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Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN CROSS-BORDER MERGER CASES

-- United States --

29 October 2013

This note is submitted by United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 29 October 2013.

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CROSS-BORDER MERGER REMEDIES

– United States –

1. Introduction

1. 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.

2. 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

3. *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”).¹ 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.

¹ 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>.

4. 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.

5. 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.²

6. *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.³ 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 behavior 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.

7. 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.

² 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>.

³ 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>.

8. *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”).⁴ 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.⁵

9. 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.⁶

10. *Johnson & Johnson/Synthes* – The FTC required a cross-border remedy to resolve its concerns with Johnson & Johnson’s 2012 acquisition of Synthes, Inc.⁷ 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.

11. 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.

12. *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

⁴ 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](http://www.justice.gov/atr/cases/f292100/292100.pdf).

⁵ 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](http://www.justice.gov/atr/cases/f296000/296044.pdf).

⁶ 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](http://www.cbrands.com/news-media/constellation-brands-receives-doj-clearance-proceed-acquisition-grupo-modelos-us-business).

⁷ 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](http://www.ftc.gov/opa/2012/08/jjsynthes.shtm).

industry.⁸ 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.

13. 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.

14. 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.⁹

2.2. *Ticketmaster/Live Nation*

15. 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.¹⁰ 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.¹¹

16. *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.¹² 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 Quadrupole Gas Chromatography-Mass Spectrometry (“3Q GC-MS”) instruments; and 3) Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”) instruments. The FTC’s Order

⁸ 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.

⁹ 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; 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>.

¹⁰ 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.

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

¹² 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>.

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.

17. 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.

18. 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.

19. *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.¹³ 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.

20. 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.

21. *BASF/Ciba* – The FTC required cross-border remedies in two high-performance pigments markets (Indanthrone Blue and Bismuth Vanadate) that are used to provide color 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 2009.¹⁴ 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 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.

¹³ 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>.

¹⁴ 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>.

22. 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*

23. *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.¹⁵ 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 behavioral commitments ensuring interoperability involve intellectual property used worldwide.

24. *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.*

25. 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.

26. The extent of cooperation on a particular investigation depends in part on parties' willingness to allow the agencies to exchange information. Confidentiality rules,¹⁶ 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

¹⁵ 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.

¹⁶ 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>.

applicable to 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.¹⁷

27. The value of providing waivers is maximized 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.

28. 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.

29. 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.

30. 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

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

¹⁷ 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>.

generally 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.

32. 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.¹⁹

4.1. *ABI/Modelo*

33. 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).²⁰

4.2. *UTC/Goodrich*

34. 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.²¹ 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.²² 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

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

¹⁹ See, e.g., [DAF/COMP/WP3/WD\(2011\)58](#), 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>.

²⁰ 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.

²¹ 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; 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.

²² 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>.

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.

4.2. Cooperation in the evaluation of potential acquirers

35. 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.

36. 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.

37. 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.²³ 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.

38. 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.

39. 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

²³ 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>.

determination that the agencies' remedies would resolve any competitive concerns in Japan, the JFTC took no formal action.

40. 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.

4.2. *Designing Behavioral/Conduct Remedies*

41. 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.

42. 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).

43. 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*

44. 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.

45. 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*

46. 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.

47. 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.²⁴ 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.²⁵

48. 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.²⁶

4.5. *UTC/Goodrich*

49. 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 fulfill obligations of the divested businesses.²⁷ In addition, DOJ's settlement required UTC to extend the period for its joint

²⁴ 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>.

²⁵ 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>.

²⁶ *Id.*

²⁷ 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>.

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.²⁸

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

4.6. *Ticketmaster/Live Nation*

51. 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,³⁰ but also to agree to various conduct remedies that would preserve competition in the primary ticketing markets in the United States and Canada.³¹

52. 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.³²

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

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

55. 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,

²⁸ *Id.*

²⁹ 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.

³⁰ 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.

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

³² *Id.*

³³ 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.

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 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.

56. 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.

57. 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

58. 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.³⁴ 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.³⁵ 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.

³⁴ 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; 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.

³⁵ 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>.

59. 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.

60. 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.³⁶ 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.³⁷

61. 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

62. 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.

³⁶ 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>.

³⁷ 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.