involving concurrent review by the DOJ or FTC and non-U.S. competition authorities. See Press Release, U.S. Federal Trade Commission, Federal Trade Commission and Justice Department Issue Updated Model Waiver of Confidentiality for International Civil Matters and Accompanying FAQ (Sept. 25, 2013), available at <http://www.ftc.gov/opa/2013/09/jointwaiver.shtm>.

<sup>18</sup> See generally Bill Baer, Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes, Remarks as Prepared for the Georgetown Law 7<sup>th</sup> Annual Global Antitrust Enforcement Symposium, (Sept. 25, 2013), available at <http://www.justice.gov/atr/public/speeches/300930.pdf>.

involve the sale of physical assets by the merging firms, or the sale or licensing of intellectual property rights. Structural remedies are generally preferred because of their simplicity and relative ease of administration.

A successful structural remedy typically requires clear identification of the assets, whether tangible, intangible, or a combination of these, that a competitor needs to compete effectively in a timely fashion and over the long-term. This often means that the best divestiture is an existing business entity that already has demonstrated its ability to compete in the relevant market. The Agencies sometimes accept divestitures of less than an existing business when a set of acceptable assets can be assembled from both of the merging firms, or when certain of the entity's assets are already in the possession of, or readily obtainable by, the purchaser in a competitive market.<sup>19</sup>

#### **4.1. *ABI/Modelo***

In *ABI/Modelo*, the Division needed to identify a group of assets that would enable the purchaser to be an independent, fully integrated, and economically viable competitor to ABI in the beer market. To do so, DOJ determined that the purchaser required both tangible assets (a brewery, located in Mexico), as well as intangible assets (perpetual and exclusive licenses to all of the Modelo brands sold in the United States at the time of the divestiture, as well as other brands sold in Mexico but not in the United States at that time).<sup>20</sup>

#### **4.2. *UTC/Goodrich***

As noted above in the discussion of *UTC/Goodrich*, the remedy required divestiture of assets located in three countries (the United States, Canada, and the UK). Waivers allowed the three agencies (DOJ, CCB, and EC) to synchronize the outcomes of the respective investigations. Specifically, the proposed settlements require UTC to divest significant assets, including Goodrich's business that designs, develops and manufactures large main engine generators for aircraft and Goodrich's business that designs, develops and manufactures engine control systems.<sup>21</sup> In addition, the DOJ settlement requires UTC to divest Goodrich's shares in Aero Engine Controls ("AEC"), a joint venture to manufacture engine control systems for large aircraft turbine engines.<sup>22</sup> Reviewing UTC's commitments made to the EC assured that the relief DOJ would achieve was not inconsistent and did not impose conflicting obligations on the merged entity. The cooperating agencies also required the parties to coordinate all of the divestiture packages and optional supply/transition services agreements to ensure consistency. Since the announcement of the settlement, DOJ and the EC have worked together to coordinate implementation of the two remedies.

<sup>19</sup> See, e.g., [DAF/COMP/WP3/WD\(2011\)58](http://www.ftc.gov/bc/international/docs/1106usremediesmergers.pdf), Remedies in Merger Cases, Contribution from the United States, OECD Working Party No. 3 on Cooperation and Enforcement, Jun. 24, 2011, available at <http://www.ftc.gov/bc/international/docs/1106usremediesmergers.pdf>.

<sup>20</sup> See Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo (Jan. 31, 2013), available at [http://www.justice.gov/atr/public/press\\_releases/2013/292096.htm](http://www.justice.gov/atr/public/press_releases/2013/292096.htm).

<sup>21</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with its Acquisition of Goodrich Corporation, (July 26, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/285420.htm](http://www.justice.gov/atr/public/press_releases/2012/285420.htm); Press Release, European Commission, Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions (July 26, 2012), available at [http://europa.eu/rapid/press-release\\_IP-12-858\\_en.htm](http://europa.eu/rapid/press-release_IP-12-858_en.htm).

<sup>22</sup> Final Judgment, U.S. v. United Technologies Corporation, et al., No. 12-cv-01230 (D.D.C. May 29, 2013), available at <http://www.justice.gov/atr/cases/f299400/299453.pdf>.

#### 4.2. *Cooperation in the evaluation of potential acquirers*

The Agencies consider several factors when they assess a potential acquirer. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm, whether because it would enhance another large competitor's dominance, or because it would increase the possibility of coordination among the remaining competitors. Second, the Agencies must conclude that the purchaser has the incentive to use the divestiture assets in to compete in the relevant market. Third, the Agencies assess the "fitness" of the purchaser to ensure that it has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. As a part of this process, the Agencies examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity effectively over the long term.

In *Western Digital/Hitachi*, the FTC and EC worked closely to identify the markets affected by the acquisition, and particularly to assure that Toshiba would be an acceptable acquirer for the markets addressed by both of the agencies. The JFTC and KFTC also accepted remedies that mirrored those required by the FTC and EC. Similarly in *J&J/Synthes*, the consideration of markets and remedy – including Biomet as the acquirer – required close consultation between the FTC and EC.

In *ABI/Modelo*, DOJ accepted Constellation as the acquirer of the divestiture package because Constellation would become an independent, viable competitor in the U.S. beer market.<sup>23</sup> Although Constellation was not a brewer, it produced and distributed wine and spirits throughout the world, and had actively participated in the U.S. beer market as part of the joint venture through which it distributed Modelo imports in the United States. Constellation therefore not only had the incentive to use the divestiture assets (a brewery, licenses to brands, and related assets) to compete in the relevant market, it also had the acumen, experience, and financial capability to compete in the market for the long term. Indeed, Constellation had the financial resources to undertake the improvements of the Piedras Negras brewery required by the Final Judgment. As noted above, the Mexican CFC also reviewed and approved the sale of the Modelo assets to Constellation.

In *UTC/Goodrich*, DOJ and the EC worked together to review and approve the acquirers of the assets their respective jurisdictions' remedies required to be divested. The two jurisdictions approved (1) Safran S.A. as the acquirer of the assets associated with Goodrich's aircraft generator business and as the acquirer of Goodrich's shares in an aircraft generator joint venture, called Aerolec, with Thales S.A. and (2) Triumph Group Inc. as the acquirer of assets associated with Goodrich's engine controls for small engines. In addition, DOJ approved Rolls-Royce plc as the acquirer of Goodrich's divested shares in the AEC joint venture. As a result of their vetting process, DOJ and the EC concluded that divestiture to these buyers, all of whom had the requisite acumen, experience, financial capability, and intention to operate the assets as a going concern, would restore competition in the affected markets.

In *Agilent/Varian*, the FTC, as noted, worked closely with the EC to develop coordinated remedies. In addition, the agencies consulted with the Australian Competition and Consumer Commission (some of the production assets were in Australia). After close consultations with the FTC and EC and a determination that the agencies' remedies would resolve any competitive concerns in Japan, the JFTC took no formal action.

In *BASF/Ciba*, the FTC and EC worked closely to evaluate the prospective acquirer, Dominion Colour, focusing on the firm's plans to move production to its main facility. The agencies' jointly-adopted monitor assisted both agencies as they conducted their review, which was expedited.

<sup>23</sup> See *id.*; Competitive Impact Statement, *U.S. v. Anheuser-Busch InBev et al.* (D.D.C. Apr. 19, 2013), available at <http://www.justice.gov/atr/cases/f296000/296027.pdf>.

#### **4.2. *Designing Behavioural/Conduct Remedies***

In certain circumstances, conduct remedies can also be used to preserve competition. A conduct remedy usually entails provisions that prescribe certain aspects of merged firm's post-consummation business conduct. Conduct remedies may be appropriate, especially in vertical acquisitions, and in cases in which a structural remedy cannot be fashioned that would not eliminate a merger's efficiencies and where a conduct remedy can be carefully crafted and effectively enforced. Conduct remedies may be practicable in cases in which they can preserve a merger's potential efficiencies while remedying the competitive harm that would otherwise result from a merger.

In order for conduct remedies to be effective, they must be enforceable. Remedial provisions that are too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked. Therefore, conduct remedies must be clearly drafted to reduce the chance that a decree can be circumvented. When the Agencies require conduct relief, it is most commonly done in combination with structural relief. This may be the case in a merger that involves multiple markets or products, or where conduct relief is necessary to effective structural relief (*e.g.*, supply agreements to accompany a divestiture or limits on a merged firm's ability to reacquire personnel assets).

Other provisions may be used to provide a short period for a divestiture buyer to become established, as well as to provide relief in vertical mergers in which a structural remedy is unnecessary. These provisions might include firewalls (designed to prevent the merged firm from learning about the business to be divested), non-discrimination (ensuring equal access, equal efforts, and equal terms for downstream competitors), mandatory licensing (requiring licenses on fair and reasonable terms to enable competitors to adjust to change in ownership of key inputs), transparency (requiring a merged firm to make information available to a regulatory agency that the firm would not otherwise be required to provide), and anti-retaliation (to prevent retaliation against customers or others who enter into contracts with the merged firm's competitors), as well as prohibitions on certain contracting practices (including restrictive or exclusive contracting that could block competitors' access to a vital input or foreclose or slow entry).

#### **4.3. *General Electric/Avio***

In *General Electric/Avio*, the proposed settlement would prevent GE from interfering with the development of a key engine component designed by Avio for rival aircraft engine manufacturer Pratt & Whitney. The proposed order builds on a commercial agreement that GE, Avio, and Pratt & Whitney recently negotiated, as well as Pratt & Whitney's original contract with Avio. Portions of these two contracts relating to the design and development of Avio's AGB and related parts for the PW1100G engine are incorporated into the proposed order, and a breach by the combined firm of those aspects of the relevant agreements would violate the FTC's consent agreement.

In addition, the proposed order prohibits GE from interfering with Avio's staffing decisions as they relate to its work on the AGB for the PW1100G engine and allows Pratt & Whitney to have representatives at the GE/Avio facility. If Pratt & Whitney terminates its agreement with Avio post-merger, GE must provide transitional services to help Pratt & Whitney manufacture AGBs and related parts for its PW1100G engine. The proposed order also prevents GE from accessing Pratt & Whitney's proprietary information about the AGB that is shared with Avio. Finally, the proposed order allows the Commission to appoint a monitor to oversee GE's compliance with its obligations.

#### 4.4. *ABI/Modelo*

Similarly, in *ABI/Modelo*, DOJ required a number of conduct remedies in addition to the package of divestiture assets (including the brewery and brand licenses) in order to ensure the success of the divestiture buyer, Constellation.

First, Constellation was required to expand the Piedras Negras brewery and, to ensure compliance with this requirement, Constellation was named as a defendant in the case through the Hold Separate Stipulation and Order (a document that is part of the divestiture package filed with the court that requires the parties to maintain the viability of assets selected for divestiture prior to their sale) entered in the matter.<sup>24</sup> The Piedras Negras brewery is located only five miles from the U.S. border with good highway and railroad connections to the U.S; it was Modelo's most technologically advanced brewery, and was focused on the U.S. export market. By requiring Constellation, the buyer, to expand the brewery's production capacity at the time of divestiture, DOJ was able to ensure that, with time, Constellation could meet current and future demand in the U.S. for Modelo-branded beer. It is unusual to require a buyer to commit to expand an asset, but doing so here eliminated any ongoing entanglements between ABI and Constellation. The Final Judgment includes construction milestones that Constellation must meet in its expansion plan.<sup>25</sup>

Second, DOJ required ABI to enter into a transition services and interim supply agreement with Constellation. This relief was important because it allows Constellation to meet demand in the United States for Modelo-branded beer until it is able to expand the Piedras Negras brewery. Fourth, a monitoring trustee was appointed to oversee the parties' compliance with the Final Judgment, including the expansion of the Piedras Negras brewery and the transition services and interim supply agreements. Lastly, the Final Judgment required ABI to agree to certain distribution requirements, which prohibited ABI from disadvantaging the Modelo brands at the distribution level.<sup>26</sup>

#### 4.5. *UTC/Goodrich*

In *UTC/Goodrich*, the proposed settlement included structural relief (described above) that was supplemented with conduct relief to ensure the success of the divestiture. The settlement required UTC to: extend the term of certain contracts held by customers of Goodrich's engine control systems business and provide various supply and transition services agreements to the acquirers of the assets being divested in order to assist in the transition of the businesses and allow the acquirers to continue to fulfil obligations of the divested businesses.<sup>27</sup> In addition, DOJ's settlement required UTC to extend the period for its joint venture partner, Rolls-Royce Group plc, to exercise its option to acquire the Goodrich business that provides aftermarket services for Rolls-Royce engines equipped with AEC engine control systems.<sup>28</sup>

<sup>24</sup> Stipulation and Order, U.S. v. Anheuser-Busch InBev et al. (D.D.C. Apr. 19, 2013), available at <http://www.justice.gov/atr/cases/f296000/296020.pdf>.

<sup>25</sup> Proposed Final Judgment, U.S. v. Anheuser-Busch InBev et al. (D.D.C. Apr. 19, 2013), available at <http://www.justice.gov/atr/cases/f296000/296044.pdf>.

<sup>26</sup> Id.

<sup>27</sup> Final Judgment, U.S. v. United Technologies Corporation, et al., No. 12-cv-01230 (D.D.C. May 29, 2013), available at <http://www.justice.gov/atr/cases/f299400/299453.pdf>.

<sup>28</sup> Id.



The FTC has also employed remedies including both structural and behavioural elements to resolve competitive concerns in individual matters, *e.g.*, *CoStar/LoopNet*,<sup>29</sup> but most recent matters did not include a cross-border element.

#### 4.6. *Ticketmaster/Live Nation*

In *Ticketmaster/Live Nation*, DOJ and the CCB required Ticketmaster, in order to proceed with the merger, not only to divest ticketing assets, including licensing a copy of its primary ticketing software to AEG, the second-largest concert promoter and operator of some of the most important concert venues in the United States,<sup>30</sup> but also to agree to various conduct remedies that would preserve competition in the primary ticketing markets in the United States and Canada.<sup>31</sup>

First, Ticketmaster was required to adopt anti-retaliation provisions. These provisions forbid it from retaliating against a venue owner that chooses to use another company's ticketing services or another company's promotional services, including restrictions on anticompetitive bundling. Second, the merged firm must also allow any venue owner that chooses to use another primary ticketing service, to take a copy of the ticketing data related to that client's sales. Third, the settlement sets up firewalls that protect confidential and valuable competitor data by preventing the merged firm from using information gleaned from its ticketing business in its day-to-day operation of its promotions or artist management business. Finally, the merged firm must provide notice of any other acquisitions of a ticketing company so that the DOJ and CCB may investigate the competitive effect of such an acquisition.<sup>32</sup>

The FTC has also employed remedies including both structural and behavioural elements to resolve competitive concerns in individual matters, *e.g.*, *CoStar/LoopNet*,<sup>33</sup> but most recent matters did not include a cross-border element.

Using or Selecting Divestiture/Hold Separate/Monitoring Trustees, Including Utilizing a Common Trustee to Report to Both Agencies.

Once the Agencies identify an appropriate divestiture package, they will require certain measures to safeguard the effective implementation of the remedy, including provisions for operating, monitoring, and selling trustees. The Agencies will consider appointing a monitor or a "hold separate manager" if they believe that the defendant has the ability and incentive to mismanage the assets during the typical divestiture period and thereby reduce the likelihood that the divestiture will effectively preserve competition. The Agencies may also opt to appoint a "monitoring trustee" to review a defendant's

<sup>29</sup> In *Co-Star/LoopNet*, the FTC used a combination of structural and conduct remedies to resolve its concerns regarding CoStar's 2012 acquisition of LoopNet, which the FTC alleged would substantially lessen competition in the market for commercial real estate ("CRE") listing information and CRE information services.

<sup>30</sup> In addition, within five years of entry of the final judgment, Ticketmaster was required to allow AEG to purchase the Ticketmaster ticketing software. AEG could decide to create its own software or partner with a ticketing company other than Ticketmaster. It has since launched its own software, AXS.

<sup>31</sup> Final Judgment, *U.S., et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 10-cv-00139 (D.D.C. July 30, 2010).

<sup>32</sup> *Id.*

<sup>33</sup> In *Co-Star/LoopNet*, the FTC used a combination of structural and conduct remedies to resolve its concerns regarding CoStar's 2012 acquisition of LoopNet, which the FTC alleged would substantially lessen competition in the market for commercial real estate ("CRE") listing information and CRE information services.

compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. The Agencies also will consider appointing a monitoring trustee to oversee compliance with a conduct remedy involving ongoing obligations, especially when effective oversight requires technical expertise or industry-specific knowledge. The Agencies also will appoint a "divestiture trustee" to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.

Cooperation in the implementation of remedies may allow, in appropriate cases, the appointment of common trustees or monitors. In *Agilent/Varian*, *BASF/Ciba*, and *Panasonic/Sanyo*, the FTC consulted closely with the EC to select monitors to serve both agencies. In addition, the agencies worked closely with those monitors to assess the potential buyers for the divested assets, and took into account all parties' views and experience as those matters were resolved.

