GCR INSIGHT

MERGER REMEDIES GUIDE

THIRD EDITION

Editors
Ronan P Harty and Nathan Kiratzis

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OVERARCHING PRINCIPLES AND CONSIDERATIONS

02

Key Principles of Merger Remedies

Ilene Knable Gotts[1]

Most transactions are not anticompetitive and many benefit consumers. Competition laws are designed to address those transactions that are likely to substantially lessen competition in a relevant market. Such harm can result either from a firm's acquisition of market power or the increasing likelihood of anticompetitive coordination. In some jurisdictions, the competition law mandate specifies a broader 'public interest standard' or other social policies, such as 'black empowerment'.

In some jurisdictions, such as that of the European Commission (EC), the competition authorities' decision not to approve the transaction effectively kills the transaction. In other jurisdictions, such as the United States[2] and Canada, the competition authority must challenge the transaction in a court to block its consummation, and the judge ultimately decides the legality of the transaction. In both types of jurisdiction, transaction parties will frequently try to resolve the concerns of a competition authority by offering potential remedies and, if accepted by the competition authority, entering into a consent decree.

Core universal goal: preserving competition

The universal goal of remedies is preserving competition that would otherwise be lost because of the transaction, while permitting, if possible, the realisation of efficiencies and other benefits.[3]

1 Ilene Knable Gotts is a partner at Wachtell, Lipton, Rosen & Katz.

2 At the federal level, the two antitrust agencies are the US Department of Justice's Antitrust Division and the Federal Trade Commission.

3 International Competition Network, ICN Merger Working Group, Merger Remedies Guide (2016), available at www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf (the ICN Merger Remedies Guide).

On 3 September 2020, the US Department of Justice (DOJ) issued a new Mergers Remedies Manual (the DOJ Manual)[4] to update its 2004 Policy Guide to Merger Remedies.[5] The DOJ Manual identifies the following principles that apply to structuring and implementing remedies in both horizontal and vertical merger cases: (1) remedies must preserve competition; (2) remedies should not create ongoing government regulation of the market; (3) temporary relief should not be used to remedy persistent competitive harm; (4) the remedy should preserve competition, not protect competitors; (5) the risk of a failed remedy should fall on the transaction parties, not on consumers; and (6) the remedy must be enforceable.[6] These principles align with the guiding principles of other jurisdictions, which focus on (1) structuring an effective remedy; (2) duration; (3) practicality; and (4) mitigation of risk.

Structuring an effective remedy

The starting point for each competition authority is the determination of the nature and scope of potential competitive harm within the jurisdiction before requiring or agreeing to propose remedies.[7] Next, to be effective, the remedy must be tailored to the harm.[8] As indicated in the DOJ Manual:

> *The goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to maintain the level of premerger competition in the market of concern. . . Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market.*[9]

In addition, '[e]ffective remedies preserve the efficiencies created by a merger, to the extent possible, while preserving competitive markets.'[10]

Duration

A remedy should seek to address the competitive harm over its expected duration.[11] Since a transaction indefinitely changes the incentives of the merged firm and the structure of the market, a remedy that temporarily regulates conduct will typically be inadequate to remedy persistent harm from a loss in competition.[12] Therefore, as discussed in greater detail in other chapters of this book, the most common remedy is to require a divestiture of a business

4 US Dep't of Justice, Antitrust Division, Merger Remedies Manual (September 2020), available at www.justice.gov/atr/page/file/1312416/download.

5 In 2018, the DOJ withdrew the 2011 Policy Guide to Merger Remedies that had been issued during President Obama's administration, reinstating the 2004 Policy Guide in its stead until the new DOJ Manual was issued.

6 DOJ Manual at 6.

7 id. at 1.

8 id. at 2.

9 id. at 6 and 8.

10 id. at 2.

11 id. at 4.

12 id.

or assets designed to preserve a competitive market indefinitely.[13] Generally, US agencies will impose a variety of behavioural conditions to support a structural divestiture, not instead of a divestiture. Transition services arrangements and supply arrangements have become more routinely included beyond the pharmaceutical industry, where they have been used for decades.[14] Mandatory licensing provisions may also alleviate competitive concerns by enabling competitors access to a key input.[15] Divestiture agreements may pair the transfer of personnel to the divestiture buyer with temporary limits on the merged firm's ability to re-hire these employees.[16]

Behavioural obligations remain more common in other jurisdictions, including in China[17] and India.[18] One of the aspects of behavioural remedies criticised is determining the appropriate duration to ensure that competition is preserved.

