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Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In Phonak/ReSound (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency.
this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties’ turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. In Serbia, there similarly is no ‘local’ effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of ‘competitively significant influence’. Although a few merger notification jurisdictions remain ‘voluntary’ (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a ‘self-assessment’ of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the ‘public interest’ approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile’s antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings
within specified periods after execution of the agreement also have the authority to impose fines for ‘late’ notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as ‘gun jumping’. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to ‘stop the clock’ on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose 
to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent CSC/Complete transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has ‘consulted’ with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in Applied Materials/Tokyo Electron ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In Office Depot/Staples, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the GE/Alstom transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the Halliburton/Baker Hughes transaction, the United States and the EC coordinated their investigations, with the United
States suing to block the transaction while the EC’s investigation continued. Also, in Holcim/Lafarge, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction’s territory. The United States, Canada and Mexico coordinated closely in the review of the Continental/Veyance transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an ‘acquisition of control’. Many of these jurisdictions, however, will include, as a reportable situation, the creation of ‘joint control’, ‘negative (e.g., veto) control’ rights to the extent that they may give rise to de jure or de facto control (e.g., Turkey), or a change from ‘joint control’ to ‘sole control’ (e.g., the EC and Lithuania). Minority holdings and concerns over ‘creeping acquisitions’, in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has ‘material influence’ (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an ‘acquisition’ subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the Holcim/Lafarge merger exemplify such a cross-border package. As discussed in the ‘International Merger Remedies’ chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that ‘structural’ remedies are preferable to ‘behavioural’ conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).
Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada’s decision in the Loblaw/Shoppers transaction, China’s MOFCOM remedy in Glencore/Xstrata, and France’s decision in the Numericable/SFR transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2018
Part I

GENERAL PAPERS
Chapter 1

CHINA’S MERGER CONTROL IN THE PHARMACEUTICAL SECTOR

Susan Ning and Ting Gong

I  INTRODUCTION

Pharmaceutical sales growth in China is expected to outstrip that of Europe and the US in the coming years due to the size of China’s population. Domestically, the pharmaceutical industry is also one of the leading industries, covering synthetic chemicals and drugs, traditional Chinese medicines, medical devices, apparatus and instruments, hygiene materials and pharmaceutical machinery.

The competitive dynamic of China’s domestic pharmaceutical industry is highly fragmented, with 1,000 domestic companies accounting for a large portion of the sector, while the top-tier pharmaceutical companies are also growing steadily. In March 2009, China’s government revealed plans for a sweeping healthcare reform. Deepening reform efforts are bringing new opportunities to invest in the market and bring profound change to the competition landscape.

In the context of China’s evolving regulatory regime, this industry is increasingly subject to more stringent competition scrutiny in China. From 2016 onwards, the three Chinese antitrust authorities highlighted pharmaceuticals sector as their enforcement priority under the Anti-Monopoly Law (AML), and this trend is likely to continue in 2018.

Against this backdrop, this chapter will focus on China’s merger control rules in the pharmaceutical sector.

II  CHARACTERISTICS OF CHINA’S PHARMACEUTICAL INDUSTRY

The characteristics of China’s pharmaceutical industry are as follows. First, historically pharmaceutical pricing has been strictly regulated by the National Development and Reform Commission (NDRC), which is also one of China’s antitrust authorities in charge of pricing-related antitrust investigations, although as part of the healthcare reform the price regulation has been gradually lifted. Since 1 June 2015, except for narcotic and psychotropic pharmaceuticals in Category I, the Chinese government no longer regulates pharmaceutical

1 Susan Ning is a senior partner and Ting Gong is an associate at King & Wood Mallesons.
2 Refer to China’s healthcare reform (the proposed plan, titled ‘Opinions of the CPC Central Committee and the State Council on Deepening the Health Care System Reform’) and 12th Five-Year Plan (2011–2015) released in 2011.
4 Ibid.
prices and the prices should be decided through market competition.\textsuperscript{5} In early 2016, the government launched the ‘two-invoice system’ for pharmaceutical distribution, which aims to control pharmaceutical prices,\textsuperscript{6} and continued publishing ancillary regulations. Second, as one component of a broader set of national goals is to push industry consolidation, pharmaceutical companies are encouraged to consolidate domestically, eliminating outdated and excessive capacity. In recent years, active merger and acquisition activity has been very much present in China’s pharmaceutical industry, both domestically and from a cross-border perspective. Third, the sector will continue to draw significant investment in research and development (R&D). The pharmaceutical industry is characterised by innovation. Top-tier pharmaceutical companies have to make significant investments in R&D in order to lead in the marketplace. Pharmaceutical innovation entails high risks and long development periods, and, therefore, competition concerns may have to be balanced against the protection of intellectual property rights in order to ensure a proper incentive to innovate. The lack of innovation in China’s pharmaceutical sector has historically resulted in more than 95 per cent of synthetic chemicals and drugs circulated in China being generic drugs, which will likely remain the case for a long time. However, since the Chinese government encourages and relies upon innovation to meet industrial targets, patented drugs are also expected to see significant growth.

Currently, China is in the process of a State Council reshuffle, which includes the proposed establishment of a new comprehensive department, the State Administration of Market Supervision (SAMS). The SAMS will consolidate the country’s three antitrust agencies, namely the NDRC, the SAIC and MOFCOM. Under the new plan, the SAMS will be the direct subordinate agency under the State Council. This new setting, which is reported to complete within the first half of this year, will have a decisive influence on China’s future anti-monopoly law enforcement landscape.

III MARKET DEFINITION

All competitive behaviours occur within a particular market scope. The definition of the relevant market purports to identify a market scope within which the undertakings are to compete with each other. Therefore, the definition of the relevant market is usually the starting point for analysing competitive behaviours. This is also applicable to China’s merger review in the pharmaceutical sector.

According to the Guidance of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market (Market Definition Guidance), it is a normal practice for the Ministry of Commerce of the People’s Republic of China (MOFCOM) to define

\textsuperscript{5} Refer to the Opinions on Facilitating Reform of Pharmaceutical Price published by NDRC together with other authorities on 4 May 2015.

\textsuperscript{6} Refer to the Notice on Issuing Key Work Tasks in 2016 Pharmaceutical and Cleaning System Reform released on 21 April 2016.
China’s Merger Control in the Pharmaceutical Sector

the relevant product market\(^7\) and the relevant geographic market.\(^8\) The methodologies set out in the Market Definition Guidance are also applicable in the pharmaceutical sector, for example, the consideration of substitution from both demand and supply perspectives.\(^9\)

There are many ways to classify and categorise pharmaceutical products. Anatomical therapeutic classification (ATC), which is developed and used by the European Pharmaceutical Marketing Research Association, and also by the World Health Organization, is normally recognised as the standard classification for the purpose of defining the relevant product market in China’s merger filing for human pharmaceutical products. ATC classifies pharmaceutical products down to five levels according to the effect of the active material on a human organ or system. The third level of ATC classification (ATC-3) allows medicines to be grouped in terms of their therapeutic indications and by MOFCOM, and therefore be used as an operational market definition. In the public decision issued on 29 September 2009 granting the conditional approval of Pfizer’s acquisition of Wyeth (Pfizer/Wyeth case), MOFCOM acknowledged the market classification of ATC-3 to appropriate when defining relevant markets in the human pharmaceutical sector.

In addition, in the public decision issued by MOFCOM on 8 August 2013 in the conditional approval of Baxter’s acquisition of Gambro (Baxter/Gambro case), MOFCOM determined that the relevant markets were composed of CRRT monitors, CRRT dialysers, CRRT blood lines and blood line dialysers. In the public decision issued by MOFCOM on 30 December 2016 in providing for the conditional approval of Abbott’s acquisition of St. Jude (Abbott/St. Jude case), MOFCOM determined that the relevant market was small hole vessel closure devices. In the public decision issued by MOFCOM on 27 December 2017 in providing for the conditional approval of merger of Becton, Dickinson and Company and C R Bard, Inc (BD/Bard case), MOFCOM determined that the relevant market was core needle biopsy devices.

Other than the above, considering the characteristics of the Chinese pharmaceutical industry, factors such as strong patient dependency on certain drugs, drug dosage forms and concern for safety from switching from one drug to the other drug may be relevant in defining a pharmaceutical product market.

Geographic markets in the pharmaceutical sector are defined in two different ways, based on MOFCOM’s past decisions. MOFCOM usually considers the national regulatory restrictions on production, importation, registration, pricing, distribution and supply to assess whether the parties’ proposed geographic market is appropriate in a specific case. In the Pfizer/Wyeth case and Abbott/St. Jude case, the geographic market was deemed as nationwide. Meanwhile, in the Baxter/Gambro case, MOFCOM eventually assessed the market situations in both China and a worldwide market.

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\(^7\) Relevant product market refers to a market comprised of a group or a category of products that are considered by consumers to have a relatively strong substitution based on the characteristics, uses and prices of the products.

\(^8\) Relevant geographic market is a scope of geographic areas within which consumers can acquire products that have a relatively strong substitution relationship.

\(^9\) There are also other methods to define a market, such as the hypothetical monopolist test, which is also called the SSNIP (Small but Significant and Non-transitory Increase in Price) test in Article 10 of the Market Definition Guidance. As an analytical method for defining the relevant market, the hypothetical monopolist test can use economic tools to help solve the uncertainties that may arise from the definition of the market scope within which the undertakings compete with each other.
IV FACTORS TO BE CONSIDERED IN MOFCOM’S SUBSTANTIVE REVIEW OF A MERGER IN PHARMACEUTICAL SECTOR

According to Article 27 of the AML, the following factors shall be taken into account in a merger review:

a. the involved undertakings’ market share in the relevant market and their controlling power over that market;
b. the degree of market concentration in the relevant market;
c. the impact of the concentration of undertakings on market access and technological advancements;
d. the impact of the concentration of undertakings on consumers and other undertakings;
e. the impact of the concentration of undertakings on national economic development;
and
f. other factors that may affect market competition, which shall be considered as determined by the Anti-monopoly Law Enforcement Agency under the State Council.

According to Article 5 of the Interim Provisions on Assessing the Impact of Concentration of Undertakings on Competition (Interim Provisions), market share is an important factor when analysing a market structure, including the positions of the undertakings concerned and their competitors in the relevant market. Market shares directly reflect the structure of the relevant market, the positions of the undertakings concerned and their competitors in the relevant market.

However, market share is not the only factor when assessing whether a concerned undertaking may obtain or enhance its market power through a proposed merger or acquisition. According to Article 27 of the AML and Article 5 of the Interim Provisions, the following factors will be taken into consideration by MOFCOM in its merger review.

i. Structure of a relevant market and the degree of market concentration

Serious competition concerns may arise when the merging parties account for substantial market shares in a highly concentrated relevant market. According to Article 19 of the AML, the merging parties may be presumed to be dominant if their combined market share accounts for 50 per cent or more in the relevant market. In addition, MOFCOM generally measures the degree of market concentration by the Herfindahl-Hirschman Index (HHI index) and the combined market share of the top companies in the industry (industry concentration index).

For example, in the Pfizer/Wyeth case, as to the Mycoplasma hyopneumoniae vaccine, MOFCOM explicitly indicated that the merger would substantially change the structure of the market and might also have the effect of eliminating or restricting competition. The obvious increase of market share and the degree of market concentration created by the undertakings’ combination were the main factors considered. MOFCOM believed that the market share of the Mycoplasma hyopneumoniae vaccine would reach 49.4 per cent (Pfizer was 38 per cent and Wyeth was 11.4 per cent) after the merger, which is much higher than other competitors and might provide Pfizer with the ability to expand its market position regardless of the presence of other competitors and possibly control the price. MOFCOM measured the degree of market concentration by HHI and concluded that the merger would lead to an obvious substantial increase in the degree of market concentration.

In the Abbott/St. Jude case, MOFCOM explicitly indicated that the merger would substantially change the structure of the small hole vessel closure device market and might
also have the effect of eliminating or restricting competition. Abbott and St. Jude combined had more than 95 per cent of the market in 2016, with shares of 71.3 per cent and 23.9 per cent respectively. The HHI before the transaction was already 5,678; HHI index after transaction would be 9,086; i.e., a change of HHI of 3,408. MOFCOM concluded that the merger would lead to a substantial increase in the degree of market concentration, while other competitors have limited market power to provide effective competition. MOFCOM noticed the combined market shares of Abbott and St. Jude exceeded 95 per cent in China’s small hole vessel closure device market, and therefore the merger would have the effect of eliminating competition in the said market. In MOFCOM’s decision, there is no explicit wording of the finding of monopoly power, but an over 90 per cent market shares could create a presumption of dominance under China’s anti-monopoly law.

ii  Difficulty of market entry
To achieve a complete assessment of the competition status of the relevant market, MOFCOM may consider potential competition from new entries. A highly concentrated market may have more barriers to new entry. As distribution channels, technological advantages or critical facilities are, to some extent, controlled by players with strong market power, these could pose difficulties for new players to enter the relevant market. On the other hand, if the entry barriers are low, the other undertakings will be able to respond swiftly to the exclusivity or restricting effect on competition carried out by a proposed transaction.

According to Article 7 of the Interim Provisions, to assess the difficulty of market entry, the likelihood, switching time and sufficiency of such entry need to be considered. In the Pfizer/Wyeth case, MOFCOM pointed out that R&D of drugs is characterised by the high cost and long duration for entry. MOFCOM further determined that the proposed merger might impose more technological barriers to entry in the relevant market (the Mycoplasma hyopneumoniae vaccine market). After the merger, Pfizer would likely take advantage of its scale to further expand its footprint in the Chinese market, and exclude the other market players in this field. In the Abbott/St. Jude case, MOFCOM pointed out that small hole vessel closure device requires high technology and it takes a long period to obtain market entry approval from relevant supervision departments. In addition, the complete analysis in the Baxter/Gambro case also illustrates MOFCOM’s views regarding the difficulty of entering into the pharmaceutical sector:

Many countries around the world have strict entry restrictions on certain medical supplies, and some products need to meet quality standards in order to obtain the appropriate technical qualifications. In China, it is difficult for undertakings to enter the pharmaceutical sector, due to the prior approvals that have to be obtained from China Food and Drug Administration.

iii  Other factors
Apart from the above, factors such as the impact of concentration on public interests, economic efficiency, whether the undertakings participating in concentration are enterprises on the brink of bankruptcy and whether there is any countervailing buyer power, etc., will also be taken into consideration. Besides, the latest regulations may change the overall pharmaceutical industry. Such change will likely affect MOFCOM’s considerations.
V REMEDIES

According to Article 3 of the Interim Provisions for Imposing Restrictive Remedies on Business Concentrations (Remedy Provisions) promulgated by MOFCOM, there are normally three types of remedies: structural remedies, which mainly include divestiture of tangible assets and intangible assets including intellectual property rights; behavioural remedies, which include access to infrastructure, such as networks or platforms, licensing key technologies (including patents, know-how or other intellectual property rights) and terminating exclusive agreements; and comprehensive remedies, combining both structural remedies and behavioural remedies.

i Structural remedies

Structural remedies are aimed at restoring the relevant market’s competition structure. The commonly applied structural remedies include, but are not limited to, the divestiture of part of the assets or businesses of the undertakings involved in the concentration.

In the Pfizer/Wyeth case, Pfizer and Wyeth both had business in the Mycoplasma hyopneumoniae vaccine market, and the merger of Pfizer and Wyeth would substantially change the structure of market competition and might also have the effect of eliminating or restricting competition. Therefore, MOFCOM required Pfizer to divest the Mycoplasma hyopneumoniae vaccine business, including the Respisure and Respisure One brands, within the mainland China territory. In the Abbott/St. Jude case, Abbott and St. Jude both had business in the small hole vessel closure device market, and the merger would have the effect of eliminating or restricting competition. As a result, MOFCOM required St. Jude to divest its small hole vessel closure device business to Terumo Corporation. In the BD/Bard case, BD and Bard both had business in the Chinese market of core needle biopsy devices. MOFCOM was concerned that the merger may have had the impact of eliminating or restricting competition after the transaction, the parties would secure a stronger control over the relevant markets in China, and the transaction may have had an adverse impact on technological advancements in the relevant markets. Therefore, MOFCOM required the parties to split up the global product line and the R&D product line of BD’s core needle biopsy devices business, including ‘R&D product A’ and all tangible and intangible assets related to the core needle biopsy devices product line.

iiBehavioural remedies

Behavioural remedies are aimed at modifying or restricting some behaviour of the undertakings involved in the concentration in order to maintain or restore effective competition.

For example, in MOFCOM’s decision issued on 13 August 2010 granting conditional approval of Novartis’s acquisition of Alcon (Novartis/Alcon case), that the agreements between its wholly owned subsidiary Shanghai CIBA Vision, and Hydron lens company post-transaction were deemed to facilitate coordination of product price, production quantity, sales areas or other sensitive information. MOFCOM conditioned approval on Novartis renouncing this agreement within 12 months after the issuance of its conditional approval, so as to reduce the adverse impact of the concentration in the relevant market.
Hybrid remedies combining both structural and behavioural remedies

In some complicated merger cases, the application of either structural remedies or behavioural remedies may not be sufficient to reduce the adverse impacts on competition. In such circumstance, the acquiring undertaking may come up with hybrid remedies combining both structural and behavioural remedies.

MOFCOM will assess the effectiveness, feasibility and timeliness of the remedies proposed by the parties. Effectiveness means the remedies are sufficient to reduce the adverse impacts of concentration on competition; feasibility means that the remedies are workable in practice; and timeliness means that the remedies can quickly solve the problem created by the concentration in competition. If the notifying party fails to submit the remedy proposal within the specified period of time, or the submitted remedy proposal is not deemed sufficient to reduce the adverse effects on the competition resulting from the concentration, then the notifying party faces the risk that MOFCOM will prohibit the concentration.

In the Baxter/Gambro case, MOFCOM relied on the market share, market concentration, market power and potential for market entry to determine the effect in the relevant market (CRRT monitors, CRRT dialysers and CRRT blood lines). MOFCOM concluded that the transaction might render Baxter a dominant market player in the CRRT products sector and the proposed transaction would also likely increase the coordination between the undertakings in the Chinese blood line dialyser market, thereby eliminating competition. Also, barriers in the CRRT products market and blood line dialyser market would limit entry. Based on this competition analysis, MOFCOM decided to impose a hybrid remedy combining both structural and behavioural remedies for the approval of this concentration. The remedies include:

a. Baxter divesting its global CRRT business, including such tangible and intangible assets as are required for the divested business to be viable and competitive on a stand-alone basis in the relevant markets; and

b. by 31 March 2016, Baxter terminating the Nipro OEM agreement in China (except for the previous customer contracts or other legal and regulatory obligations occurred before the release of this decision).

VI CONCLUSION

As part of healthcare reform, the pharmaceutical industry in China is facing increasingly strict scrutiny initiated by the top Chinese government officials, including the antitrust authorities. Most notably, certain multinational pharmaceutical undertakings are criticised for having charged excessive prices on patented drugs and medical devices, which have led to high medical costs for the general public in China. In the context of such regulatory pressures and the burgeoning transaction environment, the Chinese pharmaceutical industry may become more complex with multiple market participants further complicating the competitive landscape. Therefore, the competition assessment in a merger review requires a comprehensive understanding of such ‘state of play’ developments in China’s pharmaceutical industry.
Chapter 2

EU MERGER CONTROL

Nicholas Levy and Patrick Bock

On 21 September 1990, the EC Merger Regulation entered into force, introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration. The EC Merger Regulation has been transformative, effecting significant and permanent change to EU competition law and practice. This chapter contains a short introduction to the principal provisions of the EC Merger Regulation and identifies certain of the most important developments in its recent application.

I  INTRODUCTION

Adopted in 1989, the EC Merger Regulation is intended to ‘permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations.’ The EC Merger Regulation contains the legal framework and principal provisions of EU merger control. Responsibility for the enforcement of the EC Merger Regulation rests with the Competition Commissioner, who oversees the European Commission’s Directorate-General for Competition (DG COMP). Since October 2014, Margrethe Vestager has served as Competition Commissioner. At the time of its adoption, the Commission also approved an Implementing Regulation, which is concerned largely with procedural matters and, among other things, contains Form

1 Nicholas Levy and Patrick Bock are partners at Cleary Gottlieb Steen & Hamilton LLP. The views expressed are personal and all errors, omissions, and opinions are their own. The authors have drawn on material contained in Nicholas Levy and Christopher Cook, European Merger Control Law (Matthew Bender & Co, 2017).


3 Recital 6, EC Merger Regulation.

CO and Short Form, the forms prescribed for the notification of reportable transactions. To facilitate understanding of the EC Merger Regulation and to provide transparency in its practice, application, and interpretation, the Commission has adopted and kept updated a number of interpretative Notices and Guidelines that address a range of jurisdictional, substantive, and procedural matters and are designed to provide ‘maximum transparency and legal certainty … informing the companies and the public about our procedures and at the same time offer[ing] us the opportunity to adapt our policies over time in order to reflect legal and economic developments as they come along’.

The scope, purpose, and objectives of the EC Merger Regulation were articulated at the time of its adoption in 1989 by Sir Leon Brittan QC, subsequently Lord Brittan, then Competition Commissioner:

*My task is to discover which mergers stifle competition. They will be stopped. All others will proceed. All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. A large European merger had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles [101] and [102] [TFEU] in this field, on the basis of two judgments of the European Court. Now we have the policy right and we have clarified*

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5 Form CO relating to the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1; and Short Form CO for the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1.


9 Mario Monti, former Competition Commissioner, The Main Challenges for a New Decade of EC Merger Control, 10th Anniversary Conference, Brussels, 15 September 2000 (Commission Press Release SPEECH/00/311).
the procedures and the substantive rules. The Community's single market now has a proper system of merger law and policy to ensure that its benefits are passed on to consumers and will lead to the enhancement of competitive industry.¹⁰

In recent years, the Commission has emphasised the EC Merger Regulation’s ‘fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation)’,¹¹ and has underlined the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies:

'The goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market .... Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.'¹²

The EC Merger Regulation has evolved from ‘one of the most dynamic domains in the competition portfolio’¹³ into a relatively ‘mature area of enforcement’,¹⁴ ‘a well-oiled machine which draws on many years of experience’.¹⁵

II YEAR IN REVIEW

In recent years, the Commission’s application of the EC Merger Regulation has become more interventionist: several concentrations have been prohibited or abandoned in the face of objections, others have been subject to wide-ranging commitments, and the Commission has

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¹² Mario Monti, former Competition Commissioner, *The Future for Competition Policy in the European Union*, speech at Merchant Taylor’s Hall, 9 July 2001 (Commission Press Release SPEECH/01/340 of 10 July 2001). See too Mario Monti, Europe’s Merger Monitor, *The Economist*, 9 November 2002 (‘Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare. By supporting the competitive process, the EC Merger Regulation plays an important role in guaranteeing efficiency in production, in retaining the incentive for enterprises to innovate, and in ensuring the optimal allocation of resources. Europe’s consumers have been the principal beneficiaries of the Commission’s enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result’).
explored ways in which the EC Merger Regulation’s jurisdictional scope might be expanded, applied theories of harm that had not been actively pursued for several years, enforced the EC Merger Regulation’s procedural rules more rigorously, and routinely required up front buyers in remedies cases. The following primary developments and trends can be observed.

First, as to the jurisdictional scope of the EC Merger Regulation, the Commission has resisted applications from certain Member State agencies to cede jurisdiction over transactions having cross-border effects, in particular those affecting the media and telecommunications sectors, where a number of national agencies have unsuccessfully petitioned the Commission to review concentrations impacting their respective national markets. In June 2013, the Commission published a consultative paper seeking comments on a proposal to expand the jurisdictional scope of the EC Merger Regulation to capture the acquisition of non-controlling minority shareholdings. A year later, in July 2014, the Commission issued a White Paper and a Staff Working Document confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings. Any such expansion could have significant consequences for the EC Merger Regulation’s scope of application and, shortly after her appointment as Competition Commissioner, Margrethe Vestager suggested that the ‘balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further’.

In 2016, the Commission consulted on a new and different proposal designed to expand the jurisdictional scope of the EC Merger Regulation to capture high-value transactions that
do not meet the revenue-based turnover thresholds. It is uncertain, however, whether this proposal will be adopted following the July 2017 publication of submissions made in response to the Commission’s consultation, which disclosed that ‘the majority of public and private stakeholders responding to the questionnaire do not perceive any (significant) enforcement gap as regards highly valued acquisitions of target companies that do not generate sufficient turnover to meet the jurisdictional thresholds of [the Merger Regulation], which would require legislative action.’

Second, the Commission has devoted increasing resources to more complex cases, reducing the length of unconditional approval decisions concerning non-problematic transactions and exploring ways to simplify notification requirements in respect of such cases. In a package of reforms adopted in 2013, the Commission expanded the definition of concentrations eligible for notification under the simplified procedure to ‘reduce the administrative burden and cost for business at a time when it needs it most’. In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.

Third, as to its enforcement practice, between 2012 and 31 December 2017, the Commission prohibited six concentrations, conditionally approved a number of others on the basis of far-reaching remedies, and led a number of companies to abandon concentrations to avoid likely prohibition decisions, provoking suggestions that it had become more interventionist. The Commission has maintained its focus on unilateral effects, showing

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27 Deutsche Börse/NYSE EuroNext, Case COMP/M.6166, Commission decision of 1 February 2012; UPS/TNT Express, Case COMP/M.6570, Commission decision of 30 January 2013; Ryanair/Aer Lingus (III), Case COMP/M.6663, Commission decision of 27 February 2013; Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 11 May 2016; Deutsche Börse/London Stock Exchange Group, Case COMP/M.7995, Commission decision of 29 March 2017; and HeidelbergCement/Schwenk/Cemex Croatia, Case COMP/M.7878, Commission decision of 5 April 2017.
29 See, e.g., TeliaSonera/Telenor/JV, Case COMP/M.7419, withdrawn on 11 September 2015, Commission Press Release STATEMENT/15/5627 of 11 September 2015 (parties abandoned the concentration when it became clear the Commission would not accept commitments offered to secure approval and would instead prohibit the transaction); and Halliburton/Baker Hughes, Case COMP/M.7477, withdrawn on 2 May 2016, Commission Press Release STATEMENT/16/1642 of 2 May 2016 (parties abandoned the transaction after the Commission raised objections and the U.S. Department of Justice made clear it would seek to enjoin it from closing).
30 Joaquín Almunia, Merger Review: Past Evolution and Future Prospects, 2 November 2012 (Commission Press Release SPEECH/12/773) (‘I am often asked why the Commission is raising hurdles against the creation of large European companies; why Brussels is not supporting ‘European champions.’ I am always
greater readiness to focus on the competition that will be lost through a merger, rather than the post-transaction market shares. In 2013, the Commission prohibited for the first time a transaction that raised unilateral effects concerns, but might not have been readily susceptible to challenge under the dominance test contained in the original version of the EC Merger Regulation. In 2015 and 2016, Commissioner Vestager appeared to reverse the policy of her predecessor, who had approved four-to-three mergers in the telecommunications sector, by causing the abandonment of a four-to-three transaction between two Danish telecommunications operators, prohibiting a four-to-three transaction between two UK operators, and approving a transaction between two major Italian telecommunications operators only after the merging companies agreed to divest sufficient assets to facilitate the establishment of a new market operator. In other cases, Commissioner Vestager had required wide-ranging remedies to address coordinated effects concerns and conglomerate effects concerns after several years in which neither theory of harm had been actively pursued.

Fourth, the Commission has continued to apply sophisticated quantitative tools, to engage in economic analysis of its own, and to place increasing reliance on internal business planning documents. Among other things, the package of reforms adopted in 2013 revised Form CO to encourage notifying parties to provide a description of quantitative economic

31 See, e.g., Syniverse/MACH, Case COMP/M.6690, Commission decision of 29 May 2013.
33 Hutchison 3G Austria/Orange Austria, Case COMP/M.6497, Commission decision of 12 December 2012; Hutchison 3G UK/Telefónica Ireland, Case COMP/M.6992, Commission decision of 28 May 2014; and Telefónica Deutschland/E-Plus, Case COMP/M.7018, Commission decision of 2 July 2014.
34 Teliasonera/Telenor/JV, Case COMP/M.7419, withdrawn on 11 September 2015.
35 Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 11 May 2016.
36 Hutchison 3G Italy/WIND/JV, Case COMP/M.7758, Commission decision of 1 September 2016.
37 AB InBev/SABMiller, Case COMP/M.7881, Commission decision of 24 May 2016.
38 Dentsply/Sirona, Case COMP/M.7822, Commission decision of 25 February 2016; Worldline/Equens/Paysquare, Case COMP/M.7873, Commission decision of 20 April 2016; and Microsoft/LinkedIn, Case COMP/M.8124, Commission decision of 6 December 2016.
40 See, e.g., Universal Music Group/EMI Music, Case COMP/M.6458, Commission decision of 21 September 2012, Annex I, paras. 1–44 (Commission obtained three-year sales data covering 14 EU countries from major digital music platforms and recorded music companies to empirically test whether larger recorded music companies were able to extract better commercial terms from platforms, concluding that ‘the results indicate that there is a positive relationship between the size of a recorded music company’s repertoire and the wholesale price it negotiates with digital customers’).
data collected and stored in the ordinary course of business operations\(^{41}\) and expanded the range of internal documents that must be provided with notifications.\(^{42}\) These changes to Form CO have been supplemented by the Commission’s increasing readiness to request large numbers of internal documents during its administrative procedure.\(^{43}\) The Commission’s focus on detailed economic data and analysis, together with the more systematic review of internal business planning documents, has tended to lengthen the merger clearance timetable, in particular in complex Phase II cases.\(^{44}\)

In recognition of the increasing reliance placed on internal documents, the Director General of DG COMP disclosed in March 2018 that the Commission was preparing a set of Best Practices Guidelines ‘to clarify the Commission’s approach and give practical guidance to companies on how to reply to our requests for internal documents in merger cases’ in an effort to make Commission practice ‘more transparent and predictable’, to foster cooperation between the Commission and merging companies, and to make document requests ‘simpler and better targeted’. By publishing guidance, the Commission hopes to ‘help businesses handle requests for internal documents more efficiently without compromising on [its] responsibility to protect consumers’.\(^{45}\) The Commission subsequently consulted informally on a draft of those Guidelines.\(^{46}\)

Fifth, the Commission has expanded its consideration of effects on innovation competition beyond the pharmaceuticals sector\(^{47}\) and has introduced new theories of harm aimed at capturing negative effects of concentrations on overall innovation, outside individual product markets. In 2015, in \textit{Novartis/GlaxoSmithKline Oncology Business}, the Commission expanded its analysis into merging parties’ research projects, taking under review even products in the early stages of development,\(^{48}\) in \textit{General Electric/Alstom}, the Commission

\(^{41}\) Introduction, para. 1.8, Form CO.
\(^{42}\) Section 5.4, Form CO.
\(^{43}\) See, e.g., \textit{Hutchison 3G UK/Telefónica UK}, Case COMP/M.7612, Commission decision of 11 May 2016 (notifying parties submitted over 300,000 internal documents, which Commission reviewed to support its conclusion that Three and O2 competed closely with each other); \textit{Hutchison 3G Italy/WIND/JV}, Case COMP/M.7758, Commission decision of 1 September 2016 (WIND submitted over one million internal documents, which Commission analysed to determine whether the merging companies were close competitors).
\(^{44}\) In 2012–2014 the average length of Phase II cases was 148 working days, ranging from 105 days (\textit{UTC/Goodrich}, Case COMP/M.6410, Commission decision of 26 July 2012) to 133 days (\textit{Syniverse/Mach}, Case COMP/M.6690, Commission decision of 29 May 2013) to 147 days (\textit{Liberty Global/Ziggo}, Case COMP/M.7000, Commission decision of 10 October 2014) to 160 days (\textit{UPS/TNT Expres}, Case COMP/M.6570, Commission decision of 30 January 2014) to 172 days (\textit{Telefónica Deutschland/E-Plus}, Case COMP/M.7018, Commission decision of 2 July 2014). This trend has continued in more recent cases (see, e.g., \textit{Hutchison 3G UK/Telefónica UK}, Case COMP/M.7612, Commission decision of 11 May 2016 (eight months); and \textit{Dow/DuPont}, Case COMP/M.7932, Commission decision of 27 March 2017 (nine months)).
\(^{45}\) Johannes Laitenberger, Director General, DG COMP, Enforcing EU competition law in a time of change, W@competition Conference, Brussels, 1 March 2018.
\(^{46}\) DG Competition Draft Best Practices on requests for internal documents under the EU Merger Regulation.
\(^{47}\) See, e.g., \textit{Pfizer/Pharmacia}, Case COMP/M.2922, Commission decision of 27 February 2003, para. 22; and \textit{Novartis/GlaxoSmithKline Oncology Business}, Case COMP/M.7275, Commission decision of 28 January 2015, paras. 84–94.
was concerned that, by removing an important innovator, the transaction would reduce ‘the overall competitive pressure on the remaining competitors, with a reduction in the overall incentives to invest significantly in innovation’;49 and, in *Dow/DuPont*, 50 the Commission was concerned that the transaction would reduce the parties’ innovation incentives, resulting in reduced innovation competition in several ‘innovation spaces’ as well as at the industry level overall. The Commission’s view that innovation concerns do not need to be tied to harm in any specific market51 has been controversial and some commentators have been concerned by the lack of clear conditions and criteria for the innovation theory to apply.52

Sixth, as to procedure, the Commission has in recent years shown an increasing readiness to enforce its procedural rules and to discipline companies that do not observe those rules. In May 2017, the Commission fined Facebook €110 million for providing incorrect or misleading information during its 2014 investigation of its acquisition of WhatsApp. The magnitude of this fine dwarfed penalties imposed in the past for similar infractions and, as Competition Commissioner Vestager made clear at the time, ‘sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information’.53 Also in May 2017, the Commission sent Altice a statement of objections alleging that, in connection with its 2015 acquisition of PT Portugal, it had been ‘in a position to exercise decisive influence over PT Portugal before notification or clearance of the transaction, and ... in certain instances [had] actually exercised decisive influence over PT Portugal’.54

Seventh, as to remedies, the Commission has maintained a rigorous approach towards their evaluation and implementation, including by subjecting remedy proposals to detailed and exacting review55 and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013.56 Most significantly perhaps, the Commission has required up-front buyer commitments in an increasing number of cases. In 2014, all five Phase II commitments decisions included up-front buyer provisions (*INEOS/Solvay/...*).

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51 Matthew Newman, Dow-DuPont merger remedy reflects EU’s growing focus on innovation, Mosso says, mLex Insight, 28 March 2017 (‘In some cases, you can know in which product the companies are innovating and you can identify an overlap in the future. But there could be situations where we don’t know the outcome of the innovation process, but we nevertheless know the innovation process would be harmed as a result of the merger’).

52 See, e.g., Nicolas Petit, Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?, International Center for Law & Economics, Antitrust & Consumer Protection Research Program White Paper, 2017, p. 8 (Petit refers to the theory of harm as the ‘Significant Impediment to Industry Innovation’ (SIII) theory, characterising it as a novelty that exceeds the scope of the current European merger control framework. The author considers that innovation concerns in previous cases were always anchored to a specific product market, whether current or future).


55 See, e.g., Outokumpu/Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012, paras. 966 et seq.

JV, Hutchison 3G UK/Telefonica Ireland, Telefónica Deutschland/E-Plus, Liberty Global/Zipper, and Huntsman Corporation/Equity Interests held by Rockwood Holdings, as did three of the seven Phase II commitments decisions rendered in 2015 (Zimmer/Biomet, Orange/Jazztel, and General Electric/Alstom), three of the six Phase II commitments decisions rendered in 2016 (Staples/Office Depot, Ball/Rexam, and Liberty Global/BASE Belgium), and one of the two Phase II commitment decisions rendered in 2017 (Dow/DuPont). The incidence of Phase I commitments decisions including up-front buyer provisions has also increased. Additionally, as the Commission's scrutiny of divestment packages has increased, requirements for divestments that extend beyond the strict competition concerns identified in order to enhance the viability and competitiveness of the divestment business have become more common.