In *UTC/Goodrich*, DOJ and the EC used a common monitoring trustee to ensure that the parties preserved the divestiture assets pending their sale. In that matter, as part of its commitments to the EC, UTC selected ING as the monitoring trustee, which the EC approved. DOJ took into account the EC's experience with ING as a monitor when it approved ING as trustee.

## **5. Designing or implementing cross-border remedies can pose challenges that can be overcome through dialogue and cooperation**

In some cases, cooperating agencies reach different remedial decisions because of the different effects of the merger or acquisition in their jurisdictions. One such example is DOJ's 2011 *Deutsche Borse/NYSE* investigation. Throughout 2011, DOJ and the EC cooperated closely on their respective investigations of the proposed acquisition by Deutsche Borse (a Germany firm that operates Germany's largest stock exchange) of NYSE Euronext (one of the two largest stock exchange operators in the United States). In December 2011, DOJ announced that it had reached a settlement with the parties resolving concerns about the effect of the merger on equities trading in the United States, which was the focus of its investigation.<sup>34</sup> Although in February 2012, the EC prohibited the merger, the differing conclusions of the two agencies resulted from differences in the markets in their jurisdictions.<sup>35</sup> The EC was concerned primarily with competitive effects in the European derivatives market, whereas DOJ's focus was on the U.S. cash equity market.

The results in this matter illustrates how effective cooperation does not always result in the same outcome or remedy in different jurisdictions. DOJ and EC cooperated closely throughout the investigations, but the relevant markets in each jurisdiction were different. Thus, while the outcome was different, there was no conflict. Close cooperation was necessary and useful so that each agency could understand, and anticipate, the outcome of the other's investigation.

<sup>34</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merger with NYSE Euronext (Dec. 22, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/278537.htm](http://www.justice.gov/atr/public/press_releases/2011/278537.htm); Press Release, U.S. Dep't of Justice, Justice Department Dismisses Antitrust Lawsuit against Deutsche Börse and NYSE Euronext (Feb. 9, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280066.htm](http://www.justice.gov/atr/public/press_releases/2012/280066.htm).

<sup>35</sup> Press Release, European Commission, Commission blocks proposed merger between Deutsche Börse and NYSE Euronext (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/94>; Press Release, European Commission, Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>.

One way the Agencies have been successful in overcoming potential challenges in the design and implementation of cross-border remedies is to acknowledge the impact of the relief achieved by another investigating agency. For example, in the *UTC/Goodrich* matter, the CCB had actively investigated the matter alongside DOJ and the EC. When it announced its resolution of the investigation, the Bureau stated that it would close its investigation without seeking separate relief because the relief achieved by DOJ and the EC alleviated the potential anticompetitive effects in Canada of the merger.<sup>36</sup> Likewise, as discussed above, in the *Cisco/Tandberg* matter, in deciding to close its investigation, DOJ took into account commitments that the parties made to the EC to facilitate interoperability.<sup>37</sup>

In *Western Digital/Hitachi* it was particularly critical for the FTC and the EC to co-ordinate their reviews based on timing constraints and consult with other reviewing agencies to ensure consistent remedies. Similarly, in *J&J/Synthes*, the EC's view that a broader product market existed in Europe required close co-ordination to assure that a divestiture, including the particular buyer, would satisfy concerns in the EU and in the United States. *BASF/Ciba* presented a similar situation, especially because the main production assets were in Europe, the effects would be felt in EU and U.S. markets, and the buyer was a Canadian firm. By consulting closely on these various matters, the agencies were able to achieve an expedited resolution *and* avoid potential conflicts with respect to their remedy.

**6. At times, cross-border remedies must be revised due to unforeseen circumstances or subsequent developments requiring close cooperation and consultation**

In *Western Digital/Hitachi*, the FTC consulted closely with the EC as the required divestiture to Toshiba took place. Because of certain requirements imposed by China's MOFCOM, the agreements between WD and Toshiba had to be adjusted regarding the timing of the transfer of production lines, and the period in which certain employees would be "seconded" between companies. The FTC delayed making its order final until all open issues were resolved, and then adjusted its final order to reflect the necessary modifications to the divestiture agreements. Throughout, the FTC consulted with the EC to assure that all adjustments remained consistent with the remedies imposed by both agencies.

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<sup>36</sup> Press Release, Canadian Competition Bureau, Competition Bureau Statement Regarding United Technology Corporation's Acquisition of Goodrich Corporation (July 26, 2012), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

<sup>37</sup> Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (Mar. 29, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm).

## BIAC

### 1. Introduction

Mergers frequently involve firms whose primary customers are business entities rather than individuals. While parties to anticompetitive mergers stand to benefit from supracompetitive pricing and unjust enrichment, harm from such combinations can extend to purchasers, indirect customers downstream, and, in the case of mergers resulting in unilateral power, competitors. Because failure to impose effective remedies can result in harm to business at several levels, the business community shares an interest with competition authorities in ensuring effective merger enforcement through the imposition of remedies.

BIAC recognises the significant efforts undertaken by competition authorities to date in providing guidance and transparency into their analytical approaches respecting merger remedies. Much has been accomplished in this regard since BIAC first presented its views to the Competition Committee on this issue.<sup>1</sup> The Antitrust Division of the U.S. Department of Justice (DOJ) issued its first policy guide to merger remedies in 2004<sup>2</sup> and published revised guidance in June 2011.<sup>3</sup> The European Commission (EC) conducted a similar study in 2005<sup>4</sup> and revised its remedies notice in 2008.<sup>5</sup> In October 2011, U.S. and EU authorities released a revised summary of Best Practices on Cooperation in Merger Investigations,<sup>6</sup> including a section highlighting the benefits to parties and agencies of cooperation and coordination of remedies, particularly with respect to mergers requiring clearance in multiple jurisdictions.

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<sup>1</sup> Summary of Discussion Points, Presented by BIAC to the OECD (Oct. 17, 2003); see also Summary of Discussion Points, Presented by BIAC to the OECD Working Party No. 3 Roundtable on Cross Border Merger Remedies (Feb 15, 2005); Summary of Discussion Points, Presented by BIAC to the OECD Global Forum on Competition: “Cross-Border Merger Control: Challenges for Developing and Emerging Economies” (Feb. 17, 2011).

<sup>2</sup> U.S. Dep’t of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), available at [www.justice.gov/atr/public/guidelines/205108.pdf](http://www.justice.gov/atr/public/guidelines/205108.pdf) [hereinafter “2004 DOJ Merger Remedies Policy”].

<sup>3</sup> U.S. Dep’t of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (June 2011), available at [www.justice.gov/atr/public/guidelines/272350.pdf](http://www.justice.gov/atr/public/guidelines/272350.pdf) [hereinafter “2011 DOJ Merger Remedies Policy”].

<sup>4</sup> Merger Remedies Study, DG Comp, Eur. Comm’n (Oct. 2005), available at [ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf).

<sup>5</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) 802/2004, 2008 O.J. (C 267) 1 [hereinafter “EC Remedies Notice”].

<sup>6</sup> See, U.S. / EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (Oct. 2011), available at [www.ftc.gov/os/2011/10/111014eumerger.pdf](http://www.ftc.gov/os/2011/10/111014eumerger.pdf) [hereinafter “U.S/EU Best Practices”].

Elsewhere, the Canadian Competition Bureau published its merger remedy policy in 2006<sup>7</sup> and, in 2011, released an *ex post* study of remedies obtained under the Competition Act from 1995 to 2005.<sup>8</sup> The UK Competition Commission published its own study regarding the effectiveness of merger remedies in 2008 and released new guidelines later that year.<sup>9</sup> In March 2013, China's Ministry of Commerce (MOFCOM) published for public comment draft guidance on merger remedies under the Anti-Monopoly Law, which addressed topics including the design, implementation, monitoring, and modification of remedies.<sup>10</sup>

Complementing and informing these initiatives, multilateral efforts by the OECD and International Competition Network (ICN) have been invaluable in analysing issues facing enforcers and industry with respect to merger remedies and developing best practices. Numerous jurisdictions have built their regimes or modified their existing practices in light of recommendations by the OECD Competition Committee carried forward by the ICN Mergers Working Group. Such efforts often require amendments to laws, regulations, and rules of practice and reflect the dedication and commitment of agency officials to improve the merger review process.

These efforts are to be commended. However, the need for cooperation, collaboration, and continued consideration of issues concerning cross-border merger remedies is greater than ever. New enforcement agencies continue to proliferate and the global expansion of competition law enforcement (particularly merger control) shows no signs of abating. While many newer regimes recognize the benefits of coordination, others are less attuned due to inexperience, lack of resources, and/or overarching nationalistic considerations. Meanwhile, cross-border merger activity is intensifying as countries gradually rebound from the global economic crisis. With cross-border transactions increasingly subject to review in multiple jurisdictions (and before nascent enforcement authorities), the costs to business stemming from merger review have increased exponentially. In light of these developments, BIAAC believes WP3's consideration of this topic is particularly timely.

In today's enforcement landscape, businesses contemplating cross-border transactions face a real threat of losing efficiencies due to exceedingly broad, inconsistent, and/or contradictory remedies. In addition to harming business, these potential costs inure to the detriment of consumers subverting the aims of effective competition policy. In order to mitigate these risks, enforcement authorities should adopt remedial approaches in cross-border transactions that are (1) informed by convergent principles and cooperation early in the merger review process; (2) focused on addressing competitive harm rather than other policy considerations; (3) narrowly tailored to address such harm; (4) uninfluenced by rigid presumptions and adapted to the facts of each case; and (5) clear and straightforward.

<sup>7</sup> Canadian Competition Bureau, Information Bulletin on Merger Remedies in Canada (Sept. 26, 2006), available at [www.competitionbureau.gc.ca/eic/site/cbbc.nsf/vwapj/Mergers\\_Remedies\\_PDF\\_EN1.pdf/\\$FILE/Mergers\\_Remedies\\_PDF\\_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf).

<sup>8</sup> Canadian Competition Bureau, Merger Remedies Study (Aug. 11, 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](http://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).

<sup>9</sup> Kingdom Competition Commission, Merger Remedies: Competition Commission Guidelines (Nov. 2008), available at [www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep\\_pub/rules\\_and\\_guide/pdf/cc8](http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/rules_and_guide/pdf/cc8).

<sup>10</sup> Ministry of Commerce of the People's Republic of China, Rules on Attaching Restrictive Conditions to Concentrations between Undertakings (March 27, 2013), available at [tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml](http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml) (in Chinese).

## 2. Competition authorities should cooperate and strive to achieve convergence with respect to cross-border merger remedies

### 2.1 *Divergence continues to threaten effective imposition of remedies in cross-border mergers*

The rise in cross-border merger activity, coupled with the growing number of jurisdictions with active merger control regimes, creates a heightened risk of inconsistent or conflicting remedies (and, concomitantly, significant costs to business and the global economy).<sup>11</sup> Over a decade has passed since DOJ and the EC issued contradictory decisions in *GE/Honeywell* and significant progress has been made to reach consensus within the global enforcement community in many areas of merger review, including remedies.<sup>12</sup> Formal and informal bilateral discussions among competition authorities and multi-lateral efforts by OECD and ICN have played important roles in “minding the gap.”<sup>13</sup>

Despite these advances, as illustrated by several recent decisions, competition authorities continue to impose inconsistent or conflicting remedies in cross-border transactions. For example, in connection with *Seagate/Samsung*, U.S. and EU authorities cleared the transaction unconditionally,<sup>14</sup> whereas in China, MOFCOM required Seagate to hold separate the Samsung business while allowing Seagate to apply for waiver of the hold-separate commitments after one year. Likewise, in *Western Digital/Viviti*, authorities in the U.S., EU, Japan, and Korea approved the transaction subject to Western Digital’s divestiture of certain

<sup>11</sup> Larry Fullerton & Megan Alvarez, *Convergence in International Merger Control*, ANTITRUST, Spring 2012, at 20 (“‘Deepening’ globalisation in commerce, coupled with an increase in the number of states that have competition laws and a growing intensity of enforcement efforts, ‘increase the probability and potential intensity of conflicts among jurisdictions.’”) citing DAVID J. GERBER, *GLOBAL COMPETITION LAW: MARKETS AND GLOBALIZATION* 6 (2010); see also Rachael Brandenburger, Calvin S. Goldman, & Ilene Knable Gotts, *International Merger Reviews*, in *ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY* 1717, 1735 (2008) (“[A]s the scope of firms’ operation becomes increasingly global, and as enforcement agencies throughout the world become more active in merger enforcement, the opportunities for conflict likely will increase, not decrease, in number and magnitude.”); RONALD A. STERN, *THE ROLE OF THE ICN IN FOSTERING CONVERGENCE -- AN NGA’S PERSPECTIVE*, in *THE INTERNATIONAL COMPETITION NETWORK AT TEN* 321, 330 (Paul Lugard ed. 2011) (“[M]uch remains to be done ... because of new challenges created by the continued proliferation of merger review regimes and the increasing importance of developing and emerging economies in an ever more rapidly globalising world economy.”).

<sup>12</sup> See Maureen K. Olhausen, *Update on International Cooperation and Convergence*, Remarks Before the Fourth Annual Chicago Forum on International Antitrust Issues, Northwestern University School of Law (June 13, 2013), available at <http://www.ftc.gov/speeches/ohlhausen/130613antitrustchicagoupdate.pdf>.

<sup>13</sup> Between 2002 and 2005, the ICN Merger Working Group’s subgroup on Notification and Procedures has developed and adopted eight Guiding Principles and thirteen Recommended Practices aimed at streamlining the merger review process. See ICN, *Recommended Practices for Merger Notification and Review* (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. In addition, the ICN has reviewed merger guidelines of major jurisdictions on key issues, including coordinated effects, market definition, efficiencies, unilateral effects and barriers to entry. See generally, [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org). In the last two years alone, enforcement agencies in numerous jurisdictions have taken steps to conform their merger review processes to reflect ICN best practices, including Brazil, Turkey, Namibia, Guernsey, and the Faroe Islands.

<sup>14</sup> Press Release, European Comm’n, *Mergers: Commission clears proposed acquisition of Samsung’s hard disk drive business by Seagate Technology* (Oct. 19, 2011) (IP/11/213), available at [http://europa.eu/rapid/press-release\\_IP-11-1213\\_en.pdf](http://europa.eu/rapid/press-release_IP-11-1213_en.pdf); Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd., 77 Fed. Reg. 14525 (Mar. 12, 2012) [hereinafter “*Seagate/Samsung*”].

production assets to Toshiba, while MOFCOM additionally required Western Digital to hold separate the Viviti business with the opportunity to apply for waiver after two years.<sup>15</sup>

Divergence with respect to remedies in cross-border merger cases may stem from a range of sources, including disparate substantive and procedural approaches to merger review among competition authorities in various jurisdictions. From a substantive standpoint, competition authorities may have different underlying enforcement objectives, whether or not codified in merger control regulations. As discussed further below, in many jurisdictions (perhaps most notably, China and South Africa), merger review takes into account non-competition considerations such as economic development, industrial policy, and the protection of state-owned enterprise.<sup>16</sup> As the OECD Secretariat has recognised, “the inclusion of multiple objectives [e.g., pluralism, promoting small business, and other socio-political values] increases the risks of conflicts and inconsistent application of competition policy.”<sup>17</sup> In addition, competition authorities may adopt varying theories of competitive harm or different analytical frameworks for assessment of such harm.

From a procedural standpoint, divergence can stem from the use of different merger investigation methodologies. Former Competition Commissioner Mario Monti noted that use of the same micro-economic analytical tools by different competition authorities investigating the same transaction can greatly enhance convergence of results.<sup>18</sup> The converse is also true. Additional sources of procedural divergence that can influence enforcement outcomes include timetables for considering mergers and proffered remedies, the role of the courts, confidentiality, and the participation of interested third parties in the merger review process.

## 2.2 *The Costs of divergence are wide-ranging*

The potential costs of divergence in the cross-border merger context are significant and wide-ranging. Inconsistent or conflicting remedial approaches among competition authorities can undermine the enforcement legitimacy of one or more jurisdictions and frustrate a merging party’s good faith efforts to comply with ordered relief.<sup>19</sup> Moreover, as former FTC Chairman Timothy Muris has noted:

<sup>15</sup> Seagate/Samsung, id; Press Release, European Comm’n, Mergers: Commission clears Western Digital’s acquisition of Hitachi’s hard disk drive business subject to conditions (Nov. 23, 2011) (IP/11/1395), available at [http://europa.eu/rapid/press-release\\_IP-11-1395\\_en.pdf](http://europa.eu/rapid/press-release_IP-11-1395_en.pdf); Japan Fair Tr. Comm’n, The JFTC Closed its Reviews on Two Proposed M&A s in the Hard Disc Drive (HDD) Sector (Dec. 28, 2011), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000460.html>.

<sup>16</sup> As Professor David Gerber has observed, “Most other competition law systems [i.e., other than the U.S. and the EU] pursue several objectives, not only in the language of their statutes, but also in the decision making of competition authorities and courts. Often economic development is a central goal, but political goals such as dispersion of power and social goals such as increased access to markets are also common. In addition, fairness has been a major goal in many systems.” DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 264 (2010).