13 id.

14 See, e.g., Final Judgment, *United States v. United Technologies Corp.*, No. 1:18-cv-02279 (DDC 2019) (requiring defendants to supply manufacturing services at the purchaser's option), available at www.justice.gov/atr/case-document/file/1127776/download; Competitive Impact Statement at 17, *United States v. Bayer AG*, No. 1:18-cv-01241 (DDC 2018) (noting that interim supply and transition services agreements are 'aimed at ensuring that the [divestiture] assets are handed off in a seamless and efficient manner. . . [and that divestiture buyer] BASF can continue to serve customers immediately upon completion of the divestitures.'), available at www.justice.gov/atr/case-document/file/1066681/download.

15 See, e.g., Press Release, US Dep't of Justice, Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc. (8 April 2011), available at www.justice.gov/opa/pr/justice-department-requires-google-inc-develop-and-license-travel-software-order-proceed-its; Press Release, US Dep't of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (18 January 2011), available at www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

16 See, e.g., Final Judgment, *United States v. Thales S.A.*, No. 1:19-cv-00569 (DDC 2019), available at www.justice.gov/atr/case-document/file/1179736/download; Final Judgment, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (DDC 2019), available at www.justice.gov/atr/case-document/file/1199836/download.

17 See MOFCOM Announcement No. 30 of 2014 on Approval of Decisions on Anti-Monopoly Review Against Concentration of Undertakings in the Acquisition of AZ Electronic Materials S.A. by Merck KGaA with Additional Restrictive Conditions (4 May 2014), available at http://english.mofcom.gov.cn/article/policyrelease/buwei/201405/20140500591725.shtml. See also Announcement of State Administration of Market Registration (SAMR) on the Anti-Monopoly Review Decision on the Approval of Danaher Corporation's Acquisition of GE Healthcare Life Sciences Biopharmaceutical Business with Restrictive Conditions (28 February 2020), available at www.samr.gov.cn/fldj/tzgg/ftjpz/202002/t20200228_312297.html; see also Charles McConnell, 'China forces R&D access in Danaher/GE biopharma deal', *Global Competition Review* (3 March 2020), available at www.globalcompetitionreview.com/article/1215873/china-forces-r-d-access-in-danaher-ge-biopharma-deal. SAMR concerns included the loss of a source of potential competition, which resulted in it requiring not only the divestiture of an unfinished project, but continued R&D for two years after closing.

18 See, e.g., Order, *Bayer AG/Monsanto*, Competition Commission of India, Combination Registration No. C-2017/08/523 (14 June 2018), available at www.cci.gov.in/sites/default/files/Notice_order_document/Order_14.06.2018.pdf.

Practicality

As indicated in the ICN Merger Remedies Guide, a 'remedy should be capable of being implemented, monitored, and enforced bearing in mind the need for detecting non-compliance and the resources involved in the enforcement of the remedy'.[19] Competition authorities are reticent to adopt regulatory-like remedies (e.g., price controls) that require monitoring of internal company conduct and may not easily ensure compliance.[20] In addition, undertakings typically contain provisions that permit for modification in the event of changed circumstances. The ongoing oversight (compliance reporting) functions will also be considered. A monitor, paid for by the merged firm, may be used in some situations.

In the US, conduct remedies were primarily used to resolve concerns in vertical mergers historically, but such remedies were not always accepted, even prior to the Trump administration. For instance, during the Obama administration, Deputy Assistant Attorney General Jon Sallet indicated:

> *In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the Division – if it ever was. . . . Some vertical transactions may present sufficiently serious risks of foreclosing rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.*[21]

The Trump administration leadership at the Antitrust Division has indicated that, although it is not saying it will never accept behavioural remedies, the standard for proving that the remedy will cure the anticompetitive harm is high. Rather, the DOJ will typically require structural relief rather than behavioural conditions to remedy antitrust concerns. Starting with a keynote speech at the American Bar Association Fall Forum on 16 November 2017, Assistant Attorney General Makan Delrahim explained that behavioural remedies are 'fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market'.[22] Such regulatory schemes 'require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market.'[23] In addition, such remedies are challenging to