Eighth, as to the defences available under the EC Merger Regulation, the Commission approved two transactions on the basis of the 'failing firm' defence, including Aegean/Olympic (II), which had been prohibited in 2011, and started to show greater willingness to take positive account of efficiencies, including in FedEx/TNT Express.

Ninth, as to judicial review, in Cisco and Messagenet, which concerned an application to annul a Phase I unconditional approval decision (Microsoft/Skype), the General Court rejected the applicants' submission that the Commission was subject to a higher standard when it decided against opening a Phase II investigation, and confirmed that the

57 Case COMP/M.6905, Commission decision of 8 May 2014.
58 Case COMP/M.6992, Commission decision of 28 May 2014.
59 Case COMP/M.7018, Commission decision of 2 July 2014.
60 Case COMP/M.7000, Commission decision of 10 October 2014.
61 Case COMP/M.7061, Commission decision of 10 September 2014.
62 Case COMP/M.7265, Commission decision of 30 March 2015.
63 Case COMP/M.7421, Commission decision of 19 May 2015.
64 Case COMP/M.7278, Commission decision of 8 September 2015.
65 Case COMP/M.7555, Commission decision of 10 February 2016.
67 Case COMP/M.7637, Commission decision of 4 February 2016.
68 Case COMP/M.7932, Commission decision of 27 March 2017.
71 Case COMP/M.6796, Commission decision of 9 October 2013.
72 See, e.g., UPS/TNT Express, Case COMP/M.6570, Commission decision of 30 January 2013; and Deutsche Börse/NYSE Euronext, Case COMP/M.6166, Commission decision of 1 February 2012, paras. 1145–1342.
74 Case COMP/M.6281, Commission decision of 10 October 2011.
75 Cisco Systems Inc and Messagenet SpA v. Commission (Cisco Systems and Messagenet), Case T-79/12 EU:T:2013:635, para. 43 (applicants had contended that the Commission was required 'to show beyond reasonable doubt that a concentration does not give rise to any competition concerns').
Commission was subject to an identical standard of judicial review irrespective of whether it approves concentrations in Phase I or Phase II, namely a balance of probabilities standard.76 In 2015, the General Court77 upheld the Commission’s prohibition of the then-contemplated combination of Deutsche Börse and NYSE/Euronext,78 confirming the Commission’s broad discretion concerning the types of evidence that need be adduced to support its findings.79 In 2017, the General Court annulled a Commission decision prohibiting the acquisition by United Parcel Service (UPS) of a rival express delivery services provider, TNT Express NV (TNT), because the Commission was found to have infringed UPS’s rights of defence by relying on a version of an econometric model that had not been fully disclosed to UPS during the administrative procedure.80

Tenth, there has also been an uptick in the number of gun-jumping cases pursued by the Commission in recent years. In 2014, the Commission imposed fines on Marine Harvest for premature implementation of its acquisition of Morpol.81 It imposed separate fines – confirmed by the General Court82 – for breach of the notification and standstill requirements. This was followed by a fine of €124.5 million imposed in April 2018 on Altice for gun-jumping in relation to its acquisition of PT Portugal.83 Although a number of Commission officials have recognised that its gun-jumping rules lack certainty,84 it expects its Altice decision to provide guidance.85 It also remains to be seen what conclusions the Commission draws from the Court of Justice’s judgment in Ernst & Young (which found that gun-jumping arises only if a measure contributes to a change in control of the target undertaking, irrespective of whether that measure has market effects).86

76 Cisco Systems and Messagenet, supra, paras. 45–50, at para. 46 (‘the standard of proof is no higher for decisions adopted under Article 6 of Regulation No. 139/2004 than those adopted under Article 8 of that Regulation’). Advocate General Kokott had previously advocated a standard of proof ‘beyond a reasonable doubt’ for Phase I decisions. See Opinion of Advocate General Kokott in Bertelsmann and Sony, Case C-413/06 P EU:C:2007:790, para. 211 (This particularly high standard is known principally in the field of criminal and quasi-criminal proceedings. In merger control proceedings it is applicable only in the preliminary phase (Phase I), to compensate for the fact that at that stage the investigation of a concentration is merely a summary one. At that stage, ‘serious doubts’ as to the compatibility of the concentration with the common market will only prevent its being cleared too quickly and force the Commission to make a more extensive investigation in a formal procedure (Phase II)).
78 Case COMP/M.6166, Commission decision of 1 February 2012.
79 Deutsche Börse, supra, para. 132 (General Court held that ‘there is no need to establish a hierarchy between “non-technical evidence” and “technical evidence”, confirming that ‘the Commission’s task [is] to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation,’ prioritising certain items of evidence and discounting others).
81 Case COMP/M.7184, Commission decision of 23 July 2014.
86 Ernst & Young P/S v. Konkurrencerådet (Ernst & Young), Case C-633/16 ECLI:EU:C:2018:371 (Court of Justice held that KPMG Denmark’s termination of a cooperation agreement with KMPG International,
Finally, collaboration between the Commission and other antitrust agencies around the world has continued to deepen and instances of disagreement have remained infrequent. Within Europe, however, tensions emerged in 2014 between the Commission and certain Member State agencies concerning the Commission’s approval of a number of four-to-three concentrations impacting the telecommunications sector. Shortly after her appointment, Commissioner Vestager affirmed the Commission’s commitment to ‘a strong competition culture [that] keep[s] protectionism at bay,’ recognising that antitrust enforcement often serves wider political goals, but maintaining that individual cases are never subject to political interference.

III THE MERGER CONTROL REGIME

The EC Merger Regulation is based on four main principles: (1) the exclusive competence of the Commission to review concentrations of EU dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision making. The principal provisions of the EC Merger Regulation are summarised below.

The EC Merger Regulation applies to concentrations (i.e., lasting changes in control). The concept of a concentration includes mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise ‘decisive influence’.

All concentrations that meet prescribed jurisdictional ‘size’ tests are deemed to have EU dimension and, as such, are subject to mandatory notification under the EC Merger Regulation, irrespective of whether they have any effect in the EU. The Commission has exclusive jurisdiction over such transactions (the ‘one-stop-shop’ principle).
Concentrations that fall below the EC Merger Regulation’s thresholds may be subject to national merger control rules. Any Member State may ask the Commission to allow its national competition agency to review a concentration that has an EU dimension. One or more Member State agencies may also refer to the Commission concentrations that would otherwise be subject to national competition rules. As of 1 May 2004, parties to a concentration may petition the Commission either to have a transaction that is reportable at the EU level referred to one or more national competition agencies or to have the Commission review a transaction that would ordinarily be subject to national merger control rules.

The EC Merger Regulation contains deadlines for the Commission’s review of reportable concentrations, although those deadlines have been progressively extended and, particularly in complex cases, the Commission often encourages merging parties to engage in lengthy pre-notification discussions and may ‘stop the clock’ to secure more time. The large majority of concentrations are approved at the end of an initial 25 working day review period (Phase I). Where the Commission has ‘serious doubts’ about a concentration’s compatibility with EU competition rules, it opens an in-depth (Phase II) review that lasts 90 working days, extendable to 125 working days. Both periods may be extended in situations where commitments are offered to address competition concerns identified by the Commission. Absent a derogation, reportable concentrations may not be implemented until they have been approved, and, in cases of breach, the Commission may take remedial action. Fines may also be imposed for failure to notify, late notifications or the provision of incorrect or misleading information.

The EC Merger Regulation provides opportunities for both merging parties and third parties to be heard. The Commission encourages customers, competitors, suppliers, and other interested parties to play an active role in the EU merger control process. In practice, third parties play an important role in EC merger proceedings and the Commission attaches considerable importance to their views.

The substantive test under the EC Merger Regulation is whether a concentration ‘significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position’. The Commission’s appraisal under the EC Merger Regulation has two main elements: definition of the relevant market and competitive assessment of the concentration. The Commission generally focuses first on unilateral exercises of market power and then on whether a concentration may have coordinated effects arising from tacit collusion. Horizontal mergers (i.e., those involving firms active in the same market), have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, has prohibited) concentrations that have had anticompetitive vertical or conglomerate effects.

The Commission is not empowered to exempt or authorise, on public interest or other grounds, concentrations that are considered incompatible with the common market. It may, however, take positive account of efficiencies. The Commission may also condition its approval of transactions on undertakings or commitments offered by the merging parties.

An appraisal under Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements, may also be warranted under the EC Merger Regulation in respect of full-function joint ventures that give rise to spillover effects between their parent companies. Non-full-function joint ventures fall outside the EC Merger Regulation and may be subject to Articles 101 or 102 of the TFEU, which prohibit abusive conduct by dominant companies, as well as national competition rules.
Although the EU has an administrative system of merger control, where the Commission investigates and adjudicates, Commission decisions are subject to judicial review by the EU courts, whose contribution to EU merger control has been significant, particularly in recent years, where several Commission decisions have been subject to far-reaching review.91

Since its adoption, the EC Merger Regulation has evolved into an integral part of EU competition practice. Unlike other areas of EU competition law, where few formal decisions have been adopted,92 the EC Merger Regulation has produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets. The Commission has also adopted a pragmatic, open and informal approach to the EC Merger Regulation’s application. Former Commissioner Monti explained the Commission’s achievement under the EC Merger Regulation in the following terms:

The EC Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a ‘one stop shop’ for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions here in the EU. It has guaranteed that merger investigations are completed within tight, pre-determinable deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions—each and every merger notified to the Commission results in the communication and publication of a reasoned decision. Above all, we have put in place a merger control system which is characterised by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition.93

Between September 1990, when it entered into force, and 31 December 2017, the Commission had rendered around 6,700 decisions, of which around 6,000 (90 per cent) approved concentrations unconditionally in Phase I; 55 (1 per cent) found the EC Merger Regulation to be inapplicable; 291 (4 per cent) approved transactions subject to undertakings given in Phase I;94 58 (1 per cent) approved transactions unconditionally during Phase II; and 122 (2 per cent) approved concentrations subject to undertakings given in Phase II. As of December 2017, the Commission had rendered 27 prohibition decisions, representing less than 0.5 per cent of all notified concentrations, five of which have been overturned on

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91 In addition to reviewing appeals of Commission decisions, the EU courts have also issued a number of important judgments following preliminary references from national courts, most recently in Austria Asphalt v Bundeskartellamtwalt (Austria Asphalt), Case C-248/16 EU:C:2017:643 (clarifying the circumstances in which the Merger Regulation applies to changes from joint to sole control); and Ernst & Young P/S v. Konkurrencerådet (Ernst & Young), Case C-633/16 EU:C:2018:371 (clarifying EU rules on gun jumping rules).
92 For perspective, since the EC Treaty came into force in 1965, the Commission has rendered approximately 100 decisions applying what is now Article 102 of the TFEU, which prohibits abusive conduct by dominant companies.
94 Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.
appeal by the EU courts. Around 180 notifications have been withdrawn, of which 42 were withdrawn following the opening of Phase II investigations, in many instances to avoid prohibition decisions. Thus, around 1 per cent of all transactions notified under the EC Merger Regulation have been either prohibited or abandoned in the course of Phase II. The Commission’s ‘challenge rate’ is broadly comparable to those of other major jurisdictions. The Commission has referred 231 concentrations in whole or in part to Member State authorities (3 per cent of all notified concentrations).

In the 27 years since it entered into force, the Commission’s application of the EC Merger Regulation has evolved considerably. Eight aspects of this evolution may be identified: (1) the EC Merger Regulation’s scope of application has been broadened to include all full-function joint ventures, as well as mergers, acquisitions, and other forms of concentration; (2) the Commission has over time employed an increasingly rigorous, quantitative, and economically orientated approach to market definition and substantive assessment; (3) the Commission has applied the EC Merger Regulation’s substantive test to a wide array of situations, including conglomerate mergers, vertical transactions, and situations of collective dominance; (4) the Commission has used interpretative Notices to codify the law and bring greater transparency; (5) the Commission has developed a flexible and open-minded approach to the implementation of the EC Merger Regulation’s procedural rules, extending the review periods far beyond those originally envisaged; (6) the Commission has devoted time, effort and resources to shaping and enforcing remedies; (7) the Commission has attached increasing importance to requesting and reviewing internal documents; and (8) the Commission has fostered international cooperation and convergence in merger control.

The most significant challenge to the Commission’s role as investigator, prosecutor, and judge in EU merger control occurred in the early 2000s, when the EU courts overturned three prohibition decisions in a trilogy of judgments that were critical of the Commission’s handling of the concentrations in question (Airtours, Schneider and Tetra Laval). The principal criticism made was that the same Commission officials assess the evidence, state

96 For perspective, of the 15,310 transactions notified in the United States between fiscal years 2007 and 2016, ‘second requests’ for additional information were issued in 480 instances (3 per cent). It should be noted, however, that the filing thresholds in the United States are quite low, despite having been raised to $84.4 million as of February 2018 (see Federal Register Vol 83, No. 19, 4050). Therefore, U.S. notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to U.S. regulators. See, e.g., Gavin Robert, Merger Control Procedure and Enforcement: An International Comparison, [2014] December, European Competition Journal, pp. 523–549.
99 Schneider Electric v. Commission, Case T-310/01 EU:T:2002:254. This case was decided concurrently with Schneider Electric v. Commission, Case T-77/02 EU:T:2002:255. The two cases are collectively referred to as ‘Schneider.’
100 Tetra Laval B.V. v. Commission, Case T-5/02 EU:T:2002:264. This case was decided concurrently with Tetra Laval B.V. v. Commission, Case T-80/02 EU:T:2002:265. The two cases are collectively referred to as ‘Tetra Laval.’
the case against a notified concentration, determine how far that case is proved, and decide whether to approve or prohibit a transaction. A comparison was drawn with the United States, where the prospect of independent judicial review is said to exert discipline on decision making, irrespective of whether a given transaction is challenged or abandoned.

In response to the judgments in Airtours, Schneider and Têtra Laval, the Commission acknowledged that ‘the system put in place in 1990 [was] showing some signs of strain’ and recognised that a ‘radical’ package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques that could be tested against ‘the cold metal of economic theory,’ and maintain the existing institutional framework in which the Commission approves or prohibits mergers. The Commission expressed determination that ‘these setbacks [should not be allowed] to distort our view of the Community’s merger control policy,’ and resolved to ‘transform them into an opportunity for even deeper reform than originally envisaged.’ In December 2002, the Commission approved a ‘comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the Community’.

By ensuring that decisions rendered following the 2004 reforms were increasingly well reasoned and firmly based in fact, law, and sound economics, the Commission successfully preserved its power to vet mergers. Commission officials also welcomed the European Court of Human Rights’ determinations in Jussila and Menarini that, given the effective judicial oversight exercised by the EU courts, the Commission’s combined role as prosecutor,
investigator and decision-maker in antitrust proceedings, including merger control proceedings, is compatible with Article 6 of the European Convention on Human Rights, which provides that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.’ Should, however, complaints resurface about the perceived absence of checks and balances on Commission decision making and the lack of effective judicial review, the EU’s institutions might again be under pressure to consider further reforms.

IV OTHER STRATEGIC CONSIDERATIONS

Over the last decade, the Commission has pursued various initiatives designed to increase coordination, facilitate convergence, and avoid divergent outcomes with other agencies around the world. Perhaps the most important of these is an agreement between the EU and the United States that was intended to promote cooperation between their respective competition agencies. This agreement has led to high level dialogue at political, senior management, academic level, convergence on jurisdictional, substantive, and procedural issues. In the great majority of recent cases, the Commission has avoided diverging from its US counterparts, and antitrust enforcement has evolved from ‘comity to cooperation to convergence’. The importance of facilitating cooperation and minimising differences has been widely recognised in the EU and the United States. Then-Competition Commissioner Joaquín Almunia recognised that ‘at the beginning of the 21st century we cannot afford to operate, to enforce our competition laws in national or regional silos.’

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the General Electric/Honeywell transaction. The US Department of

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112 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1995 O.J. L95/47).

113 See, e.g., Joaquín Almunia, former Competition Commissioner, *Trends and Milestones in Competition Policy since 2010*, AmCham EU’s 31st Annual Competition Policy Conference, Brussels, 14 October 2014 (Commission Press Release SPEECH/14/689) (Commission disclosed it had ‘cooperated with other agencies in around half of [its] past significant merger cases’). See also Margrethe Vestager, *Merger review: Building a global community of practice, ICN Merger Workshop, Brussels, 24 September 2015* (‘At present, the European Commission has some form of cooperation with non-EU agencies in more than half of all cases that involve remedies or require in-depth reviews – what we call ‘second phase’’).


116 Case COMP/M.2220, Commission decision of 3 July 2001. In 2000, Senators DeWine and Kohl had written to then-Commissioner Monti, voicing concerns that the Commission’s competition policy might discriminate against US companies and suggesting that the EU might be influenced by ‘pan-European protectionism rather than by sound competition policy’. Professor Monti dismissed the concerns as being
Justice concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition. The Commission, however, prohibited the transaction, prompting criticism from US politicians and regulators. This disagreement represented the most significant divergence between Commission and US regulators since Boeing/McDonnell Douglas. Since then, the Commission and the US agencies have endeavored to avoid similar disagreements and the years following General Electric/Honeywell have been characterised by ‘quiet and business-like cooperation’.

In practice, counsel and companies should assume that antitrust agencies will, as a matter of course, cooperate in investigating transactions subject to parallel review. Counsel and companies should therefore ensure that submissions made in different jurisdictions are consistent. The differences between EU and US reporting obligations and, in particular, the lack of any requirement that companies notifying transactions to the US agencies take a position on market definition or provide a competitive assessment of a given transaction, makes it essential that US counsel are aware of, and in agreement with, notifications filed in Brussels. As a result, a premium is increasingly placed on achieving a level of cooperation and coordination between lawyers similar to that likely to occur between reviewing agencies.

V OUTLOOK & CONCLUSIONS

The Commission’s application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments, including advances in forensic tools and economic modelling, that shape its future application, the EC Merger Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission’s review, and the probable outcome.

The challenge for the Commission will be to maintain the standards that have characterised the EC Merger Regulation’s application to date; to continue to identify ways in which the administrative burden placed on notifying parties can be reduced, thereby expediting merger review and avoiding unnecessary (and costly) data-gathering; to explore the scope for approving more transactions without the need for lengthy, motivated decisions,
thereby freeing resources for complex cases; to avoid the temptation to extend the EC Merger Regulation’s jurisdictional ambit to the acquisition of non-controlling minority shareholdings; to encourage the harmonisation of national rules and procedures; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.
I INTRODUCTION

The media sector has seen an extraordinary decade of significant transformation driven, in particular, by digitisation and technological convergence. These changes have led to the emergence and success of new business models and additional ways to broadcast and consume content.

Technological changes in the media industry have generated new competition law concerns. Most notably, the European Commission (the Commission) has been confronted with a new type of undertaking: the social media company.

First, in 2014, the Commission authorised the acquisition of WhatsApp, a provider of consumer communication services, by Facebook, which offers social networking consumer communications and photo or video sharing functionalities. More recently, in December 2016, the Commission conditionally cleared the acquisition of the professional social network LinkedIn by Microsoft.

Because of the specific conditions prevailing in such high-technology markets and in the related relevant markets, these mergers have forced the Commission to adopt new standards and methods, both in defining the relevant markets and in assessing the potential effects of mergers on these new markets.

This chapter summarises the Commission’s approach in the social media sector.

II THE IDENTIFICATION OF NEW PRODUCT MARKETS

The mergers of social media companies have involved the delineation of various new markets, including the market for social networking services (professional or not), and the market for online communication services.

i Online communication services

According to the Commission: ‘Online communications services are multimedia communications solutions that allow people to communicate by means of an application or software in real time. They can be distinguished between consumer and enterprise

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1 Jérémie Marthan is counsel at Linklaters LLP. The author warmly thanks Elsa Mandel for her important contribution to this paper. The information in this chapter is accurate as of July 2017.
2 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014.
3 Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016.
communications services. Consumer communications services enable people to reach out to their friends, family members and other contacts in real time. Enterprise communications services are used by companies for business and professional purposes.4

Following a consistent approach, adopted in Microsoft/Skype,5 Microsoft/Nokia6 and then in Facebook/WhatsApp,7 the Commission confirmed in Microsoft/LinkedIn8 that consumer communications services should be viewed as a separate product market from enterprise communications services. This distinction was notably based on the fact that enterprise communications services are more sophisticated and reliable than consumer communications services. Enterprises have different and higher service requirements, such as robustness, security, reliability, ancillary functionality, management and support. The Commission further noted that enterprise communications services offer additional features in terms of collaborating tools, such as the possibility of sharing and editing a document in real time from different places. However, in all those merger control decisions, the Commission left open the question as to whether these markets should be further segmented depending on platforms, operating systems or functions.

From a geographic viewpoint, in Facebook/WhatsApp the Commission considered that the market for consumer communications applications was likely worldwide in scope, but defined it as EEA-wide, in line with a more conservative approach. This conservative approach was confirmed in Microsoft/LinkedIn.9

ii Social networking services

Social networking services, among which Facebook is the model, are multi-sided platforms that enable users to connect, share and communicate with each other across multiple devices (mobile and desktop) and means (e.g., via chats, posts, videos, recommendations). Such services are used to build social relations among people who share similar personal and career interests, activities, backgrounds or real-life connections. Among these services, a sub-set is focused on connecting with professional contacts. For this type of service, LinkedIn is currently the model.

In Microsoft/LinkedIn, despite the arguments put forward by the notifying parties, the Commission established a clear distinction between the social networking services (such as Facebook) and the professional networking services (such as LinkedIn). Based on the market investigation, the Commission considered that these two types of services constitute separate product markets, given their different functions, features and usage.10

Regarding the geographic market, the Commission considered in Facebook/WhatsApp that social networking services are commonly available worldwide, given the global scope of the internet. However, the Commission concluded that while there were indications that the geographic scope of the market could be global, the relevant geographic market should be limited to the EEA, in line with a more conservative approach.11

4 Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraph 74.
5 Case M.6281, Microsoft/Skype, Commission decision of 7 October 2011, Paragraphs 14 and 17.
6 Case M.7047, Microsoft/Nokia, Commission decision of 4 December 2013, Paragraphs 43-45.
7 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraphs 20-34.
8 Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraph 83.
9 Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraph 86.
10 Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraph 115.
11 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraphs 64-68.
With respect to the professional networking services, the Commission, however, reached a different conclusion. Indeed, in Microsoft/LinkedIn, the Commission noted that the differences in terms of language, functions, legal and regulatory requirements, and customers’ preferences among EEA countries appeared to be relevant and could influence the geographic scope of their activities. The Commission, therefore, concluded that the market of professional social services was national in scope.\textsuperscript{12}

\section*{III THE COMPETITIVE ASSESSMENT: NEW CHALLENGES}

The markets encompassed by social media mergers can be referred to as high-technology markets. These new markets present a new challenge for the Commission, which is faced with transactions between companies, the activity of which is unknown to them, and which require specific treatment.

\subsection*{i The question of the relevance of the EU merger control thresholds}

One potential issue with these relatively new markets is that some companies that have a high transaction value do not initially generate any turnover. This lack of revenue implies that competition regulators may not have jurisdiction to review the transaction since the turnover thresholds will not be triggered. Consequently, there is a risk that regulators could be prevented from reviewing mergers that may in fact negatively impact the market. For instance, in Facebook/Instagram,\textsuperscript{13} Instagram had not generated any revenue at the time of its acquisition by Facebook, although it was highly valued by Facebook. The UK Office of Federal Trade was only able to claim jurisdiction over this merger under its ‘share of supply’ test (a test that is similar to a market share test), but not under a turnover test. Therefore, in jurisdictions where merger control is based solely on revenue thresholds, such acquisitions may not be subject to review.

\subsection*{ii The market power: a renewed analysis}

Second and most importantly, these high-technology markets are characterised by constant innovation. In these markets, products have short life cycles, and companies are forced to remain innovative if they wish to ‘stay in the game’.

In social media markets, the most innovative companies usually release an ‘innovative’ product or service, which itself creates a new market or a new segment, in which the company is ‘dominant’, at least for a certain period after releasing the product or service. In addition, barriers to entry are usually low, mostly because high-technology markets (and especially markets involved in the provision of social media services) involve intangible goods. Therefore, fixed-costs are usually constant and variable costs are low, since intangible goods ‘can be replicated at virtually no cost’.\textsuperscript{14} In such fast-paced markets, establishing and evaluating

\footnotesize{\begin{itemize}
  \item Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraph 125.
  \item UK Office of Fair Trading, 14 August 2012, Case ME/5525/12, Anticipated acquisition by Facebook Inc of Instagram Inc; Kyriakos Fountoulakis, the UK OFT decides not to refer an anticipated acquisition in the social networking industry to the Competition Commission (Facebook/Instagram), 14 August 2012, e-Competitions Bulletin August 2012, Article No. 50278.
\end{itemize}
market power is a difficult task for the Commission. The tendency to rely on market shares becomes inappropriate, because in markets with constant evolution, a dominant market player may rapidly see its market shares evaporate.

Consequently, in recent decisions involving high-technology markets, the Commission concluded that in such dynamic markets, market shares were barely indicative of market power.

In Microsoft/Skype, a major case involving the market for consumer communication services, the Commission indicated that ‘market shares only provide a limited indication of competitive strength in the consumer communication services markets … consumer communication services are a nascent and dynamic sector and market shares can change quickly within a short period of time’.\textsuperscript{15} This analysis was further confirmed by the General Court.\textsuperscript{16}

Similarly, in Facebook/WhatsApp, the Commission noted that ‘the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition’.\textsuperscript{17}

In addition to the issue of market power assessment and market definition, a series of new problematics are at stake in the assessment of social media mergers. We will focus on two of them: first, the specificity of ‘networks effects’ and second, the issue of ‘big data’ and its relevance in media mergers.

\textbf{iii Network effects}

Network effects occur when the value of a product or service for a customer increases when the number of other customers also using it increases.\textsuperscript{18} Although network effects are not \textit{prima facie} indicative of a competition problem, they may nevertheless raise competition concerns if they allow the merged entity to foreclose competitors and make it more difficult for competing providers to expand their customer base, basically by creating a major barrier to entry.

In this context, in Microsoft/LinkedIn, the Commission considered that network effects created a competition problem, as they could strengthen the foreclosure of competing providers of PSN services that currently existed in certain countries. Indeed, because the number of LinkedIn members could grow, additional users would be tempted to join the network and consequently, fewer users may be induced to join competing PSN service providers. In addition, the Commission considered that such network effects may not be compensated by ‘multi-homing’ (i.e., the fact that users could be active on multiple services and not just LinkedIn), because users of PSNs usually ‘curate and update their profiles’ and build relationships on them. This means that using multiple networks would require them to reinvest time into creating and updating a new profile. These investments disincetivise users from multi-homing between PSNs.\textsuperscript{19}

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\footnotesize
\textsuperscript{15} Case M.6281, Microsoft/Skype, Commission decision of 7 October 2011, Paragraph 78.
\textsuperscript{16} General Court, T-79/12, Cisco Systems and Messagenet v. Commission of 11 December 2013.
\textsuperscript{17} Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraphs 99.
\textsuperscript{18} Non-Horizontal Guidelines, Paragraph 62 and footnote 64.
\textsuperscript{19} Case M.8124, Microsoft/LinkedIn, Commission decision of 6 December 2016, Paragraphs 342-345.
\end{flushleft}
To the contrary, in the market for consumer communications, the Commission considered in Facebook/WhatsApp that network effects were compensated by multi-homing. Indeed, using a communication service does not require any investment, and consumers usually use multiple messaging apps such as Messenger, WhatsApp, iMessage etc. Moreover, the Commission considered that network effects were compensated by the fact that consumer communication apps were a fast-moving sector with low barriers to entry as well as low switching costs for consumers.20

iv Big data issues

Big data (i.e., large datasets collected and used by companies) has been at the centre of the economic and antitrust debate in the recent years. Although it has not been dealt with in any antitrust cases yet, big data is always involved in social media mergers. Consequently, the Commission incorporated big data analysis in merger assessments both in Facebook/WhatsApp and in Microsoft/LinkedIn.

Data constitute valuable assets for companies, as well as an essential input factor for many online services. In the market for online advertising, the collection of data is fundamental, as it allows internet search providers to provide their users with more targeted advertising, thus increasing monetisation opportunities. Therefore, the concentration of data within a single company may distort competition, and therefore needs to be carefully considered in merger decisions.21

In this context, European Commission Information, Communication and Media director Guillaume Loriot recently stated that competition policy must not discourage the use of big data, but must ‘carefully’ assess it in merger control. In his opinion, the Commission needs to ‘go into the incentives and consequences that the merger may entail’.22 In particular, it is important that the Commission correctly assesses whether merging companies would be likely to engage in anticompetitive practices regarding the acquisition of data or in preventing their competitors from gaining access to these data.

In Facebook/WhatsApp, although the Commission cleared the acquisition unconditionally, it analysed a possible harm to competition in the market for online advertising services. Despite WhatsApp not being active in this market, the Commission assessed whether there was a risk that the merged entity would use WhatsApp as a source of user data in order to improve the targeting of Facebook’s advertising activities. However, the Commission found this theory of harm inconclusive, because it involved major technical challenges, including WhatsApp changing its privacy policy or matching each user’s Facebook and WhatsApp profile.23

Furthermore, the Commission concluded that even if the entity was to use newly collected data, there would still be a ‘significant number of market participants’ which also collect user data24 and which would compete with the merged entity.

The Microsoft/LinkedIn case shed light on another data-based issue: the influence of data-protection laws in merger control. Similarly to the Facebook/WhatsApp case, the

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20 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraph 132.
22 GCR Live 6th Annual Telecom, Media and Technology.
23 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraph 185.
24 Case M.7217, Facebook/WhatsApp, Commission decision of 3 October 2014, Paragraph 188.
Commission in *Microsoft/LinkedIn* excluded potential competition concerns resulting from the combination of data. This time however, it also focused on the fact that any data combination could only occur if it were allowed in application of data protection rules. It noted the fact that the newly implemented General Data Protection Regulation, which provides for harmonised protection of personal data, may limit Microsoft’s ability to have access and to process its users’ personal data in the future, since the new rules will reinforce the existing rights and give individuals more control over their personal data.\(^{25}\)

Another difficulty in social media mergers is the assessment of the potential consumer detriments that can be caused by data collection. One question raised by these recent social media cases and especially under *Microsoft/LinkedIn* is whether data protection and privacy issues could be considered as potential competition issues in merger control decisions. To answer this question, one should keep in mind that although the influence of data protection rules may be considered in merger assessment, it is not the role of the Commission to safeguard data protection and privacy in general. In *Facebook/WhatsApp*, the Commission refused to address potential privacy harms, considering that ‘Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.’\(^{26}\)

## Conclusion

While the substantive analysis of mergers of social media companies may not be fundamentally different from any other innovative industries, social media mergers are creating new challenges for the Commission:

- **Challenges in defining the relevant market:** The Commission is faced with new and evolving markets, such as the market for social networking or the market for consumer communication services. It has to define these markets precisely, in the presence of companies that often create the market themselves.

- **Challenge in assessing the degree of market concentration:** High-technology markets are constantly evolving, which implies constant changes in the positions of the competitors. The Commission can no longer rely solely on market shares to evaluate the market power of the actors of the market, and new criteria must be used.

- **Challenges in assessing potential consumer detriment:** with media mergers come new kinds of effects. For instance, the widespread collection of data, or networks effects, are typically related to media mergers.

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I INTRODUCTION

When planning an acquisition or merger involving global companies, merging parties often concentrate on obtaining merger approvals in the United States and the European Union in the expectation that other countries’ regulators would follow the lead provided by the US and EU authorities.

Now, with the increase in national merger control systems and other regulators’ increased activity, other countries’ regulators may also significantly impact a deal. Similarly, the extent of international cooperation on mergers is steadily growing. For example, the International Competition Network (ICN) mergers working group included 21 countries in 2006, but that had risen to over 60 in 2016.

So, while in practice the United States and the European Union remain ‘priority’ jurisdictions because of the economic importance of the territories they cover and their influence, parties should also consider the possible need for remedies in other jurisdictions, tailored to deal with other specific concerns.

Some local interventions remain pragmatic rather than strict, because sometimes a competition authority in a smaller country may consider that it cannot enforce its will on a big deal occurring abroad when there are no local assets in that country, or because the authority may be concerned that if it presses a company too far, the company might just withdraw from the local market. However, even then, such a situation may still lead to behavioural remedies in that country.
With all of this in mind, merger planning should cover (1) aligning the timing of filings, (2) substantive assessments and (3) remedy design worldwide, dealing with any jurisdiction where substantial lessening of competition or dominance issues could arise.\(^5\) Such review should also assess where other national economic or public interest factors could exist.

Below we highlight some prominent cases that illustrate the diverse issues being raised by international merger remedies: (1) the Seagate/Samsung and Western Digital/Viviti cases, (2) Dow/DuPont and (3) Glencore/Xstrata, as well as (4) two examples of particularly effective cooperation between agencies, namely Cisco/Tandberg and UTC/Goodrich (see Section II, below).\(^6\) We then outline some of the key context, drawing on useful OECD studies\(^7\) (see Section III, below). We also refer to the ICN’s Merger Guides. Finally, we offer some practical conclusions for companies and their advisers (see Section IV, below).

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

Although not the most recent examples, these two global mergers still are particularly interesting for international merger remedies.

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\(^5\) See, for example, the European Union and Australian contributions to the OECD report, 2011, p. 153 and p. 105 respectively.

\(^6\) Other notable more recent transactions that required review and remedies in numerous jurisdictions include: GE/Alstom, which the EU and US authorities cleared conditionally on the same day (even though they had different concerns, the EC and Department of Justice (DoJ) adopted aligned remedies – see Commissioner Vestager’s speech ‘Merger review: Building a global community of practice’, 24 September 2015 above) and which was notified to 23 other regulators (Sharis Pozen, GE’s Vice President of Global Competition and Antitrust and a former acting assistant attorney general at the DoJ, is reported as stating that GE granted all the relevant authorities waivers to communicate with each other – see ‘Ex-DOJ Atty Urges Coordination In Defending Global Mergers’, Law 360, 13 April 2016); Merck/AZ Electronic, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the United States had unconditionally cleared the transaction; and the Holcim/Lafarge merger, which involved multiple divestments (including in the United States and Canada; the European Union, Brazil, India and South Africa), see, e.g. the Federal Trade Commission (FTC) and Canadian Competition Bureau (CCB) press releases, highlighting how these agencies cooperated in making sure that the remedies that they required fitted together, given that plants and terminals affected supply in the two countries, https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets and http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html. The case is also notable because the parties appear to have come to the regulators with advanced remedies proposals from the outset. In the AB InBev/SAMiller case, interestingly the DoJ required that it be allowed to review future ABI Craft Beer acquisitions even if these would not be compulsorily notifiable to the DoJ. See https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer. In Archer Daniels Midland/GrainCorp, which involved Archer Daniels Midland’s planned acquisition of GrainCorp, the Australian Treasury also prevented the deal from closing notwithstanding that the Australian Competition and Consumer Commission (ACCC) had cleared the acquisition: see http://resources.news.com.au/files/2013/11/29/1226771/015541-131129-joe-hockey.pdf. The EC has published a ‘Competition Policy Brief’ on the main principles and its recent experience in international enforcement cooperation in mergers: see http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf.

As a result of the two transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater. In general, the competition authorities around the world agreed on the central issues. Ultimately, most jurisdictions decided to clear the transactions in the sector for hard disk drives for storage of digital data (HDDs) on condition that Western Digital (WD) sold some production assets to Toshiba. However, while China’s MOFCOM allowed the transactions to go through, it imposed materially different remedies with worldwide impact.

First, the EC, the United States and China each had different approaches to the essentially simultaneous transactions. The EC treated them under a ‘first come, first served’ rule, so that Seagate/Samsung, which was notified to the EC one day before WD/Viviti, was assessed against the market situation before the WD/Viviti transaction, while WD/Viviti was assessed against the backdrop of Seagate/Samsung. The US Federal Trade Commission (FTC) treated both cases as occurring simultaneously. MOFCOM assessed each deal separately, as if the other had not happened.