<sup>17</sup> OECD Global Forum on Competition, The Objectives of Competition Law and Policy, [CCNM/GF/COMP\(2003\)3](http://www.oecd.org/daf/competition/2486329.pdf) (Jan. 29, 2003) at 52, available at [www.oecd.org/daf/competition/2486329.pdf](http://www.oecd.org/daf/competition/2486329.pdf).

<sup>18</sup> Mario Monti, Convergence in EU-US antitrust policy regarding mergers and acquisitions: an EU perspective, Address Before the UCLA Law First Annual Institute on US an EU Antitrust Aspects of Mergers and Acquisitions 2 (Feb. 28, 2004), available at [europa.eu/rapid/press-release\\_SPEECH-04-107\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-04-107_en.pdf).

<sup>19</sup> Christine A. Varney, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.pdf>.

*The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail. Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most jurisdictions would view as competitively benign, out of concern that the most restrictive jurisdiction would block those transactions.*<sup>20</sup>

The tyranny of the “most restrictive jurisdiction” phenomenon also encourages abuses by competitors who engage in forum shopping and checker-boarding among jurisdictions to impose additional delay and costs upon the transaction parties. There is the risk that parties engaged in such strategic gaming play off one competition authority against another, thereby using antitrust enforcement as a weapon against their competitors.<sup>21</sup>

### **2.3 Cooperation among enforcement authorities is critical in the imposition and enforcement of remedies**

In order to mitigate these risks, from a broad, policy perspective, competition authorities must cooperate in an effort to achieve convergence. Convergence can be facilitated by a range of joint activities, including (1) clear communication of the rationale underlying decisions (*i.e.*, transparency);<sup>22</sup> (2) joint investigations conducted pursuant to best practices;<sup>23</sup> (3) bilateral agreements; and (4) joint study through participation in multi-lateral organisations such as ICN and OECD. As former FTC Chairman Muris noted, “At the threshold, the parties and their constituencies will profit from a clearer understanding of the differences in substantive approach employed by the various competition regimes. From this step, greater convergence can evolve.”<sup>24</sup> Convergence should not follow a “mixing bowl” approach that “blends together a hodgepodge of different standards and processes without any regard for whether some might be more effective or appropriate than others.”<sup>25</sup> Rather, all participating competition authorities should enter the process with an open mind to find out which policies and individual case decisions best serve the objectives of efficiency and competition.

<sup>20</sup> Timothy J. Muris, Merger Enforcement in a World of Multiple Arbiters, Address Before the Brookings Institution Roundtable on Trade and Investment Policy 9-10 (Dec. 21, 2001), available at [www.ftc.gov/speeches/muris/brookings.pdf](http://www.ftc.gov/speeches/muris/brookings.pdf); see also Daniel A. Crane, Substance, Procedure, and Institutions in the International Harmonization of Competition Policy, 10 CHI. J. INT’L L. 143, 148 (2009) (noting that among the “serious downsides” to divergent standards, “the significant economy with the most restrictive merger policy dictates industrial policy to the rest of the world,” likely leading to “[decisions] to disallow mergers that should be allowed.”)

<sup>21</sup> R. Hewitt Pate, Competition and the End of Geography, Address Before The Progress & Freedom Foundation 21 (Aug. 23, 2004), available at [www.usdoj.gov/atr/public/speeches/205153.pdf](http://www.usdoj.gov/atr/public/speeches/205153.pdf)

<sup>22</sup> See, e.g., U.S. Fed. Trade Comm’n, Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), available at [www.ftc.gov/bc/bestpractices/bestpractices.shtm](http://www.ftc.gov/bc/bestpractices/bestpractices.shtm); EC Remedies Notice, *supra* note 5; and 2011 DOJ Merger Remedies Policy, *supra* note 3; and the ICN Recommended Practices for Merger Notification Procedures, RP VIII-Transparency, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>

<sup>23</sup> U.S/EU Best Practices, *supra* note 6, ¶¶ 14-15.

<sup>24</sup> See, Muris, *supra* note 20, at 10.

<sup>25</sup> Pate, *supra* note 21, at 21.



From a practical perspective, enforcement agencies should engage and cooperate with their counterparts early in the merger review process with coordination informed by the following principles. First and foremost, competition authorities should not impose remedies without considering potential extraterritorial implications and approaches of other agencies to the remedy question. Mindfulness of these key considerations is essential to avoiding conflicting or otherwise suboptimal outcomes (*e.g.*, one agency requiring divestiture of certain intellectual property, while another requires that it be licensed to all interested parties). The U.S.-EU Best Practices recognize the potential for this harm when it states:

*The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties.*<sup>26</sup>

Inconsistent obligations can have serious consequences for businesses. As former Assistant Attorney General Christine Varney has observed: “[T]he risk that different agencies could take different remedial actions creates uncertainty and may undermine firms’ ability to operate globally. Businesses may be unsure about the global relevance of their dealings with one agency when another agency may yet order a different set of remedies.”<sup>27</sup>

An often cited example of cooperation working well in the remedies state is the review of General Electric’s purchase of Instrumentarium in 2003. The U.S. Department of Justice, the European Commission, and, Canada conducted largely parallel investigations, including extensive discussions on timing of the reviews and key substantive questions, such as the appropriate market definitions. The U.S. and EU made a clear effort when drafting their respective decrees not to create inconsistent obligations, including, for instance, using the same definition of assets, drafting complementary common trustee provisions, and consulting during the divestiture process as both jurisdictions evaluated the proposed purchaser of the divested business.<sup>28</sup> In recognition of the divestiture orders filed in the U.S. and EU, Canada agreed to conclude its review without a separate formal consent agreement. Canada also obtained GE’s confirmation that the undertakings provided to the EC would be applicable on a global basis and therefore available in Canada. Similarly, in *Cisco/Tandberg*, the U.S. DOJ decided not to challenge the transaction in light of the behavioural remedies that the EU Commission had imposed.<sup>29</sup>

<sup>26</sup> U.S./EU Best Practices, *supra* note 6, ¶ 14.

<sup>27</sup> Varney, *supra* note 19, at 6.

<sup>28</sup> See discussion of coordination of these efforts in Makan Delrahim, *Facing the Challenge of Globalization: Coordination and Cooperation between Antitrust Enforcement Agencies the U.S. and E.U.*, Address Before the ABA Administrative Law Section Fall Meeting 13-14 (Oct. 22, 2004), available at [www.usdoj.gov/atr/public/speeches/206429.pdf](http://www.usdoj.gov/atr/public/speeches/206429.pdf). In 2004, the U.S. FTC also indicated working cooperatively with another jurisdiction both in the investigative and remedy stages in connection with its review of General Electric’s acquisition of Agfa-Gevaert N.V.’s nondestructive testing business (cooperation with the EC); Sanofi-Synthelabo’s tender offer for Aventis (cooperation with the EC); and General Electric’s acquisition of InVision Technologies, Inc. (cooperation with Germany’s Federal Cartel Office and the United Kingdom’s Office of Fair Trading).

<sup>29</sup> Case COMP/M. 5669—Cisco/Tandberg (Mar. 29, 2010), available at [ec.europa.eu/competition/mergers/cases/decisions/M5669\\_20100329\\_2012\\_253140\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329_2012_253140_EN.pdf); Press Release, U.S. Dep’t of Justice Antitrust Div., Justice Department Will Not Challenge Cisco’s Acquisition Of Tandberg (Mar. 29, 2010), available at [www.justice.gov/atr/public/press\\_releases/2010/257173.pdf](http://www.justice.gov/atr/public/press_releases/2010/257173.pdf).

Such cooperation can work even when the affected markets are national in dimension and, therefore, the competition problems examined and the remedies adopted by each authority are different. In the *Nestle/Ralston Purina* matter, the EU, U.S. FTC and Canadian Competition Bureau cooperated closely during both the investigative and remedies stage. As a result, the authorities discussed their respective cases in detail, including the principles they intended to apply to find appropriate solutions. Therefore, the remedial action chosen by the FTC and the EU were very similar even though the pet food brands were different.<sup>30</sup>

#### 2.4 *Comity principles should be applied where differences remain*

BIAC recognises that jurisdictions will not always be able to achieve convergence, even over the long term. Divergence will inevitably exist, whether stemming from different market conditions, legal systems, or substantive/procedural approaches to the underlying analysis of mergers. We are not suggesting that agencies ignore these differences and their own interests altogether. However, despite these differences, agencies should introduce considerations of comity into their analysis of merger remedies. The OECD has been at the forefront in developing and advocating the fundamental principles and importance of applying comity principles.<sup>31</sup> Many of the bilateral agreements entered into by jurisdictions since 1996 are built upon the foundation of the OECD's comity principles.

Comity principles recognize that each jurisdiction has the right to ensure competition within its borders; however, agencies should not look to impose remedies with respect to assets in other jurisdictions except in cases where the relevant geographic market extends to those foreign nations. In those situations where the affected geographic market spans several jurisdictions and the enforcement agencies generally agree on the nature and the likelihood of anticompetitive effects, agencies should introduce notions of comity in reaching decisions on remedies. Also, rather than imposing duplicative remedies, agencies should allow the jurisdiction with the greatest ability to enforce the remedy to be the lead, and perhaps exclusive, enforcer to impose a remedy.

Cooperation and comity principles should have a role in the monitoring and enforcement aspects of remedies. It is more likely that effective monitoring and enforcement of remedies will be achieved if the jurisdiction where the transaction's "centre of gravity" is located is involved. We agree with the proposition that "a more promising way to overcome limitations of enforcement powers could be cooperation among competition authorities . . . So long as the jurisdiction where the merged entity and its assets are located seeks remedies as a condition for clearance and those remedies satisfy the competitive concerns of other jurisdictions, the other jurisdictions might either no longer require remedies or accept the same remedy and be satisfied that the domestic jurisdiction will supervise and enforce its implementation."<sup>32</sup> As mentioned above, this approach was highly successful in the *GE/Instrumentarium* matter.

<sup>30</sup> See, Mario Monti, The Commission Notice on Merger Remedies—One Year After, Address Before the Centre d'économie industrielle, Ecole National Supérieure de Mines 7 (Jan. 18, 2002), available at [europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/10&format=PDF&aged=1&language=EN &guiLanguage=en](http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/10&format=PDF&aged=1&language=EN &guiLanguage=en).

<sup>31</sup> See, e.g., OECD, Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, [C\(95\)130/FINAL](#) (July 27, 1995), available at [acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False](http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False).

<sup>32</sup> OECD Working Paper No. 3 on Co-operation and Enforcement, Cross – Border Remedies in Merger Cases, Issues Paper (Jan 7, 2005), [DAF/COMP/WP3\(2005\)1](#).

Finally, it is important that authorities weigh the magnitude of the extraterritorial remedy against the scope of the domestic harm and avoid requiring a remedy that exceeds the scope of the harm. Behavioural relief that is limited to activities solely within the jurisdiction, if feasible and not in conflict with the objectives of other jurisdictions that are the centre of gravity for the companies at issue, may raise fewer issues of unintended or undesirable extraterritorial consequences than divestiture commitments located outside the jurisdiction seeking relief. As mentioned above, however, care should be taken to ensure that the remedy imposed takes into account the potential efficiency and other benefits of the transaction as well as any spillover effects on other jurisdictions.

Coordination on implementation and monitoring may be both necessary and appropriate in those cases where close cooperation on merger evaluation is justified in the first instance. The degree of coordination on implementation and monitoring is likely to be influenced by the nature of the underlying markets and the scope of the remedy. For instance, in mergers involving relevant geographic markets that are global in scope, coordination on evaluation and the decisions on scope of remedy will be important. This means that coordination on the implementation of a remedy is more likely to be required. But it is not necessarily the case that all mergers requiring close coordination on evaluation and choice of remedy will require close coordination on implementation. In some cases, for example where the divestiture of assets in a single jurisdiction resolves all competitive problems, it may be more efficient for a single jurisdiction to take the responsibility for implementation and enforcement of a remedy. It may be the case, for example, that only that jurisdiction in which the divestiture assets are located can effectively enforce the remedy by ordering or obtaining specific performance.

Likewise, where relevant geographic markets are more localised or regionalised, the effective implementation of a remedy may not require much coordination. In markets involving retail outlets, jurisdictions may benefit from coordination on merger evaluation by sharing information on the effectiveness of an entrant, methodologies for evaluating the ability of substitutes to constrain the behaviour of merging parties, and other key aspects of evaluating competitive harm. But once the agencies identify retail outlets to be divested, it may not be efficient – for them or for the merging parties – to try to coordinate on all aspects of implementation. For example, it would not be fruitful for a jurisdiction which has already approved a divestiture buyer to hold-up the execution of a remedy while another jurisdiction is still evaluating possible divestiture buyers.

A practical approach is required, in which parties and agencies work cooperatively to find a balanced way to implement remedies. Principles of comity can be particularly important at the implementation stage. Where multiple jurisdictions share a mutual interest in effectuating a remedy, the reliance on one capable agency is more efficient and preserves resources of the other agencies which can be better utilised to preserve competition in other areas.

### **3. Remedies should be focused and proportionate**

In addition to cooperating with other competition authorities early in the merger review process, agencies must ensure that their remedies are effectively designed and implemented. Remedies in cross-border mergers should be focused on addressing competitive harms likely to arise from proposed transactions and proportionately tailored to address such harms. Remedies that are exceedingly broad – imposing too many restrictions on the merged firm's business conduct or requiring divestiture of more assets than necessary to create a viable new competitor in the marketplace – should be avoided. Such remedies risk destroying the efficiencies created by a merger, preventing the parties from achieving economies of scale, and reducing the value of the assets acquired, without benefiting the marketplace or the parties' customers.

Merger remedies should focus exclusively on rectifying competitive harms, rather than on advancing industrial policy or other non-competition-related considerations. As the ICN has noted, “Merger remedies are not tools of industrial planning and are generally ill suited to achieve aims wider than addressing competitive detriment.”<sup>33</sup> Likewise, former Deputy Assistant Attorney General Deborah Majoras has remarked:

*[T]he goal [of merger review] is not to review the market and decide how it would best operate. Rather, the goal is to effectively remedy the violation for the benefit of consumers, maintaining competition at premerger levels. Once the violation is remedied, competition will decide how the market performs, including choosing the winners and losers.*<sup>34</sup>

Consistent with this principle, many global competition authorities have correctly embraced an enforcement policy focused on remedying competitive harms without further government interference with market forces.<sup>35</sup> In Canada, the Supreme Court has stated that:

*The evil to which the drafters of the Competition Act addressed themselves is substantial lessening of competition. . . It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.*<sup>36</sup>

The French concentration guidelines specify that remedies should not be used to protect specific competitors rather than competition, or for protectionist purposes.<sup>37</sup> Moreover, the EC fully supported the principle that competition authorities should not use merger review to engage in industrial planning in its comments to a previous OECD roundtable on the issue.

<sup>33</sup> Int’l Competition Network, Merger Working Group Analytical Framework Subgroup, Merger Remedies Review Project ¶ 1.6 (June 2005), available at [www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf).

<sup>34</sup> Deborah Platt Majoras, Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme, Address Before the Canadian Bar Association National Law Section 2002 Annual Fall Conference on Competition Law 6 (Oct. 4, 2002), available at [www.justice.gov/atr/public/speeches/200354.pdf](http://www.justice.gov/atr/public/speeches/200354.pdf); see also Christine A. Varney, The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective, Remarks as Prepared for South by Southwest 1-2 (Mar. 18, 2010) (preventing anticompetitive harms “is a limited role: whatever we might want a particular industry to look like, a merger does not provide us an open invitation to remake an industry or a firm’s business model to make it more consumer friendly.”), available at [www.justice.gov/atr/public/speeches/263320.pdf](http://www.justice.gov/atr/public/speeches/263320.pdf).

<sup>35</sup> Richard G. Parker & David A. Balto, The Evolving Approach to Merger Remedies, ANTITRUST REPORT (May 2000), available at [www.dcantitrustlaw.com/assets/content/documents/2000/article\\_mergerremedies2000.pdf](http://www.dcantitrustlaw.com/assets/content/documents/2000/article_mergerremedies2000.pdf) (“The FTC is not a market regulator. Apart from enforcing the prohibitions that are contained in the antitrust laws, our job is not to regulate or prescribe the market behavior of firms. That is a function of the competitive process.”).

<sup>36</sup> Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at ¶ 85. Indeed, according to the Supreme Court “presumably some lessening of competition following a merger is tolerated, because the Act proscribes only a substantial lessening of competition.” Id. at ¶ 83 (emphasis in original).

<sup>37</sup> Autorité de la Concurrence, Lignes directrices de l’Autorité de la concurrence relatives au contrôle des concentrations (July 10, 2013), ¶ 574, available at [www.autoritedelaconcurrence.fr/doc/ld\\_concentrations\\_juill13.pdf](http://www.autoritedelaconcurrence.fr/doc/ld_concentrations_juill13.pdf) (in French).

