The divestiture remedies under merger control in the US, the EU and China

In a free market economy, mergers and acquisitions are likely to occur. On the one hand, mergers can generate efficiencies; on the other hand, they can also lead to, e.g. a state of monopoly and oligopoly, which may adversely affect effective competition in the market. Thus, a mandatory pre-merger notification mechanism is adopted by many jurisdictions, such as the US, the EU and China. Under such a mechanism, a merger satisfying certain thresholds has to be notified and reviewed by the competition agency before the implementation. When a merger raises anti-competitive concerns, the competition agency can propose a conditional acceptance, i.e. it requires the merging parties to make a commitment as a condition to approve the notified mergers. Such a commitment is called a merger remedy.

Merger remedies can be divided into two categories, structural remedies and behavioural remedies. A merger divestiture remedy is one of the most typical structural remedies which has been widely used in many jurisdictions. Divestiture is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets.

The divestiture remedies may address the most anti-competitive effects generated from the merger cases. They may, however, fail in many cases due to some risks occurred. Consequently, divestitures have to be designed in a way which can reduce those potential risks. Risk-reducing provisions (such as up-front buyer provisions) can be used by the competition agencies to alleviate these risks. China partially transplanted US and EU legislation into its own competition law, but re-contextualising the contents to its particular institutional features. MOFCOM (Chinese competition agency)'s merger divestiture policies can, to some extent, reduce the possible divestiture risks.