Second, both the US and EU authorities cleared the Seagate/Samsung transaction without any remedy, whereas MOFCOM required the two businesses to be held separate until potential subsequent approval, allowing Seagate to apply for approval a year after the decision.

Third, the EU, US, Japanese and Korean authorities diverged from China on what remedies were required in WD/Viviti. The European Union required WD/Viviti to divest certain production assets, including a production plant to an approved third party before closing the deal. The United States did the same, requiring a named upfront buyer, Toshiba. The Japanese and Korean authorities also required similar divestitures. However, in addition to this divestiture, MOFCOM required that WD and Viviti be held as separate businesses until approved, allowing WD to apply for such approval in two years.

Fourth, MOFCOM imposed other behavioural obligations. For example, Seagate was required to invest significant sums during each of the next three years to bring forward

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8 See the EC’s decisions in Case COMP/M.6214, Seagate/HDD Business of Samsung: http://ec.europa.eu/competition/mergers/cases/decisions/m6214_3520_2.pdf; and Case COMP/M.6203, Western Digital Ireland/Viviti Technologies: http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf.

9 Similarly, when assessing the three recent deals in the agricultural chemicals sector, the EC assessed the transactions on a priority/‘first-come, first-served’ basis. Dow/DuPont, which was the first transaction notified to the EC and which is discussed in greater detail below, was analysed in light of the market conditions that existed at the time of that notification so ChemChina’s (then future) acquisition of Syngenta and Bayer’s (then future) proposed acquisition of Monsanto were not taken into account.


14 In December 2014, WD announced that it agreed to pay a fine of approximately US$100,000 for not having fully complied with its hold separate requirement. See http://investor.wdc.com/releasedetail.cfm?ReleaseID=886733.

15 MOFCOM has continued to impose additional behavioural remedies in international transactions. For example, in 2017, it imposed behavioural remedies in the Dow/DuPont case discussed below. In Broadcom/
more innovative products. MOFCOM also required that the companies would not require TDK (China) to supply HDD heads exclusively to Seagate or its affiliates, or restrict TDK supplying other producers.

Fifth, there was widespread cooperation between competition authorities. For example, the FTC states that its staff cooperated with authorities in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore and Turkey, including working closely on potential remedies.\(^\text{16}\) Since many of these authorities did not have bilateral or multilateral cooperation agreements, one can only imagine that this was a varied and informal process.

Finally, at a practical level, the same trustees were appointed in the United States and European Union for the WD/Viviti divestiture remedy, while others were appointed in China, covering the rather different behavioural remedy of monitoring firewalls between the two companies.

**Comment**

MOFCOM’s approach raised several points.

First, many of the customers, the computer companies buying the HDDs, manufacture in China, so one could argue that China had a particularly strong interest in the outcome of the cases. Some of the merging parties’ production facilities were also in China.

Second, in both decisions MOFCOM emphasised its concern to allow large computer manufacturers to keep their ‘procurement model’, in which they divide their demand among two to four manufacturers.\(^\text{17}\) MOFCOM also noted that when WD lost HDD production capacity because of floods in Thailand in 2011 and raised selling prices of HDDs, other HDD manufacturers followed, with some product prices rising over 100 per cent.\(^\text{18}\) MOFCOM thus saw real competitive implications of reduced or more concentrated supply in China.

Third, one may interpret MOFCOM’s imposition of hold-separate remedies as being diplomatic to its US and EU counterparts when it was not comfortable with the level of concentration if the two transactions went through. Rather than outright prohibitions, the hold-separates gave opportunities to see if things might change in the future and to see whether Toshiba, with its new assets, could develop to become a third force in HDD. In short, MOFCOM’s approach appeared to give scope for phased and proportionate review over time, albeit that it reflected a more cautious approach than that taken in the European Union and the United States.

However, the problem for the parties was clearly that it left them unable to achieve the desired synergies from their investments and that they faced considerable uncertainty as to what the future held. In short: while the equity transfers could occur, the parties did not know when, if at all, they would be able to fully integrate the businesses, or if they would later face an order to divest.

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\(^\text{16}\) Federal Register, op. cit. 9, p. 14,525, column 3.

\(^\text{17}\) See MOFCOM Seagate/Samsung and WD/Viviti decisions, both at Paragraph 2.3. This procurement position was also noted in the EC Seagate/Samsung decision; see Paragraph 329.

\(^\text{18}\) MOFCOM Seagate/Samsung and WD/Viviti decisions, Paragraph 2.6.
In October 2015, MOFCOM partially lifted the hold-separate obligation on WD/Viviti, allowing the integration of their manufacturing and R&D activities, but it still required that WD maintain two separate sales divisions and brands (and certain other behavioural commitments). Then, in November 2015, MOFCOM removed the hold-separate obligation on the Seagate/Samsung transaction, allowing full integration (again while still maintaining certain other behavioural commitments). MOFCOM noted that the competitiveness of solid-state drivers (SSD) has been ‘markedly enhanced’ compared with HDDs, but otherwise the competitive landscape had changed little since 2012. MOFCOM also noted that these revisions would allow the parties to offer full product ranges and reduce costs. In both cases, the remaining conditions were valid until October 2017 and they lapsed then some five or six years after the transactions closed.

Hold-separate remedies of this kind are not usual in the United States and the European Union, mainly because authorities favour clear-cut structural remedies. Usually they do not leave matters in suspense, with some scepticism as to whether, with common ownership, two businesses will compete. The use of such remedies is therefore a topic of some controversy.

**ii Dow/DuPont**

The recent merger between Dow and DuPont is a good example of a transaction requiring clearance in multiple jurisdictions and of regulators requiring differing remedies. Both parties were leading agrochemical companies and they had overlapping activities in many markets including crop protection and pesticide markets (herbicides, insecticides and fungicides) and petrochemical markets.

In March 2017, the EC cleared the transaction subject to extensive structural remedies. Among other things, the EC found that the merger would have reduced competition in some EU Member States on the markets for certain pesticides. To address these concerns the parties proposed, among other things, to divest DuPont’s pesticide business. The divestment was subject to an upfront buyer requirement, so the parties could not close their transaction until the EC approved the buyer.

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21 In November 2017, MOFCOM imposed a hold-separate remedy in Advanced Semiconductor Engineering’s acquisition of Silicon Precision Industries. See http://english.mofcom.gov.cn/article/policyrelease/buwei/201711/20171102677556.shtml. This investigation concerned two companies that were based in Taiwan and engaged in outsourcing services for semiconductor packaging and testing. This was the first time that MOFCOM had imposed a hold-separate remedy since 2013 (MediaTek/MStar) – see MLex report of 29 November 2017. Interestingly, the hold-separate imposed in Advanced Semiconductor Engineering/Silicon Precision Industries automatically expires after 24 months, which is much clearer for the parties than the ongoing review imposed on Seagate and WD.

22 In addition to the jurisdictions discussed here, the transaction was also reviewed in some 20 other countries including Australia, Brazil, Canada and India.


24 See decision, Paragraph 4044.
In addition, the EC was concerned that the transaction would reduce innovation.\textsuperscript{25} Controversially, its decision highlights not only potential competition between the parties and their overlapping pipeline products but also reduced innovation at the overall industry level, rather than on particular relevant antitrust markets. To address these concerns, the EC required that the parties divest almost all of DuPont’s global R&D organisation.\textsuperscript{26}

In May 2017, MOFCOM also cleared the transaction but subject to both structural and behavioural remedies.\textsuperscript{27} MOFCOM’s structural remedies largely mirror those entered into in the EC. In addition, however, MOFCOM required behavioural commitments apparently to address issues that were specific to China. These included obligations to supply relevant products to Chinese customers ‘at reasonable prices (i.e., not higher than the average price over the past 12 months)’ for a period of five years and an obligation not to require distributors to sell certain products on an exclusive basis during the same period.\textsuperscript{28}

In June 2017, the DoJ announced that it would require divestments of a number of crop protection and petrochemical products before the deal could proceed.\textsuperscript{29} Unlike the EC, the DoJ did not, however, require any divestments to address a potential reduction in competition in innovation. Noting its close cooperation with the EC during its review of the transaction, the DoJ’s press release states that ‘[l]ike the European Commission, the Antitrust Division examined the effect of the merger on development of new crop protection chemicals but, in the context of this investigation, the market conditions in the United States did not provide a basis for a similar conclusion at this time’.\textsuperscript{30} The DoJ also did not require any behavioural remedies.

\section*{iii Glencore/Xstrata}

In October 2012, the South African Competition Commission (SACC) recommended clearance, with remedies, of the acquisition of Xstrata’s mining business by Glencore’s trading and production group, after close scrutiny of the acquisition’s implications for coal supply in South Africa.\textsuperscript{31} The SACC found that there was no substantial lessening of competition. However, in the public interest, conditions were imposed regarding proposed job losses, limiting them to 80 employees initially, with a further loss of 100 lower-level employees a year later and a financial contribution towards their retraining. Similar conditions have been imposed in other cases.\textsuperscript{32}

\textsuperscript{25} See decision, Section V.8, Paragraphs 2000-2020 and Section V.8.4.1, which outline the EC’s theory of harm.
\textsuperscript{26} See decision, Paragraphs 4032-4035.
\textsuperscript{28} Id. at, Section VI at Obligations III, IV and V.
\textsuperscript{32} See, for example, the South Africa Competition Commission’s decision in AB InBev/SABMiller, https://www.comptrib.co.za/assets/Uploads/INBEV/2016-05-31-SACC-Conditions-Final-Non-Confidential.pdf.
In April 2013, MOFCOM cleared the acquisition, subject to different remedies compared to those previously agreed with the European Union. In particular, MOFCOM considered the potential impact on trading patterns (spot contracts versus long-term agreed quantity and price contracts, especially for copper concentrate), vertical integration (from mine to trading house) and market entry barriers in a heavily resource-focused and capital-intensive industry. These concerns were raised, despite market share levels on a worldwide or Chinese basis that generally would not raise concern in other jurisdictions.

Nevertheless, MOFCOM imposed structural and behavioural remedies, apparently after consultations with other governmental departments. Glencore agreed:

a. to dispose of Xstrata’s Las Bambas copper mine project in Peru by June 2015;

b. to guarantee a minimum supply of copper concentrate to Chinese companies until 2020, including pre-defined volumes at negotiated prices; and

c. to continue to sell zinc and lead to Chinese producers under both long-term and spot prices at fair and reasonable levels until 2020.

It appears therefore, that the Chinese authorities were concerned about national economic development goals and the fragmented nature of Chinese buyers with weak bargaining power, given Chinese dependency on imports for these metals.

The risk of broader factors being a basis for intervention and remedies is therefore another important factor to bear in mind in some jurisdictions.

iv Cisco/Tandberg and United Technologies Corporation/Goodrich

Cisco’s acquisition of Tandberg, which led to overlaps in videoconferencing solutions, and United Technologies Corporation’s (UTC) acquisition of Goodrich in the aviation sector, are two examples of effective cooperation between regulators, here the EC and the US DoJ and, in UTC/Goodrich, additionally with Canada’s CCB.

In Cisco/Tandberg, Cisco proposed remedies to the EC to increase interoperability between its products and those of its competitors. The DoJ’s press release, announcing that it would not challenge Cisco’s acquisition, expressly noted the commitment entered into with the EC. Assistant Attorney General Christine Varney noted: ‘This investigation was a model
of international cooperation between the United States and the European Commission. The parties should be commended for making every effort to facilitate the close working relationship between the Department of Justice and the European Commission.37

Similarly, in UTC/Goodrich, the EC, the DoJ and the CCB all approved UTC’s acquisition on the same day. The EC and the DoJ accepted very similar remedies, which were of both a structural and a behavioural nature.38 The CCB noted that these remedies ‘appear to sufficiently mitigate the potential anti-competitive effects in Canada’ and, in particular since no Canadian assets were involved, it decided not to impose any remedies.39 It appears that the three authorities were in frequent contact throughout this investigation. The EC and the DoJ worked closely on the remedies’ implementation, jointly approving the hold separate manager and monitoring trustee.40 The DoJ’s press release also noted its discussions with the Federal Competition Commission in Mexico and the Administrative Council for Economic Defence in Brazil.

Clearly EC and US cooperation is close.41 EC and DoJ cooperation has developed from their first cooperation agreement in 1991,42 with, most recently, the 2011 Best Practices on Cooperation in Merger Investigations.43 However it is also apparent that other agencies cooperate frequently (as explained further below in Section III).

III CONTEXT

There are a number of key points that should be borne in mind when considering international merger remedies.

First, international mergers tend to present two types of remedy situation: local remedies and international remedies common to many jurisdictions. Unsurprisingly, when addressing international remedies, there is potential for conflict both in substantive assessments and remedies, since the competition authorities work with their particular laws...
and from their different regional or national perspectives, and often with different approaches and inputs (e.g., in terms of market testing results). For example, as noted above, MOFCOM occasionally uses a hold-separate remedy, which neither the European Union nor the United States would typically favour.\(^{44}\)

Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD\(^{45}\) and the ICN.\(^{46}\) The work of these organisations is in parallel and is not case-specific,\(^{47}\) but rather provides a forum for regular discussions and a network of contacts between individuals, so that authorities can notify each other and discuss broadly what they are doing about a particular case. Nevertheless, such coordination should not be underestimated and many of the examples discussed and quoted in these reports are very revealing.

For example, in October 2013, the OECD Competition Committee held a ‘Roundtable on Remedies in Cross-Border Merger cases’. Amongst other things, the Secretariat pointed to cooperation and coordination as effective tools to prevent parties from playing authorities against each other, such as using commitments accepted by one authority as leverage against others.\(^{48}\) The Roundtable report emphasised that cooperation between authorities is most effective if parties grant confidentiality waivers and allow authorities to communicate early on in their investigations and if the timing of reviews is aligned insofar as is possible.\(^{49}\) The Roundtable report also highlighted the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.\(^{50}\)

There is also an ICN initiative to improve cooperation between competition authorities on mergers. Notably, the ICN Merger Working Group presented a ‘Practical Guide to International Enforcement Cooperation in Mergers’ (the ‘ICN Practical Guide’) at the ICN 2015 Annual Conference in Sydney.\(^{51}\) The purpose of this Guide, which is quite short (14 pages), is to facilitate effective and efficient cooperation between agencies through identifying agency liaisons and possible approaches for information exchange. The Guide creates a voluntary framework for inter-agency cooperation in merger investigations and provides guidance for agencies willing to engage in international cooperation, as well as for parties and third parties seeking to facilitate such cooperation. For example, the Guide explains the need for timing alignment to facilitate meaningful communication between agencies at key decision-making stages in an investigation; how cooperation between agencies may

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\(^{44}\) Barry Nigro, Deputy Assistant Attorney General, Antitrust Division in the DoJ, has also recently commented that proposals to divest carved-out assets, as opposed to standalone businesses were ‘inherently suspect for several reasons’ (GCR Report 2 February 2018). It remains to be seen if this is an indication that the DoJ is going to become more hostile to divestments of carved-out assets.

\(^{45}\) See for example, the 2003 OECD Roundtable on Merger Remedies, the 2011 OECD Global Forum on Competition and the OECD report, 2011, all available on the OECD website, www.oecd.org.

\(^{46}\) See for example, the ICN Merger Working Group, Merger Remedies Review Project report, June 2005, and the Teleseminar on Merger Remedies in February 2010, both available on the ICN website, www.internationalcompetitionnetwork.org.


\(^{48}\) See, OECD 2013 Roundtable at p. 10.

\(^{49}\) Id. at, *inter alia*, pp. 5 and 6.

\(^{50}\) Id. at, *inter alia*, p. 6.

vary in a case; how information (including documents) may be exchanged through waivers; how agencies may organise joint investigations (e.g., interviews); and – last but not least for present purposes – how agencies may cooperate on remedy design and implementation.

In 2016, the ICN also published a ‘Merger Remedies Guide’, outlining best practices on remedy design and complementing the ICN Practical Guide. This is an extensive work (some 54 pages). It again emphasises the need for timing alignment and international cooperation on remedies in multi-jurisdictional mergers and offers ‘practical tips’ for competition authorities on how to do that and examples of cooperation on remedies.

There are also other layers of cooperation based on specific bilateral agreements, such as those between the EU and US authorities (noted above), between the European Union and Switzerland, and between Australia and New Zealand, which can be case-specific, where supported by appropriate waivers of confidentiality. Quite recently, the US DoJ and FTC also concluded a general ‘best practice’ agreement with the CCB, the ACCC signed a memorandum of understanding with MOFCOM to enhance communication on merger review cases and in October 2015, the EC signed a best practices framework agreement with MOFCOM for cooperation on reviewing mergers.

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures. For example, the ICN has published two presentations on cooperation between competition authorities. Several authorities gave examples of cooperation in cross-border merger cases. Some agencies held joint discussions with the parties to the merger and many exchanged documents after the necessary waivers had been granted. Cooperation often led to coordination of remedies.

The Nestle/Pfizer Nutrition case is an example of successful cooperation between agencies even without the use of waivers. The ACCC started cooperating with the Competition Commission of Pakistan (CCP) while the two agencies’ investigations of the proposed acquisition were at different stages: The ACCC was still in its preliminary investigation stage, while the CCP was already reviewing the transaction in Phase II. The parties did not

53 See, Annex 1, p. 29.
54 See, Annex 6, where, for example, cooperation on remedies in Nestle/Pfizer, Holcim/Lafarge and Pfizer/Wyeth is outlined.
56 See the OECD report, 2011, pp. 102, 404. The OECD 2013 Roundtable notes how, following a change in its laws, the Brazilian authority has built informal relationships with multiple agencies to promote cooperation; see p. 28.
57 Antitrust authorities from the five BRICS countries were reportedly concluding an agreement to enable easier information exchange between them. See MLex report of 12 May 2015.
61 See the US, EU and UK contributions to the OECD report, 2011, at p. 296, p. 153 and pp. 288–9 respectively.
63 See https://centrocedec.files.wordpress.com/2015/07/icn-merger-working-group-interim-report-on-the-status-of-the-international-merger-enforcement-cooperation-project2014.pdf at p. 6, which gives examples of ‘joint investigative tools’ including joint calls, meetings, interviews and requests for information.
provide these two agencies with waivers. As a result, discussions between the two agencies were limited to non-confidential information. However, it appears from the ICN Practical Guide that the cooperation was beneficial for both agencies’ understanding of the relevant markets and theories of harm.64

In the ICN Practical Guide, when discussing the Thermo Fisher Scientific/Life Technologies case, it is also emphasised that the degree of cooperation between agencies may vary, even in the same transaction.65

Third, while a competition authority may decide to defer to review by more established authorities, many also consider that reliance on a foreign authority might not deal adequately with local concerns.66 This was well illustrated in Singapore’s contribution to the OECD report, 2011:

> It is important to note that although the acceptance of commitments in overseas jurisdictions may be relevant in [The Competition Commission of Singapore’s, (CCS)] assessment of the competitive impact of the merger in Singapore, commitments accepted by overseas competition authorities do not necessarily imply that CCS will allow the merger to proceed in Singapore. Any overseas commitments must be viewed in light of the facts and circumstances of the case, to see if they are capable of addressing competition concerns arising within Singapore, if any.67

Interestingly, in the Unilever/Sara Lee case, the SACC also indicated in the OECD Cross-border Merger Control Report, 2011 that it looked at whether it was correct to require divestiture of the ‘Status’ brand, when the European Union had already required divestiture of the ‘Sanex’ brand. The SACC noted that, since it does not make practical and commercial sense only to own a brand in certain parts of the world, South Africa could be faced with a double divestiture. The SACC considered whether the divestiture of Sanex would have been enough for South Africa as well, but concluded it would not, since the brand was still small there.68 The SACC therefore appears to have shown sensitivity for the impact of other jurisdictions’ remedies internationally, while also showing that such remedies still do not outweigh a local concern.

Fourth, when considering worldwide transactions, it is important to bear in mind the related point that each competition authority views things from its own jurisdictional perspective. Notably, even when the US and EU authorities find worldwide markets and recognise worldwide dynamics, the US decision concerns the effect on US commerce and the EU decision is based on the compatibility of the transaction with the (EU) internal market.69 Even if contacted by and cooperating with other competition authorities, the US and EU competition authorities are not ruling on the effects elsewhere, in, for instance, Brazil, Korea or Singapore. As Korea notes in the OECD report, 2011:

67 See the Singapore contribution to the OECD report, 2011, p. 249.
69 See, for example, the United States contribution to the OECD report, 2011, p. 296. Similarly, post-Brexit, the EC and the UK’s CMA will frequently be considering markets that are EEA-wide, but each authority will be considering the effects in its own territory.
As for now, only a few large jurisdictions like the US or EU have full control over large-scale international M&As. However, because such large competition authorities tend to impose remedies focused on anti-competitive effect on their own domestic markets, adverse impact on developing countries might suffer if not adequately controlled.

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction’s remedy to ensure enforcement. An authority may need its own order, albeit modelled generally on a remedy accepted in other jurisdictions. For example, in Agilent Technologies/Varian, the ACCC required Agilent to comply with its commitments to the EC to divest itself of several businesses and accepted the two proposed purchasers. In so doing the ACCC noted, however, that the purchasers had ‘established and effective Australian distribution arrangements’. In other words, the ACCC checked that the EC remedy also worked in Australia.

Sixth, a competition authority may decide that it cannot order a structural remedy involving assets outside its jurisdiction because it lacks the means to enforce it, and therefore accept a behavioural remedy instead. This was, for example, the position of the UK in Drager/Airshields. It also appears often to be the position of newer competition authorities, or those in smaller countries.

Seventh, managing timing as far as possible is a major issue in achieving cohesive remedies. Competition authorities do not like it when a favourable review in one jurisdiction is then used to pressurise them to follow suit. They also do not like being a ‘non-priority’ jurisdiction that is only contacted late in the day. Unsurprisingly, therefore, they advocate simultaneous contacts to facilitate simultaneous reviews of the same transaction. Practitioners also tend to emphasise the need to ‘work back from the end’ (i.e., where possible filing earlier in jurisdictions which may take longer to rule). They also try to manage things so that the authorities are ‘in sync’ at the key time when they have to make similar closing decisions on remedies.

Two FTC officials have made the point well in the context of remedies, noting a case where time was lost dealing with the unique concern of an agency brought into the process late on. It appears that an upfront buyer had been agreed on by all the reviewing authorities previously, ‘but then a new agency was brought in at the last minute and was unable to approve the potential buyer. We had to locate and approve another buyer that satisfied all agencies, adding months to the process and delaying the deal’.
Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required,77 taking into account the differences in authorities’ practices, such as the way that the FTC selects a purchaser itself, while in the European Union the parties or the divestment trustee may carry out that task, then propose the result to the EC; and the actual timing requirements of each authority’s procedure requiring publication of proposals for comment, etc.

Interestingly in the Springer/Funke cases (concerning TV programme magazines), the German and Austrian competition authorities cooperated in the implementation of remedies which addressed different competition concerns in each country. According to the ICN Practical Guide, due to the structure of the transaction, the merging parties could only avoid serious risks for the implementation of the remedies if they were able to obtain the Austrian agency’s approval first. The timing and sequence of the two conditional clearance decisions and their implementation were therefore critical. The German and Austrian authorities coordinated on timing to ensure the successful completion of the transaction.78

IV CONCLUSIONS FOR COMPANIES AND THEIR ADVISERS

In light of the above, companies and their legal advisers should plan on a global scale, including as regards remedies, especially if some jurisdictions want an upfront buyer.

Parties should not assume that the more established competition authorities in the United States and the European Union are the only ones that matter. Clearly, those authorities are critically important, because they are responsible for large markets and their procedures and analysis are highly developed, which means that their decisions are often influential in other parts of the world.

However, markets that appear worldwide in scope may often be more limited in practice, which may mean that important and varied concerns of other authorities need to be addressed. Nor should parties assume that the newer authorities, or those in smaller countries, which in the past have tended to defer to the larger, longer-established authorities, will always do so. Whether because of concerns about local effects, or through a desire to have a locally enforceable remedy, those authorities may also intervene.

Particularly in light of situations like MOFCOM’s remedies in Seagate/Samsung and WD/Viviti, parties must consider carefully the purchaser’s ‘walk-away’ rights, any related vendor’s break-up fees and valuation rules in the purchase agreement. Given that the initial clearance in those cases was just an equity clearance, not allowing the business synergies, some purchasers may consider this to be simply too onerous and, in effect, not a clearance; nor will they be willing to deal with ongoing hold-separates and the uncertainty of subsequent review. As shown in that case, remedies like this can take a long time to work through.

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Parties should also consider how to involve all relevant competition authorities appropriately and to facilitate those authorities conducting their investigations in parallel and in consultation with each other, taking into account their likely demands (e.g., upfront buyer or not) and the practicalities of different timings for the approval of such remedies.\footnote{Id, p. 22.}

That may mean:

\begin{itemize}
\item[\textit{a}] talking to the authorities concerned prior to filing, and filing earlier in one jurisdiction than another, or accepting a ‘stop-the-clock’ solution to allow an authority to catch up;
\item[\textit{b}] a willingness to offer waivers of confidentiality, such as the standard models available through the ICN or the websites of the EU and US authorities, although clearly provided that the authorities concerned give sufficient assurance on maintaining confidentiality, especially where industrial policy considerations may come into play in local review; and
\item[\textit{c}] talking to less-central authorities early on to ensure that they have enough information to consider that they could reasonably defer to others.
\end{itemize}

If possible, the parties should include a review clause in any undertakings given, so that they can be adjusted to other authorities’ demands. For example, in the (admittedly old) Shell/Montecattini case, the European Union required divestiture of one holding in a joint venture to protect one technology, while the United States required divestiture of the other linked to a rival technology. Fortunately, the parties were able to go back to the European Union for review and revise their EU undertaking in light of the US one.\footnote{Case IV/M.269, EC decisions of 8 June 1994 and 24 April 1996; FTC File 941 0043, press release, 1 June 1995. More generally, the OECD 2013 Roundtable notes the potential need to consult with other authorities if an authority revises a remedy after clearance; see p. 7.}

As illustrated in some of the case studies in Section II, above, MOFCOM often takes longer than other agencies to review complicated transactions. As such, early contact with MOFCOM is advisable.\footnote{MOFCOM’s delay in clearing the planned Omnicom/Publicis merger has been cited as one of the reasons for that merger being abandoned. In February 2014, MOFCOM published details of an expedited preliminary merger review procedure for uncontroversial transactions that do not raise competition issues in China, which is designed to address delay issues. See www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737423411.}

Finally, as is so often the case in international situations, the parties and the authorities concerned need to be resourceful and flexible to work out practical solutions.\footnote{The need for flexibility was recently illustrated by the Bayer/Monsanto case, where Bayer had to request the EC’s approval of two modifications to its prior commitments, which had already been approved by the EC in order to ‘address competition concerns arising in other jurisdictions.’ See MLex report of 11 April 2018.} Generally, such solutions are manageable with willingness, creativity and patience.
Chapter 5

US MERGER CONTROL IN THE HIGH-TECHNOLOGY SECTOR

C Scott Hataway, Michael S Wise, Noah B Pinegar and Sabin Chung

I  INTRODUCTION

Merger enforcement has been undergoing a shift in the United States as the Trump administration made new appointments at both the Federal Trade Commission (FTC) and the Department of Justice (DOJ). This shift has particular significance for mergers in the high-technology sector, where developing theories related to innovation competition and big data continue to dominate the discussion. As of the date of this publication, the implications of a changing of the guard at both agencies are not entirely clear, but based on public statements so far, we anticipate several changes and potential global divergence for high-tech merger enforcement.

II  NEW LEADERSHIP AT THE DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION SUGGESTS MARGINALLY DOVISH ENFORCEMENT

Assistant Attorney General Makan Delrahim was confirmed in late September 2017. Since his appointment, Delrahim has given a number of speeches regarding his views on patent enforcement, several of which are particularly favourable to technology companies. For example, according to a recent speech, it is Delrahim’s view that patent hold-up ‘is fundamentally not an antitrust problem, and therefore antitrust law should not be used as a tool to police FRAND commitments that patent-holders make to standard setting organizations’. He went on to state that ‘because a key feature of patent rights is the right to exclude, standard setting organisations and courts should have a very high burden before they adopt rules that severely restrict that right’. In the merger review context, these strong positions in favour of intellectual property protection might suggest a departure from prior standards. Among other things, Delrahim’s comments seem inconsistent with the DOJ’s approach to Google’s acquisition of ITA Software in 2011, where the DOJ required Google to license the acquired software on FRAND terms to its competitors.

At the same time, Delrahim has not suggested that large technology companies should be immune from antitrust scrutiny. For example, he recently noted that the DOJ should

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‘encourage fresh thinking on how our legal tools apply to new digital platforms’.4 This at least suggests openness to new theories of harm from high-technology mergers, though Delrahim has consistently stated that any enforcement must be ‘evidence-based.’ Overall, we consider Delrahim’s positions and the DOJ’s likely enforcement efforts to be marginally favourable to high-technology mergers, particularly in comparison to other global enforcement agencies.

At the FTC, in a rather unique series of events, the five Commissioners who were serving at the end of the last administration either stepped down or announced plans to do so, leaving President Trump with the ability to appoint a completely new Commission since his inauguration in early 2017. Inevitably, this complete turnover in FTC leadership will have implications for merger reviews.

The new Commission’s approach to high technology will not be clear for some time, but the new Commissioners seem open to a more active role for the agency. The new chair of the FTC, Joe Simons, stated during his confirmation process that increased enforcement is needed, noting that the Commission may have ‘been too permissive in dealing with mergers and acquisitions, resulting in harm to consumer welfare via increased prices, limited consumer choice, and harm to workers’.5

Other new commissioners expressed similar views on the need for increased vigilance, particularly for high-technology sectors. Christine Wilson, for example, noted that it may make sense to have another look at prior enforcement decisions related to high-technology companies. However, as Rohit Chopra noted during his confirmation hearing, high-technology competition is challenging, and it is an area where agencies should be humble as they continue to learn the dynamics. Overall, we expect the Commission’s enforcement efforts to shift marginally in favour of high-technology consolidation, rejecting some of the more extreme enforcement positions of sister agencies in Europe while presenting a relatively more aggressive stance than Delrahim’s DOJ.

III  US PREFERENCE FOR STRUCTURAL REMEDIES SHOULD INCREASE BOTH POTENTIAL RISKS AND REWARDS IN HIGH-TECH MERGERS

At both agencies, there have been indications that the recent trend toward behavioural remedies may be reversed. This perhaps disproportionately impacts high-technology deals where the antitrust issues often include vertical elements and other considerations more suited to behavioural rather than structural relief.

In late 2017, Delrahim stated a strong preference for structural remedies, noting that behavioural remedies were ‘fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market’.6 He forecast that the number of long-term behavioural consent decrees would likely give way to structural remedies in contested cases. During a spring 2018 speech, Delrahim went further, stating that ‘we have a duty to ensure that the risk of a failed remedy – and thus harm to consumers – falls on

the parties to the unlawful transaction, not on the American consumer and taxpayer’. The sentiment suggests a predisposed scepticism to complicated behavioural fixes where the DOJ sees anticompetitive harm.

The new FTC leadership made its own announcements suggesting a tightening of merger remedies. FTC Bureau of Competition Acting Director Bruce Hoffman backed the DOJ’s move on vertical deals, setting forth the preferred approach:

If we have a valid theory of harm, we start by looking at structural remedies for most vertical mergers. If that can’t be achieved without sacrificing the efficiencies that motivate the merger, then we can look at conduct remedies. If those won’t work – or will be too difficult and problematic for us to be confident that they will work without an excessive commitment of FTC resources where we are effectively turned into a regulator – then there should be no surprise if we seek to block the merger.7

More broadly, new FTC Chairman Joe Simons, in his responses to the Senate Commerce Committee Questionnaire, called out ‘significant concerns’ that the US agencies have ‘been too lax’ in merger enforcement. Simons noted that the FTC’s merger remedies have failed at a 30 per cent rate and said that is ‘too high and needs to be lowered substantially, or, ideally, zeroed out altogether’.8

At their core, behavioural remedies represent a compromise in the ‘all or nothing’ US adversarial process. The parties agree to agency oversight and commercial restrictions, while the agencies allow consummation of a transaction that might otherwise yield significant anticompetitive effects. Without the behavioural option, high-technology companies face a higher stakes game in US merger control. Overall, we anticipate a relatively lax enforcement environment, but with an increase in all-or-nothing litigation positions by the federal agencies.

IV ANTITRUST AND BIG DATA – GROWING DIVERGENCE BETWEEN US AND EU APPROACHES

Antitrust treatment of data continues to drive uncertainty in the merger review context. It is often challenging to assess whether the combination of data between two merging parties may create or enhance market power. Among other things, agencies must consider – How valuable or predictive is the data? Does the data have unique attributes? Would there be substitutes? How costly would it be for other firms to access or duplicate the data? Does the data create some type of unique strategic advantage that then could be exploited in an exclusionary way? Given the complexity of the analysis, it is perhaps not surprising to see an opening divergence between the US agencies and other enforcers on these issues.

i The US approach

The standard approach to big data issues by the US agencies has focused on a case-by-case analysis on whether the data has unique attributes that cannot be replicated by other

8 See supra note 4.
competitors or whether the combination of data would pose any theory of harm to consumer privacy. For example in 2013, the DOJ successfully challenged the Bazaarvoice/Powerreviews merger, in which the Antitrust Division alleged that the companies competed with data that was unique and could not be replicated. On the other hand, the FTC recently cleared unconditionally Amazon’s acquisition of Whole Foods, seeing no reason to think that Whole Foods’ data could not be readily replicated by other companies.

US antitrust principles do not readily lend themselves to addressing at least some big data concerns. For example, under the US antitrust laws a merger is not actionable simply because the merged firm would hurt its competitors or limit access to data by its rivals, especially when better data by the merged firm would yield better services, better quality, and better products for consumers. Nor in most cases would a company’s refusal to share its self-developed data give rise to a viable antitrust theory. Instead, the FTC and DOJ tend to reject data divestitures that would lower incentives for companies to invest in innovation or encourage free-riding on competing investments. In addition, the DOJ and FTC both carefully warn against conflating antitrust and privacy when it comes to big data.

ii The European approach

The EC appears to be taking a more active stance in regulating big data. According to EC Commissioner Margrethe Vestager, if data can be an asset and act as a barrier to entry,
especially in the areas where the data is extremely valuable, enforcement may be necessary.\textsuperscript{16} The current focus for European antitrust regulators is whether companies holding big data can exclude new competitors from markets if they control exclusive information that is instrumental to competition and difficult to replicate.

While the EC has not found serious data related concerns so far,\textsuperscript{17} it has been scrutinizing potential antitrust issues with big data more closely under Vestager over the recent years, resulting in protracted investigations in some cases. Following this lead, regulators in Italy, France, and Germany are also digging into the big data issue. For example, Bundeskartellamt, the German Federal Cartel Office, is currently conducting an investigation into Facebook, and has just released its preliminary assessment that Facebook's collection and use of data from third-party sources violates competition law.\textsuperscript{18}

In addition, Europe is now considering overhauling its merger rules to review deals where valuable data is involved even if the data owner's revenues do not meet the merger control thresholds.\textsuperscript{19} European regulators want to ensure during their merger review that business rivals are not prevented from competing because they lack access to proprietary information. In cases where data is found to be unique or essential, European regulators have considered that big data could qualify as an essential facility and that the failure to share it with a competitor could therefore be an abusive practice\textsuperscript{20} – an approach that US regulators have rejected.