A core principle of remedial action is proportionality: remedies should be proportionate to the anticompetitive harm likely to result from a merger. If the risk of harm is uncertain or its scope limited, competition authorities should adjust their remedial demands to ensure that the remedy proposed is, in the words of the EC, “proportionate to the competition problem.”<sup>38</sup> Competition authorities should generally seek to implement the least burdensome, effective remedy. In particular, agencies should consider the magnitude of the problematic assets in the overall context of the transaction. The larger the non-offending assets relative to the problematic assets, the greater the transaction costs imposed by the delay in obtaining clearance. Delays in the review process, can result in significant lost synergies, particularly where agencies impose an up-front buyer requirement,

It is imperative that remedies imposed by antitrust enforcement authorities protect competition – as a foremost concern – but do so in a manner that (1) limits the costs of the remedy to the parties involved so as to preserve, to the greatest extent possible, the efficiencies that otherwise would derive from the transaction and (2) avoids to unduly damaging the value of the transaction to the parties.

#### **4. Remedies in cross-border merger cases should be flexible**

In addition to a narrow focus on rectifying competitive harms, flexibility in evaluating remedy proposals and determining the conditions of those remedies should be a priority for enforcement agencies. Rigid policies favouring certain forms of relief (such as divestiture) or implementation of relief (such as requiring an up-front buyer) should not be adhered to automatically. Rather, agencies should assess which form of relief best preserves competition given the specific facts of each particular case. Over-reliance on presumptions carries with it the prospect of high costs.

Although doctrinaire application of remedies should be avoided, adherence to general “guiding principles” such as those proposed herein can be useful and is encouraged (for instance, accepting only remedies that resolve competitive problems or crafting remedies that are clear and straightforward). Explanatory guidelines add transparency, predictability, and consistency to the merger review process for the business and legal communities. However, they should serve as a starting point for the evaluation of remedies, not an ending point.

Ultimately, the same incentives that have led many competition agencies recently to eschew market share-based structural presumptions in favour of economically grounded, dynamic factual assessment should cause agencies to re-evaluate rote, inflexible application of remedy provisions. Over-reliance on presumptions such as the requirement of structural remedies in all horizontal merger cases prevents competition authorities from carefully considering facts and market dynamics specific to the merger at issue and can result in significant costs to the merging parties. Moreover, it needlessly requires merging parties that present a unique but effective fix to “swim upstream” against agency policy. Where parties or other interested actors present a remedy and compelling reasons why that remedy resolves competition concerns, the burden should not be on those parties to explain why an inflexible presumption is inapplicable.

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<sup>38</sup> EC Remedies Notice, supra note 5, ¶ 85.

## 5. Behavioural Remedies

### 5.1 *Behavioural remedies should be considered where appropriate as part of a flexible, case-by-case approach*

As part of a remedial menu flexibly considered by competition authorities, behavioural remedies can be effective in helping to preserve competition, whether or not implemented in conjunction with structural relief. The divestiture of assets to an independent business may not sufficiently create viable new competition to replace the acquired firm's competitive presence if the divestiture buyer lacks necessary inputs to compete effectively. In these cases, behavioural relief such as requiring the merged company to enter into a supply agreement with the divestiture buyer, or guaranteeing non-discriminatory access to important competitive inputs, may be the most appropriate way to preserve competition while retaining the procompetitive aspects of the merger. Such conditions were recently imposed by the EC in *Intel/McAfee*,<sup>39</sup> *Devrient/Gemalto*<sup>40</sup> *FrieslandCampina/Zijerveld & Veldhuyzen and Den Hollander*,<sup>41</sup> and *GE/Avio*,<sup>42</sup> and by US enforcement authorities in *NBC/Comcast* and *Google/ITA*.

Merging parties and the customers they serve may prefer the imposition of reasonable obligations on the conduct of the merged entity to the compelled divestiture of additional assets. In many cases, the latter approach may reduce the productive value of the assets being acquired and prevent the post-merger company from achieving efficiencies that can be passed along to consumers. In light of these considerations, presumptions against the imposition of conduct remedies should be reconsidered and superseded by formal recognition that conduct remedies will be evaluated under a flexible approach that considers each merger on its own merits. For example, the DOJ replaced the strong preference for structural relief found in its original 2004 guidelines with a more flexible approach in the 2011 revision, noting that “[e]ffective merger remedies typically include structural or conduct provisions,” and that “each can be used to preserve competition in the appropriate factual circumstances.”<sup>43</sup> Likewise, the revised EC remedies notice states that the question of “which type of remedy is suitable to eliminate the competition concerns identified has to be examined on a case-by-case basis,”<sup>44</sup> although the practical import of this statement may be undermined by the EC's preference expressed elsewhere in the notice for structural relief.<sup>45</sup>

<sup>39</sup> Case COMP/M.5984—Intel/McAfee (Jan. 26, 2011), available at [ec.europa.eu/competition/mergers/cases/decisions/m5984\\_20110126\\_20212\\_1685278\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf).

<sup>40</sup> Case COMP/M.6564—Devrient/Gemalto/JV (Nov. 6, 2012), available at [ec.europa.eu/competition/mergers/cases/decisions/m6564\\_20121106\\_20212\\_2779342\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6564_20121106_20212_2779342_EN.pdf).

<sup>41</sup> Case COMP/M.6722—Friesland Campina/ Zijerveld & Veldhuyzen (Apr. 12, 2013) available at [ec.europa.eu/competition/mergers/cases/decisions/m6722\\_20130412\\_20212\\_3045451\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6722_20130412_20212_3045451_EN.pdf).

<sup>42</sup> Press Release, European Comm'n, Mergers: Commission clears acquisition of Italian aviation equipment company Avio by GE, subject to conditions (July 2, 2013) (IP/13/642), available at [europa.eu/rapid/press-release\\_IP-13-642\\_en.pdf](http://europa.eu/rapid/press-release_IP-13-642_en.pdf).

<sup>43</sup> Compare 2004 DOJ Merger Remedies Policy, *supra* note 2, § III.A. (“structural remedies are preferred to conduct remedies in merger cases”), with 2011 DOJ Merger Remedies Policy, *supra* note 3, § II (“Effective merger remedies typically include structural or conduct provisions. Each can be used to preserve competition in the appropriate factual circumstances.”).

<sup>44</sup> EC Remedies Notice, *supra* note 5, ¶ 16.

<sup>45</sup> *Id.* ¶ 17 (“Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps”).

The importance of avoiding adherence to rigid enforcement principles and adopting a flexible remedial approach is underscored by numerous jurisdictions' adoption of behavioural remedies, particularly where structural remedies have not been viable or where behavioural remedies could be tailored to the identified competitive harm. The Finish Competition and Consumer Authority's decision in *Valio/Aito Maito*<sup>46</sup> and the UK Competition Commission's decision in *Dräger/Air-Shields*<sup>47</sup> illustrate circumstances where structural relief was considered impractical and behavioural remedies were imposed. More recently, the Competition Commission determined that "a package of behavioural remedies has a high probability of being effective in addressing the adverse effects of the merger" proposed between Macquarie UK Ventures and National Grid Wireless Group.<sup>48</sup>

## 5.2 *Behavioural Remedies Must Be Clear and Straightforward*

While behavioural remedies may be appropriate in certain circumstances, they should be subject to the guiding principle favouring clear, straightforward remedies. Provisions that do not clearly define what conduct is required or prohibited can present serious compliance challenges, potentially harming not only the merging parties but also other stakeholders such as customers, suppliers, or licensees. As stated in the DOJ's Merger Remedy Policy:

*No matter what type of conduct remedy is considered, however, a remedy is not effective if it cannot be enforced. Remedial provisions that are too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked.*<sup>49</sup>

Significant compliance challenges can arise, for example, where conduct remedy provisions fail to define key terms with a sufficient degree of precision. In the DOJ's *Bemis/Alcan* settlement,<sup>50</sup> the parties divested certain assets including Alcan customer contracts to a third party buyer. The settlement obligated the merged party to refrain from soliciting business for flexible packaging products that were subject to any of these customer contracts that were unexpired for one year. The term "solicit" was not defined in the Final Judgment. The DOJ likely included this provision in order to allow the buyer of the divested assets sufficient time to become a viable competitor to the post-merger Bemis. However, careful drafting could have reduced any confusion as to whether, for example, Bemis was permitted to respond to a former Alcan customer's request for proposal during the one-year period.

In order to mitigate compliance challenges and related harm to business or competition stemming from ambiguity, behavioural remedies can be supported by careful oversight of implementation backed by appropriate sanctions in the event conduct objectives are not achieved. For instance, remedies imposed by the French Competition Authority in connection with the merger of Banque Populaire and Caisse

<sup>46</sup> Press Release, Finnish Competition Authority, Conditional Approval of Acquisition of Osuuskuunta Maito-Pirkka, Kainuun Osuusmeijeri and Aito Maito by Valio (June 20, 2000), available at [www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2000-06-20](http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2000-06-20).

<sup>47</sup> United Kingdom Competition Comm'n, Dräger Medical AG & Co KGaA and Hillenbrand Industries, Inc. (May 19, 2004), available at [www.competition-commission.org.uk/rep\\_pub/reports/2004/fulltext/489.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2004/fulltext/489.pdf).

<sup>48</sup> United Kingdom Competition Comm'n, Macquarie UK Broadcast Ventures Ltd./National Grid Wireless Group 12 (Mar. 11, 2008), available at [www.competition-commission.org.uk/rep\\_pub/reports/2008/fulltext/537.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/537.pdf).

<sup>49</sup> 2011 DOJ Merger Remedies Policy, supra note 3, § II.B.

<sup>50</sup> United States v. Bemis Co., Inc., Case No. 1:10-cv-00295 (D.D.C. July 13, 2010) (Final Judgment), available at [www.justice.gov/atr/cases/f260600/260625.pdf](http://www.justice.gov/atr/cases/f260600/260625.pdf).

d'Epargne mandating separate management of their branches in La Réunion provided for monitoring and potential divestitures if the remedy did not prove effective.<sup>51</sup>

### **5.3 Behavioural remedies should avoid imposing conditions on merging parties that appear unlikely to preserve competition**

Behavioural remedies should be focused on remedying actual competitive harm and should not be used to stave off speculative competition law violations. Remedies that threaten to stifle business conduct that is potentially procompetitive (*e.g.*, bundling) should be imposed cautiously and only after the agency's careful consideration of the relevant market dynamics.

Most importantly, behavioural remedies should not be imposed to address non-competition concerns. Such remedies undermine the credibility of competition review and call into question the bona fides of the reviewing authority and its commitment to consumer welfare. For example, in 2009, China held-up Nokia's acquisition of Motorola's network equipment assets – after eight other jurisdictions had cleared the deal months before – until Motorola settled IP litigation with Huawei, a Chinese competitor with the largest share of the Chinese market.<sup>52</sup> Similarly, South Africa frequently imposes employment conditions that are unrelated to competition concerns in its remedies.<sup>53</sup>

Behavioural remedies that implicate non-compete or non-bid provisions should generally be disfavoured. These provisions can reduce customer choice and output, while decreasing the incentives of the merged company to innovate because its access to certain customers is blocked. Competition agencies may argue that such provisions are necessary to incentivize the buyer of divested assets to invest in the development of those assets without having to overcome an entrenched incumbent. So long as the buyer of divested assets has fair and non-discriminatory access to critical inputs needed for competition (*e.g.*, personnel, facilities, branding/trademarks, “hard” IP, customer lists), it should have the ability and incentive to viably compete against the merged company. Restrictions on the merged company's ability to compete for certain customers for the life of the settlement – possibly 10 or 20 years – are overbroad. Market forces should be trusted to determine whether the incumbent or the new entrant gains customer loyalty.

<sup>51</sup> Decision 09-DCC-16—Banque Populaire/Caisse d'Epargne (June 22, 2009), available at <http://www.autoritedelaconcurrence.fr/pdf/avis/09DCC16decisionversionpublication.pdf> (in French).

<sup>52</sup> Sherry Mazzocchi, China Delays \$1.2B Nokia Siemens-Motorola Deal, LAW360, Mar. 9, 2011, available at [www.law360.com/competition/articles/230943/china-delays-1-2b-nokia-siemens-motorola-deal](http://www.law360.com/competition/articles/230943/china-delays-1-2b-nokia-siemens-motorola-deal); Pete Brush, Chinese Regulators OK \$975M Nokia-Motorola Deal, LAW360, Apr. 21, 2011, available at [www.law360.com/corporatefinance/articles/240533/chinese-regulators-ok-975m-nokia-motorola-deal](http://www.law360.com/corporatefinance/articles/240533/chinese-regulators-ok-975m-nokia-motorola-deal).

<sup>53</sup> See, *e.g.*, Case No: 71/LM/Oct09—Harmony Gold Mining Co. Ltd. & Pamodzi Gold Free State (Pty) Ltd (Feb. 5, 2010), available at [www.comptrib.co.za/assets/Uploads/Case-Documents/71LMOct09.pdf](http://www.comptrib.co.za/assets/Uploads/Case-Documents/71LMOct09.pdf).





## SUMMARY OF DISCUSSION

*By the Secretariat*

**Mr. William Baer**, the Chair of Working Party Nr. 3, opened the Roundtable discussion and made a few general remarks regarding the importance of international co-operation and consultation between antitrust enforcers on cross-border mergers remedies. The **Chair** noted that lack of co-operation between the competition authorities might lead to different outcomes in terms of remedies and this could encourage the merging parties to act strategically and try to reach an agreement on a remedy package in one jurisdiction and use that as leverage in negotiations with other authorities. The **Chair** mentioned the impressive improvement in the quality and intensity of co-operation among authorities in the merger area and referred to the use of waivers as the main reason for such development.

The **Chair** identified three topics for discussion at the Roundtable: (i) the challenges faced by competition authorities when designing, implementing and monitoring cross-border merger remedies; (ii) a discussion of important cross-border merger cases; and (iii) the revision of a cross-border remedy after it has been approved.

### **1. Challenges faced by competition authorities when designing, implementing and monitoring cross-border remedies**

The **Chair** invited Canada to discuss how different timing of investigations in different jurisdictions can potentially affect co-operation between the reviewing agencies.

According to the delegation from **Canada** the timing of the investigations has become less of a problem for the Competition Bureau since the statutory amendments which entered into force in 2009, which aligned filing and timing provisions with other authorities. Canada has now a two-stage review process for mergers which is substantially aligned with many other national merger review systems and for this reason today many cross-border transactions are reviewed by Canada at the same time as other authorities. Canada's co-operation experience with other jurisdictions has been overwhelmingly positive, especially if the Bureau is able to engage with other agencies early during the investigative stage. However, there may still be cases of mergers filed in Canada after they are filed in other jurisdictions. The highest risk arising in these cases is when there is a need to identify appropriate remedies in more than one jurisdiction. If there is no co-operation in the investigative stage, it is unlikely that a disagreement can be settled in the remedy stage.

The **Chair** thanked Canada for these remarks and turned to the contribution of the European Commission (EC), which also addresses the importance of aligning the timing of different merger investigations. He asked the EC to give an example of a merger case where the timelines of the various merger reviews were not aligned and of the challenges that this raised.

The **European Commission** referred to the *Panasonic/Sanyo* merger and discussed the important challenges it presented. The timings of the reviews of the different reviewing authorities were not aligned and that increased the risk that these agencies could take different approaches to the remedies required to address the concerns that each of them had identified in its own jurisdiction. In fact, the case was notified to the EC when a second request had already been launched in the US and when the Japanese Fair Trade

Commission had already discussed in quite some detail a remedy package. However, thanks to effective co-operation, the three agencies involved in this case were able to address their differences and arrive at a globally acceptable and effective remedy package. To address the different timing of the review processes, the EC engaged in co-operation even before the formal notification during the pre-notification phase. This allowed to reach an understanding of the concerns of the other authorities before the notification, which enabled the EC to progress faster in its own investigation and to close the case in phase I. The main lesson from the case is that co-operation should start as early as possible, even before the notification if necessary.

The **Chair** asked both Canada and the EC if they take any measure to encourage the merging parties to take a common approach to the merger in the different jurisdictions involved, when they realise that merger notifications are made sequentially by the merging parties for strategic reasons.

The delegate from **Canada** explained that in these circumstances the best solution to discuss the situation with the other agencies and inform the parties of the importance of agency co-operation. The ability of the reviewing agencies to talk to one another is absolutely essential to counterbalance any strategic behaviour of the parties. The representative of the **European Commission** agreed with Canada's position, and explained that this position has been formalised by the European Commission in the EC/US Best Practices on Co-operation in Merger Investigations. This document indicates that the merging parties have an interest in insuring alignment of timings of different reviews. If they do not facilitate agencies' co-operation, there is a risk that agencies could adopt incompatible remedies.

The **Chair** turned to the submission from Brazil which discusses the recent changes in merger review after the adoption of the new merger regime in 2012. In particular, he asked Brazil to elaborate on how those changes have affected the ability of the competition authority to co-operate internationally.

The delegate from **Brazil** explained that one of the main changes introduced by the 2012 reform was the adoption of a pre-merger review system. This enabled CADE to coordinate more effectively with other agencies. So far, two international mergers have been analysed and decided under the new regime following intensive co-ordination with other jurisdictions. This experience has been very positive in the sense that the companies were very keen to take part in this co-ordination and this resulted in faster decisions and in more effective remedies.