19 ICN Merger Remedies Guide at 4.

20 DOJ Manual at 4.

21 Jon Sallet, Deputy Assistant Attorney General of the Antitrust Division, Remarks at the American Bar Association Fall Forum, The Interesting Case of the Vertical Merger (17 November 2016), available at www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

22 Makan Delrahim, Assistant Attorney General of the Antitrust Division, Keynote Address at the American Bar Association's Antitrust Fall Forum (16 November 2017), available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar. See also Makan Delrahim, Assistant Attorney General of the Antitrust Division, Remarks Delivered at the New York State Bar Association, Improving the Antitrust Consensus (25 January 2018), available at www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

23 id.

enforce, presuming 'that the Justice Department should serve as a roving ombudsman of the affairs of business; even if we wanted to do that, we often don't have the skills or the tools to do so effectively.'[24]

The DOJ Manual recognises that in limited circumstances, stand-alone conduct relief may be appropriate when the transaction parties prove that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the remedy can be enforced effectively.[25] For instance, firewall provisions, which are designed to prevent the dissemination of information within a firm that could facilitate anticompetitive behaviour, have been used in vertical transactions where significant efficiencies could not be achieved without the merger or through a structural remedy.[26]

The FTC has also continued to recognise the role of conduct remedies in some vertical mergers. Then FTC Competition Bureau Director Bruce Hoffman indicated: '[T]he FTC prefers structural remedies to structural problems, even with vertical mergers.'[27] But, at the same time, the FTC recognises that:

> *[I]n some cases . . . a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration . . . if the FTC looks closely at a vertical merger that raises the concerns . . ., no one should be surprised if the FTC requires structural relief. . . . If that can't be achieved without sacrificing the efficiencies that motivate the merger, then [it] can look at conduct remedies. If those won't work – or will be too difficult and problematic . . . to be confident that they will work without an excessive commitment of FTC resources where [it is] effectively turned into a regulator – then there should be no surprise if [the FTC were to] seek to block the merger.*[28]

Risk

Inherent in any remedy is the potential risk that the competition authority's goal of preserving competition will not be achieved. The three most common risks are: (1) a package or composition risk; (2) a purchaser risk; and (3) implementation risks. The extent to which a particular

24 id.

25 DOJ Manual at 16.

26 id. at 15. See also Competitive Impact Statement at 18–19, *United States v. Northrop Grumman Corp.*, 1:02-cv-02432 (DDC 2002) (establishing firewall between Northrop's payload and satellite prime businesses), available at www.justice.gov/atr/case-document/competitive-impact-statement-165; Competitive Impact Statement, *United States v. Lehman Bros. Holdings, Inc.*, 1:98-cv-00796 (DDC 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defence technologies), available at www.justice.gov/atr/case-document/competitive-impact-statement-139.

27 Bruce Hoffman, then Acting Director, Bureau of Competition, Remarks at Credit Suisse 2018 Washington Perspectives Conference, Vertical Merger Enforcement at the FTC (10 January 2018), available at www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

28 id. at 8–9.

jurisdiction will knowingly tolerate risk varies depending on the specific laws and policies of that jurisdiction, including the extent to which the authority has the power to remedy failings after entering into the consent and the transaction's closing.

Package and composition risks

This risk factor relates to the adequacy of the business or assets to be divested in a structural remedy, as well as the efficacy of the conditions and prohibitions prescribed in a behavioural remedy. In January 2017, the FTC issued a retrospective study,[29] reviewing 89 merger orders entered into between 2006 and 2012. The FTC concluded that, although the FTC's merger remedy practices are generally effective, certain areas needed to be adjusted.

First, the study found that divestiture buyers of a more limited package of assets were deemed not to succeed at times, even when the buyer was identified upfront. The FTC indicated that, in future, parties can expect that proposals to divest selected assets will undergo more detailed scrutiny and the Commission will accept a proposal of less than the entire ongoing business only if the parties and the divestiture buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition. An example cited is that ongoing business divestiture is infeasible. In addition, the Commission indicated that it may require divestiture of assets (including manufacturing facilities) related to additional complementary products, the use of brand or trade names, or other affirmative conduct obligations, including facilitating the transfer of customers, to ensure the buyer's viability.[30]

Second, the study indicated that divestiture buyers have sometimes had unforeseen complexities in transferring critical back-office functions and need more time to transition these services. The FTC indicates that it is important that the divestiture buyer is able to conduct due diligence to understand what back-office support services it needs and that it will undertake additional scrutiny in this area. In addition, the FTC takes the position that critical back-office functions on a transitional basis must be supplied to the divestiture buyer at no more than the parties' cost.