\section*{iii Effects of divergence on cross-border deals}

Given the divergence between US and EC treatment of big data issues, large high-technology transactions face increased uncertainty during the clearance process. While the DOJ and FTC are likely to give significant weight to the pro-competitive efficiencies of data aggregation, the EC seems equally more likely to engage in prolonged fact-finding as to the preclusive impact of the aggregation on would-be competitors. Successful cross-border mergers must not only account for the increased time and complexity of developing economic theories in this area, they must also present coherent, pro-competitive narratives that respect the enforcement priorities in all relevant jurisdictions. Over time, we expect all jurisdictions to follow the EC, albeit at varying pace, toward a heightened sensitivity to the impact of data on durable market structures.

\begin{itemize}
\item \textsuperscript{17} The European Commission previously cleared Facebook's acquisition of WhatsApp and Google's acquisition of DoubleClick. While the European Commission cleared the Facebook transaction in 2014, three years later Facebook was fined €110 million for providing misleading information during the merger investigation about its ability to establish reliable automated matching between Facebook and WhatsApp user accounts.
\end{itemize}
V  SO-CALLED ‘INNOVATION MARKETS’ WILL CONTINUE TO CREATE UNCERTAINTY IN HIGH-TECH TRANSACTIONS

Treatment of ‘innovation markets’ continues to be a developing area of antitrust law, with particular relevance in pharmaceuticals, medical devices, life sciences, and other technology-driven industries. The enforcement trends in this area highlight the significant disruption that innovation enforcement may have on traditional paradigms.

The evolving treatment of innovation competition is evident from the US and EC treatments of Dow/DuPont in 2017. While the deal was reviewed on both sides of the Atlantic, the EC took a leading role in addressing purported innovation competition concerns. The EC ultimately cleared the transaction with significant remedies, including the divestiture of DuPont’s entire global research and development organisation.

In its decision, the EC concluded that divestiture of DuPont’s research and development capabilities was necessary to remedy a generalised harm to innovation competition in herbicides, fungicides and insecticides. The primary evidence relied on by the Commission was a planned reduction in the total R&D spend of the merged entity, a common synergy in which the merging parties expect to create the same output with fewer resources. Despite its vague reference to product categories, the EC did not explicitly connect elimination of redundant R&D expenses to any specific harm to consumers. Rather the elimination of innovation, or more specifically R&D expense, was taken as the harm itself.

The EC’s decision is arguably inconsistent with the US Horizontal Merger Guidelines. The Guidelines refer to a unilateral theory of harm in innovation competition based on changed incentives: ‘curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products’. The Guidelines leave some ambiguity where they read: ‘The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.’ While the US approach seems to clearly require a tether between R&D expenditures and existing product market concentration, the EC seems to have instead accepted innovation itself as a separate product that can be subject to structural concentration.

Though the EC’s more aggressive stance could simply reflect a reasonable difference of opinion, we continue to think that the difference in treatment primarily flows from the US adversarial system. As we noted with respect to the FTC’s challenge to potential competition in Steris, the burden of proof in the United States falls squarely on the plaintiff to demonstrate by at least a preponderance of evidence the harm alleged in the complaint. Consider by contrast the explanation of Paul Csiszar, director of basic industries at DG Comp, who admitted in relation to Dow/Dupont that ‘often we cannot rely on good economic evidence’ because it is ‘much more difficult to model [long term innovation] in a robust way’. It seems likely that US enforcers would approach such a sweeping innovation divestiture with considerably more reticence given the ultimate leverage that the federal judiciary plays in the process.

Rather than attacking concentration of innovation generally, it seems more likely that the United States will continue to make incremental changes within the framework of existing guidelines and precedent. For example, the FTC Bureau of Competition Director Bruce Hoffman recently announced that the FTC will no longer accept divestitures of pipeline products in inhalant and injectable drugs when the alleged anticompetitive harm involves potential competition with an existing product.23 Explaining the decision, Hoffman said that the failure rate of divestitures of these pipeline products is ‘startlingly high’ and contrasted them with the FTC’s ‘overall “pretty good” rate of merger remedies succeeding’. Instead, the FTC will require the acquiring party’s existing inhalant or injectable product to be divested, leaving the combined firm with the task of bringing the corresponding pipeline product to market. The agency’s exercise of its leverage in this categorical fashion is a notable shift, and an attempt to reconcile existing enforcement tools with innovation concerns.

Hoffman added a familiar refrain: ‘the risk of failure belongs on the parties, not on the public.’ This sentiment signals a further tightening of merger remedies at the FTC that is likely to disproportionately affect high-technology deals given the rate of change and difficulty in predicting competitive effects.

CONCLUSION

It is the nature of high technology to be rapidly evolving. Big data and innovation market issues, among others, will only become more important as our economy continues to expand in these areas. The FTC and DOJ will continue to face the daunting challenge of balancing traditional modes of enforcement with modified approaches that are intended to better promote innovation, and in doing so, they will continue to face political pressures and pressures from other regulators, such as the EC, who have their own views on how antitrust law should apply in these sectors. While sweeping changes are rare in US antitrust enforcement, a series of incremental developments from new leadership at the FTC and DOJ on big data, innovation and other high-technology issues could well have significant impacts on mergers across a broad swathe of the economy.

I OVERVIEW OF AGENCY REVIEW

Like mergers in other industries, mergers involving media companies are reviewed by the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) under Section 7 of the Clayton Act. In addition to these antitrust agencies, the Federal Communications Commission (FCC) also plays an important role in reviewing media mergers. This chapter describes these agencies’ procedures and methods of analysis before turning to a summary of recent mergers in the media industry.

Antitrust agency review

Under the Hart-Scott-Rodino (HSR) Act, parties to mergers and acquisitions that exceed specified thresholds must make premerger notification filings and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act (typically 30 days) has passed or the government has granted early termination of the waiting period.

The agencies sometimes require additional time to review a transaction that raises serious competitive issues, in which case they will issue a formal request for additional information, or ‘second request,’ at the end of the initial 30-day waiting period. A second request is a highly detailed and burdensome request for documents, data and written responses, and generally requires at least three months (and often much longer) to respond. The response process typically involves the collection, review and production of tens or hundreds of thousands of documents (including emails) related to the competing products; collection and analysis (typically with the help of an outside economist) of large amounts of data regarding the companies’ pricing and sales; and significant time from the parties’ management personnel.

The DOJ and FTC conduct a fact-specific review of whether a proposed merger would enable the merged entity to raise prices, reduce output, diminish innovation or would otherwise harm consumers, such as by facilitating collusion among the remaining market participants. These agencies have issued guidance on how they evaluate the likely competitive impact of mergers in the Horizontal Merger Guidelines (19 August 2010) (the Merger Guidelines), which outline the analytical techniques used to evaluate mergers. The DOJ has generally taken the lead in antitrust review of media mergers.
The first step in determining whether a proposed merger raises substantive antitrust concerns is usually defining the market. To define the market, the agencies will consider which product or group of products are reasonable substitutes for one another, and the geographic area in which customers may reasonably seek suppliers of the products.

Generally, the second step is to evaluate concentration in the market as a screen for the likelihood of possible anticompetitive effects. The US antitrust enforcement agencies measure market concentration by the Herfindahl–Hirschman Index (HHI). The HHI requires determining each market participant's respective market share, squaring that share, and then summing the squares. According to the Merger Guidelines, mergers that result in an increase in the HHI of less than 100 points, or post-merger HHIs below 1,500, are unlikely to have adverse competitive effects and ordinarily do not require additional analysis. Markets with post-merger HHIs between 1,500 and 2,500 are regarded as moderately concentrated. Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.

Markets with post-merger HHIs above 2,500 are regarded as highly concentrated. If the HHI is over 2,500, and the increase from pre-merger would be between 100 and 200 points, such mergers may raise significant competitive concerns and often warrant scrutiny. If the increase would be more than 200 points, then the merger raises significant competitive concerns and will be presumed by the enforcement agencies to create or enhance market power unless consideration of qualitative factors militates against that conclusion.

When the enforcement agencies are concerned that a transaction may have anticompetitive effects, they will analyse the market carefully to determine whether the transaction is likely to result in injury to competition based on either unilateral effects (the ability of the combined entity to raise prices or reduce output unilaterally post-merger) or coordinated effects (including not only an increased likelihood of explicit collusion, but also a reduction in the incentive of market participants to undercut each other's attempts to raise prices or reduce output).

**FCC review**

The Communications Act of 1934 provides a separate, but complementary, role for the FCC in reviewing transactions. The FCC's review is informed by competition principles derived from the Clayton Act, but also focuses more broadly on whether the merger serves the public interest. This standard encompasses the goals of the Communications Act of preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally serving the public interest.

The FCC also has issued detailed rules regarding permissible levels of multiple ownership of radio broadcast licences and television stations, as well as cross-ownership.

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4 See Sallet, supra note 3; In re Charter, supra note 3 Paragraph 27.

5 See 47 CFR Section 73.3555(a) (2010).

6 See id Section 73.3555(b), (e).
between radio and television stations\(^7\) or between daily newspapers and radio or television stations.\(^8\) The purpose of these rules, a full treatment of which is beyond the scope of this chapter, is to ensure a diversification of programming sources and viewpoints and prevent excessive concentration in the broadcasting industry.

Once an application to the FCC is complete, the FCC issues a public notice and sets a schedule for public comment.\(^9\) The FCC also may send requests for information to the applicants and third parties.\(^10\) The FCC may approve a transaction or approve it with conditions necessary to ensure that the public interest is served.\(^11\) Unlike the antitrust review process, in which the DOJ and the FTC bear the burden of proving in court (or, for the FTC, sometimes in an administrative proceeding) that a transaction is likely to have an anticompetitive effect, applicants before the FCC bear the burden of proving that the transaction is in the public interest.\(^12\) If the FCC is unable to approve a transaction, it designates the transaction for review by an administrative law judge (ALJ).\(^13\) Once the ALJ issues an initial decision, the full Commission will then vote on whether to approve the application.\(^14\)

The FCC typically seeks to complete its review within 180 days.\(^15\) It endeavours to coordinate with the antitrust review by the FTC or DOJ to avoid creating duplicative work for the parties, or work that requires conflicting remedies.

### II RECENT MEDIA MERGERS

The FCC and the DOJ reviewed several very large proposed media mergers between 2015 and the first half of 2018, in addition to more modest-sized deals in the television and radio spaces. The most prominent recent transaction is AT&T’s proposed acquisition of Time Warner Inc. Other prominent deals in this period included two proposed transactions involving Time Warner Cable – the first of which was abandoned by the parties in the face of opposition by the FCC and the DOJ but the second of which was approved – and AT&T’s US$49 billion acquisition of DirecTV. Most deals that posed competition issues closed, although in several instances only after the acquirer agreed to conditions (including divestitures) to address the regulators’ concerns.

#### i AT&T/Time Warner, Inc

On 22 October 2016, AT&T announced its intended US$85 billion acquisition of Time Warner, Inc AT&T touted the benefits of combining ‘Time Warner’s vast library of content and ability to create new premium content’ with AT&T’s ‘extensive customer relationships, world’s largest pay TV subscriber base and leading scale in TV, mobile and broadband

\(^7\) See id Section 73.3555(c).
\(^8\) See id Section 73.3555(d).
\(^11\) Id.
\(^12\) See Sallet, supra note 3.
\(^14\) See Sallet, supra note 3.
distribution.\textsuperscript{16} AT&T also stated that ‘the combined company will strive to become the first US mobile provider to compete nationwide with cable companies in the provision of bundled mobile broadband and video’.\textsuperscript{17}

The antitrust review of the AT\&T/Time Warner deal has received considerable attention, including in the 2016 US presidential election campaign. As a candidate, now-President Trump expressed opposition to the transaction.\textsuperscript{18} While the head of the DOJ Antitrust Division, Makan Delrahim, said in 2016 (before taking that role) that he did not view the transaction as ‘a major antitrust problem’, after a lengthy investigation the DOJ ultimately sued to block the merger.\textsuperscript{19} On 18 December 2017, AT&T announced that the company was unable to reach a satisfactory settlement with the DOJ.\textsuperscript{20} A six-week trial on the DOJ’s challenge to the merger began on 19 March 2018. As discussed below, the Court ruled in June 2018 that the government failed to meet its burden to establish that the proposed transaction is likely to lessen competition substantially, and let the merger proceed without conditions.

\textit{FCC review}

The FCC did not review this transaction. Although Time Warner held dozens of FCC licences at the time the deal was announced, in February 2017 it announced the sale of its lone TV station – the subject of its FCC licences – to Meredith Corporation for US$70 million.\textsuperscript{21} Shortly following this announcement, FCC commissioner Ajit Pai confirmed that he did not expect the FCC to review the merger.\textsuperscript{22}

\textit{Competition issues}

In its complaint, the DOJ raised three specific antitrust concerns in connection with the merger: (1) that the merged entity could raise costs of, or withhold content from, cable competitors, harming end consumers through passed-on price increases, (2) that AT&T/Time Warner could harm emerging cable competitors by raising prices or withholding content, and (3) that the resulting increase in market concentration would increase the likelihood of oligopolistic coordination.\textsuperscript{23}

Potential harm to cable competitors by withholding or increasing the price of content. The DOJ asserted that the merged entity could harm competition by withholding content from, or raising its price to, cable companies that compete with DirecTV, ultimately resulting in harm to the consumer in the form of higher prices. The DOJ premised its argument

\textsuperscript{17} See id.
\textsuperscript{23} \textit{US v. AT&T}, Complaint, pg. 15.
on several observations about the cable television market, namely: (1) even a small loss of customers could have a large financial impact on a cable provider, (2) customers lost during a content blackout imposed in the event of a negotiation stalemate are unlikely to return, and are expensive to recruit back, (3) internal studies by DirectTV had shown a number of Turner networks, including HBO, to be particularly important to customers, and (4) cable providers typically passed price increases on to their customers.24 Based on the above, the DOJ alleged that the merged entity would be in a position to demand higher prices for some or all of its content, and its competitors, fearing customer loss and the expenses of reacquiring customers, would agree to higher prices rather than lose the content. In turn, these competitors would pass the price increase onto their customers, resulting in higher prices for cable television as a result of the merger. The DOJ also noted that the merged company would be in a position to specifically target customers moving away from a competitor cable provider should that provider lose access to the Time Warner content, which would provide additional financial incentive for the merged entity to engage in anticompetitive conduct.25

Potential harm to new cable competitor entrants by denying them content or increasing the cost of entrance by increasing the price of content. The same conduct that could harm current competitors also could hurt new entrants into the cable market. The DOJ’s complaint highlighted internal documents which suggested that the emerging competitor Sling TV could not survive without Turner content.26

Increased likelihood of oligopolistic coordination. The DOJ cited internal documents which praised the increased concentration that would occur in the industry if the merger went through, and noted that the merger would, in AT&T’s words, bring about ‘stability’ in the market.27 It also noted that the industry relies heavily on most-favoured-nation clauses, which would assist in any oligopolistic coordination between the competitors post-merger.

AT&T countered that imposing higher fees on distributors (or denying distributors access to Time Warner content) would not be a profit-maximising strategy, and that the transaction would actually provide the opportunity for efficiency in advertising. According to AT&T, the transaction would allow AT&T to better compete in the advertising market with Apple, Google and Facebook, and it would lead to lower prices for subscription television.

Decision

The court rejected the DOJ’s positions across the board. The court rejected the DOJ’s purported ‘real-world’ evidence of likely anticompetitive effects as speculative, unconvincing or inconsistent with the bulk of real-world evidence. The judge found that ‘Turner’s content is not literally ‘must-have’’, and any negotiating leverage resulting from the desirability of such content existed before the merger and would not be enhanced by the merger. The court also found no likelihood that the combined company would withhold programming from competing distributors or would gain increased negotiating leverage given the high cost of forgoing affiliate fees and advertising revenue. And the judge did not find statements of AT&T’s competitors opposing the merger to be persuasive.

For a host of reasons, mostly based on the court’s findings of fact, the judge also rejected the DOJ’s expert testimony asserting that the combined company would have increased

24 Id. at pgs. 16-18.
25 Id. at pg. 18.
26 Id. at pg. 20.
27 Id. at pg. 20.
negotiating leverage that would result in higher prices. The court specifically rejected the expert's reliance on the complex 'Nash bargaining model', which the judge likened to a 'Rube Goldberg contraption', finding that the model lacked 'both reliability and factual credibility'.

More broadly, most court challenges by the DOJ and FTC have been to horizontal mergers between competitors. AT&T/Time Warner, by contrast, is a vertical merger; the competitive implications were alleged to arise from the combination of distribution and content. The court's ruling highlighted the challenges of opposing vertical mergers, noting that they typically are pro-competitive to some degree by eliminating 'double marginalisation'. Thus, the enforcement agency must establish that the likely harm to competition exceeds the pro-competitive benefit. The court's rejection of the DOJ's efforts to show an anticompetitive effect could dampen the enforcement agencies' appetite for challenging other vertical mergers.

Lastly, AT&T had offered to address competitive concerns by adopting a process to arbitrate complaints by competing distributors that AT&T was overcharging for Time Warner content. In turning down this proposal, the DOJ questioned the effectiveness and desirability of conduct remedies, insisting that, even in vertical mergers, competition must be protected through structural remedies such as divestitures. That point of view is consistent with the current DOJ leadership's statement that the antitrust agencies should be enforcers of merger law, not regulators of ongoing post-merger conduct. The court, however, found that Turner's commitment to arbitrate disputes with its distributors over renewal terms and not to impose blackouts once arbitration is invoked would likely have 'real world effects' on negotiations between Turner and its distributors. The court's ruling may encourage the agency to accept conduct solutions, rather than insist on structural remedies, in future vertical transactions.

In short, although the court's ruling did not break substantial new ground in merger analysis, its careful and detailed application of existing antitrust principles to this significant vertical transaction is likely to encourage additional, substantial transactions in media and other dynamic industries.

ii Comcast/Time Warner Cable and Charter Communications/Time Warner Cable transactions

In April 2015, Comcast Corporation abandoned its proposed acquisition of Time Warner Cable in the face of a prolonged review and opposition from the FCC and the DOJ. Shortly thereafter, Time Warner Cable entered into an agreement to merge with Charter Communications and Bright House Networks, which was approved with conditions by the DOJ on 25 April 2016 and by the FCC on 5 May 2016. Both the failed Comcast/Time Warner merger and the successful Charter/Time Warner merger involved FCC consideration of whether the transactions would serve the public interest, including growing consumer preference for cord cutting, namely, consumers cancelling traditional cable subscriptions.

in favour of more targeted viewing over the internet.\textsuperscript{30} The FCC’s reviews also highlighted its goal of geographic expansion of high-speed internet access to underserved areas of the United States.\textsuperscript{31} The DOJ’s review also focused on the concern that the new company could make it more difficult for online video distributors (OVDs) to obtain video content from programmers.

\textbf{Comcast/Time Warner Cable merger}

On 24 April 2015, Comcast and Time Warner Cable cancelled their proposed transaction after the FCC told the companies that it had ‘serious concerns that the merger risks outweighed the benefits to the public interest.’\textsuperscript{32} FCC Chairman Wheeler stated that the merger ‘would have created a company with the most broadband and video subscribers in the nation alongside the ownership of significant programming interests’.\textsuperscript{33} He added that the decision to abandon the merger was ‘in the best interests of consumers’, specifically noting that ‘an online video market is emerging that offers new business models and greater consumer choice[,] ... especially given the growing importance of high-speed broadband to online video and innovative new services’.\textsuperscript{34}

\textbf{Charter/Time Warner Cable merger}

On 23 June 2015, the FCC opened a docket for a proposed merger of Charter, Time Warner Cable and Bright House Networks. The proposed transaction would bring together the fourth (Time Warner Cable), seventh (Charter), and 10th (Bright House Networks) largest multichannel video programming distributors (MVPDs) in the country to create the third largest provider. The new company would also have 19.4 million broadband subscribers, creating the second largest broadband internet provider in the United States.\textsuperscript{35} The FCC sought public comments and made requests for information to the applicants and numerous third parties. Following nearly a year’s review, the FCC approved the merger, subject to certain conditions. The FCC’s approval order detailed the potential benefits and harms of the merger and also described the required conditions.

\textbf{Potential harms and benefits}

The FCC suggested that Charter and Time Warner Cable would have an incentive to harm OVD competition. OVDs are entities, such as Sling TV, that compete with more traditional television services by offering the same programming streaming online, often with more

\begin{quotation}
\textsuperscript{30} FCC Chairman Tom Wheeler expressed his support for cord cutting and other forms of innovation in the television industry in an article he wrote for the influential tech blog Recode. See Tom Wheeler, ‘It’s Time to Unlock the Set-Top Box Market’, Recode (27 January 2016, 9:30 AM), www.recode.net/2016/1/27/11589108/its-time-to-unlock-the-set-top-box-market.


\textsuperscript{32} See ‘Statement from FCC Chairman Tom Wheeler on the Comcast–Time Warner Cable Merger’, supra note 16.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\end{quotation}
flexibility and consumer choice. As part of their applications, Charter and Time Warner submitted an economic study showing that it would not be profitable for the merged entity to foreclose competition from OVDs, but the study did not persuade the FCC. The agency found that:

[be]cause of [the merged company’s] increased MVPD and broadband footprint, and its increased number of homes passed, it will capture a greater share of the benefits that would accrue to MVPDs should [the merged company] take actions that reduce the competitive viability of OVDs.

Therefore, the FCC concluded, the merged company was likely to have a greater incentive to take actions negatively impacting OVDs following the merger.

The FCC’s description of public benefits highlighted its goal of providing high-speed internet to more American consumers. The approval order noted that Charter and Time Warner committed to providing high-speed access to 1 million additional customers within four years of closing. The FCC found that this benefit was not specific to the transaction, however, because there would be a natural build-out to new customers within that time frame regardless of whether the transaction was approved. The FCC therefore modified the planned build-out, requiring the merged entity to build out high-speed internet access to at least two million additional customer locations within five years. Moreover, to increase competition, it required that at least one million of those customer locations be outside of the merged entity’s current footprint where any provider other than the merged entity offers 25Mbps or faster broadband internet access service.

Conditions for approval

FCC conditions

Some of the conditions for approval of the Charter/Time Warner Cable merger reflect the FCC’s public interest goal of facilitating consumer preferences for cord-cutting. First, the FCC required the merged entity to adopt a free interconnection policy allowing OVDs to access its networks. Without such a policy, the merged company could arguably freeze out OVDs or charge them prices too high to allow them reasonable access to the merged entity’s networks, thereby depriving consumers of the option to use OVDs.

Another condition of approval was related to the disclosure of interconnection agreements (i.e., agreements regarding what internet traffic is exchanged between parties, over what route, and whether one party is compensated). The FCC noted that interconnection agreements are often subject to non-disclosure provisions. The FCC was concerned that,
without a requirement that the merged company disclose all interconnection agreements to the FCC, it could deny or impede access to its networks. The disclosure requirement was designed to deter anticompetitive practices and to alert the FCC if they did occur.43

Some Commissioners believed that the FCC should have done more to protect consumers. Commissioner Mignon L Clyburn, for example, objected to the absence of a condition requiring a stand-alone broadband offering, stating:

*Why does this matter? In a world in which consumers are increasingly cutting the cord and relying on [OVDs], a competitively priced, stand-alone broadband offering ensures consumers truly have a choice in where they get their video programming.*

**DOJ conditions**

The DOJ and FCC ‘consulted extensively to coordinate their reviews of the proposed merger and devise remedies that were both consistent and comprehensive’.45 The DOJ’s review, like the FCC’s, was animated by the concern that the new company ‘could make it more difficult for [OVDs] to obtain video content from programmers’.46 The DOJ imposed several conditions to address that issue. The DOJ prohibited the new company from entering into or enforcing any agreement with a programmer that forbids, limits or creates incentives to limit the programmer’s provision of content to OVDs.47 The DOJ also precluded the new company from taking advantage of other distributors’ most favoured nation provisions if they are inconsistent with this prohibition.48 Lastly, the DOJ barred the new company from retaliating against programmers for licensing to OVDs.49

**iii Other media mergers**

**tronc, Inc and the Chicago Sun-Times**

On 15 May 2017, tronc, Inc, the owner of the *Chicago Tribune*, announced its intent to purchase Wrapports LLC, the owner of the *Chicago Sun-Times*.50 The transaction would have combined the two largest newspapers in Chicago. The DOJ immediately began an investigation into the potential acquisition. The investigation focused on whether the *Sun-Times* was a failing company under the Merger Guidelines, which provide that a transaction is not likely to be anticompetitive if one of the firms (or its assets) would otherwise exit the market. Shortly after the DOJ began its investigation, Wrapports announced a public sale process for the *Chicago Sun-Times*. If no reasonable alternative offers were made in the public auction,
tronc might have been able to establish one prong of the failing company provision of the Merger Guidelines. The DOJ closely monitored the sale process, which ultimately resulted in the *Sun-Times* being sold to a third-party outside the Chicago newspaper market.51

**Discovery Communications-Scripps Network Interactive Merger**

In summer 2017, Discovery announced a proposed merger with Scripps, bringing together the owners of several well-known cable channel brands, including Discovery’s Discovery Channel, Animal Planet, and TLC and Scripps’ HGTV, Travel Channel and Food Network. Some commentators suggested that the deal might face regulatory hurdles because it would increase the combined company’s bargaining leverage with cable companies.52 The parties did receive a second request from the DOJ, but the DOJ ultimately allowed the deal to proceed without any remedy.53 On 6 March 2018, it was announced that the deal had closed.54

**US v. Nexstar Broadcasting Group, Inc and Media General Inc**

In September 2016, the DOJ approved the US$4.6 billion merger of Nexstar Broadcasting Group, Inc and Media General, Inc, with conditions. The parties, both owners of broadcast television stations, competed in certain geographic markets both in the sale of broadcast television spot advertising and for viewers who are MVPD subscribers. The DOJ noted that, while broadcast advertising competes with other forms of advertising, including increasingly online advertising, there was no suitable substitute for broadcast television ad buys because of their audiovisual nature and broad demographic reach. Accordingly, the DOJ believed that the transaction ‘would lead to (1) higher prices for broadcast television spot advertising in each [local market] and (2) higher licensing fees for the retransmission of broadcast television programming to MVPD subscribers in each of the [local markets]’.55 The consent decree called for the divestiture of properties in six markets in which the merger would result in a combined market share of broadcast television stations of 41 per cent or higher, including one market where the share would be 100 per cent post-merger, absent divestiture.56

**US v. AMC Entertainment Holdings, Inc and Carmike Cinemas, Inc**

In December 2016, the DOJ approved the merger of AMC Entertainment Holdings, Inc and Carmike Cinemas, Inc, two companies with national networks of theatres offering first-run movies. The DOJ expressed concerns about competition in markets for first-run film displays and preshow services and cinema advertising. It contended that in 15 markets

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51 Department of Justice, Office of Public Affairs, ‘Department of Justice Statement on the Closing of Its Investigation into the Possible Acquisition of Chicago Sun-Times by Owner of Chicago Tribune,’ July 12, 2017.


56 See id.
the merger would result in impermissibly high levels of concentration, with post-merger HHIs of 3,800–10,000.\textsuperscript{57} The consent decree called for divestiture of either the AMC or the Carmike theatres in each of these markets.\textsuperscript{58}

\textit{AT&T and DirecTV}

In July 2015, the FCC approved the \textit{AT&T/DirecTV} merger, with several conditions.\textsuperscript{59} AT&T was one of the largest phone and internet providers in the United States, while DirecTV was the largest satellite provider. The FCC found that the merged company would offer consumers more choices and lower prices. To ensure that those benefits would be realised, however, the FCC required the merged company to expand its broadband internet service and offer discounted rates on that service to low-income subscribers.\textsuperscript{60}

\textit{US v. Gray Television, Inc and Schurz Communications, Inc}

In March 2016, the DOJ entered into a consent order with Gray Television, Inc (Gray) and Schurz Communications, Inc (Schurz), to resolve the agency’s concerns about Gray’s proposed acquisition of Schurz.\textsuperscript{61} Gray and Schurz each owned television broadcast stations in various designated market areas (or media markets), including South Bend, Indiana and Wichita, Kansas,\textsuperscript{62} in which Gray and Schurz competed head-to-head in the sale of broadcast television spot advertising (which targets viewers in specific geographic areas).\textsuperscript{63} The DOJ distinguished this advertising from other types of advertising, such as national advertising on cable and satellite television (which has a more limited reach than broadcast television) and radio, newspapers, or billboards (which are less likely to create memorable advertisements because they do not combine sound and motion in the way television advertisements do).\textsuperscript{64}

The DOJ alleged that the parties’ combined market shares were approximately 57 per cent in Wichita and 67 per cent in South Bend\textsuperscript{65} and that the acquisition would increase spot advertising prices in each of the two markets.\textsuperscript{66} The consent order required Gray to divest to pre-approved buyers one station in each of the Wichita and South Bend markets.

\textit{Disney Acquisition of 21st Century Fox}

In late 2017, Disney announced the proposed acquisition of key parts of 21st Century Fox, a deal that would eliminate one of the six major Hollywood studios and bring more sports programming under the control of Disney, which owns ESPN. The DoJ investigated the transaction and identified the combination of Disney’s ESPN network – the most popular

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\textsuperscript{57} Final Judgment: \textit{U.S. v. AMC Entertainment Holdings, Inc. and Carmike Cinemas, Inc.}, No. 16-2475 (DDC 7 March 2017).
\textsuperscript{58} Complaint: \textit{U.S. v. AMC Entertainment Holdings, Inc. and Carmike Cinemas, Inc.}, No. 16-2475 (DDC 7 March 2017).
\textsuperscript{60} Id Paragraphs 4, 8.
\textsuperscript{63} Id.
\textsuperscript{64} See id at 4.
\textsuperscript{65} Id at 5.
\textsuperscript{66} See id at 1–2.
cable sports network in the US – with Fox’s array of regional sports networks as likely to substantially lessen competition by resulting in higher prices for cable sports programming in the local markets served by the regional sports networks.\(^{67}\) The DoJ filed a complaint and simultaneously announced a settlement with Disney that required the divestiture of all 22 of Fox’s regional sports networks as a condition of the sale.\(^{68}\)

**US v. Entercom Communications Corp and Lincoln Financial Media Company**

In October 2015, the DOJ entered into a consent decree with Entercom Communications Corp (Entercom) and Lincoln Financial Media Company (Lincoln) to allay the DOJ’s concerns about Entercom’s proposed acquisition of Lincoln.\(^{69}\) Entercom and Lincoln each owned English-language radio stations in numerous metropolitan areas, including the Denver, Colorado area. After the acquisition, Entercom would have 37 per cent of advertising sales in the highly concentrated Denver market.\(^{70}\) The DOJ also alleged that the Entercom and Lincoln stations were particularly close substitutes that (among other things) targeted similar customers.\(^{71}\) For these reasons, the DOJ alleged that the acquisition’s likely effect would be to increase English-language broadcast radio advertising prices in the Denver area.\(^{72}\) To address these concerns, Entercom agreed to divest three of its Denver area radio stations.\(^{73}\)

**US v. Entercom Communications Corp and CBS Corporation**

In a transaction with parallels to Entercom’s proposed acquisition of Lincoln Financial Media Company, Entercom’s proposed acquisition of CBS’s radio stations in November 2017 also raised antitrust concerns. As in the Lincoln deal, the DOJ identified competitive concerns in the market for advertising and noted three particular markets – Boston, Sacramento, and San Francisco – in which there would be significant overlap in radio station ownership that would allow the merged entity to raise prices on advertising.\(^{74}\) In these markets, there would be only a single provider of wide-reaching, English-language radio advertising post-merger, leaving advertisers with no effective substitutes should Entercom raise prices. The DOJ noted the advertising market for sports commentary would be particularly affected, as the competitors owned the two highest-rated sports talk shows in Boston, these stations had similar listener demographics, and the stations competed against each other on price.\(^{75}\) To remedy these concerns, the final judgment required divestiture of the CBS radio stations in the Boston, Sacramento, and San Francisco markets.\(^{76}\)

\(^{67}\) See *U.S. v. Disney and Twenty-First Century Fox, Inc.*, Complaint (27 June 2018).

\(^{68}\) See ‘The Walt Disney Company Required to Divest Twenty-two Regional Sports Networks in Order to Complete Acquisition of Certain Assets From Twenty-First Century Fox: Proposed Settlement Preserves Cable Sports Programming Competition,’ DoJ Press Release (27 June 2018).


\(^{71}\) See id at 6.

\(^{72}\) See id at 7.


\(^{75}\) Id. at 7.

\(^{76}\) *US v. Entercom Communications Corp and CBS Corporation*, Final Judgment, Jan. 31 2018.
US v. Tribune Publishing Company

In March 2016, the DOJ sued to enjoin Tribune’s proposed acquisition, through a bankruptcy sale, of Freedom Communications, Inc Tribune owns the Los Angeles Times, while Freedom owned local newspapers in Orange County and Riverside County, both of which are in the greater Los Angeles area. The key issue was whether the relevant market should be limited to local newspapers, as the DOJ asserted, or expanded to account for internet-based sources of local news (including Google News and Apple News), as Tribune contended. The court agreed with the DOJ, noting that local newspapers serve the unique function of creating local content. Using that market definition, the proposed acquisition would have resulted in Tribune’s share of local daily newspapers increasing to 98 per cent in Orange County and 81 per cent in Riverside County. The court held that ‘such a concentration clearly constitutes a threat to competition’. Accordingly, only one day after the DOJ sued and immediately before the bankruptcy court was to consider the proposed acquisition, the court issued a temporary restraining order enjoining the transaction. The bankruptcy court thereafter approved an alternative purchaser for the two newspapers.

III CONCLUSION

In addition to the DOJ’s consideration of traditional antitrust concerns, the FCC’s review of media mergers involves broader considerations of the public interest. With the ever-growing necessity of using the internet for everyday life, the FCC became increasingly sensitive during the Obama administration to consumer desires for more flexibility from their internet providers. It remains too early to tell how the Trump administration will address these concerns, and if the dismantling of protections such as net neutrality also heralds fewer restraints on media and telecommunications companies seeking merger approval. Until then, companies would be wise to consider these factors in any merger applications submitted to the FCC.

78 See id.
79 See id at 5-7.
80 See id.
81 See id at 8.
82 See id.
83 See id.
Part II

JURISDICTIONS
I INTRODUCTION

The Australian merger control regime appears, superficially, to have many similarities with merger control regimes in other countries. It is, however, materially different from many of the mandatory notification regimes in other countries, because the first question to be addressed in the Australian context is not whether certain filing thresholds are triggered but, rather, whether the transaction is likely to give rise to competition concerns in Australia.

The core of Australia’s merger control regime is contained in Section 50 of the Competition and Consumer Act (Cth) 2010 (CCA) (previously known as the Trade Practices Act), which prohibits any direct or indirect acquisition of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia. The authority responsible for enforcing the CCA’s merger control regime is the Australian Competition and Consumer Commission (ACCC). The ACCC may investigate any transaction to ascertain whether it involves an anticompetitive acquisition of shares or assets, and it may seek an injunction from the Federal Court of Australia (the Federal Court) blocking a proposed acquisition. Post-closing, the ACCC (or any other interested

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1 Peter Armitage is a senior partner, Ross Zaurrini is a partner and Amanda Tesvic is a senior associate at Ashurst.
2 In addition, Section 50A of the CCA applies to acquisitions that occur outside Australia that result in a controlling interest in a corporation and that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.
3 The Federal Court may grant injunctions on such terms as it determines to be appropriate. In merger cases where closing of a proposed transaction is imminent, the ACCC may seek an interlocutory injunction restraining the merger parties from consummating the proposed transaction pending a hearing of the case on a final basis. The Federal Court has wide discretion in relation to the granting of interlocutory injunctions. The Federal Court must be satisfied that there is a serious question to be tried, and that the balance of convenience favours granting an interlocutory injunction. The Federal Court will then make its decision about the granting of a final injunction after a full trial.
4 Third parties cannot seek an injunction from the Federal Court to prevent a proposed transaction from closing.
person) can apply to the Federal Court for a divestiture order. In addition, the ACCC may also seek a court order imposing a pecuniary penalty on the merger parties if a completed merger has the effect, or is likely to have the effect, of substantially lessening competition.

In considering a transaction, the ACCC can use its wide-ranging compulsory information-gathering powers to obtain the information and market data that it considers necessary to assess the competitive effects of that transaction in Australia.

The ability of the ACCC to investigate any transaction and the risks of court action to prevent a transaction from closing (or post-closing court action for divestiture, declaration that a transaction is void or penalties) have resulted in the practice in Australia of seeking ‘informal clearance’ from the ACCC where a proposed merger may raise competition concerns in Australia.