According to the Irish submission, the Irish Competition Act does not allow the carving out of purely Irish elements of a larger-cross border merger. The **Chair** asked Ireland which are the challenges from this situation for merger enforcement and for effective international co-operation.

The delegate from **Ireland** replied by bringing the example of the *Top Snacks/KP Snacks* merger. In that case, the merging parties generated 95% of their revenues in the UK and only 5% in Ireland. The deal, however, did not pose any problem in the UK, whereas in Ireland the merged entity would be the number one player in the market. The parties decided not to file in the UK (where there is a voluntary notification system) and to implement the transaction there, while the investigation in Ireland was still ongoing. In this case, the deal was not notified to the UK OFT or called in by its Mergers Intelligence Committee (who monitor non-notified merger activity) but if it had been, then the Irish competition authority would have tried to obtain waivers from the parties to discuss the matter with OFT. Since the Irish law cannot be enforced outside Ireland, the situation poses an obvious challenge for Ireland Competition Authority.

According to the Australian submission, the effectiveness of remedies often depends on the remedies obtained by the lead reviewing agency. The **Chair** asked the Australian delegation to discuss the challenges that the Australian Competition and Consumer Commission (ACCC) faces in cross-border mergers and in particular what are the consequence of having a voluntary notification regime.

The delegate from **Australia** explained that the challenge arises from two considerations. First, Australia has a voluntary notification system and second, the centre of a global transaction is often elsewhere (i.e. there are limited assets in Australia). Under these circumstances, when the transaction is reviewed by multiple authorities it is very important for the ACCC to engage with the lead regulator(s), which is often the agency of the jurisdiction where the assets are located, as early as possible. Close international co-operation leads to a smaller number of transactions escaping the attention of the ACCC. In the past, there have been occasions where mergers have completely slipped past Australian review, but this does not happen anymore. The main challenge is to deal with situations where the main assets involved by the merger are located overseas and the business in Australia cannot operate as a standalone business. In these cases, a separate divestiture undertaking is not possible and therefore it is very important that the ACCC coordinates with the agency in the jurisdictions where the assets are located so that the lead agency understands the ACCC's concerns and is in a position to negotiate a remedy package that addresses the concerns in both jurisdictions.

The **Chair** thanked the Australian delegation for its intervention and asked the Mexican delegation to elaborate on the institutional challenge faced by the Mexican competition authority (CFC) in co-ordinating remedies internationally, because of the fact that the Director General for mergers of the CFC who co-ordinates remedies with other agencies is not the final decision maker in Mexico.

The delegate from **Mexico** explained that the Plenum of the CFC is the last decision maker in Mexico. Any form of co-ordination and agreement between the Director General for mergers and other agencies does not bind the Plenum. This institutional challenge is very important but normally is more theoretical than practical because the recommendations of the Director General for mergers are regularly taken into account by the Plenum and decisions on remedies are generally consistent with what the staff's recommendations. There are many examples of very good informal co-operation with international counterparts in important cross border mergers, like for example the *Nestle/Pfizer* case discussed in the Mexican written contribution.

The **Chair** then turned to the US delegation and asked what would happen when the merging parties decide to grant waivers with different scopes for different jurisdictions or refuse to grant a waiver preventing discussions with certain jurisdictions.

The delegation of the **United States** emphasised that when these situations come up they lead to differentiated co-operation with different international partners. This can pose significant challenges, at least in theory. In practice however communication among enforcers and with parties can help to overcome these challenges. The *Western Digital/ Hitachi* merger case is a very good example of this. In this case, the US FTC cooperated with ten other agencies and the extent of the co-operation with each agency differed depending on the likely competitive effects in each jurisdiction. The parties granted waivers for co-operation with each agency which had launched an extended review of the case. However, there were a handful of other reviewing agencies with which the US FTC did not have waivers. Despite this, the agencies were able to co-operate quite effectively through calls to determine the different review timetables and the general approaches to the investigation in each jurisdiction. These discussions were based on publicly available or agency confidential information so they did not require the exchange of confidential information. The US delegation also reminded delegates that the US Department of Justice (DoJ) and Federal Trade Commission (FTC) have recently issued a model confidentiality waiver along with an explicatory document to be used in mergers cases and in civil non-merger matters. The revised form reflects the US agencies' recent learnings and it is expected to make it easier for merging parties and third parties, as well as for the agencies, to negotiate waivers.

The **Chair** opened the floor to comments and the delegate from **Germany** pointed at the *CPTN/Novel* case as a case raising issues related to the different timing of the investigations in different jurisdiction (the Bundeskartellamt and the US DoJ). The merger was notified shortly before Christmas, which already raised significant time constraints for the agencies. The authorities, however, were able to cooperate thanks to waivers but concluded their investigations with complementary sets of remedies; in Germany the transaction was withdrawn and pragmatically re-notified by the parties after the initial concerns were addressed in a restructured transaction.

The **Chair** asked BIAC and other outside business community representatives how widespread is strategic behaviour of notifying parties in deciding to stagger notifications and what could be the legitimate explanations for delaying notification in one or more jurisdictions.

**BIAC** noted that co-ordination of 10 or more notifications at once is a complicated task. The real challenge for the notifying parties is to figure out the jurisdiction(s) in which the process takes the longest. While strategic behaviour cannot be excluded, in the large majority of cases the simple complexity of handling multiple filings leads to the staggering of notifications. The number of jurisdictions with merger notification regimes has risen dramatically in the last ten years and this has increased the risk of conflicting remedies. The *Western Digital/Hitachi* case, for example, involved five jurisdictions all of which imposed a different set of remedies, which the businesses considered difficult to reconcile, if not conflicting. The business community has noted the tendency in some jurisdictions to issues “personalised” remedies. While this is understandable and justifiable in some cases, this should be balanced by a convergent approach to the remedy package, governed by positive comity principles. This means that the jurisdictions involved should be relying on the jurisdiction which is most able to execute the remedy, especially when the assets involved are located in one jurisdiction.

The **Chair** inquired if there were any reactions to BIAC’s contribution.

The representative of the **European Commission** stressed that when the authorities reviewing a merger have different notification systems (as in the case of EU and US), notification in both jurisdictions at the same time is not necessary. In such a situation it is better to notify first in the back loaded system and later in the front loaded system since the latter requires providing much more information. On the other hand, the best way to avoid any criticisms about gaming the system is to have a good dialogue from the beginning with the agencies involved. In response to BIAC particular comment about positive comity and the recognition that there need not always to be a remedy in every jurisdiction where there is an issue, the delegate from **Canada** pointed out that the experience of the Bureau shows that it does not take an action when the Bureau is fully satisfied with the remedies entered into in another jurisdiction.

## 2. Discussion of actual cross-border merger remedy cases

The **Chair** opened the second part of the discussion concerning the challenges that competition authorities face in seeking for coordinated outcomes in actual cross-border merger cases and gave the floor to Australia.

The delegate from **Australia** described the two key issues for designing an effective remedy: the assets and the purchaser. Evidently, the most effective remedy may not be identical in each jurisdiction as there may be additional and specific concerns in one jurisdiction or a purchaser in one jurisdiction may already have a significant presence in another preventing it to be a suitable purchaser for a global divestiture. In the *Pfizer/Wyeth* case, for example, there were specific concerns in Australia that did not arise in the US. In this case, a two part remedy was necessary, including a global remedy and an Australian-specific remedy. That was, however, an example where the parties resisted offering a suitable remedy in the first place and the discussion on what would be the most effective remedy for all the

jurisdictions had to go through multiple iterations. The delay however could have been avoided by acknowledging the issue earlier.

The **Chair** asked the Canadian delegation to expand on the challenges the Bureau faced in the *Novartis/Alcon* review, which is a case of a global merger affecting markets which are national.

According to the delegate from **Canada** the *Novartis/Alcon* was a case where the US had already ordered divestitures but there were additional concerns in Canada which were not necessarily addressed by such remedy package. The merging parties, the Competition Bureau and the US FTC engaged in substantial discussions to reach a distinct remedy package in a coordinated fashion. The solution involved identifying a single purchaser for all of the assets to be divested in both jurisdictions and also a common monitoring program by the divestiture trustee. This proved to be very efficient and effective because it reduced duplication and allowed the agencies to have the same information and the same perspective on the enforcement of the remedy.

The **Chair** moved to the Japanese delegation and asked to reflect on the challenges that monitoring behavioural remedies may pose and what measures the Japan Fair Trade Commission (JFTC) has taken to insure compliance with the behavioural undertakings.

To respond to the questions, the delegate from **Japan** gave a brief description of the *ASML/Cymer* merger case and the nature of remedies adopted in such case. In order to insure that the parties implemented the behavioural remedies involved with this case, they were required to report the status of compliance for five years from the closing of the merger. Also, the parties agreed to set up an independent monitoring scheme subject to approval of the JFTC.

The **Chair** then asked the Korean delegation how to secure implementation of a remedy when the merging parties are located in another jurisdiction and to insure that the remedy package is fully complied with.

The delegate from **Korea** referred to the *Rio Tinto/BHP Billiton* merger. In order to address the concerns of price increase and coordination due to high concentration post-merger and the level of dependence of Korea on the iron ore products of the merging parties, the Korean Fair Trade Commission (KFTC) considered two options: imposing behavioural remedies and banning the transaction. In the end, the KFTC decided not to prohibit the transaction which would have led to the possibility of the parties exiting the Korean market with an impact on consumer welfare, but concluded that international co-operation was the best means to secure compliance.

The **Chair** thanked the Korean delegation and turned to Mexico to offer its perspective on the use of waivers as a means to address some of the challenges posed by cross-border merger enforcement.

The delegation from **Mexico** indicated that the *Nestle/Pfizer* merger in 2012 led to a very high concentration in the infant formula market and was opposed by the Mexican authority (CFC). The CFC opposed the merger on the basis that the transaction was substantially lessening competition in the Mexican market. The CFC Plenum required the divestment to a third party of all assets necessary to maintain Pfizer infant formula division's presence in the Mexican market as an independent competitor. The CFC considered that this remedy, which *de facto* prevented the merger of Nestle and Pfizer in Mexico, would insure competition in the market. Since the transaction was notified in other jurisdictions (Chile and Colombia), waivers granted by the parties allowed the agencies to discuss effectively the remedy package with a full information set. As a result similar remedies were imposed in the other jurisdictions as well.

The **Chair** turned to the Ukrainian delegation to discuss why the Ukrainian Antimonopoly Committee preferred behavioural obligations in the Tampa/Kontern case when the parties had offered structural commitments.

The delegate from **Ukraine** clarified that the *Tampa/Kontern* merger did not lead to monopolization or to a substantial restriction of competition in Ukraine. However, since the market affected was very dynamic and market shares seemed prone to fluctuations, the Antimonopoly Committee preferred to consider behavioural instead of structural commitments.

The **Chair** then invited Brazil to discuss examples of successful co-operation mentioned in its submission and the reasons such success.

According to the delegate from **Brazil** prior to the 2012 legislative reform co-operation with other agencies was complex because the timing of the different notifications and national procedures were not always aligned. Under the former regime there was only one case where Brazil co-operated with other agencies and the remedies imposed were indeed aligned with those of the other enforcers. This case, however, took almost two years to reach a final decision in Brazil. Based on the Brazilian more recent experience, the reasons for successful co-operation are the similarity of the competition concerns and the pro-active involvement of the parties in procedural and substantial aspects as of the start of the investigation. Co-operation proved particularly important to reach consistent remedies in cases where the assets subject to divestment were located outside Brazil.

The **Chair** asked the Russian delegation to explain how seasonality influenced the remedy chosen for the dairy products case reviewed by FAS.

The delegate from **Russia** explained that the price volatility in the dairy products market is generally due to the seasonality of supply and demand of raw material and that this important factor had to be taken into account in the decision. The analysis of FAS showed a high concentration rate and the possibility of future dominance, indicating that while seasonality was important to consider it was not the key factor for the final decision. The merger was approved and remedies included some form of price control and non-discriminatory access of suppliers to crude milk. In addition to competition factors, FAS also considered social economic aspects of the merger as the merger promoted a positive influence on both farmers' profits and price stability.

### **3. The modification of remedies after their approval**

The **Chair** moved to the third and final part of the discussion and asked to the US delegation to comment on the specific situation where an remedy needs to be modified after it has been adopted.

The delegation of the **United States** emphasized that when modifying remedies in a cross-border context, the US agencies are very careful to ensure that the modifications would not have a negative impact on the remedies approved by sister agencies. International co-operation in these cases is paramount to a successful remedy revision discussion with the parties and with the other agencies. For example, in the case of the *Western Digital/Hitachi* merger, when intervening events called for a modification, the US FTC engaged in a close co-operation with the European Commission in order to ensure that all the aspects of the revised merger remedy were consistent with the existing arrangements. This allowed the effective implementation of the revised remedy in all jurisdictions involved.

The **Chair** then asked Korea to discuss the related case where a remedy is modified in another jurisdiction and this decision may have an impact in Korea. This may be the case in particular of remedies which have a long implementation period and require on-going coordination.

The delegate from **Korea** responded that there have not been cases where the differences in terms of the remedies imposed by other jurisdictions were significant. Usually, the KFTC is confronted with minor differences arising from different competitive environments. Also, procedural differences can cause differences in remedies and in their enforcement. This is the reason why, even if co-operation is very productive there can be cases where remedies will differ. In cross-border mergers, co-operation among competition authorities becomes very important but when remedies must be implemented over a long period of time it might be useful to consider ways to require the consent of other jurisdictions which have been involved in the design of the original remedy, which would make co-operation smoother when one agency reaches the conclusion that the original remedy should be modified.

To conclude the roundtable discussion, the **Chair** invited BIAC to react to the interventions of the other delegations and to offer its remarks on the discussion from a business perspective.

According to the delegate from **BIAC** in consumer products one can expect to see differing remedies in different jurisdictions due to different factual contexts. But even if remedies imposed by different agencies are different in the end, co-ordination on the process and procedures is quite welcome by the business community. However, in more global or regional cases, there is a need to coordinate on the substance of the remedy. What has changed since *GE-Honeywell* transaction, which is unanimously viewed as a low point for enforcement co-operation, is not the “how” to cooperate or the principles behind effective co-operation but rather the number of agencies that are active on the competition front in terms of imposing remedies, and the dynamics and complexity that this generates.

The **Chair** thanked all participants from the very interesting discussion and for the thoughtful remarks and adjourned the meeting.





## SYNTHÈSE

*Par le Secrétariat\**

Il ressort des débats de la table ronde, de la note du Secrétariat et des contributions écrites des délégués, les principaux points suivants :

- (1) *Les fusions transnationales posent des difficultés spécifiques aux autorités de la concurrence examinant une même opération dans plusieurs juridictions. Ce type d'opération peut nécessiter une étroite coordination et coopération entre les autorités chargées du contrôle afin qu'elles prescrivent des solutions si ce n'est similaires, à tout le moins cohérentes. La coopération est utile dans les discussions et dans les approches sur les mesures correctives en particulier.*

La concertation et la coopération entre autorités sont cruciales pour concevoir et mettre en œuvre des mesures correctives efficaces dans les affaires de fusions transnationales. L'action corrective retenue doit dissiper les préoccupations mises au jour par l'autorité tout en étant cohérente avec les mesures correctives imposées par d'autres juridictions. Une communication insuffisante peut déboucher sur des solutions différentes, voire contradictoires, ce qui peut inciter les parties à une fusion à se livrer à des manœuvres stratégiques visant à conclure un accord sur une mesure corrective avec une juridiction et à utiliser cet accord pour influencer les négociations avec d'autres autorités. La coopération peut s'avérer très utile même dans les affaires dans lesquelles les autorités chargées du contrôle parviennent à des conclusions différentes quant à l'opportunité d'imposer une mesure corrective. Même si ces divergences s'expliquent souvent par la disparité des contextes dans lesquels la fusion est évaluée, la coopération permet de garantir qu'elles se justifient.

- (2) *L'expérience des autorités de la concurrence montre que la coopération est plus efficace (i) lorsque les parties à la fusion donnent aux autorités les moyens d'engager une communication efficace dès le début du processus d'examen en leur accordant le cas échéant des dispenses de confidentialité ; et (ii) lorsque les calendriers des différents contrôles nationaux menés sur une même fusion coïncident le plus possible.*

Aujourd'hui, un nombre croissant de fusions notifiées ont des effets transfrontières et, à ce titre, font l'objet d'un contrôle dans plusieurs juridictions. Les risques et les coûts encourus par les entreprises du fait des multiples examens réglementaires ont augmenté de façon exponentielle. Le principal risque survient lorsqu'une mesure corrective est nécessaire dans plus d'une juridiction, puisqu'il est impératif d'assurer la cohérence des interventions réglementaires. L'expérience des autorités montre que, dans ces situations, la communication et la collaboration entre autorités de la concurrence sont les plus efficaces lorsqu'elles interviennent à un stade précoce de l'enquête. Certaines autorités soulignent par ailleurs que si une juridiction préconise une mesure corrective qui répond de façon satisfaisante aux préoccupations de leur juridiction en matière de

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\* Cette synthèse ne reflète pas nécessairement un consensus entre les membres du Comité de la concurrence. En revanche, il récapitule les points essentiels des débats ayant eu lieu au cours de la table ronde, des communications écrites présentées par les délégués, ainsi que du document de référence du Secrétariat.

concurrence, il ne sera pas nécessaire de prescrire à leur tour une action corrective. La coopération peut jouer un rôle décisif dans la création de mesures correctives qui peuvent dissiper les préoccupations de plusieurs autorités.