In addition, agencies have more frequently required divestitures to include out-of-market assets (i.e., a divestiture package that goes beyond the assets in the relevant market) to ensure that the divestiture buyer has adequate assets to be effective.[31] In fact, in *Bayer/Monsanto*, which resulted in the largest divestiture package in DOJ history with a comprehensive package

29 Fed Trade Comm'n, The FTC's Merger Remedies 2006–2012 (January 2017), available at www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

30 Principal Deputy Assistant Attorney General Barry Nigro similarly indicated in February 2018 that carved-out assets, as opposed to stand alone businesses, were 'inherently suspect'. Barry Nigro, US Dep't of Justice, Principal Deputy Assistant Attorney of the Antitrust Department, Remarks at the Annual Antitrust Law Leaders Forum (2 February 2018), available at www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law. See also Charles McConnell, 'US DOJ official: asset carve-outs are "inherently suspect"', *Global Competition Review* (2 February 2018), available at www.globalcompetitionreview.com/article/1153335/us-doj-official-asset-carve-outs-are-%E2%80%9Cinherently-suspect%E2%80%9D.

31 For a discussion of remedies, including out-of-market assets from the FTC's perspective, see Dan Ducore, Fed Trade Comm'n, Bureau of Competition, Divestitures may include assets outside the market (24 April 2015), available at www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market.

of assets worth US$9 billion, the consent required the package to include other assets sufficient for BASF, the divestiture buyer, to maintain the viability and competitiveness of the divested businesses following its acquisition of the assets and provided BASF a one-year window after closing to identify additional assets that are reasonably necessary to ensure the continued competitiveness of the divested businesses.[32]

The same is true in consummated merger challenges. In both *Chicago Bridge*[33] and *Polypore*,[34] the FTC required the parties to include assets outside of the market to restore competition within the relevant market and to provide the divestiture buyer with the ability to compete. In addition, in *Valeant*,[35] the FTC required Valeant not only to divest the entire hard contact lens business it had acquired from Paragon Holdings in 2015, but also the assets it had later acquired that the FTC deemed necessary to ensure that the divested business would continue to have access to the disks that are made into the finished contact lenses. Similarly, when affirming the Administrative Law Judge's decision in *Otto Bock*, the Commission concluded that the divestiture of the acquired companies' overlapping microprocessor prosthetic knee business might be inadequate to resolve competitive concerns since the company bundles the knees product line with its prosthetic foot business and both product lines may be needed by a buyer to compete effectively.[36]

In certain industries, the package risk includes the potential that the assets will deteriorate significantly prior to divestiture (or even following divestiture if the divestiture buyer is unable to stave off such deterioration). Two 'failed' FTC divestitures illustrate this risk. First, in 2015, the FTC approved the divestiture of 146 supermarkets to Haggen Holdings LLC (Haggen) to resolve concerns about Albertsons' acquisition of Safeway.[37] On 14 August 2015, Haggen announced that it would close 27 acquired stores and, on 8 September 2015, it filed for Chapter 11 bankruptcy to permit it to reorganise with only its core profitable stores. On 24 September 2015, Haggen announced that it would exit from California, Arizona and Nevada, and continued to operate only 37 stores in those states. Haggen, Cerberus International and Safeway petitioned the FTC

32 Final Judgment, *United States v. Bayer AG*, No. 1:18-cv-01241-JEB (DDC 8 February 2019), available at www.justice.gov/atr/case-document/file/1165136/download.

33 FTC Opinion, *In the Matter of Chicago Bridge & Iron Company*, FTC Docket No. 9300 (6 January 2005), available at www.ftc.gov/sites/default/files/documents/cases/2005/01/050106opionpublicrecord version9300_0.pdf.

34 FTC Opinion, *In the Matter of Polypore Int'l Inc.*, FTC Docket No. 9327 (13 December 2010), available at www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf?utm_source=govdelivery.

35 Agreement Containing Consent Order, *In the Matter of Valeant Pharm. Int'l Inc.*, FTC File Nos. 151-0236 and 161-0028 (7 November 2016), available at www.ftc.gov/system/files/documents/cases/161107_paragon_pelican_agreement_2.pdf.