In its Merger Guidelines of November 2008 (updated in November 2017), the ACCC provides guidance as to when it would be prudent for the merger parties to seek clearance. It ‘encourages’ merger parties to notify a proposed merger in advance of completing it where the products of the merger parties are either substitutes or complements; and the merged entity will have a post-merger market share of greater than 20 per cent in the relevant market or markets. The ACCC adds that, as market shares are an imprecise indicator of likely competition effects, a proposed merger that does not meet these thresholds may still raise competition concerns and be subject to an investigation.

The ACCC can investigate transactions, even if informal clearance is not sought. The circumstances in which there is a heightened risk that the ACCC may commence an investigation on its own initiative include, in particular, where there are substantial complaints by industry participants; the parties are required to notify the Foreign Investment Review Board (FIRB) under the Foreign Acquisitions and Takeovers Act (the FIRB, as a matter of course, seeks the ACCC’s views as part of its consultation process); or, in global merger cases, where the proposed merger raises competition concerns in other jurisdictions, particularly where it is subject to a second-phase investigation in the European Union or the United States.

The ACCC has recently investigated several closed transactions. In 2016 the ACCC accepted legally enforceable undertakings from Primary Health Care and Healthscope in relation to Primary’s acquisition of Healthscope’s pathology assets in Queensland, which completed in 2015 without ACCC clearance. The parties undertook to divest assets to a third party, unwinding the effects of the merger. Separately, in March 2018 it obtained a hold-separate undertaking from Qube Logistics while the ACCC reviewed its completed acquisition of Maritime Container Services Pty Ltd.

5 To date, however, a divestiture order has never been made in Australia for breach of section 50 of the CCA. Where the vendor is involved in the contravention, the ACCC may apply for a declaration that the transaction is void and order that the shares or assets be deemed not to have been disposed of by the vendor, and that the vendor refund payment made to it. (CCA, Section 81(1A)).

6 The maximum penalty for corporations per contravention is the greater of A$10 million; three times the total value of the benefits that have been obtained by the contravention; or, if the court cannot determine the total value of those benefits, 10 per cent of the annual group turnover referable to activities in Australia. Penalties totalling A$4.8 million were imposed in 1996 on Pioneer International Limited and others for contravening Section 50.

7 http://registers.accc.gov.au/content/index.phtml/itemId/1196388/fromItemId/751043.

8 http://registers.accc.gov.au/content/index.phtml/itemId/1205120/fromItemId/751046.
II YEAR IN REVIEW

The ACCC has considered, in recent years, around 300 merger proposals each year. As the following table from the ACCC indicates, the vast majority of transactions either did not require a public review, or were reviewed and cleared.9

<table>
<thead>
<tr>
<th>Matters assessed – no review required</th>
<th>2013 FY (to 30 June)</th>
<th>2014 FY (to 30 June)</th>
<th>2015 FY (to 30 June)</th>
<th>2016 FY (to 30 June)</th>
<th>2017 FY (to 30 June)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reviews undertaken</td>
<td>76</td>
<td>55</td>
<td>44</td>
<td>32</td>
<td>35</td>
</tr>
<tr>
<td>Not opposed</td>
<td>55</td>
<td>36</td>
<td>35</td>
<td>17</td>
<td>23</td>
</tr>
<tr>
<td>Finished – no decision (including withdrawn)</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>6</td>
<td>8</td>
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<tr>
<td>Publicly opposed outright</td>
<td>6</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Confidential review – opposed or ACCC concerns expressed</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Resolved through remedies</td>
<td>2</td>
<td>10</td>
<td>7</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Variation to remedy accepted</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Variation to remedy rejected</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total matters assessed and reviews undertaken</td>
<td>289</td>
<td>297</td>
<td>322</td>
<td>319</td>
<td>288</td>
</tr>
</tbody>
</table>

The overwhelming majority of mergers notified to the ACCC are dealt with in the ‘pre-assessment’ process, which is outlined further below. This process is designed to provide faster clearance for ‘non-contentious mergers’, without referring the transaction to public market inquiries (hence why it is described in the table above as ‘no review required’). Details of those mergers that have been pre-assessed are not made public by the ACCC, nor is the basis for the ACCC’s pre-assessment decision. Even the parties are provided with limited information regarding the pre-assessment analysis.

In the last 12 months,10 the ACCC has publicly opposed only one merger – BP’s proposed acquisition of Woolworths’ retail service station sites. However, this statistic is slightly misleading as it excludes those transactions where the parties withdrew their request for informal clearance following the ACCC publishing a statement of issues outlining serious competition concerns with the transaction (see, for example, APN Outdoor Group’s proposed merger with ooh!media Limited11 and Camp Australia Pty Ltd’s proposed merger with Junior Adventures Group Pty Ltd).12 It also excludes reference to the ACCC’s opposition to the Tabcorp/Tatts merger, as this opposition did not take place through the informal review process.

We have observed a number of developments in the past 12 months that are outlined below.

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9 Final figures for the 2018 FY were not available at the time of publishing.
10 1 May 2017 to 30 April 2018.
11 http://registers.accc.gov.au/content/index.phtml/itemId/1202240/fromItemId/751043.
12 http://registers.accc.gov.au/content/index.phtml/itemId/1203805/fromItemId/751043.
i More documents and data required in contentious merger reviews

The ACCC has not successfully opposed a litigated merger in many years and the courts have been very critical of the theoretical nature of the evidence relied on by the ACCC in those cases.13 As a result, the ACCC has recently (in August 2017) announced changes to its merger review process for contentious mergers that are designed to ensure that it is armed with sufficiently probative evidence should it oppose a merger.14 In practice this means that in a small number of contentious mergers the ACCC will increasingly be using its compulsory information-gathering powers to require the merger parties to produce more documents and data and to submit their executives to examination under oath. This, in turn, will result in considerably longer time frames for the informal merger clearance process in those cases. In some mergers, we expect it may also result in parties offering remedies earlier in the process, to avoid having to respond to time-consuming and burdensome document and information requests. Our recent experiences indicate that the ACCC has already implemented this change of practice.

ii Detailed concluded analyses of mergers not published by ACCC; merger decision-making is more opaque

A public competition assessment (PCA) is a document published by the ACCC that provides a detailed summary of the issues considered when making a particular merger decision. The ACCC says its practice is to issue a PCA for all transactions where it opposes a merger, a merger is subject to undertakings; the parties seek such disclosure; or a merger otherwise raises important issues that the ACCC considers should be made public. Unfortunately, this has not been its recent practice. In the period 1 May 2017 to 30 April 2018, there have been no PCAs published by the ACCC; the last PCA was issued in February 2017.

This is particularly problematic in circumstances where the ACCC has opposed a merger but not released its detailed analysis (such as BP’s proposed acquisition of Woolworths’ retail service station sites in December 2017)15 and in instances where the ACCC has released a statement of issues indicating concerns in relation to a merger then subsequently cleared the transaction (such as Moly-Cop’s proposed acquisition of Donhad16 and Platinum Equity’s proposed acquisition of OfficeMax Australia17 both in the past 12 months).

It is also concerning in circumstances where the vast majority of mergers are being processed through the non-public pre-assessment process. No information is provided to the public regarding the ACCC’s review of these transactions and very little information is provided to the parties regarding the basis of the ACCC’s decision. The combination of the absence of PCAs plus the large number of matters being pre-assessed has meant that the ACCC’s merger decision-making process has become increasingly opaque, to the detriment of Australian merger theory and practice.

15 http://registers.accc.gov.au/content/index.phtml/itemId/1204787/fromItemId/751046.
16 http://registers.accc.gov.au/content/index.phtml/itemId/1205255/fromItemId/751046.
17 http://registers.accc.gov.au/content/index.phtml/itemId/1204628/fromItemId/751043.
iii ACCC’s theories of harm continue to focus on concentrated markets and closeness of competition

The ACCC has long been concerned about mergers that result in highly concentrated markets, as well as mergers that combine a market’s closest competitors due to the potential for such mergers to result in increased prices and reduced service levels. The last 12 months are no exception.

In almost all the mergers that were publicly reviewed by the ACCC in the last 12 months18 in which the ACCC published a statement of issues (i.e., Phase II), the ACCC expressed horizontal concerns regarding the level of concentration in the market and the closeness of competition between the parties (with the potential that the merger would result in increased prices, reduced service levels or reduced innovation).

In its review of APN Outdoor Group Limited’s proposed merger with oOh!media Limited,19 the ACCC outlined serious concerns that the merger would combine the two largest providers of out-of-home advertising services and create a market leader with over 50 per cent share, based on its (narrow) market definition of the market for out-of-home advertising. It also highlighted the fact that the parties were each other’s closest competitors, as they were the only two providers present in categories of all out-of-home advertising. The merger was subsequently abandoned by the parties as a result of these concerns.

Similarly, in the proposed merger of Camp Australia and Junior Adventures Group,20 the ACCC’s statement of issues noted that the merger involved the consolidation of the two largest providers of before and after school care who were each other’s closest competitor, potentially resulting in higher fees for parents or lower quality services. This merger was also abandoned following the statement of issues.

While high levels of market concentration and close competition between merger participants will raise the ACCC’s concerns, they are not necessarily fatal to all transactions. The ACCC cleared Platinum Equity’s proposed acquisition of OfficeMax Australia in November 2017, despite the transaction raising these types of concerns as it was satisfied that the remaining market participants would provide sufficient competitive constraint on the merged entity.21 The transaction was effectively a ‘four into three’, but involved combining the two largest competitors. Unfortunately, no PCA has been released and until it is, it is difficult to understand precisely the factors on which the ACCC relied in providing clearance for this transaction.

iv Barriers to entry and expansion

Unsurprisingly, the absence of barriers to entry or expansion is often a key factor in many of the ACCC’s decisions not to oppose proposed acquisitions. The basis of the ACCC’s conclusions is not always clear, however. In many of the short notes on acquisitions it has cleared, the ACCC states that barriers to entry or expansion are low, without supplying facts. While this is understandable, it makes it difficult to predict the outcome of the ACCC’s assessment of this issue in other transactions. This unpredictability is of particular significance in sectors that are undergoing dynamic change. For instance, in its decision to oppose the

18 1 May 2017 – 30 April 2018.
19 http://registers.accc.gov.au/content/index.phtml/itemId/1202240/fromItemId/751043.
20 http://registers.accc.gov.au/content/index.phtml/itemId/1203805/fromItemId/751043.
21 http://registers.accc.gov.au/content/index.phtml/itemId/1204628/fromItemId/751043.
proposed acquisition by Carsales of assets associated with the Trading Post, the ACCC concluded that the barriers to entry for the supply of online automotive classified advertising were high. It is unclear, however, why the ACCC reached that conclusion. The acquirer itself was a relatively recent and successful entrant, and the impediments to entry by others were not obvious.

In more static markets, the ACCC’s analysis of barriers to entry and expansion has been more rigorous. It requires convincing evidence of the likelihood of new entry or expansion and that it will provide a sufficient and timely competitive constraint on the merged entity. For example, in Iron Mountain’s proposed acquisition of Recall, the ACCC concluded that new entry or expansion of existing smaller firms would not constrain the merged firm because of high barriers including the trend away from physical storage of documents which limits a new entrant’s ability to attract new customers to the industry, significant customer ‘stickiness’ due to permanent retrieval fees in contracts and the need to operate at a particular scale to attract large customers.

v Vertical effects
The ACCC continues to focus on the vertical effects of transactions, notwithstanding statements in its Merger Guidelines to the effect that ‘it is often the case that vertical mergers will promote efficiency’ and that ‘in the majority of cases [vertical] mergers will raise no competition concerns’. This focus is perhaps due to the weight the ACCC places on the third-party views that it obtains through its public market inquiry process. Third parties will frequently articulate vertical concerns, even if they are not economically rational.

The Merger Guidelines indicate that the ACCC will focus on the merged firm’s ability and incentive to foreclose rivals in the market and the likely effect of any such foreclosure. The ACCC has adhered to this focus on foreclosure in some recent transactions. One such example is its consideration of Metcash’s proposed acquisition of Home Timber & Hardware Group in 2016. Home Timber & Hardware Group was Metcash’s only rival full-service hardware wholesaler and the ACCC was concerned that in addition to the acquisition potentially resulting in raised prices and reduced service to hardware stores, the acquisition would allow Metcash to foreclose entry and expansion by other wholesale suppliers, by imposing terms on retail stores that restricted their ability to obtain supply from other sources. The ACCC was also concerned that without another wholesale supplier to switch to, Metcash could discriminate against independent retail stores who compete with stores in which Metcash has an ownership interest. The ACCC accepted undertakings from Metcash to address these concerns.

In 2017, vertical concerns were raised in the proposed merger of Essilor International SA with Luxottica Group SpA, which would result in a vertically integrated eyewear business. The ACCC found that the transaction would not give the merged firm the ability to engage...

22 http://registers.accc.gov.au/content/index.phtml/itemId/1094677/fromItemId/751043.
23 http://registers.accc.gov.au/content/index.phtml/itemId/1194800/fromItemId/751043.
24 Barriers to entry and expansion were also explored in Camp Australia’s proposed acquisition of Junior Adventure Group that was abandoned following the statement of issues. In the statement of issues, the ACCC expressed the view that barriers to entry and expansion in the relevant markets were ‘significantly higher than suggested by a simple analysis of the time and cost of establishing a new provider’. See: http:// registers.accc.gov.au/content/index.phtml/itemId/1203805.
25 http://registers.accc.gov.au/content/index.phtml/itemId/1197122/fromItemId/751043.
in bundling or foreclosure conduct in any market, as there was sufficient competition in each of the markets to constrain such conduct and its brands were not 'must-haves'. On this basis, the merger was cleared.

The ACCC has also outlined vertical concerns in its statement of issues regarding Pacific National/Linfox's proposed acquisition of intermodal assets from Aurizon.  

vi Coordinated effects
A review of the ACCC’s public competition assessments (PCAs) over the past several years indicates that concerns from the increased risk of coordinated effects do not arise frequently in the analysis of mergers in Australia.

The ACCC’s stated approach to the assessment of coordinated effects, as set out in its Merger Guidelines, is uncontroversial and in some instances, the actual approach taken by the ACCC is similarly unexceptional. On the other hand, the ACCC’s discussion of coordinated effects has, in some transactions, been less rigorous and, as a consequence, less predictable. For example, its controversial refusal to clear the acquisition of the petrol retail assets of Mobil Oil Australia by Caltex Australia Limited in 2009.

More recently, in December 2017 the ACCC announced it would oppose BP’s proposed acquisition of Woolworths’ retail service station sites. The statement of issues in that transaction referred to concerns which included the removal of a strong competitor with a discounting strategy (Woolworths) and replacement with a less aggressive pricing strategy (BP’s), as well as coordinated effects, by enabling the remaining retailers to more effectively co-ordinate price increases during the ‘price increase’ phase of the petrol price cycle. As the ACCC has not yet published a PCA, it is unclear exactly how much importance it ultimately gave to these concerns when deciding to oppose the merger and in particular whether the assertion that BP was likely to price fuel at the acquired Woolworths sites less competitively than Woolworths would, was justified.

vii Conglomerate effects
The ACCC has investigated conglomerate effects theories more frequently in recent years. In Pfizer/Wyeth, it was concerned that, post-acquisition, the merged entity would have the ability and incentive to bundle its range of vaccine products to leverage its strong position in the supply of animal health vaccines into other animal health markets. Pfizer was able to allay these concerns by providing a court-enforceable undertaking to divest a range of sheep and cattle-worming products. More recently, the ACCC’s market inquiries letter in Bayer’s proposed acquisition of Monsanto revealed the ACCC was concerned with exploring

26 http://registers.accc.gov.au/content/index.phtml/itemId/1203319/fromItemId/750991.
27 For example, in its assessment of the proposed acquisition of Newreg, a share registry provider, by Link Market Services, which also provided, inter alia, share registry services, the ACCC concluded that the transaction would have been likely to increase the ability and incentive of Link and the only other major supplier of registry services to engage in coordinated conduct. This was because, inter alia, changes in the providers of share registry services are highly visible, the barriers to entry and expansion in this activity are high, and the customised nature of the services and the stickiness of customers (because of the perceived risks of switching) were, in combination, likely to give rise to a real chance of muted competition or tacit market sharing post-acquisition.
28 http://registers.accc.gov.au/content/index.phtml/itemId/904294/fromItemId/751043.
29 http://registers.accc.gov.au/content/index.phtml/itemId/895088/fromItemId/751043.
similar issues in that transaction. However, the ACCC published only very brief notes on this transaction after clearing it on the basis of divestiture undertakings to the European Commission.\(^{30}\)

It also explored this concern in Cleanaway’s acquisition of Tox Free Solutions Ltd in April 2018, but found sufficient competition to constrain the combined entity.\(^{31}\)

**viii Change in approach to merger remedies in multi-jurisdictional transactions**

In the past 12 months the ACCC has made a significant yet unheralded change to its approach to merger remedies in multi-jurisdictional transactions. In matters where global divestitures are contemplated, the ACCC’s practice has previously been to require the parties to provide it with a separate divestiture undertaking to the same effect as those made to other regulators. However, in three recent global transactions, the ACCC has been satisfied to provide its clearance on the basis of the commitments provided to other competition regulators, without requiring it be provided with a separate undertaking.

In Dow Chemical Company’s proposed merger with EI du Pont de Nemours and Company, the ACCC initially released a statement of issues outlining concerns, then cleared the acquisition in June 2017 on the basis of divestiture commitments made to the European Commission, without requiring a separate undertaking.\(^{32}\)

In March 2018, the ACCC also cleared Bayer AG’s proposed acquisition of Monsanto Company following divestiture commitments made to the European Commission, also without a separate undertaking.\(^{33}\) Lastly, confirming that this is not an approach that is limited to mergers involving commitments to the European Commission, in June 2017 the ACCC cleared General Electric Company’s proposed acquisition of Baker Hughes Incorporated on the basis of a consent decree filed by the US Department of Justice that required divestment of an overlapping business.\(^{34}\) This is a welcome change to the ACCC’s previous practice and will reduce administrative costs for the parties.

A by-product of this new approach to remedies in global transactions is that the ACCC has effectively removed itself from any involvement in ‘pre-approval’ of the purchaser of the divestiture assets in those cases.\(^{35}\) For instance, in the *Bayer/Monsanto* transaction, BASF was identified on 21 March 2018 as a potential purchaser of part of Bayer’s crop science business, but only cleared by the European Commission to acquire these assets on 30 April 2018. Before the European Commission had approved BASF as a purchaser, the ACCC cleared the deal on 22 March 2018, without separate undertaking. In doing so, the ACCC removed itself from the process of pre-approval of the purchaser. This is in contrast with its approach in Saputo’s proposed acquisition of Murray Goulburn, in which it has significant involvement.

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\(^{30}\) [http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.](http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.)

\(^{31}\) [http://registers.accc.gov.au/content/index.phtml/itemId/1205330/fromItemId/751046.](http://registers.accc.gov.au/content/index.phtml/itemId/1205330/fromItemId/751046.)

\(^{32}\) [http://registers.accc.gov.au/content/index.phtml/itemId/1202487/fromItemId/751046.](http://registers.accc.gov.au/content/index.phtml/itemId/1202487/fromItemId/751046.)

\(^{33}\) [http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.](http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.)

\(^{34}\) [http://registers.accc.gov.au/content/index.phtml/itemId/1202521/fromItemId/751043.](http://registers.accc.gov.au/content/index.phtml/itemId/1202521/fromItemId/751043.)

\(^{35}\) Of course, if a purchaser was concerned its acquisition of the divestiture business may substantially lessen competition it may seek informal clearance before doing so. However, it has removed the need for pre-approval of all potential purchasers in those cases.
in the divestiture process, including requiring that it approve the identity of the purchaser of the divestiture assets as well as any technical assistance agreements and transitional supply agreements if required.36

ix New media merger guidelines

In October 2017, the ACCC published updated Media Merger Guidelines.37 The previous guidelines were published in 2006 and there have been significant changes to media in that time. Also in 2017, the Australian government made significant changes to Australia’s media control and ownership laws, to remove certain restrictions on ownership known as the ‘75 per cent reach rule’ and the ‘two out of three rule’. The removal of these restrictions creates the potential for media mergers and acquisitions that have not been possible in the past. However, although these restrictions have been lifted, media mergers remain subject to Section 50 of the CCA. The ACCC’s new Media Merger Guidelines identify some specific areas of attention for the ACCC when reviewing a media transaction, including the effect on diversity of media voices and access to key content, as well as the impact of technological change on a market.

III THE MERGER CONTROL REGIME

The Australian merger control regime has a number of distinctive features that result, directly or indirectly, from the fact that there is no mandatory notification requirement and no statutory suspension of closing of transactions. As previously discussed, a process of informal clearance by the ACCC evolved as a result of, on the one hand, the desire of merger parties to manage the risk of contravening the prohibition on anticompetitive acquisitions and, on the other, the desire of the ACCC to engage with merger parties in relation to transactions rather than in litigation.

There are two processes available for parties who wish to seek clearance for a proposed merger: the informal clearance process, and the authorisation process. These are outlined below. Until November 2017, a third option (formal merger clearance) also existed but this was recently removed.

i Informal clearance

The informal clearance process is a merger review process that concludes with an informal decision by the ACCC as to whether it considers that a particular merger proposal is likely to contravene Section 50 of the CCA. If it considers that a proposed merger is likely to result in anticompetitive effects in Australia, the ACCC will ‘oppose’ it by giving the merger parties notice in writing of its informal view and (in the case of a public merger review) by issuing a media release (sometimes followed by a more comprehensive public competition assessment explaining its reasons in more detail). Otherwise, it will inform the merger parties in writing that it does not propose to intervene in the proposed merger. The ACCC’s decision is ‘informal’ – it is effectively the exercise of the regulator’s discretion. A decision opposing

36 http://registers.accc.gov.au/content/index.phtml/itemId/1205274/fromItemId/751046.
a merger (or clearing a merger only subject to remedies) cannot be appealed by the merger parties, and a clearance decision does not afford protection from third-party court action challenging the merger.

The process is usually commenced by the purchaser providing the ACCC with submissions that outline the nature and structure of the transaction, provide information on the relevant markets and assess the likely competitive impact of the transaction on those markets. The ACCC will also request information about customers, suppliers and competitors in those markets.

On receipt of the submissions, the ACCC will conduct its own brief internal review known as a ‘pre-assessment’, over approximately two to four weeks. For straightforward transactions, the ACCC may ‘clear’ the transaction at this point. In some cases, the ACCC may request the merger parties to agree to limited or targeted enquiries of particular market participants. In these transactions, the review may take four to six weeks.

Those transactions that are not cleared will then undergo a full public review process where the ACCC seeks the views of market participants in relation to the transaction. This public process will commence only once the transaction has been announced.

There are no statutory time periods for the informal review process. According to ACCC practice, the public review typically takes six to 12 weeks. At the conclusion of this process, it will decide whether to clear the proposed merger or enter into a second stage investigation by releasing a statement of issues, which is a public document setting out the ACCC’s competition concerns and inviting interested parties to comment on the concerns raised in it.

The ACCC will commence a second-stage review where, following conclusion of the initial public market inquiries, it considers that the proposed merger raises substantial competition concerns that are incapable of being resolved without further information from the marketplace. There is no standard timeline for the second stage process. The duration of the review depends on, in particular, the complexity of the competition issues and whether merger remedies are necessary to resolve the competition concerns. The second stage review will generally be completed six to 12 weeks after the statement of issues is published. In some cases (for instance where the merger is opposed, the ACCC may issue a public competition assessment (setting out the reasons for its decision), though it is not required to do so.38

Merger parties may request the ACCC to consider a merger proposal confidentially. The ACCC will first decide whether it is prepared to conduct a confidential merger review. If it is prepared to do so, it will endeavour to provide the parties with an interim view within four weeks as to whether the proposal is likely to raise competition concerns. Unless it is obvious that a confidential merger proposal will not raise any competition concerns, the ACCC will not provide an unqualified final view until the proposal is public and market inquiries have been conducted. Approaching the ACCC on a confidential basis may have some utility in transactions in which the parties do not wish to make a public announcement unless they have received an indication from the ACCC that obtaining clearance for the proposal may be a real possibility.

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38 The ACCC’s says its practice is to issue a public competition assessment (PCA) for all proposals where a merger is opposed; a merger is subject to undertakings; the parties seek such disclosure; or a merger otherwise raises important issues that the ACCC considers should be made public. However, this has not been the case for mergers reviewed between 1 May 2017 to 30 April 2018. The last PCA was issued in February 2017. Prior to that, there were two in July 2016.
ii Authorisation

There is an alternative, more formal merger clearance route under which parties may seek that the ACCC ‘authorise’ the transaction. The ACCC has the power to authorise an acquisition where either (1) it forms the view that the transaction would not (and is not likely to) have the effect of substantially lessening competition in a market; or (2) the likely benefit of the transaction would outweigh the likely detriment of the transaction. The ACCC has 90 days in which to decide an application for authorisation, which can be extended by any additional period with agreement by the parties.39 Following the ACCC’s decision, the parties (or third parties with sufficient interest) may seek limited merits review of the ACCC’s decision by the Australian Competition Tribunal. The Tribunal has an additional 90 days to make its decision (with the potential to extend further if it receives further information or there are special circumstances).

Merger authorisation is a public process and the application and any submissions by interested parties are made available on the ACCC’s website, subject to limited confidentiality claims.

Merger authorisation is a new power for the ACCC, which only took effect in November 2017. As at May 2018 no applications for merger authorisation by the ACCC had yet been made. Previously the Australian Competition Tribunal (a separate body) had power to authorise mergers.

Some of the previously perceived advantages of the merger authorisation process no longer exist now that the decision-making power is held by the ACCC rather than the Tribunal. On the other hand, the disadvantages of the process remain potentially significant and few transactions can withstand the extended timetable and the opportunities for opponents to attack the transaction on a wide range of grounds (not just competition grounds).

IV OTHER STRATEGIC CONSIDERATIONS

Aspects of the Australian merger control regime that can take on particular significance in the context of global or multi-jurisdictional transactions include the interaction of the ACCC’s information-gathering powers with its desire to exchange information and documents with overseas regulators; the absence of any minimum threshold for identifying share acquisitions that may be of concern; and ambiguity about the consequences of not obtaining informal clearance.

i Information gathering and exchange

The number of international mergers that are being reported to the ACCC has increased significantly over the past few years. The ACCC appreciates that parties to international mergers will often have to deal with multiple competition authorities around the world, and that it can be a challenging task to coordinate multi-jurisdictional filings with a view to ensuring that all regulatory processes are completed in time for the global closing of the deal. For these reasons, the ACCC is increasingly involved in discourse and cooperation with overseas competition authorities. Merger parties should endeavour to ensure that the

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39 If the ACCC does not make a decision in the 90 days or any agreed longer period, it is taken to have refused the application.
ACCC clearance application is lodged simultaneously with the merger notifications in other jurisdictions (in particular, the EU and the US). The ACCC expects to be given the same notice of proposed mergers as other authorities.

The ACCC may share information of a non-confidential nature and discuss with other regulators the competition issues that are raised by a proposed merger. In controversial or complex international mergers, it will almost invariably request a confidentiality waiver from the merger parties, allowing it to exchange and discuss confidential information about a particular merger with overseas competition authorities. A refusal to grant a confidentiality waiver may cause delays in the review process.

In theory, the ACCC does not require a confidentiality waiver because Section 155AAA of the CCA allows it to disclose information provided to it in confidence to a ‘foreign government body’ (which includes antitrust authorities) if the ACCC chairperson is satisfied that particular confidential information will ‘enable or assist’ the foreign government body to ‘perform or exercise any of its functions or powers’. Although it has this broad power to disclose confidential information to overseas regulators, the ACCC’s practice to date has been to request the parties’ consent in the form of a confidentiality waiver prior to such disclosure so that it can be confident that the overseas regulators are permitted to disclose confidential information to it.

The ACCC has the power to compel merger parties and non-merger parties to produce documents, provide information and make individuals available for interview. It is increasingly prepared to exercise these far-reaching powers when considering transactions, even if the transaction is subject to an ‘ACCC clearance’ condition precedent. In exercising these powers it may obtain information that concerns other jurisdictions. For example, the ACCC commonly requests merger parties to provide (voluntarily or compulsorily) copies of all documents disclosing the rationale for the transaction or consideration of its effects on competition, namely, studies, surveys and reports prepared by or for directors and other senior executives for the purposes of analysing the proposed transaction (such as board papers and presentations). This locally gathered information is likely to be of significance in global transactions, because the ACCC is statutorily entitled to disclose such information to overseas regulators.

ii Acquisitions of minority interests

Australia’s merger control regime applies to any acquisition of shares in a corporation, irrespective of the level of shareholding involved. That is, even an acquisition of a minority interest (e.g., of less than 20 per cent) would be prohibited if it is likely to result in a substantial lessening of competition in a market in Australia. There is also no particular shareholding level at which it is customary to seek clearance from the ACCC. Whether it may be advisable to seek clearance from the ACCC for an acquisition of a minority interest depends on the circumstances of each individual case and, in particular, on the substantive competition effects the acquisition is likely to have in Australia. In determining the appropriate ACCC strategy, merger parties should note that there have been a number of cases in recent years
where the ACCC has challenged proposed acquisitions that involved minority shareholdings of 20 or 30 per cent on the basis that the minority shareholding would give the acquirer the ability to ‘exert a high degree of influence’ over the target company.40

The Merger Guidelines of November 2008 provide some guidance on how the ACCC analyses acquisitions of partial shareholdings:

- an acquisition of a controlling interest will be treated in the same way as an acquisition of all of the shares in the target company. While an acquisition of a majority interest will typically ensure control, an acquisition of a ‘much lower’ level of shareholding may suffice to confer control over the target company; and

- a level of shareholding that is less than a controlling interest may give rise to competition concerns where it alters the commercial incentives of the parties involved.

In horizontal mergers, the ACCC’s main concern is the resulting interdependence between the rivals that may result in muted competition or coordinated effects. In vertical and conglomerate mergers, it is particularly concerned about foreclosure effects. A further significant concern that may arise in any of the three types of mergers is gaining access to commercially sensitive confidential information of competitors.

In 2015, subscription television provider Foxtel proposed to acquire up to 15 per cent of free-to-air broadcaster Ten Network (Ten), while Ten proposed to acquire a 24.99 per cent stake in MCN, a company majority-owned by Foxtel which supplied advertising on subscription television channels. Ten also proposed to acquire an option to invest in 10 per cent of Presto TV, a joint venture between Foxtel and Seven West Media. The ACCC considered the extent to which the proposed acquisitions would result in Foxtel being able to influence Ten’s decision making by looking at a range of factors, including the size of Foxtel’s investment, Foxtel’s right to appoint directors to the Ten Board and the composition of the rest of the Board. The ACCC also looked at whether the proposed acquisitions would lead to a greater alignment of interests of Foxtel, Ten, MCN and Presto, altering their incentives. The ACCC’s review concluded that while there would be greater influence of Foxtel over Ten and greater alignment between the various companies, the proposed acquisitions were unlikely to result in a substantial lessening of competition.

iii Merger remedies

The ACCC has a strong preference for ‘fix-it-first’ remedies. In its Merger Guidelines of November 2008, it states that ‘wherever practicable, divestiture should occur on or before the completion date of the merger, particularly in cases where there are risks in identifying a (suitable) purchaser or asset-deterioration risks’. It will usually seek to require:

- the vendor to divest overlapping assets to a third party prior to, or simultaneously with, completion of the merger;

- the purchaser to divest a package of assets to an identified (and ACCC-approved) purchaser simultaneously with the completion of the merger; or

- a combination of both approaches.

40 For example: BG Group’s proposed acquisition of Origin Energy Ltd in 2008; Alinta Ltd’s proposed acquisition of AGL in 2006; DUET Consortium’s proposed acquisition of the DBNG Pipeline in 2004; and AGL’s proposed acquisition of the Loy Yang power station in 2003.
In circumstances where none of the options is commercially viable, merger parties will need to devote significant time and resources to persuading the ACCC of their difficulties. A mere commercial preference for divestiture after consummation is unlikely to be sufficient to change the ACCC’s mind.

Despite the ACCC’s stated preference for fix-it-first remedies, it has accepted post-closing divestiture undertakings in a number of instances. In cases where the ACCC allows divestiture after completion, the merger parties will be required to agree to detailed and stringent ‘hold-separate’ obligations until divestiture to an ACCC-approved purchaser has occurred; a short period in which the sale process for the divestiture business can take place; ‘fire-sale’ provisions by a third-party agent if the divestiture business is not sold within the divestiture period (including a ‘no minimum price’ clause); and in some cases, a requirement to include ‘crown jewels’ in the fire sale to put more pressure on the parties to perfect the sale process within the allocated time and to make the divestiture business more attractive to third-party purchasers.

A corollary of the fact that the ACCC has accepted post-closing divestitures is that it typically inserts itself more deeply into the divestiture process. Where the divestiture will take place post-completion, the ACCC will now commonly require parties to seek its approval of the following aspects of the divestiture:

- any technical assistance or interim supply agreements proposed with the purchaser of the divestiture business (as part of the ACCC’s approval of the proposed purchaser);
- the separation and management plan (as part of the ACCC’s approval of the independent manager of the divestiture business); and
- the marketing and sale plan (as part of the ACCC’s approval of the divestiture agent who will conduct the fire sale of the divestiture business if it is not sold within the time specified).

The most recent example of a case in which the ACCC accepted post-closing divestitures is Saputo Dairy Australia Pty Ltd’s acquisition of Murray Goulburn’s operating assets. In that case, the ACCC required that the divestment of the Koroit plant be completed within a prescribed time frame to a purchaser approved by the ACCC. Saputo was required to appoint an independent manager to manage the divestiture assets until the completion of the divestment. In the event the assets were not divested in the prescribed time frame, the undertaking required ‘fire sale’ of those assets by a divestiture agent at no minimum price.

Notwithstanding the ACCC’s preference for divestiture remedies it will, in some circumstances, clear transactions on the basis of behavioural remedies. For example, in Metcash’s acquisition of Home Timber and Hardware Group in 2016, the ACCC cleared the proposed acquisition on the basis of an undertaking from Metcash that it would not

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41 Recent examples of these requirements are found in Iron Mountain’s and Federation’s undertakings referred to in the footnote above. Further examples are also found in Healthscope and Primary Health Care’s undertakings in 2016, though these were given in the unusual circumstance of the parties already having completed the acquisition without seeking prior ACCC review.

42 For Saputo, see http://registers.accc.gov.au/content/index.phtml/itemId/1205274/fromItemId/751043. Other examples include Iron Mountain’s proposed acquisition of Recall Holdings Ltd in 2016 which required a post-closing divestiture within a specified confidential period. The undertakings given by Federation and Novion in 2015 in relation to their proposed merger were also post-closing and (unusually) gave the parties the option of divesting either Novion’s Bayside Shopping Centre or Federation’s 50 per cent interest in Karingal Hub Shopping Centre, also in a specified confidential period.
restrict independent hardware stores from acquiring products from non-Metcash sources, and it would not favour its own hardware stores over nearby independent stores. As part of the undertaking, the ACCC required the appointment of an independent auditor who will report to the ACCC and ensure that Metcash is meeting its obligations. This is a common feature of such behavioural undertakings.43

iv Options if the ACCC does not clear the transaction

There is no appeal avenue against an informal clearance decision by the ACCC. If the ACCC opposes a proposed merger, the choices for the merger parties are to seek a court declaration to the effect that the transaction will not have the likely effect of substantially lessening competition or to ‘threaten’ to complete the merger, thereby forcing the ACCC to seek an injunction from the court blocking the merger. (A third option, seeking authorisation of the merger from the Tribunal no longer exists as the power to authorise mergers now rests with the ACCC, as described above. Hypothetically, parties could seek authorisation from the ACCC on public benefit grounds after the ACCC opposed informal clearance, but this has not yet happened and seems unlikely.)