Les décalages existants entre les calendriers des examens menés en parallèle sur une fusion peuvent être à l'origine de difficultés pour les autorités de contrôle. Ces décalages peuvent être involontaires ou résulter d'une décision stratégique des parties à la fusion. Si celles-ci ont un intérêt commun à faire coïncider les procédures afin de faciliter la coopération et d'éviter que des mesures correctives incompatibles ne soient retenues, la difficulté à gérer de multiples contrôles de front peut conduire inévitablement à un espacement des notifications et à des décalages dans les enquêtes. Dans la pratique, lorsque des autorités ont connaissance d'une fusion susceptible de les concerner, elles devraient « encourager » les parties à remplir leurs obligations d'enregistrement dans la juridiction concernée afin de permettre aux autorités qui opèrent les contrôles de coopérer pendant les différentes étapes de leur examen. Cette démarche permet d'engager une coopération dès les premières étapes du processus d'examen et de limiter le risque que des solutions incohérentes soient adoptées ultérieurement.

- (3) *Le degré de coopération entre autorités de la concurrence dans les affaires de fusions transnationales a augmenté de façon significative grâce également au recours fréquent aux dispenses de confidentialité, qui rendent possibles les échanges d'informations confidentielles entre autorités chargées d'appliquer le droit de la concurrence. Autre dispositif propre à faciliter la coopération : la désignation de mandataires communs chargés de faire appliquer et de suivre la mise en œuvre des mesures correctives. Ce dispositif permet aux autorités de s'appuyer sur un ensemble commun d'informations relatives à l'exécution des mesures correctives et d'éviter les stratégies incohérentes.*

Au fil des ans, la coopération entre autorités de la concurrence dans le contexte des contrôles de fusions s'est fortement améliorée. Le recours croissant aux dispenses de confidentialité a joué un rôle déterminant dans cette évolution. Les dispenses peuvent s'avérer particulièrement utiles lorsque les autorités doivent discuter de mesures correctives, dans la mesure où elles permettent la transmission d'informations et de documents confidentiels nécessaires afin de s'assurer que les mesures correctives adoptées dans une juridiction sont compatibles avec celles adoptées dans d'autres juridictions. Le recours aux dispenses a toutefois ses limites. Il est peu probable, par exemple, que la cible d'une fusion hostile accorde une dispense. De même, les motivations des tiers à accorder des dispenses peuvent ne pas être aussi fortes que celles des parties à la fusion. Les informations fournies par les tiers peuvent toutefois s'avérer d'une grande importance notamment quand il s'agit de concevoir un programme correctif efficace permettant de traiter les effets transfrontaliers des fusions.

Après avoir élaboré une mesure corrective adaptée, les autorités doivent déterminer le meilleur moyen d'en suivre l'exécution par les parties. Les mesures correctives structurelles transfrontalières sont difficiles à faire appliquer (à titre d'exemple, si les actifs sont situés hors du pays, il se peut que l'autorité de la concurrence nationale n'ait pas la compétence de faire exécuter la mesure corrective en cas de non-respect ou de respect seulement partiel des dispositions prévues). Dans le cas des mesures comportementales, la difficulté réside dans l'accès aux informations nécessaires pour contrôler le respect durable des engagements ; l'obtention de ces informations peut requérir l'assistance de la juridiction concernée qui n'a peut-être pas intérêt à les fournir (lorsque par exemple elle n'a pas imposé la mesure corrective et n'a donc aucune obligation de suivi). La désignation de mandataires communs pour la mise en œuvre et le suivi des mesures correctives peut aider les autorités à surmonter certaines de ces difficultés. Le

recours à un mandataire commun réduit les doublons et permet aux autorités de bénéficier des mêmes informations lorsqu'elles évaluent la bonne exécution d'une mesure corrective.

- (4) *L'intensité de la coopération des autorités de la concurrence entre elles peut varier selon les circonstances. Dans les affaires impliquant de multiples juridictions, une collaboration étroite n'est nécessaire qu'entre les autorités dont la juridiction est la plus concernée par la fusion.*

Les juridictions dans lesquelles il est le plus probable que la fusion produira des effets (anti)concurrentiels sont les plus susceptibles de procéder à un contrôle complet de l'opération. Ces autorités devront engager une coopération bien plus étroite et devront probablement s'entraider au stade de la définition et de l'exécution du programme correctif. Les autres juridictions peuvent participer à ce dialogue sans qu'il soit utile d'atteindre un tel degré de coopération. L'expérience montre que l'élément clé pour assurer la fluidité et l'efficacité d'un processus de coopération est l'établissement d'un dialogue de qualité entre autorités homologues. Ce dialogue sera plus ou moins poussé et pourra prendre différentes formes : participation à des conférences téléphoniques communes avec les parties ou avec des tiers, organisées par d'autres autorités ; discussion sur le contexte et l'arrière-plan sectoriel d'une opération ; comparaison sur le fond des approches de la définition du marché et des effets de l'opération ; partage et examen des documents et autres informations obtenus des parties à la fusion ou de tiers ; ou encore coordination sur des mesures correctives.

- (5) *Concevoir des mesures correctives adaptées dont les effets attendus perdurent dans le temps peut s'avérer difficile. Les marchés concernés par la mesure corrective évoluent et une modification de la mesure après qu'elle a été convenue avec l'autorité de la concurrence peut se révéler nécessaire. Pour cette raison, il est possible que des mesures correctives doivent être révisées après un certain temps, afin de tenir compte de la survenue d'un événement ou de l'évolution de la situation. Si cela se produit, il importe au premier chef de coordonner toute modification avec les autres autorités initialement impliquées dans le contrôle de la fusion, car les modifications peuvent avoir également des effets sur leurs mesures correctives.*

Selon ce qu'il ressort de la table ronde, il serait souhaitable qu'il existe des dispositifs permettant de demander la modification d'une mesure corrective, que ce soit pour tenir compte de l'évolution de la situation ou de problèmes posés par la mesure corrective telle qu'elle a été initialement conçue. Plus la durée d'application de la mesure corrective est longue, plus l'existence de tels dispositifs est importante. Si le régime de contrôle des fusions d'un pays ne prévoit de dispositifs permettant de réviser des mesures correctives une fois adoptée la décision concernant la fusion, il peut être utile d'inclure une « clause de révision » dans le programme correctif prévu. Les clauses de révision permettent aux autorités de prolonger le délai de mise en œuvre de la mesure prévue dans les engagements si des circonstances inattendues entravent la bonne application de la mesure corrective convenue. Elles leur permettent par ailleurs de lever ou de modifier les engagements dans l'éventualité où une évolution imprévue des conditions de marché l'exige. Ces clauses peuvent également être invoquées par les parties à la fusion si elles peuvent justifier de motifs sérieux.



## NOTE DE RÉFLEXION

*Par le Secrétariat*

### 1. Introduction

L'expression « *mesure corrective transfrontalière* » s'emploie lorsqu'une autorité de la concurrence souhaite appliquer une mesure corrective dans une affaire de fusion, mais que les parties à la concentration et/ou leurs actifs sont situés à l'étranger, ce qui implique la vente d'actifs de la nouvelle entité ou l'adoption de certaines mesures par celle-ci dans une autre juridiction que celle chargée de statuer sur la fusion. Dans ces cas, les autorités de la concurrence peuvent se trouver confrontées à d'importantes difficultés à différentes étapes du processus d'élaboration et de mise en œuvre de la mesure corrective :

- d'une part, il est possible que plusieurs autorités de la concurrence examinant la même opération de fusion parviennent à des conclusions contradictoires quant à l'opportunité de mesures correctives, notamment si le « centre de gravité » de la fusion<sup>1</sup> est situé dans une juridiction qui a choisi de ne pas adopter de mesures contre cette opération ;
- d'autre part, deux autorités de la concurrence peuvent mettre en évidence des problèmes se rapportant à des aspects différents d'une même fusion, auquel cas les mesures correctives jugées nécessaires par une autorité peuvent ne pas coïncider avec celles souhaitées par l'autre et une discordance peut être constatée ;
- enfin, même si les autorités impliquées s'accordent sur les problèmes de concurrence soulevés par la fusion, elles peuvent avoir des avis divergents sur les mesures correctives à prendre afin de les résoudre.

Dans son courrier d'appel à contributions du 26 juillet 2013 (COMP/2013.133), le président du Groupe de travail n°3 a suggéré d'axer la réflexion sur le suivi et l'application des mesures correctives transfrontalières ainsi que sur les problèmes qui surviennent lorsque ces mesures doivent être revues. La question des fusions internationales a été abordée sous différents angles lors de nombreuses tables rondes ces dernières années<sup>2</sup>.

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<sup>1</sup> Le centre de gravité de l'opération peut être défini en fonction de la nationalité des parties, du lieu où se trouvent les actifs productifs ou de celui où est réalisée la majeure partie des ventes.

<sup>2</sup> Voir les documents suivants : Les mesures correctives dans les affaires de concentration en 2003 [DAF/COMP(2004)21], Les mesures correctives transfrontalières dans les affaires de concentration en 2005 (documents disponibles uniquement sur OLIS), Le Contrôle des fusions transnationales : défis à relever par les pays en développement et les économies émergentes en 2011 [DAF/COMP/GF(2011)13] et Les mesures correctives dans les affaires de concentration en 2011 [DAF/COMP(2011)13]. Voir également le Rapport du Comité de la concurrence de l'OCDE au Conseil de l'OCDE concernant la recommandation de 2005 sur le contrôle des fusions [C(2013)72].

## 2. Coopération et coordination : avantages et difficultés

Ces dernières années, l'application de la réglementation en matière de fusions est devenue de plus en plus transnationale et il est indispensable, dans tout processus de décision, de définir les mesures correctives à prendre pour contrebalancer les effets anticoncurrentiels des fusions transnationales. Des conflits peuvent survenir à tous les stades du processus, de la détermination de la mesure corrective à prendre (une autorité peut par exemple estimer qu'elle n'a pas le pouvoir d'exiger et de faire exécuter une mesure corrective portant sur des actifs situés dans un autre pays) au suivi de sa bonne exécution (une autorité peut par exemple ne pas disposer des outils juridiques indispensables pour demander les informations nécessaires au suivi de l'exécution et du respect de la mesure corrective dès lors que ces informations se trouvent dans un autre pays). Des conflits peuvent également survenir en cas de modification ou de révision des mesures correctives décidées, une fois que l'opération a été autorisée par toutes les juridictions ayant participé au contrôle. Dans ce cas, la modification des mesures correctives dans une juridiction donnée peut être en contradiction avec les mesures appliquées dans une autre, en particulier lorsqu'il n'est pas nécessaire de revoir les mesures correctives déjà convenues dans cette autre juridiction.

Dans l'application de la réglementation en matière de fusions transnationales, la consultation et la coopération entre autorités de la concurrence est cruciale. Si les autorités chargées de contrôler une même opération ne coopèrent ou ne communiquent pas suffisamment, les entreprises peuvent être incitées à n'opérer que des fusions qui seront jugées acceptables dans l'ensemble des pays où leur notification est probable, ce qui peut décourager d'autres opérations susceptibles de servir la concurrence ou l'efficacité. La coopération et la coordination sont également importantes pour éviter que les parties à la fusion ne se livrent à des manœuvres stratégiques visant à trouver un accord avec une autorité et à tenter d'utiliser cet accord pour influencer les négociations avec d'autres autorités. Si les parties savent que les différentes autorités sont en contact régulier, il leur sera plus difficile de se servir de l'une contre l'autre.

En pareil cas, la coopération bilatérale présente des avantages substantiels pour les autorités de la concurrence et pour les parties à la fusion. Pour les autorités de la concurrence, ces avantages ne se limitent pas à des aspects administratifs, ils ont aussi des effets concrets pour les consommateurs et les marchés locaux, par exemple lorsque la coopération améliore la perspective d'élaboration et de mise en œuvre d'une mesure corrective efficace dans une affaire donnée. La coopération entre les autorités de la concurrence au stade des mesures correctives est dès lors essentielle, en particulier pour assurer une plus grande cohérence entre ces autorités. Dans le cadre des discussions internationales qui ont eu lieu au sein de l'OCDE et d'autres instances, diverses formes de coopération<sup>3</sup> ont été envisagées, notamment l'idée d'un « partage des tâches » entre les autorités de la concurrence.

<sup>3</sup> Le rapport remis par l'ICPAC en 2000 a examiné de façon approfondie la possibilité de recourir à des dispositifs de partage des tâches au stade des mesures correctives et a conclu qu'un recours plus fréquent à ce type de coopération pourrait offrir des avantages substantiels. Le rapport envisage différents scénarios dans lesquels ces dispositifs pourraient être utilisés : i) des négociations conjointes, durant lesquelles chaque juridiction concernée exposerait ses propres préoccupations quant aux effets anticoncurrentiels probables d'une opération proposée et mettrait en œuvre individuellement des mesures correctives négociées conjointement et ii) la désignation d'une seule juridiction, dite « juridiction chef de file », qui négocierait avec les parties à la fusion des mesures correctives répondant à ses propres préoccupations et à celles des autres juridictions concernées. Ce second scénario pourrait correspondre, par exemple, à une situation dans laquelle les préoccupations de toutes les juridictions concernées seraient identiques, mais aussi à une situation dans laquelle la « juridiction chef de file » exigerait des mesures correctives allant au-delà de ses propres préoccupations, afin de répondre aux inquiétudes exprimées par les autres juridictions qui coopèrent. L'ICPAC était le Comité consultatif sur les questions internationales de concurrence (International Competition Policy Advisory Committee) de l'Attorney General et de l'Assistant Attorney General for Antitrust américains. Créé en novembre 1997 afin d'examiner les questions de concurrence qui

Au fil des ans, la coopération entre les autorités de la concurrence s'est fortement accrue dans le cadre de leurs enquêtes sur les fusions. Cela tient à ce que les parties à la fusion accordent plus communément des dérogations qui permettent aux autorités d'échanger des informations (y compris des informations confidentielles) et d'examiner le fond de l'affaire. Le recours croissant à ces dérogations a assurément aidé les autorités à coordonner les mesures correctives dans un contexte international. Lorsqu'en mai 2003, le Groupe de travail n°3 examinait la question des échanges d'informations dans le cadre de la coopération internationale en matière d'enquêtes sur les fusions, il a constaté que très peu de juridictions avaient sollicité des dérogations. La plupart d'entre elles ne l'avaient jamais fait et seuls les États-Unis avaient alors indiqué que l'usage des dérogations était une « pratique courante ». En 2011, cependant, la plupart des pays de l'OCDE indiquaient recourir régulièrement à ces dérogations.

### **Box 1. Éventuelles questions à examiner**

(1) Veuillez décrire brièvement quelques grandes fusions contrôlées par votre autorité au cours des 5 dernières années et dans le cadre desquelles des mesures correctives transfrontalières ont été prises (impliquant par exemple la vente d'actifs ou l'adoption d'autres mesures en dehors de votre pays ou un aspect ayant fait l'objet d'une enquête par une autre autorité).

(2) Avez-vous déjà été en désaccord avec la juridiction considérée comme le « centre de gravité » de l'opération quant à l'opportunité de mesures correctives ?

(3) Veuillez décrire l'expérience de votre autorité en matière de coordination et de coopération avec toute autre autorité concernant ces mesures correctives, notamment sur les points suivants :

- l'obtention de dérogations de la part des parties ; en cas de refus de dérogation, veuillez expliquer les raisons de ces refus ;
- les mécanismes de coordination/coopération utilisés en l'absence de dérogation, et l'efficacité de ces mécanismes ;
- la détermination ou l'évaluation des actifs à vendre ;
- l'évaluation des éventuels repreneurs et la consultation des acteurs du marché au sujet de la mesure corrective proposée ;
- l'élaboration de mesures correctives comportementales, le cas échéant ; et
- l'utilisation ou la sélection de mandataires chargés du contrôle, de la séparation ou des ventes, y compris le recours à un même mandataire rendant des comptes aux deux autorités concernées.

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se posent au niveau international au XXI<sup>e</sup> siècle, il a achevé ses travaux en juin 2000. Les conclusions et recommandations de l'ICPAC figurent dans un rapport publié le 28 février 2000. Le rapport complet est disponible à l'adresse <http://www.justice.gov/atr/icpac/finalreport.html>.



### 3. Contrôle et exécution des mesures correctives transnationales

Une fois élaborée la mesure corrective appropriée, les autorités doivent définir le meilleur moyen de surveiller son exécution par les parties. Elles peuvent avoir recours à des mandataires et à d'autres tiers intéressés pour les aider à garantir le respect des mesures correctives dans les affaires de fusion. L'exécution fait également l'objet d'un contrôle différent selon le type de mesure corrective. Les mesures correctives dans les affaires de fusion sont le plus souvent considérées comme *structurelles* lorsqu'elles exigent une cession d'actifs ou l'octroi de droits de propriété intellectuelle, ou *comportementale* lorsqu'elles obligent la nouvelle entité à adopter un comportement donné ou à ne pas s'y livrer.