36 FTC Opinion, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (1 November 2019), available at www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf. Otto Bock petitioned the DC Circuit Court to review the Commission's decision on 30 December 2019; that proceeding has been held in abeyance pursuant to the parties' joint motions citing covid-19 complications and delays to ongoing discussions between the parties regarding the divestiture order and other related matters. Joint Motion to Hold Proceedings in Abeyance, *Otto Bock HealthCare N. Am., Inc. v. FTC*, Case No. 19-1265 (D.C. Cir. 9 June 2020).

37 Press Release, Fed Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (27 January 2015), available at www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger.

on 23 September 2015, seeking approval on an expedited basis of a modification of the consent to permit Albertsons to rehire Haggen employees who were otherwise being terminated by Haggen, without violating the consent order.[38] The FTC had no choice but to grant this request.

Third, the divestiture buyer in the *Dollar Tree/Family Dollar*[39] transaction had mixed success in the stores it acquired. Of course, the divestiture occurred in a very challenging retail industry environment generally.

Purchaser risk

The identity of the divestiture buyer may, on rare occasions, potentially contribute to the divestiture's lack of success. The FTC's November 2012 order approving the divestiture of Hertz's Advantage low-cost rental business and rights to operate 29 Dollar Thrifty airport locations to Simply Wheelz – a subsidiary of Franchise Services of North America, which at that time operated U-Save Car Rental – may be such a case.[40] Four months after the FTC issued its final order, Simply Wheelz filed for bankruptcy, reportedly in part owing to Hertz's exercise of its right to terminate its fleet-leasing arrangement with Advantage, since Advantage owed Hertz in excess of US$39 million. Both US agencies often require the parties to identify an acceptable upfront buyer before accepting divestiture packages. The upfront buyer requirement is justified by the agencies as being necessary to ensure that the divestiture will be effective in maintaining competition at the same level as it had been pre-transaction. The transaction parties, however, can face substantial delay from the process: the need to identify a divestiture buyer, negotiate a divestiture agreement, and have that buyer and the divestiture package vetted by the agencies before the main transaction is permitted to proceed can literally add months to the merger review process.

The factors considered by competition authorities when approving a divestiture buyer that can mitigate purchaser risk are: (1) the financial capability to purchase the divested business and make necessary investments, and commitment to remain in the market; (2) the managerial expertise to run the business; and (3) the operational capacity and resources to run the divested business, particularly if the divestiture consists of less than a stand-alone business. The financial capability of the purchaser is likely to be a particular focus during covid-19 and any recovery thereafter.

Implementation risk

Competition authorities consider the risk of potential failure either because of the merged firm's conduct or other market factors, and the potential for circumvention. For post-closing divestitures, hold-separate or asset preservation agreements can help to prevent interim

38 Application for Approval of Waiver Agreement to the Haggen Divestiture Agreement, *In the Matter of Cerberus Inst'l Partners V, L.P.*, FTC Docket No. C-4504, Fed Trade Comm'n (23 September 2015), available at www.ftc.gov/system/files/documents/cases/150925cerberusapplication.pdf.

39 Press Release, Fed Trade Comm'n, FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger (2 July 2015), available at www.ftc.gov/news-events/press-releases/2015/07/ftc-requires-dollar-tree-family-dollar-divest-330-stores.

40 Press Release, Fed Trade Comm'n, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (15 November 2012), available at www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition.

competitive harm to the divestiture assets. In addition, to reduce implementation risk, undertakings frequently provide that the competition authority may require the divestiture to occur 'at no minimum price' after the initial time period for a merged firm-driven sale has passed and the divestiture process has been relinquished to a divestiture trustee. Use of a monitor with industry experience can mitigate some of the implementation concerns in a transaction involving ongoing behavioural provisions.

Remedies in a global competition setting

Increasingly for multi-jurisdictional transactions, competition authorities have cooperated during the investigation stage and, on some occasions, at the remedies stage. The ICN Merger Remedies Guide indicates that each competition authority should exercise its independent judgement in reaching its decision regarding the need for a remedy.[41] Nevertheless, in many investigations, coordination among competition authorities may avoid conflicting remedies (i.e., when one or more authority enters into separate remedy orders) or, in some cases, even the need for a particular jurisdiction to enter into a remedy itself because of the actions taken by another jurisdiction.[42] Such coordination and cooperation is particularly needed when the authority reaches the conclusion that an effective remedy should include assets outside of its jurisdiction.