The pathway of merger parties seeking a court declaration that the proposed transaction does not contravene the CCA has been used only once.44 Following this case, the ACCC’s practice has been to seek an injunction to prevent a transaction proceeding rather than permit a merger party to seek a declaration of non-contravention. In the three subsequent merger cases which have been commenced in the Federal Court, this was the ACCC’s approach.45

Litigation of mergers and acquisitions in Australia on the basis of competition concerns has been rare. There have been a total of four proceedings brought before the Federal Court and three before the Tribunal (under the previous authorisation process that no longer exists).46

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43 Another example of a recent behavioural undertaking accepted by the ACCC is in the proposed acquisition by Qube Holdings Ltd of the remaining 50 per cent of Australian Amalgamated Terminals Pty Ltd in November 2016. More recently, the divestment undertaking offered by Saputo when acquiring Murray Goulburn’s assets also contained a behavioural aspect, as it required Saputo to supply raw milk to the approved purchaser of the Koroit plant on specific terms for a specified period.


The ACCC’s track record of opposing mergers has been described by the ACCC’s Chairman as ‘not good’, though it is starting to make changes to its approach to evidence-gathering, in order to improve its results, as discussed above.47

V OUTLOOK & CONCLUSIONS

The vast majority of mergers in Australia are now being dealt with by the ACCC in the first part of the informal clearance process known as ‘pre-assessment’.

ACCC does not provide any public information in relation to the identity of the parties to these transactions, the markets in question or its decision-making process. When coupled with the ACCC’s delay in and reluctance to publish PCAs over the past 12 months in particular, the result is that the ACCC’s decision-making process has become increasingly opaque, to the detriment of Australian merger theory and practice.

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Chapter 8

AUSTRIA

Dieter Zandler and Linda Marterer

I INTRODUCTION

The Austrian merger control regime is set out in Part I, Chapter 3 of the Austrian Cartel Act 2005 (KartG). The turnover thresholds that trigger a merger filing requirement in Austria are among the lowest in the European Union. Furthermore, as the domestic turnover threshold is only based on the parties’ combined Austrian turnover, it is not required that at least two parties achieved a turnover in Austria in the last financial year under Austrian merger control rules.

In addition, it is also important to note that the Austrian merger control rules contain very specific and sometimes far-reaching provisions concerning the attribution of turnover: In contrast to most other EU jurisdictions, Austrian merger control rules do not only require that the turnover of (directly or indirectly) controlling shareholders and (directly or indirectly) controlled shareholdings is attributed. Rather, Austrian merger control rules normally also require that the turnover of non-controlling shareholders and non-controlling shareholdings with a participation (capital or voting rights) of at least 25 per cent are (fully) taken into account for calculating the turnover of a concerned undertaking. Although this very wide attribution of turnover (which in some cases may lead to nearly indefinite ‘chains’ for turnover attribution) has to some degree been constricted by the case law, establishing the turnover of the concerned undertakings for purposes of Austrian merger control sometimes requires additional efforts and cannot simply be based on the consolidated group turnover figures.

The scope of Austrian merger control became even wider in 2017 with the entry into force of the Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017), which introduced an additional jurisdictional threshold for concentrations based on the value of consideration (‘size of the transaction test’). Altogether, these factors led to a relatively high number of merger filings in Austria.

The institutional structure of competition enforcement in Austria is split between the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP), (together the Official Parties), and the cartel courts (the Higher Regional Court of Vienna acting as the cartel court (Cartel Court) and the Supreme Court acting as the Supreme Cartel Court.

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1 Dieter Zandler is a partner and Linda Marterer is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.
2 Cf Section 21 No. 2 KartG in conjunction with Section 7(1) No. 3 KartG.
3 For example, indirect participations of at least 25 per cent normally are only attributed if there is also a controlling influence at the preceding level (OGH 17 December 2001, 16 Ok 9/01).
4 Section 9(4) KartG (in the version of BGBl I No. 56/2017).
Austria

(OGH)). Merger notifications in Austria have to be submitted to the FCA and are then assessed by the Official Parties in Phase I. The Official Parties have the exclusive right to request an in-depth (Phase II) review of a notified transaction by the Cartel Court.

Notwithstanding the above aspects, it is important to note that the vast majority of transactions notified in Austria receive merger clearance in Phase I. Since there is no pre-notification requirement and no ‘stop-the-clock’ principle under Austrian law, merger control clearance for most cases can usually be obtained within the initial four-week review period. Moreover, the Official Parties have introduced a Form CO also providing for a simplified filing (comparable to a Short Form CO under the European Merger Regulation (EUMR)) for merger control cases that do not exceed certain (market share) thresholds.

Although the Official Parties (based on their headcount) are rather ‘small’ competition authorities or enforcers compared to most of their counterparts in the European Union and at the same time have to deal with a high number of merger filings each year, they typically find a good balance between efficiency when dealing with unproblematic transactions and accuracy when dealing with cases that possibly may harm competition. Therefore, despite its wide scope of application, in practice the Austrian merger control system is working quite well.

II YEAR IN REVIEW

In 2017, 439 merger cases were notified to the FCA in total (a slight increase of 19 cases or around 4.5 per cent compared to 2016). The large majority of notifications (409) was cleared in Phase I after expiry of the initial four-week review period. In 23 cases the Official Parties have waived their right to request an in-depth (Phase II) review even before the expiry of the four-week review period and in four cases the notifying party or parties have withdrawn the filing. There have been 44 pre-notification meetings with the Official Parties (compared to 28 in 2016).

Only two cases notified in 2017 were subject to an in-depth (Phase II) review by the Cartel Court. One of these cases was cleared subject to commitments while in the other Phase II case, the notification ultimately was withdrawn (some of the major Austrian merger control cases are described below in more detail).

5 Pursuant to the FCA’s last annual report (page 30), 99.5 per cent of the merger cases notified with the Official Parties in 2017 were approved in Phase I. The FCA’s annual report of 2017 is available at https://www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00142/imfname_693706.pdf (last accessed 15 May 2018).

6 A German version of the filing form/Austrian Form CO is available at https://www.bwb.gv.at/fileadmin/user_upload/Downloads/formulare/Formular%20-%20Formblatt%20-%20Fr%20Zusammenschl%3Fsse.doc (last accessed 9 May 2018).

7 In 2017, the FCA counted 40 employees, including 31 case handlers (three of which were working part time, the others full time) in 2017: See the FCA’s annual report of 2017, page 12. The FCP consists of the federal cartel prosecutor and his deputies (according to Section 75(3) KartG at least one deputy must be appointed). Currently one deputy federal cartel prosecutor is appointed. Pursuant to Section 80(1) KartG, the FCP can use the administrative staff of the Cartel Court.

8 See the FCA’s annual report of 2017, page 30 et seq.

9 The merger notifications in the cases BWB/Z-3304 (notification withdrawn) and BWB/Z-3250 (clearance subject to commitment) were already notified in 2016; see the FCA’s annual report of 2017, page 33 et seq.


11 BWB/Z-3560, FCA’s annual report of 2017, page 34 et seq.

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i  Fines for violation of the standstill obligation

It is important to note that the Official Parties are quite active in cases involving a violation of the standstill obligation and regularly request the imposition of fines by the Cartel Court in case of a (possible) infringement for implementing a transaction prior to receiving Austrian merger clearance. The following table lists the fine decisions of the Cartel Court so far rendered in 2017/2018 for violations of the standstill obligation.

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 April 2017</td>
<td>Coal</td>
<td>Vulcan Holdings LP; Apollo Management LP</td>
<td>€70,000 (jointly and severally)¹</td>
</tr>
<tr>
<td>21 April 2017</td>
<td>Steel and metal distribution</td>
<td>SWOCTEM GmbH; Dr.-Ing. E.h. Friedhelm Loh</td>
<td>€11,000 (jointly and severally)²</td>
</tr>
<tr>
<td>5 March 2018</td>
<td>Leather chemicals</td>
<td>Stahl Lux 2; Lederchemikaliengeschäft der Clariant International</td>
<td>€185,000³</td>
</tr>
<tr>
<td>19 December 2017</td>
<td>Software, IT services, Hardware</td>
<td>Comparex AG; Agile Software BV</td>
<td>€30,000⁴</td>
</tr>
<tr>
<td>19 December 2017</td>
<td>Software, IT services</td>
<td>Comparex AG; Datalog Software AG</td>
<td>€40,000⁵</td>
</tr>
</tbody>
</table>

1  Cartel Court 21 April 2017, 128 Kt 2/17.
2  Cartel Court 21 April 2017, 29 Kt 35/16.
3  Cartel Court 5 March 2018, 128 Kt 8/17x.
4  Cartel Court 19 December 2017, 27 Kt 9/17a.
5  Cartel Court 19 December 2017, 128 Kt 10/17s.

In one case, a violation of the standstill obligation was established but no fine was imposed as the acquirer only acted with slight negligence and the consequences of the violation were insignificant (the acquirer did not exercise its voting rights in the target company until receiving merger clearance; in addition, its acquisition of sole control over the target was based on a put-option exercised by the seller, which gave the acquirer only little time to make the required merger filing).¹²

ii  Overview of major Austrian merger control cases in 2017

**Austria Asphalt v. Bundeskartellanwalt – preliminary ruling by the ECJ**

The Austria Asphalt case was the first preliminary reference case decided by the European Court of Justice (ECJ) in connection with the interpretation of the EUMR: Teerag Asdag (part of Porr construction group) as the sole owner of the Mürzzuschlag asphalt plant and Austria Asphalt (part of Strabag construction group) contemplated to form a (50:50) joint venture (JV) that would acquire the asphalt plant.

The transaction was initially notified in Austria in August 2015. After the Official Parties requested an in-depth review of the transaction, the Cartel Court decided that the proposed transaction was a concentration under the EUMR and therefore not subject to Austrian merger control based on the EUMR’s ‘one-stop-shop’ principle, dismissing the application of the Official Parties. Austria Asphalt lodged an appeal against that decision before the OGH. The appeal was accompanied by a letter from the Commission staff (Directorate-General for Economic and Financial Affairs).

¹² OGH 7 December 2017, 16 Ok 2/17f (the Cartel Court’s decision – which was appealed by the FCA – did not even find an infringement of the standstill obligation: Cartel Court 19 April 2017, 24 Kt 9/16b).
Competition) stating that the transaction does not to appear to fall under the EUMR as the JV presumably lacks full functionality. In the appeal proceedings, the OGH decided to stay its proceedings and referred the questions on the applicability of the EUMR to the ECJ. 13

In its decision rendered on 7 September 2017, the ECJ held that the Article 3 EUMR 'must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the JV created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity' 14

Following the ECJ’s preliminary ruling, the OGH decided to set aside the Cartel Court’s decision and referred the case back to the Cartel Court as the transaction was not subject to the EUMR and therefore can be reviewed under Austrian merger control rules.15

**Other Phase II cases from 2017**

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification: 23 December 2015, final decision: 21 December 2016 (Decisions published on 19 January 20171 and 9 June 20172)</td>
<td>Casino and slot games</td>
<td>Novomatic AG; Casinos Austrias AG</td>
<td>Prohibition: regulatory provisions (e.g., Austrian Gaming Act) do not exclude the application of competition rules.</td>
</tr>
<tr>
<td>Notification: 24 October 2016, final decision: 19 April 2017</td>
<td>Outdoor advertising</td>
<td>Gewista Werbegesellschaft mbH; Ankünder GmbH</td>
<td>Clearance subject to behavioural commitments: non-discriminatory access to advertising spaces of all sorts (especially city lights and poster lights) for national campaigning in the province Styria in appropriate quality and under fair market conditions.3</td>
</tr>
<tr>
<td>Notification: 30 November 2016, withdrawal: 18 May 2017</td>
<td>Container terminal services</td>
<td>Wiener Hafen und Lager Ausbau- und Vermögensverwaltung GmbH &amp; Co KG; ÖBB Infrastruktur AG; Gemeinschaftsunternehmen (Terminal Wien Freudenau und Terminal Wien Inzersdorf)</td>
<td>Withdrawal of notification.4</td>
</tr>
<tr>
<td>Notification: 20 July 2017, withdrawal: 27 September 2017</td>
<td>Animal foods and accessories</td>
<td>Fressnapf Handels GmbH; Tomy’s Zoo GmbH</td>
<td>Withdrawal of notification.5</td>
</tr>
<tr>
<td>Notification: 4 September 2017, decision: 28 March 2018</td>
<td>Wagon hiring</td>
<td>VTG Rail Assets GmbH; CIT Rail Holdings SAS</td>
<td>Clearance subject to structural commitments: disposal of certain parts of the target’s business to third parties prior to completion of the proposed transaction; the same commitments were made in the German merger control proceedings before the Federal Cartel Office (FCO).6</td>
</tr>
</tbody>
</table>

1 OGH 21 December 2016, 16 Ok 11/16b.
2 Cartel Court 26 August 2016, 24 Kt 3 and 4/16.
3 OGH 19 April 2017, 16 Kt 14/16.
4 Cartel Court 8 June 2017, 27 Kt 17/16.
5 BWB/Z-3560, FCA’s annual report of 2017, page 34 et seq.
6 BWB/Z-3633, FCA’s annual report of 2017, page 37. More detailed information on the commitments will be available after publication of the Cartel Court’s decision.

13 OGH 31 March 2016, 16 Ok 1/16g.
15 OGH 19 October 2017, 16 Ok 3/17b; in the meantime, Austria Asphalt withdrew its merger filing: Cartel Court 5 December 2017, 128 Kt 9/17v.
**Other Phase I cases from 2017**

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification:</td>
<td>Free-TV and TV advertising</td>
<td>ProSiebenSat.1Pus4 GmbH; ATV Privat TV GmbH; ATV Privat TV GmbH &amp; Co KG</td>
<td>Clearance subject to commitments after pre-notification negotiations with the Official Parties and the media authority KommAustria.¹</td>
</tr>
<tr>
<td>9 February 2017</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clearance:</td>
<td>Aviation</td>
<td>Laudamotion GmbH; Parts of NIKI Luftfahrt GmbH</td>
<td>Clearance without conditions.²</td>
</tr>
<tr>
<td>23 February 2018</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

¹ BWB/Z-3373, FCA’s annual report of 2017, page 32 et seq.
² BWB/Z-3807, FCA’s annual report of 2017, page 35 et seq.

**III THE MERGER CONTROL REGIME**

**i Jurisdiction**

The Austrian merger control regime requires a (mandatory) merger filing if the:

- a transaction constitutes a concentration pursuant to Section 7 KartG;
- b turnover thresholds¹⁶ or the new (‘transaction value’) thresholds of Section 9(4) KartG are met; and
- c transaction has an effect on the domestic (Austrian) market(s).¹⁷

**ii Concept of concentration**

Unlike many other European jurisdictions, the Austrian merger control regime is not limited to ‘acquisitions of control’ and full-function JVs. Rather, the Austrian merger control regime has a distinct definition of the types of transactions that constitute a concentration. A concentration is defined as:¹⁸

- a the acquisition by one undertaking of all, or a substantial part of, the assets of another undertaking, especially by merger or transformation;
- b the acquisition of rights by one undertaking in the business of another undertaking by means of a management or lease agreement;
- c the direct or indirect acquisition of a participation of at least 25 or 50 per cent (of the capital or voting rights) in one undertaking by another undertaking;
- d the establishment of interlocking directorates at the management board or supervisory board level (if at least half of the members of the management board or the supervisory board in two undertakings are identical);
- e any other connection between undertakings directly or indirectly conferring one undertaking a decisive influence over another undertaking; or
- f the establishment of a full-function JV.

Please note that although Austrian merger control contains a specific provision declaring that the establishment of a full-function JV constitutes a concentration (Section 7(2) KartG), it is currently the prevailing view that this provision does not exclude non-full function JVs from

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¹⁶ Section 9(1) KartG (with the exemption in Section 9(2) KartG not being applicable).
¹⁷ Section 24(2) KartG.
¹⁸ Section 7(1) and (2) KartG.
the scope of Austrian merger control. Instead, also the establishment of a non-full function JV may qualify as a concentration if the transaction falls under any of the other types of concentrations set out above.\textsuperscript{19}

\textbf{iii Turnover thresholds}

Under Austrian law, a concentration (see above) shall be notified prior to its completion if the following turnover thresholds are met by the concerned undertakings in the last financial year:\textsuperscript{20}

\begin{itemize}
  \item[a] combined worldwide turnover of all undertakings concerned exceeded €300 million;
  \item[b] combined Austrian turnover of all undertakings concerned exceeded €30 million; and
  \item[c] the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.
\end{itemize}

\textbf{iv Exemptions}

Even if the above thresholds are met, no notification has to be made if, in the last financial year:\textsuperscript{21}

\begin{itemize}
  \item[a] only one undertaking concerned achieved a domestic turnover of more than €5 million; and
  \item[b] the combined aggregate worldwide turnover of the other undertakings concerned was less than €30 million.
\end{itemize}

\textbf{v Transaction value threshold}

The KaWeRÄG 2017 has introduced a new jurisdictional threshold based on a ‘value of consideration’ criterion that entered into force on 1 November 2017 and applies in addition to the existing turnover-based thresholds. According to the legislative materials, the new threshold based on the ‘value of consideration’ shall particularly prevent monopolisation in the field of companies from the digital economy. The legislative rationale behind the new provision is to make acquisitions of companies with low turnovers for which a high purchase price is paid (e.g., due to the value of data collected by such company) subject to merger control rules.\textsuperscript{22} A comparable transaction value threshold has also been introduced in Germany (with a transaction value of €400 million; see the Germany chapter) with the Austrian provision closely following the German one. Both the Austrian and the German transaction value thresholds in particular where triggered by the experience with the Facebook/WhatsApp transaction that was only reviewed by the EU Commission based on a referral request under Article 4 (5) EUMR.\textsuperscript{23}

According to Section 9(4) KartG, concentrations that do not meet the turnover thresholds (set out above) also need to be notified with the FCA when the undertakings concerned achieved a combined aggregate turnover in the last financial year prior to the concentration exceeding €300 million worldwide, of at least €15 million in Austria, the value of consideration for the concentration exceeds €200 million and the target company is active in Austria to a significant extent.

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\textsuperscript{19} Section 7(1) KartG.
\textsuperscript{20} Section 9(1) KartG.
\textsuperscript{21} Section 9(2) KartG.
\textsuperscript{22} ErlRV 1522 BlgNR 25. GP 3.
\textsuperscript{23} Commission, decision dated 3 October 2014, case COMP/M.7217, Paragraphs 9–12.
The new transaction value threshold contains a number of new legal terms which will require clarification by the case law (in particular the terms ‘value of consideration’ and ‘significance of domestic activities’). In order to assist undertakings with filing requirements, the FCA and the FCO recently have published a draft of a joint guidance paper on the application of the new transaction value threshold (Guidance).\(^{24}\)

According to the Guidance, the concept of ‘value of consideration’ includes all forms of cash payments, securities, unlisted securities or shares, other assets (real estate, tangible assets, current assets), intangible assets (licences, usage rights, rights to the company’s name and trademark rights, etc.) and considerations for a non-compete undertaking that are offered to the seller in return for the acquisition of the target company. In addition, also the liabilities of the target company and the seller that are assumed by the buyer form part of the value of consideration.\(^{25}\) In the view of the FCA and the FCO, the inclusion of liabilities, however, only applies for interest-bearing liabilities.\(^{26}\) Although the new threshold has some similarities with the US ‘size-of-transaction’ test, the Austrian ‘value of consideration’ test does not require that the value of assets or voting rights already held by the acquirer prior to the transaction are aggregated to the value of the assets or voting rights subject to the concentration.\(^{27}\)

The local nexus requirement (‘significance of domestic activities’) shall exclude marginal activities of the target from Austrian merger control. However, on the basis of the legislative materials, having a location of the target company in Austria is already considered a significant domestic activity. Furthermore, the factors indicating a significant domestic activity will depend on the particular industry (e.g., the number of ‘monthly active user’ or ‘unique visits’ in the digital economy).\(^{28}\) According to the Guidance, also the Austrian turnover may be used as a benchmark.\(^{29}\)

vi Media concentrations

A concentration qualifies as media concentration\(^ {30} \) if at least two undertakings concerned can be qualified as:

a media undertakings\(^ {31} \) or media service companies.\(^ {32} \)

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\(^{24}\) See FCA and FCO, Joint Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification of Concentrations, is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leitfaden/20180709_Leitfaden_Transaktionschwelle_final.pdf (last accessed 17 July 2018).

\(^{25}\) According to the Guidance (Paragraph 50), this also applies to liabilities of the target company which are not (directly) assumed by the acquirer (e.g. in cases of a share deal where the acquirer does not assume the target’s liabilities). Please note that this interpretation is not necessarily supported by the wording of the new provision and could make the calculation of the ‘value of consideration’ for share deals more difficult.

\(^{26}\) See Guidance, Paragraph 50 et seq.

\(^{27}\) Guidance, Paragraph 13.

\(^{28}\) ErlRV 1522 BlgNR 25. GP 3.

\(^{29}\) See Guidance, Paragraphs 77 et seqq.

\(^{30}\) Section 8(1) and (3) KartG.

\(^{31}\) Media undertakings are defined in Section 1(1) No. 6 Austrian Media Act 1981 (MedG) as undertakings (1) supplying or providing the content of a medium and (2) providing or arranging its production and dissemination or, in case of an electronic medium, its broadcast, accessibility or dissemination.

\(^{32}\) Media service companies are defined in Section 1(1) No. 7 MedG as undertakings recurrently providing media undertakings with contributions in word, print, sound or image.
b media support undertakings (i.e., publisher, printing houses, undertakings that procure advertising orders, undertakings that procure the distribution of media on a large scale, film distributors);\textsuperscript{33} or
c undertakings holding an (aggregate) direct or indirect participation of at least 25 per cent in a media undertaking, media service company or media support undertaking; or
d one undertaking concerned can be qualified as media undertaking, media service company or media support undertaking; and one or more media undertakings, media service companies or media support undertakings directly or indirectly hold an (aggregate) participation of at least 25 per cent in another undertaking concerned.

The turnover thresholds (see above) also apply to media concentrations with the difference that the turnovers of media undertakings and media service companies are multiplied with 200 and the turnovers of media support undertakings are multiplied with 20 for calculating the ‘combined’ (worldwide and domestic) turnover.\textsuperscript{34}

If a media concentration has to be notified under the EUMR, the transaction nevertheless may require an Austrian media merger control notification if the turnover thresholds for media concentrations are met\textsuperscript{35} (cumulative judicial competence as provided for in Article 21(4) EUMR). In such case, the substantive assessment under Austrian law is limited to assessing whether the concentration limits media plurality or diversity (see Section III.ix, below).\textsuperscript{36}

\textbf{vii Consequences for completion without merger clearance}

In addition to fines, the main legal consequence for infringing the obligation of not implementing a merger without prior clearance is that the agreement implementing the concentration is invalid. Although there is no specific case law on whether a subsequent notification may cure such invalidity, it is common practice to also file for merger clearance in cases where a filing obligation initially has been ignored. According to the unanimous opinion expressed in legal writing, an agreement implementing a concentration prior to the expiration of the standstill obligation is (only) provisionally invalid as long as merger clearance has not been obtained. Thus, once the transaction receives clearance, the agreement implementing the concentration (which was initially invalid as it violated the standstill obligation) will become legally effective with retroactive effect.\textsuperscript{37}

Furthermore, the Cartel Court may:
a order measures to terminate the implementation of an unlawful concentration (only in case clearance has not been obtained subsequently);\textsuperscript{38}
b declare that a concentration was implemented contrary to the standstill obligation (in case clearance has subsequently been obtained);\textsuperscript{39}

\begin{itemize}
\item[33] Section 8(2) KartG.
\item[34] Section 9(3) KartG in conjunction with Section 9(1) No. 1 and 2 and (2) No. 2 KartG.
\item[35] See for example most recently Comcast Corporation's contemplated acquisition of Sky, which was notified under the EUMR with the European Commission (case number M.8861) and – as media concentration – with the FCA (case number BWB/Z-3915); Reidlinger/Hartung, Das österreichische Kartellrecht\textsuperscript{3} (2014), page 173 et seq; Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Vor Section 7 KartG Paragraph 41.
\item[36] Section 13 KartG.
\item[37] Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Section 17 KartG Paragraph 31.
\item[38] Section 26 KartG.
\item[39] Section 28 KartG; this requires a legitimate interest of the party requesting the declaration.
\end{itemize}
impose a fine of up to 10 per cent of the worldwide (group) turnover achieved in the last financial year against an undertaking violating the standstill obligation; and

d) impose a change of the corporate structure of the concerned undertakings (e.g., forced unwinding) if other alternative measures are not equally effective or are more burdensome for the concerned undertakings.  

In addition, culpable violations of the standstill obligation may allow injured parties to claim damages before civil courts under general civil law rules (the special provisions of the KartG governing private antitrust damage actions normally do not apply for such cases).

Please note that the Official Parties actively pursue infringements of the standstill obligation and regularly request the imposition of fines. Fines for violation of the standstill obligation are regularly imposed by the Cartel Court even in cases where the concerned undertakings voluntarily disclosed the infringement to the Official Parties after a short period (e.g., in the context of a subsequent filing) and the (subsequent) substantive review of the concentration proved to be unproblematic (see Section II.i above).

viii Procedure

The Austrian merger control regime does not provide for a filing deadline or a pre-notification requirement. A notification can be filed as soon as the parties have agreed on the structure and timing of the transaction and intend to implement the proposed transaction within reasonable time. However, notifications must be submitted before the implementation of the transaction, as transactions subject to merger control must not be implemented before merger clearance (standstill obligation).

Every concerned undertaking is entitled to submit a merger notification to the FCA (i.e., not only the acquirer but also the target undertaking and (based on the case law) even the seller). There are no specific form requirements for merger filings with the exception that the notification has to be executed in four copies and has to include the information pursuant to Section 10 (1) KartG. The Official Parties have published a Form CO (comparable to the Form/Short Form CO under the EUMR) which is intended to facilitate the swift review of a merger notification. Although the use of this filing form is not mandatory, it is common practice to follow the structure of the Form CO when making merger filings in Austria.

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40 Section 26 KartG.
41 Cf Section 37b No. 1 KartG.
42 OGH 23 June 1997, 16 Ok 4/97.
43 Section 10(1) first sentence KartG.
44 OGH 12 October 2016, 16 Ok 9/16h.
45 Cf OGH 23 June 1997, 16 Ok 6, 7, 8/97; Cartel Court 24 November 2008, 26 Kr 10/08, 26 Kr 11/08.
46 Similar Hoffer, Kartellgesetz (2007), Section 10 page 158 et seq; Reidlinger/Hartung, Das österreichische Kartellrecht (2014), page 191 hold the view that the seller is not entitled to directly make a merger filing.
47 See footnote 6.
Initial four-week (Phase I) review

The initial four-week review period will commence on the day the notification is received by the FCA provided that the notifying party has also paid the merger filing fee (currently €3,500)\textsuperscript{48} and the merger filing fee has been credited to the FCA’s account.\textsuperscript{49} After the receipt of the filing, the FCA has to publish the fact that the notification was made including its date and a short summary of the proposed transaction (including the names of the parties; nature of the concentration and business segment concerned) on its website.\textsuperscript{50} This publication triggers a two-week period allowing interested third parties to provide comments to the Official Parties with respect to the proposed transaction.\textsuperscript{51}

Unlike in many other countries, the Austrian merger control system does not have a ‘stop-the-clock’ mechanism in case the Official Parties request additional information\textsuperscript{52} or if a remedy proposal is submitted. However, the notifying party may request an extension of the initial four week Phase I review period to six weeks.\textsuperscript{53}

The Official Parties have the exclusive right to request an in-depth (Phase II) review by the Cartel Court. If neither of the Official Parties requests the initiation of an in-depth review within the initial four- (or, if extended, six-) week review period, the transaction subject to notification is cleared upon expiry of the review period. The Official Parties have to inform the applicant of the fact that they did not initiate an in-depth review.\textsuperscript{54}

Prior to the expiry of the initial review period, the Official Parties can waive their right to request an in-depth (Phase II) review, thereby allowing an early merger clearance prior to the expiry of the initial review period. In practice, an early clearance is only possible if the following prerequisites are met:

\begin{itemize}
\item[a] Expiry of the two-week period allowing an interested third party to provide comments with respect to the notified transaction;
\item[b] the Official Parties were able to complete the substantive assessment of the notified concentration (and the assessment has not raised any concerns that – in the view of an Official Party – warrant an in-depth review by the Cartel Court); and
\end{itemize}

\textsuperscript{48} Section 10a(1) Austrian Competition Act (WettbG). In the KaWeRÄG 2017, the filing fee for notifications made as of 25 April 2017 has been increased to €3,500 (from previously €1,500).
\textsuperscript{49} Cf Section 10a(2) WettbG and the information on the FCA’s website: https://www.bwb.gv.at/Zusammenschluesse/Seiten/default.aspx#Vergebuehrung (last accessed 23 May 2018).
\textsuperscript{50} Section 10(3) No. 2 KartG in conjunction with Section 10b WettbG.
\textsuperscript{51} Section 10(4) KartG.
\textsuperscript{52} In case the Official Parties hold the view that they require further information for the assessment of a notified concentration and such information is not provided to them in time to complete the assessment within the initial review period, they may request an in-depth review of the notified concentration (cf https://www.bwb.gv.at/recht_publikationen/standpunkte/mangelhafteunvollstaendige_anmeldung_eines_zusammenschlus/ (last accessed 24 May 2018)). In case a merger notification does not contain the information required pursuant to Section 10(1) and (2) in case of a media concentration) KartG, the presiding judge of the Cartel Court may order ex officio or upon request by an Official Party in the application for in-depth review (within one month) the notifying party to supplement the merger notification. In case the notifying party does not comply with such order, the merger notification can be rejected. Furthermore, a request for supplementing the merger notification from the Cartel Court will ‘stop-the-clock’ until the supplemented merger notification has been received (see Section 43 KartG).
\textsuperscript{53} Section 11(1a) KartG.
\textsuperscript{54} Section 11(4) KartG.
The notifying party or parties may propose commitments to the Official Parties aimed at preventing the initiation of an in-depth review before the Cartel Court.56

**In-depth (Phase II) review by the Cartel Court**

If at least one of the Official Parties requests an in-depth review, the Cartel Court will review the notified transaction. The Cartel Court must adopt its decision within five months after the receipt of the (first) request. If requested by the notifying party, this review period can be extended to six months.57 If the Cartel Court does not adopt a decision within the five- (or, if extended, six-) month review period, the concentration cannot be prohibited and the Cartel Court has to terminate the review proceedings58 (with the termination decision effecting a clearance of the transaction59).

The Cartel Court may adopt a clearance decision subject to commitments if the transaction otherwise would not fulfil the clearance requirements.60 An implementation of a concentration having received merger clearance only subject to commitments without adhering to such commitments is considered a violation of the standstill obligation.61 Furthermore, the violation of a commitments decision after implementing a concentration or obtaining a clearance decision on the basis of incomplete or incorrect statements allows the Cartel Court to impose proportionate post-merger remedies on the undertakings concerned.62

A prohibition decision will be issued if the Cartel Court considers that the concentration leads to the creation or strengthening of a dominant market position unless the grounds for a justification set out in Section 12(2) KartG apply.63 Furthermore, the Cartel Court may reject an application for in-depth review (e.g., because it was lodged after the expiry of the initial review period or because the notified transaction does not qualify as a (notifiable) concentration under Austrian merger control rules).64

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56 Section 17(2) second sentence first alternative KartG.
57 Section 14(1) second sentence KartG.
58 Section 14(1) third sentence KartG.
59 Section 17(1) third case KartG.
60 According to the prevailing view, a clearance subject to commitments requires the approval of the notifying party or parties. The notifying party or parties may also propose commitments to the Official Parties in Phase II aimed at the Official Parties withdrawing their request for an in-depth review (Section 17(2) second sentence second alternative KartG).
61 Section 17(2) first case KartG.
62 Section 16 KartG.
63 According to Section 12(2) KartG, a clearance shall be granted notwithstanding the creation or strengthening of a dominant position if the concentration (1) leads to competitive benefits outweighing the disadvantages of dominance or (2) is required to maintain or strengthen the competitiveness of the concerned undertakings on an international level and is justified by national economic considerations. The last prohibition decision was rendered by the Cartel Court in the Novomatic/Casinos Austria case (see table in Section II.ii – Other Phase II cases from 2017, footnotes 1 and 2).
64 Section 12(1) No. 1 KartG; see also footnote 61 on the treatment of merger filings that do not contain the information required by law.
A final decision of the Cartel Court can be appealed with the OGH. The deadline for lodging an appeal is four weeks.\textsuperscript{65} The OGH has to render its decision within two months of the receipt of the files from the Cartel Court.\textsuperscript{66} In case the matter is referred back to the Cartel Court, it is likely that the Cartel Court again will have five month to adopt a new decision.\textsuperscript{67} Especially in case of transactions that are likely to raise substantive issues that may have to be analysed in an in-depth (Phase II) review, the above deadlines should be kept in mind for the overall time required until clearance of the transaction can be expected.

\textbf{ix} Substantive assessment

While the EUMR uses the significant impediment of effective competition (SIEC) test, (see EU chapter), Austrian merger control still applies a dominance test. A concentration shall be cleared if it does not lead to the creation or strengthening of a dominant market position. As regards media concentrations, the assessment – in addition to the dominance test – is based on whether the concentration has negative effects on media plurality or diversity.\textsuperscript{68}

An undertaking is considered dominant if it (1) is not subject to any or only insignificant competition or (2) holds a ‘superior market position’ in comparison to all other competitors.\textsuperscript{69} Two or more undertakings are considered to hold collective dominance if there is no significant competition between them and (1) they are not subject to any or only insignificant competition or (2) together hold a ‘superior market position’ in comparison to all other competitors.\textsuperscript{70}

During in-depth review (Phase II) proceedings before the Cartel Court, (independent) court appointed experts play a significant role when defining the relevant markets and providing a competitive analysis as regards the effects of a notified transaction. Therefore, the substantive assessment of a merger often will be based to a significant extent on the findings of such expert, which are often used as the basis for the Cartel Court’s decision.

Please note that the KartG contains rebuttable presumptions of (single or collective) dominance in case certain market share thresholds are exceeded.\textsuperscript{71}

\section*{IV OTHER STRATEGIC CONSIDERATIONS}

The FCA is a member of the European Competition Network and the International Competition Network. The Official Parties cooperate closely with other competition authorities, particularly with the German FCO.\textsuperscript{72} If a transaction has to be filed in multiple jurisdictions, the concerned undertakings should ensure to provide consistent information in their respective filings.

\bibitem{65} \textsuperscript{65} Section 49(2) KartG.
\bibitem{66} \textsuperscript{66} Section 14(2) KartG.
\bibitem{67} \textsuperscript{67} OGH 17 December 2001, 16 Ok 9/01 (please note that this decision was still made under the old Austrian Cartel Act 1988).
\bibitem{68} \textsuperscript{68} Section 13 KartG.
\bibitem{69} \textsuperscript{69} Section 4(1) KartG.
\bibitem{70} \textsuperscript{70} Section 4(1a) KartG.
\bibitem{71} \textsuperscript{71} Section 2(2) and (2a) KartG containing the various thresholds triggering a (rebuttable) presumption of dominance. In these cases, the onus is on the concerned undertakings to proof that they do not hold a dominant market position.
\bibitem{72} \textsuperscript{72} For example, in connection with the commitments imposed in the \textit{VTG/CIT} transaction (see table in Section II.ii – Other Phase II cases from 2017, footnote 6 et seq.).
Under Austrian merger control law, pre-notification negotiations with the Official Parties are not mandatory and, although possible, not very common. However, in complex cases where it is likely that the Official Parties raise competition concerns, pre-notification discussion can be very useful to avoid extensive and cost-intensive in-depth reviews before the Cartel Court.

Since the initiation of an in-depth (Phase II) review leads to a change of the ‘decision-making’ body, the review process basically is restarted with the notifying party or parties and the Official Parties becoming parties of the Cartel Court proceedings. Please note that court appointed experts play a significant role in merger control proceedings before the Cartel Court, especially in connection with the definition of the relevant market and regarding the competitive analysis of a notified transaction.