Au chapitre des mesures structurelles, l'utilisation d'accords de séparation, le recours à des mandataires chargés du contrôle, les mesures à mettre en œuvre avant que l'autorité de la concurrence ne rende sa décision, l'exigence faite aux parties de désigner un acquéreur approuvé en cas de cession d'actifs et les dispositions prévoyant la possibilité de céder des actifs alternatifs ont contribué à ce que les mesures correctives soient mises en œuvre en temps opportun. Sur le front des mesures comportementales, qui requièrent une surveillance permanente, le recours aux clauses d'arbitrage s'est révélé utile dans certains pays afin d'abaisser le coût induit par le contrôle de la mise en œuvre. En cas de différend sur la mise en œuvre de la mesure corrective, le groupe spécial d'arbitrage est habilité à proposer à la partie lésée des mesures correctives de droit privé, tandis que l'autorité conserve la faculté d'imposer des sanctions telles que des amendes. La possibilité de recourir à l'arbitrage incite tous les éventuels bénéficiaires à veiller à la bonne mise en œuvre des mesures correctives par la nouvelle entité, ce qui pourrait s'avérer plus efficace que tout effort de contrôle de la part de l'autorité de la concurrence.

Les mesures correctives transnationales structurelles sont difficiles à faire appliquer (à titre d'exemple, si les actifs sont situés hors du pays, l'autorité de la concurrence nationale peut ne pas avoir la faculté de faire appliquer la mesure corrective en cas de non-respect ou de respect seulement partiel des dispositions prévues). Dans le cas des mesures comportementales, la difficulté consiste à accéder aux informations nécessaires pour contrôler régulièrement le respect des engagements ; l'obtention de ces informations peut requérir l'aide de la juridiction concernée, sans que cette dernière ait intérêt à les fournir (lorsqu'elle n'a par exemple pas imposé la mesure corrective et n'a donc aucune obligation de contrôle).

#### Box 2. Éventuelles questions à examiner

(4) Quelles difficultés peuvent survenir dans l'élaboration ou la mise en œuvre de mesures correctives transnationales et comment les autorités les ont-elles surmontées, seules ou en coopération ou coordination avec une ou plusieurs autres autorités ?

(5) S'agissant de la mise en œuvre et du contrôle, quel type de mesure corrective (structurelle ou comportementale) est préférable en cas de fusion internationale ?

### 4. Révision des mesures correctives convenues en raison de circonstances imprévues ou d'évolution de la situation

Une modification de la mesure corrective peut se révéler nécessaire une fois la mesure convenue avec l'autorité de la concurrence. En cas de modification ou de révision d'une mesure corrective après l'autorisation d'une fusion transnationale par l'ensemble des juridictions concernées, des conflits peuvent survenir. La modification des mesures correctives dans une juridiction donnée peut être en contradiction avec les mesures appliquées dans une autre, en particulier lorsqu'il n'est pas nécessaire de revoir les mesures correctives déjà convenues dans cette autre juridiction.

De manière générale, il est souhaitable que l'autorité de la concurrence et les parties puissent demander la modification d'une mesure corrective, que ce soit pour tenir compte d'un changement de situation ou de problèmes soulevés par la mesure corrective telle qu'elle a été initialement conçue<sup>4</sup>. Plus la durée d'application de la mesure corrective est longue, plus ces mécanismes sont importants. Si le régime des fusions d'un pays ne prévoit pas de dispositions permettant de réviser les mesures correctives après la décision concernant la fusion, il peut être utile d'inclure une « clause de révision » dans les mesures correctives prévues.

Les clauses de révision permettent aux autorités de prolonger le délai de mise en œuvre de la mesure qui est prévu dans les engagements si des circonstances inattendues entravent la bonne application de la mesure corrective convenue. Elles leur permettent par ailleurs de lever ou modifier des dispositions si une évolution imprévue des conditions de marché l'exige. Les parties à la fusion peuvent faire valoir ces clauses en exposant des motifs légitimes<sup>5</sup>.

Certaines autorités peuvent réviser l'ensemble de mesures correctives en modifiant la décision initiale concernant la fusion. Elles n'auront toutefois qu'une marge de manœuvre limitée dans l'élaboration de la nouvelle mesure corrective. Les tiers opposés à la décision doivent normalement être consultés et il revient aux parties notifiantes de justifier que la situation a évolué dans une mesure telle qu'une révision de la décision de fusion dans son ensemble s'impose. Compte tenu de ces difficultés, cette possibilité est rarement saisie.

### Box 3. Éventuelles questions à examiner

(6) Avez-vous rencontré des situations dans lesquelles des mesures correctives transnationales ont dû être révisées en raison de circonstances imprévues ou d'une évolution de la situation ? Comment avez-vous coopéré et vous êtes-vous coordonnés dans ces cas ?

(7) Selon votre autorité de la concurrence, existe-t-il des obstacles juridiques ou pratiques qui entravent votre faculté à réviser une mesure corrective une fois qu'une opération a été autorisée ?

<sup>4</sup> Voir le rapport de 2005 du Réseau international de la concurrence sur le projet d'examen des mesures correctives dans les affaires de fusion.

<sup>5</sup> Les textes type de la Commission européenne sur les engagements de cession d'actifs comportent la clause de révision suivante :

« 34. La Commission pourra, le cas échéant et en réponse à une demande de [X] exposant des motifs légitimes, accompagnée d'un rapport du Mandataire chargé du contrôle :

- (i) accorder une prolongation des délais prévus par les Engagements, ou
- (ii) lever, modifier ou remplacer, en cas de circonstances exceptionnelles, une ou plusieurs dispositions des présents Engagements.

Pour solliciter une prolongation de délai, [X] devra déposer une demande auprès de la Commission au plus tard un mois avant l'expiration du délai en question en exposant des motifs légitimes. [X] ne sera habilité à solliciter une prolongation durant le dernier mois de toute période qu'en des circonstances exceptionnelles. »



## COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

Le Président du Groupe de travail n° 3, **M. William Baer**, ouvre les débats de la table ronde et prononce quelques remarques générales sur l'importance de la coopération et de la concertation internationales entre autorités chargées d'appliquer le droit de la concurrence en ce qui concerne les mesures correctives dans les affaires de fusions transnationales. Le **Président** note qu'une coopération insuffisante entre les autorités de la concurrence peut déboucher sur des solutions différentes en termes de mesures correctives, ce qui pourrait inciter les parties à une fusion à se livrer à des manœuvres stratégiques visant à parvenir à un accord sur un programme correctif dans une juridiction, puis à utiliser cet accord pour influencer les négociations avec d'autres autorités. Le **Président** souligne l'amélioration considérable, en qualité et en intensité, de la coopération entre autorités dans le domaine des fusions, et voit dans le recours aux dispenses de confidentialité la principale raison de cette évolution.

Le **Président** énumère trois sujets à débattre en table ronde : (i) les difficultés rencontrées par les autorités de la concurrence dans l'élaboration, la mise en application et le suivi des mesures correctives dans les affaires de fusions transnationales ; (ii) une discussion sur des affaires de fusions transnationales de grande ampleur ; et (iii) la révision d'une mesure corrective transfrontalière après son approbation.

### **1. Difficultés rencontrées par les autorités de la concurrence dans l'élaboration, la mise en application et le suivi de mesures correctives transfrontalières**

Le **Président** invite le Canada à évoquer en quoi les décalages dans les calendriers des enquêtes des différentes juridictions peuvent avoir des incidences sur la coopération entre les autorités chargées d'examiner une fusion.

Selon la délégation du **Canada**, le calendrier des enquêtes pose moins de problèmes au Bureau de la concurrence depuis l'entrée en vigueur, en 2009, des modifications apportées à la loi sur la concurrence, qui ont permis d'harmoniser les dispositions relatives à l'enregistrement des opérations et au calendrier des procédures avec celles d'autres autorités. Le Canada dispose désormais d'une procédure de contrôle des fusions en deux étapes qui coïncide dans une large mesure avec celle de bon nombre d'autres systèmes nationaux d'examen des fusions, et, de ce fait, nombre d'opérations transnationales sont aujourd'hui examinées par le Canada en même temps que par d'autres autorités. L'expérience du Canada en matière de coopération avec d'autres juridictions est largement positive, notamment lorsque le Bureau peut collaborer avec d'autres autorités au début de la phase d'enquête. Cependant, il peut encore arriver que des fusions soient enregistrées au Canada après l'avoir été dans d'autres juridictions. Dans ces affaires, le principal risque survient lorsqu'il faut définir des mesures correctives appropriées dans plus d'une juridiction. En l'absence de coopération au cours de la phase d'enquête, il est peu probable qu'un différend puisse être réglé au stade des mesures correctives.

Le **Président** remercie le Canada de ces remarques et passe à la contribution de la Commission européenne (CE), qui traite elle aussi de l'importance de faire coïncider les calendriers des différentes enquêtes menées sur une fusion. Il demande à la Commission européenne de citer l'exemple d'une affaire de fusion dans laquelle les calendriers des différents examens n'étaient pas harmonisés et d'exposer les difficultés qui en ont découlé.

La **Commission européenne** évoque la fusion *Panasonic/Sanyo* et décrit les importantes difficultés rencontrées. Les examens des différentes autorités de contrôle ne coïncidaient pas, ce qui augmentait la probabilité de voir ces autorités adopter des stratégies correctives différentes pour résoudre les préoccupations que chacune d'elles avait mises au jour dans sa propre juridiction. De fait, l'opération avait été notifiée à la Commission européenne alors même qu'une deuxième demande avait déjà été déposée aux États-Unis et que la *Japan Fair Trade Commission* (JFTC) avait déjà discuté de façon assez approfondie d'un programme correctif. Toutefois, grâce à une coopération efficace, les trois autorités intervenant dans cette affaire ont pu trouver un terrain d'entente et arrêter un ensemble de mesures correctives acceptable et efficace dans les différents pays. Pour résoudre le problème des décalages entre les procédures d'examen, la Commission européenne avait engagé un processus de coopération avant même la notification formelle, pendant la phase de notification préalable. Cette démarche a permis d'appréhender les préoccupations des autres autorités avant la notification, ce qui a aidé la Commission européenne à avancer plus vite dans sa propre enquête et à clore le dossier en phase I. Le principal enseignement tiré de cette affaire est que la coopération devrait commencer le plus tôt possible, si nécessaire avant même la notification.

Le **Président** demande au Canada et à la Commission européenne s'ils prennent des mesures visant à inciter les parties à une fusion à adopter une approche commune de l'opération dans les différentes juridictions concernées, dès lors qu'ils s'aperçoivent que plusieurs notifications sont réalisées successivement par les parties à la fusion pour des raisons stratégiques.

Le délégué du **Canada** explique que, dans ces circonstances, la meilleure solution consiste à examiner la situation avec les autres autorités et à informer les parties de l'étendue de la coopération entre les autorités. La capacité des autorités de contrôle à échanger entre elles est absolument déterminante pour contrebalancer d'éventuelles manœuvres stratégiques des parties. Le représentant de la **Commission européenne** rejoint le Canada sur ce point et explique que cette position a été formalisée par la Commission européenne dans le code des bonnes pratiques sur la coopération entre l'UE et les États-Unis en matière d'examen des opérations de concentration. Ce document indique qu'il est de l'intérêt des parties à une fusion de faire en sorte que les calendriers des différents contrôles coïncident. Si les parties ne facilitent pas la coopération entre les autorités, celles-ci peuvent adopter des mesures correctives incompatibles.

Le **Président** passe à la contribution du Brésil, qui traite des récents changements intervenus dans l'examen des fusions à la suite de l'adoption, en 2012, du nouveau régime de contrôle des opérations de fusion. Il demande en particulier au Brésil d'expliquer en quoi ces changements ont modifié la capacité de l'autorité de la concurrence à coopérer à l'échelle internationale.

Le délégué du **Brésil** explique que l'un des principaux changements introduits par la réforme de 2012 est l'adoption d'un système de contrôle préalable, qui a permis à l'autorité de la concurrence brésilienne (CADE) de coordonner plus efficacement son action avec d'autres autorités. Pour l'heure, l'autorité a eu recours à ce nouveau régime pour analyser deux fusions internationales et statuer sur ces opérations au terme d'un processus de coordination intensive avec d'autres juridictions. Le bilan a été très positif dans le sens où les entreprises se sont montrées tout à fait disposées à prendre part à cet effort de coordination, ce qui s'est traduit par des décisions plus rapides et des mesures correctives plus efficaces.

Selon la contribution de l'Irlande, la Loi sur la concurrence irlandaise ne permet pas d'analyser séparément les éléments purement irlandais d'une fusion transnationale. Le **Président** demande à la délégation irlandaise quels sont les problèmes qui en résultent pour la mise en œuvre de la législation sur les fusions et pour une coopération internationale efficace.

Le délégué d'**Irlande** répond en prenant l'exemple de la fusion *Top Snacks/KP Snacks*. Dans cette affaire, les parties à la fusion réalisaient 95 % de leur chiffre d'affaires au Royaume-Uni et seulement 5 % en Irlande. L'opération ne posait toutefois aucun problème au Royaume-Uni, alors qu'en Irlande, l'entité issue de la fusion aurait été l'acteur numéro un du marché. Les parties ont décidé de ne pas enregistrer l'opération au Royaume-Uni (où la notification est volontaire), et de la mettre en œuvre sur ce territoire, alors que l'enquête était toujours en cours en Irlande. Dans cette affaire, l'opération n'a pas été notifiée à l'OFT britannique et son comité d'analyse des fusions (le *Mergers Intelligence Committee*, chargé du suivi des fusions non notifiées) ne s'en est pas saisi, mais, dans le cas contraire, l'autorité de la concurrence irlandaise aurait tenté d'obtenir des dispenses de confidentialité auprès des parties afin de discuter de l'affaire avec l'OFT. Comme le droit irlandais ne peut pas s'appliquer en dehors de l'Irlande, la situation pose un problème évident pour l'autorité de la concurrence irlandaise.

Selon la contribution australienne, l'efficacité de l'action corrective dépend souvent des mesures correctives négociées par l'autorité de contrôle chef de file. Le **Président** demande à la délégation australienne d'exposer les difficultés que rencontre l'*Australian Competition and Consumer Commission* (ACCC) dans le contexte des fusions transnationales et, en particulier, ce qu'implique l'existence d'un dispositif de notification volontaire.

Le délégué de **Australie** explique que l'origine des difficultés rencontrées est double : premièrement, l'Australie dispose d'un système de notification volontaire ; deuxièmement, le centre de gravité d'une opération internationale se situe souvent à l'étranger (il y a peu d'actifs concernés en Australie). Dans ces circonstances, lorsqu'une opération est contrôlée par plusieurs autorités, il est très important pour l'ACCC de nouer le plus tôt possible des contacts avec l'autorité (ou les autorités) chef de file, qui est souvent l'autorité du pays où se trouvent les actifs. Une étroite coopération internationale permet de réduire le nombre d'opérations échappant à l'attention de l'ACCC. Si, par le passé, des opérations de fusion ont pu échapper totalement à l'examen de l'Australie, cela n'arrive plus désormais. Le principal défi est de traiter des situations où les principaux actifs concernés par la fusion sont situés à l'étranger et où l'entreprise en Australie ne peut pas exercer en tant qu'activité autonome. Dans ces affaires, un engagement de cession d'actifs séparé n'est pas envisageable et il est donc très important que l'ACCC se concerte avec l'autorité du pays où sont situés les actifs, de sorte que l'autorité chef de file comprenne les préoccupations de l'ACCC et soit en mesure de négocier un programme correctif propre à dissiper les préoccupations des deux juridictions.

Le **Président** remercie la délégation australienne de son intervention et demande à la délégation mexicaine d'exposer en détail l'obstacle d'ordre institutionnel que rencontre l'autorité de la concurrence mexicaine (CFC) pour coordonner une action corrective à l'échelle internationale, sachant qu'au Mexique, la décision finale n'est pas du ressort du directeur général chargé des fusions de la CFC qui assure la coordination des mesures correctives avec d'autres autorités.

Le délégué du **Mexique** explique que c'est la réunion plénière de la CFC qui statue en dernier ressort au Mexique. Aucune forme de coordination ni d'accord entre le directeur général chargé des fusions et d'autres autorités de la concurrence ne peut engager la réunion plénière. Cet obstacle institutionnel est très important mais s'avère normalement plus théorique que pratique, puisque les recommandations du directeur général chargé des fusions sont régulièrement prises en compte par la réunion plénière, et que les décisions relatives aux mesures correctives sont généralement cohérentes avec les recommandations du service chargé des fusions. Il existe de nombreux exemples de coopération informelle très poussée avec

des homologues internationaux dans des affaires de fusions transnationales importantes, comme l'affaire *Nestlé/Pfizer*, présentée dans la contribution écrite du Mexique.

S'adressant ensuite à la délégation américaine, le **Président** s'interroge sur ce qui se passe dans l'éventualité où les parties à la fusion décident d'accorder des dispenses de confidentialité de portée différente selon les juridictions, ou encore, refusent d'accorder une dispense, empêchant ainsi les échanges avec certaines juridictions.