By way of example, in *Holcim/Lafarge*,[43] the FTC conditioned clearance on the divestiture of plants and terminals, including a terminal in Alberta, Canada and a cement plant in Ontario, Canada. Canadian assets that were named in the FTC consent decree were included by the FTC as necessary to remedy competitive concerns in northern US markets. The Canadian consent – entered into the same day – provided mirror provisions.

Similarly, in *ZF Friedrichshafen AG/TRW Automotive Holdings Corp*,[44] the FTC conditioned approval of a US$12.4 billion merger that would create the world's second-largest auto parts supplier with the divestiture of TRW's linkage and suspension business in North America and Europe, even though only suppliers that have production facilities in the United States, Canada

41 ICN Merger Remedies Guide at 3.

42 Press Release, US Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (29 March 2010), available at www.justice.gov/opa/pr/justice-department-will-not-challenge-cisco-s-acquisition-tandberg; Melissa Lipman, 'FTC Approves Novartis' $16B GSK Oncology Buy With Fixes', *Law360* (23 February 2015), available at www.law360.com/articles/624083/ftc-approves-novartis-16b-gsk-oncology-buy-with-fixes.

43 Press Release, Fed Trade Comm'n, FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger (4 May 2015), available at www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

44 Press Release, Fed Trade Comm'n, FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp. (5 May 2015), available at www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

and Mexico were deemed eligible to compete for US business.[45] The FTC's order followed the EC's clearance, which was subject to Friedrichshafen's commitment to divest TRW's chassis components businesses in the European Economic Area.

In addition, in *NXP Semiconductors*, the parties agreed to divest all NXP assets that are used primarily for manufacturing, research and development of radio frequency (RF) power amplifiers, including a manufacturing facility in the Philippines, a building in the Netherlands to house management and some testing labs, as well as all patents and technologies used exclusively or predominantly for the RF power amplifier business, based on the finding that the market for RF power amplifiers is worldwide. The FTC worked with the staff of antitrust agencies in the EU, Japan and South Korea on all aspects of the analysis, including potential remedies, to reach compatible approaches on an international scale. The proposed revisions to the Antitrust Guidelines for International Enforcement and Cooperation recognises these factors when it indicates that the agencies will seek a remedy that involves conduct or assets outside the United States if it deems that doing so is necessary to ensure the remedy's effectiveness and is consistent with the agency's international comity analysis.

45 As noted in the Director's Report, Spring 2016, the EU had determined as well that the merger would reduce competition in the chassis components for cars and trucks market. The broader divestiture resolved concerns in both jurisdictions. Deborah L Feinstein, Bureau of Competition, Director's Report (Spring 2016), available at www.ftc.gov/system/files/documents/public_statements/944113/feinstein_-_spring_update_april_2016.pdf.

Appendix 1

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Ilene Knable Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters. Mrs Gotts is regularly recognised as one of the world's top antitrust lawyers, including being recognised over the past decade in *Who's Who Legal* as one of the top 15 global competition lawyers and, in a recent edition, as the top Thought Leader in North America, in the first-tier ranking of *Chambers USA* and in the 'leading individuals' ranking of *PLC Which lawyer? Yearbook*, being named an 'All Star' by BTI Consulting Group because of her level of dedication and commitment to exceptional client service, and having been selected as the 'Antitrust Lawyer of the Year' in 2016 by the *Wall Street Journal*'s 'Best Lawyer' survey. Mrs Gotts was recently a member of the American Bar Association (ABA) Board of Governors, serving on the Executive Committee and as the chair of the Finance Committee. She previously served as chair of the ABA's Section of Antitrust Law, as well as in a variety of leadership positions in the Section for over two decades, including as the International Officer. From 2006 to 2007, Mrs Gotts was chair of the New York State Bar Association's Antitrust Section. She has been a member of the American Law Institute for over two decades. Mrs Gotts is a frequent guest speaker, has had over 200 articles published on antitrust-related topics and was the editor of the ABA's *Merger Review Process* handbook for over two decades. In 2019, *Euromoney* awarded Mrs Gotts with its Americas Women in Business Law lifetime achievement award. She is currently the co-editor of *Antitrust Report* and is on the advisory boards of MLex and GCR. Mrs Gotts is a member of the Lincoln Center Counsels' Council.

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

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

The Guide draws not only on the wisdom and expertise of 46 distinguished practitioners from 18 firms, but also the perspective of former enforcers Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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