V OUTLOOK & CONCLUSIONS

The Austrian merger control regime already had a broad scope of application before the new ‘size of the transaction’ threshold introduced by the KaWeRäG 2017 entered into force on 1 November 2017. The introduction of this additional (transaction-value-based) threshold for merger notifications is likely to further increase the number of merger control filings in Austria.

Notwithstanding the recently published Guidance, there will remain some uncertainties concerning the scope of application of the new threshold. Moreover, despite its legislative rationale, the new threshold does not only concern companies operating in the field of the digital economy. Rather, experience has already shown that transactions where the new threshold triggered a notification obligation often involved companies from the real estate sector and other traditional industries where the target companies achieved high profits in relation to their turnover.

It will be interesting to see how the Official Parties and the Cartel Court will interpret the new jurisdictional threshold and, ultimately, whether its implementation will have the desired legislative effect.

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73 In 2017, there were 44 pre-notification meetings with the Official Parties (see footnote 8). A recent example for a case where pre-notification discussions with the Official Parties allowed a clearance subject to commitments already in Phase I was ProSiebenSat.1Puls 4’s takeover of ATV (see table in Section II.ii – Other Phase I cases from 2017, footnote 1).

74 See footnote 24.
Chapter 9

BELGIUM

Carmen Verdonck and Daniel Muheme

1 INTRODUCTION

The entry into force of Book IV of the Code of Economic Law on 6 September 2013 introduced some fundamental changes to Belgian competition law.

One of the main innovations was the simplification of the Belgian Competition Authority’s structure. The Competition Authority’s former tripartite structure was changed into a single administrative body that investigates and decides upon competition law infringements. Within this newly created administrative body, a distinction was made between the College of Competition Prosecutors (headed by the Prosecutor-General), which holds the Belgian Competition Authority’s investigative powers, and the Competition College, which holds the Competition Authority’s decision-making powers. The Competition College consists of two assessors (appointed in alphabetical order from the relevant (native Dutch or French-speaking) list of 20 nominated assessors) and the President of the Belgian Competition Authority, who presides over the Competition College. In merger control cases, the Competition College will decide whether to authorise a concentration in regular proceedings, whereas the Prosecutor will, in the first instance, decide whether to authorise mergers filed under the simplified merger procedure.

A pre-merger notification and approval for all concentrations above the legally established thresholds is required. Concentrations must be notified to the Competition Authority where the undertakings concerned, taken together, have a total turnover in Belgium of more than €100 million, and where at least two of the undertakings concerned each have a turnover of at least €40 million in Belgium.

In addition to Book IV of the Code of Economic Law, there are a large number of royal decrees regulating various aspects of merger control in Belgium. The Belgian merger

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1 Carmen Verdonck is a partner and Daniel Muheme is an associate at Altius.
3 Despite the Competition College formally holding the Belgian Competition Authority’s decision-making powers, Book IV of the Code of Economic Law also grants certain decision-making powers to the College of Competition Prosecutors (for example, within the framework of the simplified merger procedure).
4 Article IV.16 ff Code of Economic Law.
5 Article IV.7, Section 1 Code of Economic Law. In May 2017, the Authority launched a consultation of stakeholders on the thresholds for notification and an assessment whether they should be changed.
6 The most important royal decrees are the Royal Decree of 30 August 2013 on procedures with regard to the Protection of Economic Competition, Belgian Official Gazette 6 September 2013; and the Royal Decree of 30 August 2013 on the Notification of Concentrations of Undertakings in Accordance with Article IV.10 of the Code of Economic Law as inserted by the Acts of 3 April 2013, Belgian Official Gazette, 9 September 2013.
control rules and case law are substantially influenced by European merger control rules and case law. The Belgian courts and Competition Authority have repeatedly stated that Belgian competition law should be interpreted in light of the European courts’ jurisprudence and the decisions and guidelines of the European Commission, to which reference is often made.

II YEAR IN REVIEW

In 2005 the notification thresholds were substantially increased and in 2006 a simplified procedure was formally introduced into Belgian competition law. These changes resulted in a significant decrease in the number of notifications and a substantial increase in the number of mergers filed under the simplified procedure. In 2008 and 2009, the number of concentrations further declined as a consequence of the financial and economic crisis. From 2010, the number of notifications increased again. In 2017, 29 final decisions were issued. Out of these final decisions, 19 were issued under the simplified procedure and 10 under the non-simplified procedure.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of notifications</th>
<th>Number of final decisions</th>
<th>Number of non-simplified procedures</th>
</tr>
</thead>
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<tr>
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<td>59</td>
<td>61</td>
<td>29</td>
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<tr>
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<td>10</td>
</tr>
</tbody>
</table>

Given that the decisions in simplified procedures are generally only a page long and only include the parties’ names, the markets in which they operate and the Prosecutor’s confirmation that the conditions for the simplified procedure were fulfilled, these decisions do not provide any guidance on procedural issues or substantive matters. Therefore, only the decisions taken in regular procedures or the Court of Appeal’s judgments are discussed here.

On 21 December 2016, the Belgian Competition Authority issued a decision in the pharma sector following the notification of McKesson group’s acquisition of exclusive control

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of Belmedis, Espafarmed, Cophana, Alphar Partners and of a majority interest in Sofiadis. The case was referred to the Belgian Competition Authority on the basis of Article 4(4) of the Merger Regulation, at the notifying party's request.

The Prosecutor decided that the market for full-line pharmaceutical products was affected horizontally, while the market for retail sales was affected vertically. The Prosecutor concluded that the concentration might significantly impede effective competition on the Belgian market for the wholesale distribution of full-line pharmaceutical products because of important coordinated effects that would not be counter-balanced by the efficiency gains following the acquisition. The proposed concentration would create a collective dominant position on the Belgian market for the wholesale distribution of pharmaceutical products, as the structural characteristics of the market concerned might bring about tacit coordination in this market. The Competition College followed the Prosecutor's assessment and decided there were serious doubts about the admissibility of the concentration and consequently decided to open a Phase II procedure. On 20 April 2017, the Belgian Competition College conditionally approved the acquisition. The parties offered a commitment regarding the divestment of one of their depots in the Ghent area together with all relevant related assets and commitments to protect the opportunities of smaller players among the full-line wholesalers. It is noteworthy that the Competition authority started a cartel investigation and carried out dawn raids based on the information received during the (pre)notification of this transaction.

On 25 January 2017, the Belgian Competition Authority announced the unconditional clearance of the acquisition of Van Gansewinkel Groep BV (Van Gansewinkel) by Shanks Netherlands Holdings BV (Shanks). Both transaction parties were active in the waste collection sector, including in the collection and treatment of non-hazardous and hazardous waste. The parties indicated that the transaction would produce such synergies as fulfilling the demand for circular economies (i.e., an alternative to a traditional linear economy (make, use, dispose) in which we keep resources in use for as long as possible, extract the maximum value from them while in use, then recover and regenerate products and materials at the end of each service life), providing better coverage within the Benelux and neighbouring European markets and merging complementary activities. The Prosecutor focused his analysis on non-hazardous waste collection, because there was only a very limited overlap between the concerned parties' in hazardous waste collection. The Competition College only focused on the following markets for its competitive analysis: (1) the national market for the collection of non-hazardous household waste, (2) the market for the collection of commercial (similar) industrial waste in Flanders and Brussels, (3) the national market for the recycling of flat glass and (4) the market for the recycling of flat and spherical glass to the extent they would be considered the same market. The geographic market was limited to a radius of 150 kilometres. In general, the Competition College followed the approach adopted by the Prosecutor and reached the conclusion that the merger did not significantly impede competition in the relevant markets. The prevailing opinion was notably that there

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7 Decision No. ABC-2016-C/C-39 of 21 December 2016 in Case No. CONC-C/C-16/0038, the acquisition of the sole control by the McKesson Group of Belmedis SA, Espafarmed SLU, Cophana SA and Alphar Partners and of a majority participation in the control of Sofiadis.
8 Decision No. ABC-2017-CC-13 of 20 April 2017 in Case No. CONC-C/C-16/0038, the acquisition of the sole control by the McKesson Group of Belmedis SA, Espafarmed SLU, Cophana SA and Alphar Partners and of a majority participation in the control of Sofiadis.
9 Decision No. BMA-2017-C/C-02 of 25 January 2017 in Case No. MEDE-C/C-16/0041, the acquisition of Van Gansewinkel Groep BV by Shanks Netherlands Holdings BV.
was little direct overlap between the activities of the concerned undertakings and where anticompetitive effects could occur, they would be mitigated by the existence of sufficient alternatives in the relevant markets.

On 13 April 2017, the Belgian Competition Authority approved the transaction in which Panasonic Corporation, active worldwide as a producer of electronic devices (Panasonic), acquired exclusive control over the undertaking Zetes Industries SA (Zetes). More specifically, Panasonic’s AVC division, which produced and distributed hardware such as projectors, digital cameras and surveillance cameras, would integrate Zetes, which focuses on the identification of persons (production of electronic ID cards, driver’s licences, etc.) and the identification of goods (automatic data-capture solutions, such as barcode readers, labelling solutions etc.), without producing any hardware itself. The parties argued that the transaction would create significant synergies, including a broader offer to the clients of both parties, improved quality of Panasonic’s products and expanded presence in the European Union and Africa. The competitive analysis by the Prosecutor is limited to the market for rugged terminals (mobile computers) in grand format (the ‘upstream market’) and the market for automatic data capture solutions, focusing on the sub-market for automatic data capture solutions for the identifications of goods (the ‘downstream market’). The Prosecutor based his analysis on the European Commission’s Guidelines on the assessment of non-horizontal mergers and stated that non-horizontal mergers were generally less likely to significantly impede effective competition than horizontal mergers, because it does not result in an immediate reduction in the number of effective competitors in the market. The most likely anticompetitive effects are market foreclosure on the upstream or downstream market through refusal to supply or access. Zetes almost exclusively used rugged terminals (mobile computers) in small format from suppliers other than Panasonic, so there was no risk that Panasonic would limit the access to its product to Zetes. Moreover, the Prosecutor found that alternative provision sources would remain post-transaction and Panasonic would not have the capacity nor the incentive to eliminate access. The Competition College followed this approach and concluded that the market for rugged terminals (mobile computers) in grand format was a growth sector, characterised by the presence of multiple actors. The transaction was, therefore, approved.

On 26 April 2017, the Belgian Competition Authority approved the proposed expansion of the joint undertaking, Mediahuis, via the transfer of several shareholdings held by Corelio NV (Corelio) and Concentra NV (Concentra). Both Corelio and Concentra are Belgian multimedia undertakings with activities in Belgium and the Netherlands and several overlapping activities, including the operation of national television channels and the production of media content for television programmes, the operation of national and regional television channels, the operation of newspapers, the publication of a free door-to-door magazine, the operation of radio stations, cycling tournaments, and print-related activities, both coldset and heatset. The transaction consisted of the acquisition of exclusive control by Mediahuis of several of these activities, as well as joint control over others and

10 Decision No. ABC-2017-C/C-10 of 13 April 2017, in Case No. CONC-C/C-17/00005, Acquisition of Zetes Industrie SA by Panasonic Corporation.
11 Decision No. BMA-2017-C/C-14 of 26 April 2017 in Case No. MEDE–C/C–17/00006, The expansion of the activities of the joint undertaking Mediahuis NV, through the transfer of several participations that are currently held by Corelio NV and/or Concentra NV.
non-controlling shares in another activity. Only four markets appeared to raise concern in
the transaction assessment made by the Competition College because the post-transaction
market share would exceed 25 per cent:

\( a \) horizontal relevant market: the market for national topic-related advertising in Belgian
Dutch-speaking magazines (including business newspapers), both free magazines and
online; and

\( b \) vertical relevant markets:
- the vertical market for Belgian Dutch-speaking (national and regional) paid
  magazines (including online), with the exception of business newspapers;
- the national market for nationwide subject-related advertising in Dutch-speaking
  magazines; and
- the market for the sale of advertising space on national television channels in the
  Flemish region.

Regarding the first relevant market, the Competition College concluded, in line with
the Prosecutor’s analysis, that the transaction would not lead to uncoordinated effects in
the market, mainly because market dynamics would remain unchanged and because new
environmental factors such as digitalisation, internationalisation and convergence would
lead to a significant proportion of advertising flowing towards digital media. For the
national market for nationwide subject-related advertising in Dutch-speaking magazines,
the Prosecutor concluded that the newspapers from Mediahuis were not indispensable
advertisement channels for competitors to position themselves in the market. Moreover, if
Mediahuis refused access to advertising space to competitors in its newspapers, this would
lead to significant financial losses that would be difficult to recoup. Finally, in the market
for the sale of advertisement space on national television channels in the Flemish region, the
Prosecutor’s analysis showed that Mediahuis would be unable and would lack the incentive
to foreclose the market for its competitors. Furthermore, the transaction would not lead to
any conglomerate or coordinated effects, because it seems unlikely that Mediahuis would
be able to offer a bundle in which magazine, television, door-to-door magazines and radio
activities would be incorporated. Such a strategy of mandatory exclusive or optional bundles
would not be an obvious market offering. Besides that, the Prosecutor assessed the possibility
of coordinated effects, as the transaction would lead to only two remaining economic powers
in the relevant markets, namely Mediahuis and De Persgroep. The Competition College
approved the decision, predominantly because the existence of fierce competition for
advertising revenues was based on many variables for price setting, led to a variety of tariffs
and therefore made coordination between competitors unlikely.

On 31 May 2017, the Belgian Competition Authority published its decision
concerning Kinepolis’ demand for the removal of conditions that had been imposed on it by
a decision of the Belgian Competition Authority on 17 November 1997 and subsequently
modified by a decision of 2010.\(^\text{12}\) In the 1997 decision, the Belgian Competition Authority
approved a transaction between Bert and Claeys under the designation ‘Kinepolis’ contingent
upon conditions. The Belgian Competition Authority concluded that the transaction would

\(^{12}\) Decision No. BMA-2017-C/C-22 of 31 May 2017 in Case No. MEDE–C/C–17/0014, Request by
Kinepolis Group NV for the uplifting of conditions imposed by the Competition Council in decision
No. 97-C/C-25 of 17 November 1997 as modified in the judgment 2008/MR/22-23-24 of the Court of
Belgium

strengthen the notifying parties’ dominant position in the Belgian market for the projection of films, but approved it based on the competitiveness of the concerned sector internationally. This expansion in scale would enhance technical audiovisual improvements in the sector from which viewers would benefit and lead to a better balance between movie theatre owners and the large international groups that control the film business. In turn, the transaction would increase the then-limited film offering in Belgium.

The Competition College imposed a number of remedies to reduce the possible anticompetitive effects from the transaction, including: (1) a restriction on demanding exclusivity for film distributors for the allocation of films to other movie theatre owners; and (2) prior approval to establish any new complex or expand, renovate or replace any of its existing complexes. However, this measure did not apply to the expansion, renovation or replacement of any existing complex, if it resulted in an increase in the number of screens or seats by less than 20 per cent. The Belgian Competition Authority imposed these measures for a duration of 10 years, tacitly renewable for equal periods of 10 years, except if the Belgian Competition Authority, at the parties’ request submitted six months before the expiry of this period, decided to remove the measures. The measures would be deemed to be removed in the absence of a Belgian Competition Authority decision within the periods provided for transaction procedures.

In its decision of 16 April 2007, the Belgian Competition Authority approved the removal of the measures after a request by Kinepolis on 8 December 2006. The Belgian Cinema Federation and two competitors, UGC and Utopolis, appealed against this decision before the Brussels Court of Appeal. On 23 August 2007, the Brussels Court of Appeals suspended the Belgian Competition Authority’s decision, mainly because the allegedly changed market conditions had not been sufficiently proved and because the removal of the measures due to the absence of a dominant position would not be a valid argument, when exactly these measures prevented the expansion or limited its existence. On 18 March 2008, the Brussels Court of Appeal annulled the decision based on these findings and sent the case back to the Belgian Competition Authority. Subsequently, the Belgian Competition Authority only partially upheld the measures from the 1997 decision and the Belgian Cinema Federation and again the competitors, UGC and Utopolis, appealed against the decision. On 11 March 2011, the Court of Appeal annulled the Belgian Competition Authority’s decision and reiterated its findings regarding unchanged market conditions, but allowed Kinepolis to add, expand, renovate or replace an existing complex by more than 20 per cent and reduced the duration of the measures to renewable three-year periods rather than the previous 10-year period. Finally, at Kinepolis’ request, the Belgian Competition Authority partially lifted the measures on 31 May 2017. Even if the Belgian Competition Authority concluded that Kinepolis’ dominant market position in the market for the projection of films remained, it reassessed the likely effect of the measures imposed by the 1997 decision. An appeal against this decision of the Belgian Competition Authority has been brought before the Brussels’ Court of Appeal.

On 12 June 2017, the Belgian Competition Authority approved, contingent upon commitments, the €400 million acquisition of Coditel Brabant SPRL and its subsidiary, Coditel SARL, together operating under the trade name SFR (Coditel), by Telenet Group BVBA (Telenet).13 Telenet, which is a part of Liberty Global, is a Belgian cable operator

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supplying fixed internet, fixed telephony and cable television services to customers throughout Flanders and parts of the Brussels region, and mobile services throughout Belgium. Coditel supplies cable television, fixed internet, fixed telephony and mobile services as a mobile virtual network operator (MVNO) in some parts of Brussels, Flanders and in the south of the Hainaut province. Market participants expressed several competitive issues. Regarding the retail markets, the Prosecutor assessed: (1) the retail market for the supply of television services in Coditel’s coverage area, (2) the Belgian retail market for the supply of fixed internet services, (3) the Belgian retail market for the supply of mobile telecommunication services, and (4) the Belgian retail market for the supply of multiple play-services. However, the Prosecutor concluded that this horizontal transaction would not result in the restriction of competition in these markets. The major competition issue concerned the wholesale market for access to television services, more precisely regarding Telenet having an increased incentive not to give access or to delay the access to Orange Belgium (a competitor on those markets) in Coditel’s coverage area for television services post-transaction. In turn, this outcome would have an indirect but significant effect in Coditel’s coverage area on the Belgian retail market for the supply of fixed internet services, the Belgian retail market for the supply of mobile telecommunication services and the Belgian retail market for the supply of multiple-play services. The Competition College found the commitments offered by Telenet, consisting of giving Orange Belgium access to Coditel’s network within four months following the completion of the proposed transaction, to be satisfactory. This is remarkable since the Belgian Institute for Postal Services and Telecommunications (BIPT) explained how the existing regulatory obligations imposed on Telenet’s wholesale tariffs would apply on the newly acquired cable network. The Competition College agreed that Telenet could solve these competitive concerns by committing to give Orange Belgium access to Coditel’s network within four months following the completion of the proposed transaction at wholesale tariffs similar to those in Flanders. Moreover, Telenet committed not to offer new quadruple play bundles in Coditel’s coverage area for an undisclosed period.

On 3 July 2017, the Belgian Competition Authority approved the transaction in which Sator Holding BV (Sator Holding) acquired 100 per cent of the shares of the target company, Henrard Groep. In Belgium, Sator Holding was mostly active as an importer (warehouse distributor) of replacement parts and accessories for light motor vehicles through its subsidiary, Van Heck Interpieces (VIP), and for a smaller portion as a wholesaler on the market for the same products (local distributor). Henrard Groep consisted of several undertakings and was active as a wholesaler (local distributor) of replacement parts and accessories of light motor vehicles, as a seller of workshop equipment (automotive equipment and automotive tools), as a seller of tyres, as a seller of vehicle bodywork parts, and as a seller of automotive paint. The transaction’s purpose was the vertical integration of Henrard Groep to achieve synergies. The Prosecutor identified three relevant markets for the transaction’s competitive assessment: (1) the Belgian identity access management market (IAM market) for the import of replacement parts and accessories for light motor vehicles (warehouse distributors), (2) the Belgian IAM market for wholesale replacement parts and accessories for light motor vehicles (local distributors) and (3) the Belgian market for the distribution of automotive paint for deliveries to the repair market in the framework of vehicle repair. Only the Belgian IAM market for the import of replacement parts and accessories for light motor

vehicles (warehouse distributors) was relevant for the assessment because the combined entity had a market share of around 35–40 per cent. The next competitor, Doyen, had a market share of 29.2 per cent and Motor Parts and Valeo each had a 10 per cent market share. The major competitive concern of the transaction was input foreclosure, since the merging entity was active both at the import level, where it had an important position, and at the wholesale level. However, since market participants had enough alternatives for obtaining supplies, the transaction would not lead to higher prices. The Competition College largely agreed with the Prosecutor’s assessment and therefore approved the transaction.

On 4 July 2017, the Belgian Competition Authority approved the acquisition of sole control of ALL 4 U BV (ALL 4 U) by ALSO Deutschland GmbH (ALSO).\(^\text{15}\) ALSO is part of the ALSO group, and internationally active in wholesale and distribution in the IT sector and the consumer electronics sector. Its business mainly focused on the sale of hardware and software products to resellers and retailers on the B2B market, as well as ICT services and customised solutions to several customer groups. ALL 4 U’s main business consisted of holding shares in other companies. The company held shareholdings in three subsidiary companies: (1) Esseko BV, (2) Five 4 U Nederland BV and (3) Five 4 U BVBA. Together, the last two entities formed the company ‘Five 4 U’, active on the wholesale market for information technology products, communication technology products and consumer electronics. The market for the wholesale of printer consumables gave rise to a particular concern in the Prosecutor’s assessment of the transaction, as the combined entities would have a market share exceeding 25 per cent post-transaction in the Benelux market. The Prosecutor concluded that the transaction would not lead to anticompetitive non-coordinated horizontal or conglomerate effects, mainly because of the existence of sufficient competitors, which made customers price-sensitive. The same was true for anticompetitive coordinated effects. These were almost non-existent, because the relevant wholesale markets contained hundreds or even thousands of products, whose characteristics regularly changed. Besides the existence of competition on price, there were several relevant competitive factors to take into account, such as, the policy on the return of goods, the delivery period, aftersales services etc. The Competition College followed the Prosecutor’s approach.

On 11 September 2017, the Belgian Competition Authority cleared the notification of a concentration involving Thomas Cook Airlines Belgium (TCAB) and the Belgian airline company, Brussels Airlines (SNB).\(^\text{16}\) The concentration mainly concerned the purchase by SNB of TCAB ‘slots’ for takeoff and landing from the Zaventem Brussels airport and other TCAB international flights, as well as goodwill related to these flights, the leasing of two A-320 airplanes and related employment rights. The Prosecutor defined the two relevant markets as: (1) the market for scheduled passenger air transport services (based on the ‘point-of-origin/point-of-destination’ approach), and (2) the national market for the wholesale supply of seats to tour operators. For the first market, the Prosecutor analysed nine out of 33 transferred flight routes in more detail, as the parties had overlapping activities. Only seven out of these nine flight routes were considered as concerned markets for the competitive analysis, as the parties’ combined market shares remained below 25 per cent in two of these analysed flight routes. For the second market, the Prosecutor concluded that the market was a concerned market in

\(^{15}\) Decision No. BMA-2017-C/C-29 of 4 July 2017 in Case No. MEDE–C/C–17/0021, Acquisition of ALL 4 U B.V. by ALSO Deutschland GmbH.

which the combined entities would acquire approximately 70–80 per cent of market shares for the winter season and 85–95 per cent for the summer season. The Prosecutor’s assessment of the concentration on the concerned markets included horizontal non-coordinated effects, horizontal coordinated effects and vertical effects. Despite enhanced market shares of 70–80 per cent and 80–90 per cent on some of the flight routes, the Prosecutor considered the concentration unproblematic for the assessment of horizontal non-coordinated effects on the market for scheduled passenger air transport services, as competitive pressure would remain sufficient together with opportunities for competitors to enter the market. The same applied to the national market for the wholesale supply of seats to tour operators as competition was preserved and market entry easy. For horizontal coordinated effects, the Prosecutor considered that these were non-existent in both markets, as entry would defeat the chances of achieving coordination among market players. The Competition College followed the competitive analysis by the Prosecutor. Finally, the Belgian Competition Authority kept a large part of the vertical effects’ assessment confidential, but nothing had such an overriding interest to prohibit the concentration.

On 18 September 2017, the Belgian Competition Authority approved a transaction in which Lyfra SA (Lyfra) acquired exclusive control of Sweetinvest SA (Sweetinvest) and Verguts Gebroeders SA (Verguts Gebroeders).\(^{17}\) Lyfra is part of the Luxembourg group, Landewyck group SARL (Landewyck), which is active in the production and supply of tobacco-based products. The group is the owner of another company active on the Belgian market for the production of tobacco-based products, namely Torrekens Tobacco Belgium SPRL (Torrekens). Lyfra, Sweetinvest and Verguts Gebroeders are all active in the market for wholesale distribution of food and non-food products, which includes the market for wholesale distribution of tobacco-based products. First, the market for the production of tobacco-based products was a concern for the concentration, because Torrekens, a subsidiary corporation of Landewyck, was active on that market, while the market share of the concerned parties to the concentration on the downstream market for the distribution of these tobacco-based products exceeded 25 per cent. Therefore, the concentration vertically affected the market for the production of tobacco-based products. Second, the concentration horizontally affected the market for the wholesale distribution of tobacco-based products, because the parties’ combined market share would exceed 25 per cent post-transaction. This last market was the main concern and the Prosecutor therefore assessed the potential anticompetitive effects in this market in more detail. Regarding unilateral effects, the Prosecutor excluded its likelihood in the overall market for the wholesale distribution of tobacco-based products, even if the transaction would have led to a relatively significant increase in market shares in some sub-markets. In particular, the existence of a competitor with the same market share limited the potential unilateral effects. Regarding coordinated effects, the Prosecutor also excluded its likelihood, mainly because the market was not transparent, customers have tended to change their suppliers when discontent, the neighbouring market for wholesale convenience products had a disruptive effect on any potential coordination and the producers of tobacco-based products had significant power over the market for the distribution of wholesale tobacco-based products. Based on the above, the Competition College approved the transaction, also partly because 90 per cent of independent clients who answered its questionnaire did not oppose the transaction.

\(^{17}\) Decision No. BMA-2017-C/C-33 of 18 September 2017 in case No. CONC-C/C-17/0026, Lyfra SA/ Sweetinvest SA and Verguts Gebroeders SA.
III THE MERGER CONTROL REGIME

As mentioned in Section I, concentrations must be notified in Belgium if the undertakings concerned, taken together, have a total turnover of more than €100 million in Belgium,18 and if at least two of the undertakings concerned each have a turnover of at least €40 million in Belgium, unless the concentration has a ‘Community dimension’19 and thus must be notified to the European Commission. The relevant turnover is the consolidated sales turnover in Belgium during the preceding financial year. On the seller’s side only the Belgian turnover generated by the target company (or companies) (or sold business) should be taken into account.20 The parties must obtain approval for the proposed concentration before it can be implemented.21

In 2006, the ‘significant impediment to effective competition’ test was introduced in Belgian competition law as the substantive test for clearance, aligning it with the EU Merger Regulation. A particular feature of the Belgian merger control system is that if the post-merger joint market share of the parties in any relevant horizontal or vertical market does not exceed 25 per cent, then the transaction must be approved by the Competition College.22

The first step in the notification procedure usually consists of pre-notification contacts with the Competition Authority, in particular with the Prosecutor. The Code of Economic Law does not oblige the parties to make pre-notification contacts, but it is highly recommended23 and has become standard practice. It is also not uncommon that the Authority asks the parties’ consent to start its investigation and send out requests for information to third parties already during the pre-notification stage. In principle, a formal notification may only be submitted after the informal approval of the Prosecutor-General has been obtained in the context of such pre-notification contacts. These contacts can take place via telephone or e-mail, or in face-to-face meetings. The discussions usually take place based on a draft notification. These contacts have several purposes, including:

a the parties and the Prosecutor can discuss a number of essential points (such as whether the concentration must be notified, whether the simplified procedure could be used and what information must be provided);

b reducing the risk of the Prosecutor finding the notification to be incomplete (which has a significant impact on the notification’s timing);

c the Prosecutor can, at the parties’ request, exempt the notifying parties from providing certain information,24 which can make the notification less onerous; and

d they allow the parties to understand the Prosecutor’s point of view on, for example, the market definition, and to more accurately estimate whether Phase I clearance is likely to be granted.

18 Article IV.7, Section 1 of the Code of Economic Law.
19 Article IV.11 Code of Economic Law.
20 Article IV.8 Code of Economic Law.
21 Article IV.10, Section 5 of the Code of Economic Law.
22 Article IV.61, Section 2, 2 of the Code of Economic Law.
23 The Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 recommend contacting the College of Competition Prosecutors at least two weeks before notification (see Section III.i, infra). Until further notice, these Rules remain applicable also after the entry into force of Book IV of the Code of Economic Law.
24 Article 5, Section 4 of the Royal Decree on the notification of concentrations.
For the notification itself, the parties must use the CONC C/C form. By completing this form, the parties provide a wide range of information on, among other things, the concentration, the parties, their economic activities, the relevant markets and the effects of the concentration on the relevant markets. The information provided must be correct and complete; otherwise the notification cannot have any effect. In general, the notification obligation falls on the party acquiring control through the concentration. In the case of a merger between two formerly independent companies, the obligation falls on both parties. The concentration must be notified after the agreement’s conclusion and before its implementation. Nevertheless, the parties can notify a draft agreement if they declare that it will not significantly differ from the proposed agreement on all relevant points from a competition law perspective.

The notification must be made in Dutch or in French. The documents attached to the notification must be filed in their original language. If that language is not Dutch, French or English, a translation into the notification language must be added. The notification, including its annexes, must be sent to the Belgian Competition Authority for the attention of the Prosecutor-General in three copies, either by registered post or by courier with acknowledgment of receipt, using the address indicated on the Belgian Competition Authority website. At the same time, an electronic copy of the notification and its annexes must be sent by email to the Secretariat of the Belgian Competition Authority for the attention of the Prosecutor-General, using the email address indicated on the Belgian Competition Authority website.

As is the case in European merger control, the parties must suspend the implementation of the merger until it has been cleared. Failure to respect this standstill obligation can result in fines of up to 10 per cent of the notifying parties’ annual turnover. In exceptional circumstances, the President can permit the parties to implement the merger before it has been approved, but such an exemption must, in principle, always be requested before the merger’s implementation. Failure to notify a merger can result in fines of up to 1 per cent of the notifying parties’ respective annual turnovers. The same fines may apply if incorrect

25 Annexed to the Royal Decree on the notification of concentrations. For the simplified procedure, form CONC C/C-V/S is used, which is annexed to the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.
26 Article 4, Section 1 of the Royal Decree on the notification of concentrations.
27 Article 5, Section 2 of the Royal Decree on the notification of concentrations.
28 Article IV.10, Section 2 Code of Economic Law.
29 Ibid.
30 Article IV.10, Section 1 Code of Economic Law. In Case No. 98-C/C-11 of the Competition Council of 28 July 1998, Promedia CV/Belgacom Directory Services NV, Belgian Official Gazette 18 September 1998, p. 30,441, the Council ruled that an agreement that had not yet been approved by the works council was not sufficiently binding to be notified.
31 Article IV.10, Section 3 Code of Economic Law.
32 Article 3, Section 4 of the Royal Decree on the notification of concentrations.
33 Article 3, Section 2 of the Royal Decree on the notification of concentrations.
34 Article IV.10, Section 5 Code of Economic Law.
35 Article IV.70, Section 1 and Article IV.72 Code of Economic Law.
36 Article IV.10, Section 7 Code of Economic Law; See for a recent application also the decision No. BMA-2015-C/C-79 of 23 December 2015 in Case No. MEDE-C/C-15/0035, acquisition of Imtech Belgium Holding NV and Imtech Belgium NV by Cordeel Group NV Cordeel.
37 Article IV.71, Section 2 Code of Economic Law.
or incomplete information is provided in a notification or a request for information, if the information is not provided on time or if the notifying parties hinder or prevent the investigation.\(^{38}\)

The Belgian Competition Act makes a distinction between the simplified merger procedure and the regular merger procedure.

i  
**Simplified procedure**

On 1 October 2006, the simplified merger procedure was introduced in Belgian competition law. Before that date, the simplified procedure was based on ‘soft law’. It was only on 8 June 2007 that the General Assembly of the Council approved this procedure’s detailed rules and thus replaced the previous ‘soft law’ rules.\(^{39}\)

The simplified procedure is highly practical, and today the vast majority (about 80 per cent) of notifications are made using this procedure.

The simplified procedure has two essential characteristics: first, the Prosecutor examines the merger and decides whether to authorise it (and not the Competition College); second, the simplified procedure is very short, as the Prosecutor has to make a final decision within 15 working days of having received the notification. The amount of information that must be filed is also substantially less than in the regular procedure.

The parties can choose the simplified procedure for the following categories of concentrations:\(^{40}\)

\(a\) two or more undertakings acquire joint control over a joint venture on condition that the joint venture is not active or is only active to a small degree on the Belgian market, when the joint venture’s turnover or the turnover of the brought-in activities in Belgium, or the turnover of both, is less than €40 million; and the total value of the transfer in assets to the joint venture in Belgium is less than €40 million;

\(b\) none of the parties to the concentration are active on the same product and geographical markets, or on a product market situated upstream or downstream of a product market on which one or more parties to the concentration is active;

\(c\) two or more of the parties to the concentration are active on the same product market and geographical market (horizontal relationship), on condition that their joint market share is less than 25 per cent; or one or more parties to the concentration are active on

\(^{38}\) Article IV.71, Section 1 Code of Economic Law. See also decision No. BMA-2015-C/C-31 of 30 September 2015 in Case No. MEDE-C/C-15/0017, Acquisition of Humo NV, Story, TeVe-blad and Vitaya by De Persgroep Publishing NV, in which the Competition College ruled that the Guidelines on the calculation of fines may be used as guidance for the calculation of such fines.

\(^{39}\) Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations on 8 June 2007.

\(^{40}\) Point II.3.2 of the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 states that, in special circumstances, the simplified procedure cannot be applied. This can be the case where it is impossible to determine the exact market shares of the parties (e.g., on new or less-developed markets) or where markets with high entry barriers or a high degree of concentration are concerned. In decision No. BMA-2015-C/C-79 of 23 December 2015 in Case No. MEDE-C/C-15/0035, the acquisition of Imtech Belgium Holding NV and Imtech Belgium NV by Cordel Group NV Cordeel, ‘gun jumping’ was also considered to be a special circumstance to set aside the simplified procedure.
a product market upstream or downstream of a product market on which another party to the concentration exercises activities (vertical relationship), on condition that their individual or joint market shares amount to less than 25 per cent; and

d a party acquires sole control over an undertaking over which it already exercises joint control.41

As mentioned above, the Prosecutor has only 15 working days from the notification42 to decide whether the conditions for the simplified merger procedure apply and whether the concentration raises any objections43 or doubts as to its permissibility.44 If the Prosecutor fails to come to a decision before the deadline, the merger is deemed to have been approved.45 If the Prosecutor concludes that either the conditions for applying the simplified procedure are not fulfilled or the concentration raises objections, the use of the simplified procedure will be rejected and a full notification under the regular procedure must be made.46 Moreover, the timetable for the regular proceedings will only start running after the new filing is made, as the simplified notification will be deemed to have been incomplete from the start. If the Prosecutor accepts that the conditions for the simplified procedure apply and does not find any objections, the merger must be approved. In this respect, it is also useful to refer to a peculiarity of Belgian merger control that obliges the Authority to approve any merger where the parties’ Belgian market share does not exceed 25 per cent, which will often be the case in simplified merger filings. The Prosecutor informs the parties of the decision by post, which is deemed by law to have the value of a decision of the Competition College for the application of Book IV of the Code of Economic Law.47

Even though the simplified procedure is formally included in Book IV of the Code of Economic Law, it still entails some uncertainty for the parties. First, there is uncertainty as to timing. As set out above, a ruling that the simplified procedure cannot be used means that the parties have to start regular proceedings from scratch. Even if the Prosecutor during the pre-notification contacts indicates that the concentration qualifies for the simplified procedure, nothing is certain, especially given the wide interpretation of the ‘no objection’

41 Point II.1 of the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.
42 Article IV.63, Section 6 Code of Economic Law. Please note that Article I.1 Code of Economic Law defined working days as all calendar days with the exception of Sundays and statutory holidays. This meant that Saturdays had to be considered as working days. An Act of 29 June 2016 changed the definition of working days again to also exclude Saturdays.
43 Article IV.63, Section 3 Code of Economic Law. This criterion was widely interpreted in case law. In the Belgian Airports/Brussels South Charleroi Airport case, the Prosecutor refused the application of the simplified procedure merely because a third party voiced an objection against the concentration (Case No. 2009-C/C-27 of 4 November 2009, Belgian Official Gazette 22 January 2010).
44 Article IV.63, Section 5 Code of Economic Law. Strangely, this Paragraph (‘doubts as to the permissibility’) does not use the same criterion as Paragraph 3 (‘no objection’).
45 Article IV.63, Section 6 Code of Economic Law.
46 For example, Decision No. ABC-2014-C/C-03 of 26 March 2014 in Case No. CONC-C/C-13/0030, Tecteo/EDA – Avenir Advertising, which was notified under the simplified procedure but had to be renotified under the regular procedure as some of the market definitions were contested and the transaction raised multiple competition concerns according to the auditor.
47 Article IV.63, Sections 3 and 4 Code of Economic Law.