La délégation des **États-Unis** souligne que lorsque ces situations se présentent, elles entraînent une coopération différenciée avec les différents partenaires internationaux, ce qui peut créer d'importantes difficultés, du moins en théorie. Dans la pratique, toutefois, la communication entre autorités et avec les parties peut aider à surmonter ces difficultés. La fusion *Western Digital/ Hitachi* en est un très bon exemple. Dans cette affaire, la FTC américaine a coopéré avec dix de ses homologues et le champ de la coopération avec chaque autorité différait en fonction des effets probables de l'opération sur la concurrence dans chaque pays. Les parties ont accordé des dispenses de confidentialité permettant la coopération avec chaque autorité procédant à un examen complet de l'affaire. Toutefois, il restait quelques autorités de contrôle auprès desquelles la FTC ne disposait pas de dispense de confidentialité. Pour autant, les autorités ont pu coopérer assez efficacement *via* des échanges téléphoniques visant à déterminer les calendriers des différents examens et la stratégie générale de l'enquête dans chaque juridiction. Ces discussions s'appuyaient sur des informations librement accessibles ou sur des informations confidentielles propres aux autorités, de sorte qu'elles ne nécessitaient pas l'échange d'informations confidentielles. La délégation américaine rappelle également aux délégués que le *Department of Justice* (DoJ) et la *Federal Trade Commission* (FTC) ont récemment publié un modèle de dispense de confidentialité, assorti d'un document explicatif, utilisable dans les affaires de fusions et dans les affaires civiles non liées à des fusions. Le formulaire révisé, qui tient compte de l'expérience récente des autorités américaines, devrait aider les parties à une fusion et les tiers intéressés, mais également les autorités, à négocier des dispenses de confidentialité.

Le **Président** demande s'il y a des commentaires et le délégué d'**Allemagne** cite l'opération *CPTN/Novel* comme un exemple d'affaire posant des problèmes liés à l'absence d'harmonisation des calendriers d'enquête entre différentes juridictions (le *Bundeskartellamt* et le DoJ américain). La fusion avait été notifiée peu de temps avant Noël, ce qui imposait d'importantes contraintes de délai aux autorités. Celles-ci ont toutefois pu coopérer grâce aux dispenses et ont conclu leurs enquêtes en adoptant des programmes correctifs complémentaires ; en Allemagne, l'opération a été retirée puis, dans une démarche pragmatique, notifiée de nouveau par les parties après que la restructuration de l'opération eut permis de dissiper les préoccupations initiales.

Le **Président** demande au BIAC et à des représentants extérieurs des milieux d'affaires dans quelle mesure la décision des parties à une fusion d'espacer les notifications relève d'une manœuvre stratégique, et quels pourraient être les motifs légitimes pour retarder la notification dans une ou plusieurs juridictions.

Le **BIAC** fait observer qu'il est compliqué de gérer de front une dizaine de notifications ou plus. La véritable difficulté pour les parties notifiantes est de repérer la/les juridiction(s) dans laquelle la procédure est la plus longue. Si l'on ne peut exclure une manœuvre stratégique, dans la grande majorité des cas, la complexité de gérer de multiples procédures d'enregistrement explique à elle seule l'espacement des notifications. Le nombre de juridictions dotées de régimes de notification des fusions a considérablement crû au cours des dix dernières années, ce qui augmente la probabilité que des mesures correctives contradictoires soient prescrites. Dans l'affaire *Western Digital/Hitachi*, par exemple, cinq juridictions sont intervenues, qui toutes ont imposé des programmes correctifs différents, que les entreprises ont estimé difficiles à concilier, voire contradictoires. Les représentants des milieux d'affaires ont remarqué une tendance dans certaines juridictions à prescrire des mesures correctives « personnalisées ». Si cette

démarche est compréhensible et peut se justifier dans certains cas, elle doit avoir pour parallèle une approche convergente du programme correctif, régie par les principes de courtoisie active. Cela signifie que les juridictions intéressées devraient s'en remettre à la juridiction la plus à même d'assurer l'exécution des mesures correctives, notamment lorsque les actifs concernés se situent dans un seul pays.

Le **Président** demande si les participants souhaitent réagir à la contribution du BIAC.

Le représentant de la **Commission européenne** souligne que lorsque les autorités chargées d'examiner une fusion disposent de systèmes de notification différents (comme c'est le cas pour l'Union européenne et les États-Unis), il n'est pas nécessaire de mener de front la notification dans les deux juridictions. Dans une situation de ce genre, il est préférable de notifier l'opération d'abord à l'autorité qui applique une procédure dans laquelle l'essentiel des informations sont communiquées à la fin de l'opération (« *back-loaded system* »), puis à l'autorité qui applique une procédure dans laquelle l'essentiel des informations sont communiquées au début de l'opération (« *front-loaded system* »), puisque cette autorité demandera de produire beaucoup plus d'éléments. Cela étant, le meilleur moyen de couper court à toute suspicion de contournement du système est d'engager un dialogue de qualité dès le début avec les autorités concernées. Répondant en particulier au commentaire du BIAC sur la courtoisie active et le fait qu'il n'est pas toujours utile de prescrire des mesures correctives dans toutes les juridictions où un problème est identifié, le délégué du **Canada** signale que l'expérience du Bureau montre que l'autorité canadienne n'entreprend aucune action lorsque les mesures correctives définies par une autre juridiction lui conviennent parfaitement.

## 2. Discussion sur des mesures correctives dans des affaires de fusions transnationales, à partir de cas concrets

Le **Président** ouvre la deuxième partie du débat qui vise à évoquer, à partir de cas concrets, les difficultés que rencontrent les autorités de la concurrence souhaitant coordonner leur action dans des affaires de fusions transnationales, et donne la parole à l'Australie.

Le **délégué de l'Australie** explique que les deux principales difficultés qui se posent pour concevoir des mesures correctives efficaces se situent au niveau des actifs et de l'acquéreur. De toute évidence, les mesures correctives les plus efficaces ne peuvent pas être identiques dans chaque juridiction, sachant que des préoccupations supplémentaires et spécifiques peuvent être exprimées dans une juridiction, ou encore qu'un acquéreur dans une juridiction peut disposer d'une présence importante dans une autre, et donc s'avérer ne pas être un repreneur recevable pour une cession d'actifs à l'échelle internationale. Dans l'affaire *Pfizer/Wyeth*, par exemple, certains problèmes spécifiques se posaient en Australie mais pas aux États-Unis. Dans cette affaire, il était nécessaire d'élaborer un ensemble de mesures correctives en deux parties, l'une prévoyant des mesures correctives internationales, l'autre des mesures correctives spécifiques pour l'Australie. On a, avec cette affaire, un exemple de situation dans laquelle les parties ont refusé de proposer des mesures correctives adaptées en premier lieu, et où les négociations pour établir quelles pourraient être les mesures correctives les plus efficaces dans toutes les juridictions n'ont abouti qu'au terme d'un long processus itératif. Le retard aurait pu être évité si le problème avait été pris en compte plus tôt.

Le **Président** demande à la délégation canadienne d'exposer dans les détails les difficultés rencontrées par le Bureau de la concurrence dans l'examen de la fusion *Novartis/Alcon*, affaire dans laquelle une fusion internationale avait un impact sur des marchés nationaux.



Selon le délégué du **Canada**, dans l'affaire de la fusion *Novartis/Alcon*, les États-Unis avaient déjà imposé des cessions d'actifs, mais il existait au Canada des préoccupations que ce programme correctif ne permettait pas réellement de dissiper. Les parties à la fusion, le Bureau de la concurrence et la FTC américaine ont engagé d'importantes discussions afin de définir de façon coordonnée un programme correctif distinct. La solution proposée prévoyait la désignation d'un repreneur unique pour l'ensemble des actifs à céder dans les deux juridictions, ainsi qu'un dispositif de suivi commun mis en œuvre par le mandataire chargé de la cession. Cette solution s'est avérée très efficace et efficiente car elle réduisait les doublons et permettaient aux autorités de bénéficier des mêmes informations et du même point de vue sur l'exécution des mesures correctives.

S'adressant à la délégation japonaise, le **Président** lui demande de faire part de ses réflexions sur les difficultés que peut poser le suivi de mesures correctives comportementales, ainsi que sur les mesures adoptées par la *Japan Fair Trade Commission* (JFTC) pour veiller au respect des engagements comportementaux.

Pour répondre à ces questions, le délégué du **Japon** décrit brièvement la fusion *ASML/Cymer* et la nature des mesures correctives adoptées dans cette affaire. Afin de veiller à ce que les parties s'acquittent des mesures correctives comportementales en question dans cette affaire, il leur a été demandé de rendre compte du respect de ces mesures pendant les cinq années suivant la réalisation de la fusion. De plus, les parties sont convenues de mettre en place, sous réserve de l'approbation de la JFTC, un dispositif de suivi indépendant.

Le **Président** demande ensuite à la délégation coréenne comment assurer la mise en œuvre d'une mesure correctrice lorsque les parties à la fusion se trouvent dans un autre pays, et comment veiller à ce que le programme correctif soit pleinement respecté.

Le **délégué de la Corée** évoque la fusion *Rio Tinto/BHP Billiton*. Afin de répondre aux préoccupations en matière d'augmentation et de coordination des prix qui pourraient naître de la forte concentration du marché après la fusion et du degré de dépendance de la Corée à l'égard du minerai de fer produit par les parties à la fusion, la *Korean Fair Trade Commission* (KFTC) a envisagé deux options : soit imposer des mesures comportementales, soit interdire la fusion. En définitive, la KFTC a choisi de ne pas interdire l'opération, ce qui aurait pu avoir pour effet que les parties abandonnent le marché coréen, au détriment du bien-être des consommateurs, mais a décidé que la coopération internationale constituait le meilleur moyen de veiller au respect des mesures.

Le **Président** remercie la délégation coréenne puis demande à la délégation mexicaine de donner son point de vue sur le recours aux dispenses de confidentialité comme moyen de surmonter certaines des difficultés que pose l'application de la réglementation en matière de fusions transnationales.

La délégation du **Mexique** indique que la fusion *Nestlé/Pfizer* en 2012, entraînait une très forte concentration du marché des laits en poudre pour nourrissons, et que l'autorité mexicaine (CFC) s'y était opposée au motif que l'opération diminuait de façon substantielle la concurrence sur le marché mexicain. La réunion plénière de la CFC a requis la cession à un tiers de tous les actifs nécessaires pour que l'activité laits en poudre pour nourrissons de Pfizer puisse se maintenir sur le marché mexicain en tant que concurrent indépendant. La CFC estimait que cette mesure correctrice, qui, *de facto*, empêchait la fusion de Nestlé et de Pfizer au Mexique, assurerait le jeu de la concurrence sur le marché. L'opération ayant été notifiée dans d'autres juridictions (Chili et Colombie), les dispenses de confidentialité octroyées par les parties ont permis aux autorités de discuter efficacement du programme correctif à la lumière d'informations complètes. Finalement, des mesures correctives similaires ont également été imposées dans les autres juridictions.

Le **Président** s'adresse à la délégation ukrainienne pour lui demander d'expliquer pourquoi, dans l'affaire *Tampa/Kontern*, la Commission anti-monopole ukrainienne a préféré des mesures comportementales alors que les parties proposaient des engagements structurels.

Le délégué de l'**Ukraine** précise que la fusion *Tampa/Kontern* n'entraînait pas de monopolisation ni de restriction substantielle de la concurrence en Ukraine. Cependant, comme le marché concerné était très dynamique et que les parts de marché semblaient avoir tendance à fluctuer, la Commission anti-monopole a préféré envisager des engagements comportementaux plutôt que structurels.

Le **Président** invite ensuite le Brésil à discuter des exemples de coopération réussie évoqués dans sa contribution, et des raisons de cette réussite.

Selon le délégué du **Brésil**, avant la réforme législative de 2012, la coopération avec d'autres autorités était complexe car les calendriers des différentes notifications et procédures nationales ne coïncidaient pas toujours. Le Brésil n'a coopéré avec d'autres autorités que dans le cadre d'une seule affaire sous le régime antérieur, et il s'avère que les mesures correctives imposées concordaient en effet avec celles des autres autorités. Il avait toutefois fallu près de deux ans pour arrêter une décision définitive au Brésil. À la lumière de l'expérience plus récente du Brésil, les raisons expliquant le succès des efforts de coopération sont la similitude des préoccupations en matière de concurrence et l'implication des parties dès le début de l'enquête dans les aspects relatifs à la procédure et au fond. La coopération s'est avérée particulièrement importante pour définir des mesures correctives concordantes dans des affaires où les actifs à céder se trouvaient en dehors des frontières brésiliennes.

Le **Président** demande à la délégation de la **Fédération de Russie** d'expliquer en quoi les variations saisonnières ont influé sur les mesures correctives prescrites dans une affaire concernant les produits laitiers, examinée par FAS.

Le délégué de la **Fédération de Russie** explique que la volatilité des prix sur le marché des produits laitiers s'explique généralement par le caractère saisonnier de l'offre et de la demande de matières premières et que cet élément important est à prendre en compte dans la décision. L'analyse de FAS mettait en évidence une forte concentration du marché et la possibilité d'une position dominante à terme, ce qui permet de penser que, s'il était important de tenir compte des variations saisonnières dans la décision finale, il ne s'agissait pas là de l'élément décisif. La fusion a été approuvée ; les mesures correctives prévoyaient un certain degré de contrôle des prix et un accès non discriminatoire des fournisseurs au lait cru. Outre les aspects liés à la concurrence, FAS a également examiné les aspects socio-économiques de la fusion car l'opération avait des retombées positives à la fois sur les bénéfices des éleveurs et sur la stabilité des prix.

### 3. Modification des mesures correctives après leur approbation

Le **Président** passe à la troisième et dernière partie du débat et demande à la délégation américaine de faire part de ses observations sur le cas spécifique où des mesures correctives doivent être modifiées après leur adoption.

La délégation des **États-Unis** souligne que lorsque les autorités américaines modifient des mesures correctives dans un contexte international, elles veillent tout particulièrement à ce que les modifications ne compromettent pas les mesures correctives approuvées par leurs homologues. La coopération internationale dans ces situations est cruciale pour que les discussions avec les parties et les autres autorités au sujet de la révision des mesures correctives soient constructives. Par exemple, dans l'affaire de la fusion *Western Digital/Hitachi*, l'évolution de la situation imposant des modifications, la FTC a engagé une étroite coopération avec la Commission européenne afin de garantir que tous les aspects de la mesure

corrective révisée soient conformes aux accords existants, ce qui a permis une mise en œuvre efficace de la mesure modifiée dans toutes les juridictions concernées.

Le **Président** demande ensuite à la Corée d'évoquer la situation connexe dans laquelle une mesure correctrice modifiée par une autre juridiction est susceptible d'avoir un impact en Corée. Ce peut être le cas notamment de mesures correctives dont la durée d'application est longue et qui requièrent une coordination durable.

Le **délégué de la Corée** répond qu'il n'y a pas eu d'affaires dans lesquelles les mesures correctives imposées par d'autres juridictions présentaient des disparités importantes. En général, la KFTC est confrontée à des disparités mineures dues à des environnements concurrentiels différents. En outre, des différences au niveau des procédures peuvent se répercuter sur l'action correctrice et sur son exécution. C'est la raison pour laquelle, même si la coopération est très fructueuse, il peut y avoir des cas où les mesures correctives diffèrent. Dans les affaires de fusions transnationales, la coopération entre autorités de la concurrence a pris une grande importance, mais lorsque des mesures correctives nécessitent une longue période d'application, il pourrait être utile d'envisager des moyens de rechercher le consentement d'autres juridictions ayant participé à l'élaboration de la mesure correctrice initiale, ce qui pourrait faciliter la coopération lorsque l'une des autorités parvient à la conclusion que la mesure correctrice initiale devrait être modifiée.

Pour conclure les débats de la table ronde, le **Président** invite le BIAC à réagir aux interventions des autres délégations et à faire part de ses remarques sur ces échanges, du point de vue des entreprises.

Selon le délégué du **BIAC**, dans le domaine des produits de consommation, la variété des contextes factuels fait que l'on peut s'attendre à ce que différentes juridictions proposent des mesures correctives différentes. Mais même si les mesures correctives imposées par diverses agences diffèrent en définitive, la coordination du processus et des procédures est accueillie favorablement par les milieux d'affaires. Cependant, dans des affaires de dimension plus internationale ou régionale, une coordination de l'action correctrice sur le fond est nécessaire. Ce qui a changé depuis l'opération *GE-Honeywell*, unanimement considérée comme un point bas de la coopération en matière d'application de la loi, ce ne sont pas les modalités de la coopération ni les principes qui sous-tendent une coopération efficace, mais plutôt le nombre d'autorités actives sur le front de la concurrence dans le sens où elles imposent des mesures correctives, ainsi que la dynamique et la complexité qui en résultent.

Le **Président** remercie l'ensemble des participants pour ces débats très intéressants et ces remarques judicieuses, et clôt la réunion.

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