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criteria, which can allow third parties to force the notifying parties into a regular notification by filing objections. This uncertainty is increased by the absence of any right to appeal against a Prosecutor’s decision to revert to the regular procedure.

ii Regular procedure

The regular procedure is divided into two phases (Phase I and Phase II), which each consist of an instruction and a decision stage. Once a complete notification has been filed, the Prosecutor will open a Phase I procedure. At this point, a summary of the notification is published in the Belgian Official Gazette and on the Competition Authority’s website. The Prosecutor gathers information and submits a reasoned draft decision to the Competition College, who takes the final decision to either approve the merger (possibly subject to certain conditions) or to open a Phase II procedure.

Book IV of the Code of Economic Law contains fixed time frames for both the decision and the investigation. Once the concentration has been notified, the Prosecutor must submit a reasoned draft decision to the Competition College within 25 working days of the day after the notification.48 A copy of this report will also be sent to the parties and a non-confidential version to the representatives of the employee organisations of the undertakings involved.49 If the file is incomplete, the time period only starts when the complete information is received. If commitments are presented, the time limit is extended by five working days.

No less than 10 working days after the communication of the Prosecutor’s reasoned draft decision, the Competition College organises a hearing during which the parties and any interested third parties are heard.50 From the moment the Prosecutor’s draft decision is submitted, the parties must be given full access to the file, except for confidential submissions from third parties. Third parties, on the other hand, only have a right of access to the file in limited circumstances. The Competition College must decide whether to approve the merger within 40 working days from the day after the notification.51 This deadline is extended by 15 working days in cases where commitments are proposed. Furthermore, the parties can request an extension of the deadline after the investigation has ended.52 This extension may be particularly relevant if the parties need more time to convince the Competition College of their case, offer commitments, etc., to avoid the opening of a Phase II investigation.

If the Competition College has serious doubts about approving the merger, it can order an additional investigation under the Phase II procedure. The parties have 20 working days after such a decision to propose commitments.53 Furthermore, the Prosecutor must submit its revised draft decision within 30 working days of the decision.54 The parties may submit their written observations within 10 working days of the submission of the revised draft decision. If the parties submit written observations, the Prosecutor may submit an additional draft decision within five working days.55 A hearing must be held no less than 10 working days

48 Article IV.58, Section 4 Code of Economic Law.
49 Article IV.58, Section 4 Code of Economic Law.
50 Article IV.60, Sections 1 and 2 Code of Economic Law.
51 Article IV.61, Section 2 Code of Economic Law.
52 Article IV.61, Section 3 Code of Economic Law.
53 Article IV.62, Section 1 Code of Economic Law.
54 Article IV.62, Section 2 Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any.
55 Article IV.62, Sections 3 and 4 Code of Economic Law.
after the submission. The Competition College must decide whether to approve the merger within 60 working days of initiating the Phase II procedure. This deadline can be extended at the parties’ request.

If the Competition College fails to make a Phase I or Phase II decision by the deadlines set out above, the merger is deemed to have been approved.

The Competition Act does not grant interested third parties the right to access the file, but only to be heard by the Competition College. However, the Supreme Court has somewhat limited this principle by ruling that, in exceptional circumstances, an interested third party can obtain access to the file to the extent that this access is limited to a non-confidential version and that such access is strictly necessary to allow the third party to set out its views on the merger. In practice, it seems that the Competition College is more inclined to refuse access than to grant it. However, in the Mediahuis decision, the Brussels Court of Appeal confirmed that the Belgian Competition Authority is obliged to give access to the concentration file that was submitted to the Competition College during the appeal proceedings.

Once a decision has been taken, notifications must be sent to the parties, the relevant Minister, anyone who might have an interest and anyone who has requested to be kept informed. The decisions are also published in the Belgian official gazette and on the Competition Authority’s website. Before publication, the President of the Competition College will decide which, if any, passages in the decision are confidential, and will invite the parties to submit their views on this confidentiality.

Appeals against decisions made by the Competition College can be made to the Brussels Court of Appeal and, subsequently, the Supreme Court. The appeal could be against the Competition College’s decision to approve or refuse a merger or against default approvals when the Competition College failed to make a decision by a specified deadline. The appeal could be lodged by the parties, by interested third parties who have requested to be heard by the Competition College and by the Minister of Economic Affairs. The appeal must be lodged within 30 days of the notification of the decision.

Before the Court of Appeal, the parties present their arguments in writing and at a hearing. The Minister of Economic Affairs can also submit written arguments to the Court of Appeal. Since the entry into force of Book IV of the Code of Economic Law, the Belgian Competition Authority, represented by the President, can also intervene as a party in the proceedings and submit written arguments. At any time, the Court of Appeal can call the parties to the case before the Competition College when there is a risk that the appeal may

56 Article IV.62, Section 5 and Article IV.60 Code of Economic Law.
57 Article IV.62, Section 6 Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any.
58 Article IV.62, Section 5 and Article IV.60 Code of Economic Law.
60 Decision of the Brussels Court of Appeal of 19 November 2014 in Case No. 2013/MR/30, De Persgroep NV/Belgian Competition Authority and Corelio NV and Concentra NV.
61 Article IV.66, Section 2 Code of Economic Law.
62 Article 65 Code of Economic Law.
63 Article IV.79, Section 1 Code of Economic Law.
64 Article IV.79, Sections 3 and 4 Code of Economic Law.
affect their rights or obligations. In cases concerning the admissibility of concentrations, the Court of Appeal does not have full jurisdiction, but will only rule with the power of annulment.

An appeal to the Court of Appeal does not suspend the Competition College’s decision, and it continues to have full effect until the Court of Appeal issues its judgment. However, at the request of one of the parties, the Court of Appeal can order the suspension of the Competition College’s decision. In practice, the suspension of a College decision usually is of limited interest to the parties, as they are bound by the suspension obligation of the merger until it is approved. However, in the Cable Wallon case, it turned out to be useful when the Court of Appeal overruled a tacit admissibility decision and reopened the investigation. On the other hand, a suspension might be useful to third parties who have appealed against a decision to ensure that the merger is not implemented.

IV OTHER STRATEGIC CONSIDERATIONS

As is the case in all merger control proceedings, time is of the essence. Under the Belgian merger control system, a third party could try to prolong merger procedures to the disadvantage of its competitors. A third party could, for instance, prevent the merging parties from enjoying the benefits of the simplified (and much faster) procedure by raising objections to the merger.

Regarding timing, it should be noted that the deadline imposed on the prosecutors to issue decisions in simplified merger filings has been shortened to 15 working days in 2013. This term of 15 working days is very short for the investigatory team. Therefore, it is important to start pre-notification talks, which can take months, well before the actual merger filing. On the other hand, as more and more issues are investigated and solved during the pre-notification period, decisions are often taken before the end of the legal deadline for the decision. In case of a simplified procedure, it is also advisable to start pre-notification contact to obtain as much certainty as possible about the Prosecutor’s preliminary view on whether the conditions for a simplified procedure have been fulfilled and on the extent of the information that should be provided to convince the Belgian Competition Authority that the simplified procedure’s conditions indeed apply.

V OUTLOOK & CONCLUSIONS

Since 2015, the number of notifications filed and the notification decisions issued has significantly increased when compared to previous years. Moreover, in 2017 the number of concentrations filed under the regular merger control procedure doubled compared to 2016. Several recent decisions have given rise to fines for procedural infringements (for negligent obstruction, for ‘gun jumping’, and for non-compliance with commitments given). It is clear that the Belgian Competition Authority expects the parties to a concentration to act diligently.

65 Article IV.79, Section 5 Code of Economic Law.
66 Article IV.79, Section 2 Code of Economic Law. This was confirmed in the decision of the Brussels Court of Appeal of 19 November 2014 in Case No. 2013/MR/30, De Persgroep NV/Belgian Competition Authority and Corelio NV and Concentra NV.
67 Article IV.79, Section 2 Code of Economic Law.
and that it will fine undertakings that omit to notify, do not promptly reply to requests for information in merger proceedings or do not, whether or not intentionally, comply with commitments imposed, with or without intent.

From the decisions that have already been issued under the regular merger control procedure since the entry into force of Book IV of the Code of Economic Law, it can be seen that it is not uncommon for admissibility decisions to be linked to complying with certain commitments. In this context, it should be noted that, as is the case under European competition law, both behavioural and structural remedies can be accepted. Whereas the Belgian Competition Authority seemed to be more inclined to impose behavioural remedies in the past, in recent decisions also structural remedies have been imposed (e.g., in the Delhaize/Ahold, the Kinepolis/Utopolis and the McKesson/Belmedis cases).

The Code of Economic Law provides that the Belgian Competition Authority shall carry out an assessment of the two merger filing thresholds every three years, taking into account, inter alia, the economic impact and the administrative burden for undertakings. The BCA stated that in view of the relatively high notification thresholds in Belgium, the BCA sees no reason to raise these thresholds. If a reduction were to be envisaged, the Authority would advocate lowering the thresholds in certain specific sectors, with a local catchment area, as is for example the case in France. Also an information obligation for concentrations below the thresholds that are important for the Belgian market could possibly be considered according to the Authority. However, it first launched a stakeholder consultation on the existing thresholds and the need to modify them, the outcome of which is not known yet.

Finally, it should be noted that a legislative proposal is currently pending concerning amending Belgian competition legislation. In this respect, there have been calls to introduce a ‘stop the clock mechanism’ in Belgian merger proceedings. It is also proposed to increase the maximum fines from 10 per cent of the Belgian turnover to 10 per cent of the worldwide turnover of the infringing undertakings.
Chapter 10

BOSNIA AND HERZEGOVINA

Nihad Sijerčić

I INTRODUCTION

Before 2009, the Bosnian merger control regime was well known for being very diligent in imposing fines for late merger filings (even if a filing was only a few days late). These fines often reached hundreds of thousands of euros. The jurisdiction was also known for being a frequent ‘rest of the world’ jurisdiction for a large number of European deals, as well as for its relatively long review periods. However, following amendments to the merger control regime in 2009, and the resulting higher turnover thresholds, there has been a sharp decrease in the number of filings made each year. Under the 2005 regime, on average the Competition Council processed around 60 to 80 merger notifications each year, while over the past few years this number has dropped to below 20 per year.

The main regulation concerning antitrust matters in Bosnia and Herzegovina is the Competition Law. The Law was initially enacted by the Parliamentary Assembly of Bosnia and Herzegovina in 2005 and was significantly amended in 2009. Together with the law governing general administrative procedures, the implementing regulations (e.g., the Regulation on Form and Content of Merger Notifications, the Regulation on Criteria for Assessment of Relevant Markets, the Fee Tariff Regulation – around a dozen regulations in total) and non-binding opinions issued by the Competition Council pertaining to specific matters, these constitute the bulk of competition law in Bosnia and Herzegovina.

The Competition Law is modelled on the EU competition rules and encompasses the standard measures regarding restrictive agreements and practices, abuse of dominant position and merger control. It also sets out the mandate of the Competition Council, and prescribes certain specific procedural matters.

The first competition law in Bosnia and Herzegovina was enacted in 2001. However, it did not follow the relevant solutions and achievements of the modern EU acquis communautaire, and this led to the enactment of the Competition Law of 2005. The first members of the competition authority in Bosnia and Herzegovina were appointed in 2004, pursuant to the Law of 2001.

Since 2008, when the stabilisation and association agreement between the EU Member States and Bosnia and Herzegovina (SAA) was signed, the Bosnian competition rules have been formally exposed to the influence and case law of the European Union. The SAA came into force in June 2015.

Under the SAA, Bosnia and Herzegovina formalised its commitment to harmonise its legislative framework with that of the EU, and furthermore stipulated that the criteria for
interpretation used in the EU will be implemented insofar as the SAA is concerned. The SAA stipulates that EU law should be applied to certain cases concerning inter-party trade. While no practice of this sort has occurred so far, it means that, concerning the territorial scope of certain infringements (such as export bans or selective distribution systems), trade between Bosnia and Herzegovina and the EU will be treated in a similar manner to EU interstate trade. Furthermore, the Competition Council readily accepts the decisional practice of the European Commission and of the courts as a persuasive authoritative source of law.

The Central European Free Trade Agreement (CEFTA), similarly to the SAA, envisions the application of EU competition law principles and rules to all matters in which trade among the member countries may be affected. Therefore, while normally Bosnian competition law would not apply to sales outside Bosnia and Herzegovina, the CEFTA rules will, together with the laws of Bosnia and Herzegovina and the interpretative criteria and principles of the EU, which the national authorities are obliged to follow. Practice of the Competition Council involving cross-border trade is still to be developed.

Certain specific rules and regulations, including the occasional deviation from the general competition law regime, are contained in the appropriate sector legislation: for example, banking regulations, telecom rules (ex ante regulation and special rules regarding significant market power operators), public health norms (maximisation of drug prices) and media laws.

The seat of the competent authority, the Competition Council of Bosnia and Herzegovina, is in Sarajevo. In addition to its main premises, it has two branches, located in Banja Luka (the Republic of Srpska) and in Mostar.

The Competition Council consists of six members who are appointed to reflect the structure of Bosnia and Herzegovina’s main ethnic groups (referred to as ‘constituent peoples’). The Head of the Council is appointed annually by the Council of Ministers of Bosnia and Herzegovina from among the members of the Competition Council. Council members are appointed by three governmental bodies: three members (one from each of the three constituent peoples) are appointed by the Council of Ministers of Bosnia and Herzegovina, two members are appointed by the Government of the Federation of Bosnia and Herzegovina and one member is appointed by the Government of the Republic of Srpska. The new members of the Council were appointed early in 2017.

The quorum for decision-making is five members of the Council, and at least one member from each of the constituent peoples of Bosnia and Herzegovina, who must vote for the decision.

The Competition Council is a member of the International Competition Network. The Competition Council has signed memoranda on cooperation with the competition authorities of Bulgaria, Turkey, Serbia, Croatia and Macedonia, and is one of the founders of the regional competition initiative called the Sofia Competition Forum, which is supported by the United Nations Conference on Trade and Development.

II YEAR IN REVIEW

Compared with the period before the 2009 amendments to the Competition Law, the merger control aspect of the Competition Council’s activities has been somewhat diminished in favour of restrictive agreements and abuse of dominance cases. Besides the increase of the merger control thresholds, this might simply be due to market structure and activity, or to an intentional emphasis on these issues by the Council.
During 2017, the Competition Council held 11 expert sessions and 19 sessions of the Council. Its core activities were focused on antitrust, preventing and sanctioning restrictive agreements and abuses of dominance cases. Based on decisions available on the authority's website, compared to 2016 the Council has continued to be active on the merger control front – in 2017, it received 24 notifications out of which it cleared five notified mergers. Additionally, in 2017 the Competition Council continued with its competition advocacy activities in increasing general awareness of competition rules with the business community and other interested stakeholders, by organising seminars, workshops, regular public announcements etc.

In 2017, the Court of Bosnia and Herzegovina, which is entrusted with examining the decisions of the Competition Council rendered several judgments in competition law cases. Majority of decisions in 2017 were negative (i.e., annulled by the Court and returned to the Competition Council for new proceedings), which is a trend that has continued from the previous period.

III  THE MERGER CONTROL REGIME

i  Definition of concentration

The Competition Law defines concentrations in the same way as the European Merger Regulation (EUMR). Essentially, all forms of ‘amalgamations’ of previously independent undertakings qualify as concentrations. In formal terms, a concentration can result from:

a  mergers and other status changes in which a fusion of undertakings occurs in terms of the law regulating the status of companies (i.e., mergers by combination and mergers by acquisition);

b  acquisition of direct or indirect control by one or more undertakings over another undertaking or part of an undertaking. This includes the ability or possible ability to exert a material influence on the business of an undertaking by way of rights, agreement or any other legal or factual means, and in particular:
   • ownership or right of use of some or all of the property of an undertaking; or
   • the ability (arising from an agreement or otherwise) to have a determinable influence on the composition, work or decision making of another undertaking; and

c  full-function joint ventures, where full functionality is interpreted similarly to the EUMR’s interpretation (creation of a new undertaking by two or more independent undertakings that will exercise joint control over the new undertaking, but that will be independent from its shareholders and have full access to the market).

The notion of control is practically identical to that used in the EUMR.

The following are not concentrations:

a  temporary acquisitions of shares by banks and other financial institutions in the course of regular business activities, assuming they intend to dispose of the shares and assuming there is no change of control on a lasting basis;

b  acquisitions of shares by investment funds, assuming the shares are used only for maintaining the value of the business;

c  cooperative joint ventures; and

d  acquisition of control by a bankruptcy administrator.
ii Merger control thresholds

Merger filings are mandatory in Bosnia and Herzegovina if the following two thresholds have been met:

- the total annual turnover of all the parties to the concentration in the world market in the previous accounting year exceeds 100 million convertible marks; and
- the total annual turnover of each of at least two of the parties to the concentration in the Bosnian market exceeds 8 million convertible marks for the previous accounting year or their combined market share on the relevant market exceeds 40 per cent.

Alternatively, for parties that are only registered locally, a merger filing is required regardless of threshold (a).

Intra-group turnover is not taken into account.

The Competition Law also applies to foreign-to-foreign mergers, provided that the prescribed thresholds are exceeded. Local mergers are prescribed a different filing regime, in that, as noted, for mergers involving locally registered parties for the filing obligation to arise it is sufficient that the threshold under (b) has been exceeded.

The Competition Council has in many cases examined and issued clearances in foreign-to-foreign transactions. Normally, foreign-to-foreign mergers without any competition concerns in the local Bosnian market will be processed through fast-track (Phase I) proceedings.

iii Procedure

Filing deadline

The merger notification must be filed with the Competition Council within 15 calendar days as of the time of entering into the agreement, the announcement of the public offer or the acquisition of controlling shares, whichever occurs first. This deadline is very strict, and if the applicant is late with filing (even by a day), the Competition Council, in general, imposes very severe fines (up to 1 per cent of the acquirer’s worldwide turnover realised in the previous year). The filing can be made based on a letter of intent, memorandum of understanding or any similar document showing the parties’ intent to enter into the transaction.

Pre-notification discussions

The Competition Law does not provide for pre-notification discussions with the Competition Council. Members of the Council and case handlers are generally reluctant to enter into any verbal discussions with prospective applicants. Pre-notification discussions are nevertheless possible, but are not customary (i.e., not a formal part of the procedure). They are used only by exception, e.g., in certain more complex (Phase II) cases.

Review

When deliberating the permissibility of a concentration, the Competition Council in particular takes into consideration the following:

- the structure of the relevant market;
- the effects of the concentration on actual and potential competitors;
- the market position of the parties, their market shares and their economic and financial power;
- the possibility to choose suppliers and customers;
e. economic, legal and other barriers to entry in the relevant market;
f. the level of domestic and international competitiveness of the parties;
g. supply and demand trends for relevant products or services;
h. technical and economic development trends; and
i. the interests of consumers.

Length of review

Upon receiving a merger notification, the Competition Council reviews its completeness. If the Competition Council considers a notification to be incomplete, it will ask the notifying party to complete it within eight days. After the notification is declared complete and the Council issues the certificate of completeness, the Competition Council then has 30 days to either render a decision in fast-track proceedings (Phase I) or, if it finds that the merger might have significant negative effects on competition, to open in-depth proceedings (Phase II).

In Phase II, the Council has three months to render a final decision (as of the date of the commencement of the Phase II proceedings). However, if the Council decides that additional evidence or analysis is necessary, or the concentration concerns especially sensitive markets or industries, it has the right to extend the Phase II time frame for additional three months (six months in total). If the transaction is not cleared (conditionally or unconditionally) or prohibited within these deadlines, the merger is considered to be cleared.

Confidential information

Information regarding the merger control proceedings may be classified as confidential and shall not be published by the Council. The decisions of the Council (including the whole reasoning of the clearance decision), apart from information classified as confidential, are regularly published on the Council’s website and the official gazettes published in Bosnia and Herzegovina.

Standstill obligation

The law prescribes a standstill obligation – the parties must suspend the implementation of the transaction before the clearance is issued, or before the statutory deadlines have expired. Mandatory stay of the concentration does not prevent the implementation of a takeover notified to the relevant authority pursuant to the law regulating the takeover of joint-stock companies.

Merger clearances with commitments

Even though the law clearly entitles the Competition Council to issue conditional clearances, the Council has so far not issued any merger decision with strings attached. There have been instances where the applicants have offered commitments to the Competition Council and the Competition Council could theoretically have issued conditional clearances, but as far as we are aware, in all these cases, the Competition Council failed to issue its decision within the prescribed deadlines and, as a result, the mergers were deemed cleared due to the lapse of time. In practice, in very complex merger cases (with local effects) where commitments may be issued, it is extremely difficult for the Council members to agree and usually such transactions end up being cleared due to the lapse of time.
In-depth merger control procedure

The Competition Council shall initiate an in-depth procedure (i.e., Phase II or inquiry proceedings) when it finds that the concentration in question raises serious competition concerns (if the concentration may lead to a significant prevention, limitation or distortion of competition on the relevant market).

The Council has a deadline of 30 days from receipt of the complete filing to decide where it will initiate the Phase II procedure. Once the Phase II procedure has been initiated, it must be completed within three months, which deadline can be extended once for additional three months (to six months from the start of Phase II in total).

When the Competition Council commences an in-depth (Phase II) procedure, the applicant still cannot know what direction the Council’s enquiries during the Phase II procedure will take. The parties’ main competitors, their largest suppliers and buyers are entitled to provide the Council with their assessments of the concentration in question (i.e., whether the competitors, suppliers and buyers estimate that their position will be degraded or perhaps improved by the implementation of the concentration). During Phase II and prior to the adoption of the final decision, the Council may deliver to the parties the draft decision for comments.

Prohibited concentrations

To our knowledge, the Competition Council has decided to prohibit a concentration in only one case; in 2009, the Council decided to prohibit a merger in the market for the production of bread, fresh pastry goods and cakes. The main reason for the prohibiting decision was the creation of a dominant position and the failure of the parties to the concentration to suggest the conditions for the conditional clearance.

The main reason for not allowing a merger is assumed creation or strengthening of the acquirer’s dominant position in the relevant market. However, even though such mergers can raise serious competition concerns, it can be the case that the competition authority does not prohibit the transaction at all, but will rather decide to clear the merger with acquirer commitments (conditional clearance) or even without any commitment whatsoever (which is lately more often the case due to the inability of the Council members to agree). As noted above, the Competition Council has never issued a conditional clearance.

Normally, the prohibition of a merger would take place following an in-depth procedure and after the dismissal of the applicant’s offered commitments (conditions and obligations). The procedure is often very complex and burdensome for both the competition authority and the applicant. As these are, by their nature, very complicated cases, the case handlers would collect a significant amount of documents and information from the parties involved, and from public sources, parties’ competitors, suppliers and buyers. Sometimes, even economic, technical or other experts could be involved.

Fees and penalties

Concerning merger control, there are two fees that are most relevant in Bosnia and Herzegovina: the filing fee and the clearance fee. The initial fee for filing the merger notification is 2,000 convertible marks. The fee for issuance of the decision will vary depending on whether the Competition Council issued the decision in the summary proceedings, in which case the clearance fee is 2,500 convertible marks, or in the inquiry proceedings (Phase II), in which case the clearance fee is 25,000 convertible marks.
The fine for failure to notify within the 15-day filing deadline is up to 1 per cent of the concerned undertaking’s annual worldwide turnover realised in the previous accounting year. The responsible person within the company can also be fined an amount of between 5,000 convertible marks and 15,000 convertible marks. The statute of limitations for failure to notify is three years. In practice, individual fines have mostly ranged between 190,000 convertible marks and 400,000 convertible marks.

In the case of the implementation of a concentration without clearance, the Competition Council could fine the filing party up to 10 per cent of its annual worldwide turnover from the year preceding the year of infringement. The responsible person within the company can also be fined an amount of between 15,000 convertible marks and 50,000 convertible marks. The statute of limitations for such an infringement is five years. In practice, the Court of Bosnia and Herzegovina (as the second instance) has usually validated fines imposed by the Competition Council for both late filings and mergers either lacking or contrary to the clearance received.

The Competition Council can order a reversal (demerger) of an already implemented concentration if it has been unnotified or implemented contrary to the clearance received. This can be effected by way of a split-off, sale of shares, restriction of voting rights or performance of any other action that would lead to restitution of the prior status. As far as we are aware, the Competition Council has not implemented any demerger decision to date.

The Competition Council may impose behavioural and structural measures on the merging entities to alleviate antitrust concerns. As far as we are aware, no conditional clearance has been issued by the Competition Council to date. Special sanctions might be applicable in certain particular sectors (i.e., banking or telecommunications), such as additional fines or non-registration.

Judicial review

Resolutions of the Competition Council are final in administrative proceedings. The party to the proceedings may challenge the decision before the Court of Bosnia and Herzegovina by initiating an administrative dispute through filing a claim within 30 days of receipt of the decision. The challenge does not preclude the enforcement of the decision.

The Court of Bosnia and Herzegovina may confirm the decision, annul the decision and return it to the Competition Council for reconsideration, or decide the case itself. In practice, when it wants to strike down a Council decision, the Court is hesitant to take full jurisdiction over competition law matters and prefers to set aside the Council’s decision and return it to the authority for reconsideration. More often than not, the Court confirms Council decisions.

There is no deadline for the Court to decide on the administrative dispute.

The Court of Bosnia and Herzegovina is also in charge of deciding on extraordinary legal remedies against the rulings of the same Court, namely, an extended composition of the judges decides on extraordinary legal remedies. Such extraordinary remedy may only be filed if the Court has violated the law or procedural rules where this could have affected the outcome of the proceedings.

iv Substantive assessment

As previously mentioned, the Competition Council in particular considers the following when deliberating on the permissibility of a concentration:

a the structure of the relevant market;
actual and potential competitors;
the market position of the parties and their economic and financial power;
the possibility to choose suppliers and customers;
legal and other barriers to entry in the relevant market;
the level of competitiveness of parties;
supply and demand trends for relevant goods or services;
technical and economic development trends; and
the interests of consumers.

The Competition Council applies the SIEC test in combination with the dominance test, based on wording that has been transposed from the EUMR. The authority can be expected to analyse the level of concentration of the market by relying on the Herfindahl–Hirschman Index, and assess the parties’ market power based on the market share information.

Despite the SIEC test being an integral part of the assessment toolkit, in practice the Competition Council initiates Phase II proceedings, discusses remedies and blocks transactions almost exclusively by relying on the dominance test.

IV OTHER STRATEGIC CONSIDERATIONS

i Acquisition of minority shareholdings

Similarly to the EU regime, an acquisition of a minority shareholding should trigger the filing requirement provided that the minority shareholder would be able to exercise certain controlling rights that fall outside the scope of ordinary rights attributed to a minority shareholder. However, while the European Commission would normally rely on its own guidelines (the Consolidated Jurisdictional Notice), the Competition Council has enacted no such guidelines, but looks at the European Commission’s Consolidated Jurisdictional Notice as persuasive authority. Parties normally rely on the Consolidated Jurisdictional Notice for guidance, although in certain cases the Competition Council may use a wider interpretation of control than that found in the European Commission’s Notice. In addition, from Competition Council precedent it is not clear, owing to the lack of proper reasoning of its previous decisions, what sort of rights would be considered sufficient to provide the minority shareholder with control.

ii Hostile takeovers

The merger control regime in Bosnia and Herzegovina places the burden for submitting the documents for review upon the applicant, which in situations of a hostile takeover may not be privy to documents and information related to the target’s business. In those instances, the acquirer must rely on the Competition Council to request such information from the target. In one case in 2012 (which was aborted), the authority expressed its willingness to obtain the necessary documents from the target. However, there are no systematic or procedural tools that are readily available to the acquirer in such hostile takeovers.

V OUTLOOK & CONCLUSIONS

Following the amendments in 2009 to the merger control regime and the increase in turnover thresholds, all the conditions were met to enable the Competition Council to focus on general antitrust matters (cartels, restrictive practices, dominance), as well as on more complex
merger cases. Measures should therefore be put in place to ensure that more straightforward merger cases are not unnecessarily delayed. Usually the Competition Council buys the review time when issuing certificate of completeness given that the law does not prescribe a deadline within which the Competition Council must issue such a certificate. This part of the procedure can considerably extend the review period in Bosnia and Herzegovina even in the simplest Phase I merger cases. Following the issuing of the certificate of completeness, the Council has a fairly short deadline to decide and usually decides within days. However, in certain cases the Competition Council has even opted for opening of Phase II review in order to have more time to decide than to allow a transaction to be cleared by the application of law.

In addition, in the past, the Competition Council has focused on the formal aspects of merger control rather than the substantive review. We hope that its experiences in dealing with general antitrust matters have built its capacity to perform more thorough analyses in merger control cases.

The Competition Council is yet to render a merger clearance with strings attached. In that light, it remains to be seen how the authority will handle remedies, in particular those that are structural in nature.
I INTRODUCTION

The Competition Law\(^2\) introduced a pre-merger control regime, whereby a transaction is subject to a pre-merger notification whenever a double turnover test is met and the transaction may generate effects in Brazil (thus including foreign-to-foreign transactions).

In contrast with the double turnover criterion above, which is objectively quantifiable, the former competition law (valid until May 2012) provided one additional criterion (i.e., that the transaction involves a horizontal overlap or vertical integration). This additional criterion requires merits analysis, the interpretation of which has varied pursuant to CADE’s case law. Under the current Competition Law, in practice, a merger transaction is notifiable whenever the double turnover threshold is met, regardless of the assessment of effects in Brazil, as the Brazilian competition authorities tend to consider potential effects, even if not proven, as enough to assume the fulfilment of the effects test.

The assessment of potential or materialised effects in Brazil, or even the existence of horizontal overlap or vertical integration, is carried out upon analysis of the merits of the case.

Finally, even though the Competition Law provides for the assessment of the case with basis on the rule of reason, due to the high costs involved in an investigation, the Guidelines for Analysis of Horizontal Overlap Transactions (the ‘H Guidelines’, published in July 2016) set out that the review of horizontal transactions is subject to assumptions as to the occurrence of effects which are detrimental to the competition in the relevant market.

The rule of reason (i.e., the assessment of efficiencies deriving from the transaction that would prevail over its detrimental effects), is typically only applicable to complex cases, under a close-scrutiny proceeding.

In extreme cases where the transaction creates a monopoly in the market, the Brazilian authorities tend to block the transaction. Other than these extreme cases, when facing competition concerns, the Brazilian authorities tend to approve the transaction by imposing restrictions such as structural (for instance divestiture of assets or trademarks, or veto of part of the transaction) or behavioural remedies. In cases of gun jumping, the authorities may impose a fine and may also render the transaction null and void, thus reinstating the status quo ante.

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2 Law No. 12,529/11, in force as of May 2012.
II MAIN RULES AND CONCEPTS

i Main laws and regulations

The Brazilian pre-merger control is governed by the Brazilian Competition Law, Resolutions published by CADE, and guidelines, such as the Internal Manual for Concentration Acts under the Close-Scrutiny Procedure issued in July 2017, the H Guidelines and the Guidelines for the Analysis of Previous Consummation of Merger Transactions (Gun Jumping) issued in May 2015. The main resolutions are:

a Resolution No. 2/2012: provides for the pre-merger control regime;
b Resolution No. 8/2014: introduced amendments to Resolution No. 1/2012, providing for transactions in the stock exchange and for CADE’s second review of cases approved by the Superintendence General (SG);
c Resolution No. 9/2014: introduced amendments to Resolution 2/2012, including the definition of economic group for purposes of turnover thresholds, notifiable minority holdings, rules concerning investment funds, and transactions eligible to fast-track proceeding;
d Resolution No. 13/2015: provides for sanctions for gun jumping and the investigation of transactions by CADE;
e Resolution No. 16/2016: sets out the 30-day deadline for fast-track proceedings;
f Resolution No. 17/2016: revoked Resolution No. 10/2014, and provides for notifiable ‘associative agreements’; and
g Resolution No. 20/2017: provides for CADE’s Internal Rules.

ii Main concepts

Double turnover criterion

Pursuant to the Brazilian Competition Law, transactions are subject to prior clearance by the Brazilian antitrust authorities whenever the following double turnover is met: (1) one of the economic groups involved in the transaction had annual gross turnover derived in Brazil equal to or in excess of 75 million reais; and (2) another economic group involved in the transaction derived an annual gross turnover in Brazil equal to or in excess of 750 million reais, in the fiscal year immediately preceding the transaction.

It is noteworthy that, in contrast to other jurisdictions, Brazilian law takes into account the turnover of the economic group of the acquirer as well as the economic group to which the target pertains, instead of the turnover of the target itself.

For the purposes of calculating the turnover, the following companies are deemed to pertain to a same economic group: (1) companies under common control; and (2) companies in which any company under common control holds, directly or indirectly, at least 20 per cent of the voting or total capital.

Investment funds are subject to a different definition of economic groups for purposes of the double turnover criterion, that was introduced by CADE’s Resolution No. 9/2014. Whenever investment funds are involved in the transaction, the following entities are deemed as pertaining to a same economic group: (1) the fund directly involved in the transaction; (2) the economic group of each investor that holds, directly or indirectly, participation of at least 50 per cent of the fund directly involved in the transaction, individually or through an agreement with other investors; and (3) portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund is holder, directly or indirectly, of at least 20 per cent of the voting or total capital.
The effects test

In view of CADE’s recent case law, for a transaction to be deemed as potentially able to generate effects in Brazil, the market must be considered international in its geographical scope or the economic group of at least one of the companies involved in the transaction (acquirer’s or target company’s group) must be able to sell in or export to the Brazilian market. ‘Effects in Brazil’ include any transaction where the target company has assets, legal entities or revenue generated in Brazil. There is no definition of a minimum revenue amount that would be relevant to the antitrust analysis. Direct effects in Brazil are achieved, for instance, through local sales representatives, local subsidiaries or distributors, while indirect effects are verified, most frequently, through export sales to Brazil, whether by the parties themselves or third parties.

The most recent decisions on foreign-to-foreign mergers on the existence or not of potential effects in Brazil are the following.

AT&T/Time Warner

AT&T intended to acquire all of Time Warner’s corporate capital. In Brazil, the merger would have resulted in detrimental effects to the market due to the vertical integration relationship between, on the one side, the activities of channel licensing to pay-TV operators, by Time Warner Group and, on the other side, the pay-TV services via satellite provided by the operator Sky Brazil (packing and distribution), a controlled company of the AT&T Group.

Time Warner had a high market share in the activities of content programming and channel licensing, while the market of pay-TV services represents a duopoly in Brazil. Also, Sky and its competitor concentrate nearly 80 per cent of the market, thus, CADE understood that the transaction could result in an alignment of interests that could harm competitors in both segments. Therefore, for the transaction to be approved by CADE, the parties executed a merger control agreement, whereby they committed to comply with several obligations imposed by the Brazilian authority, such as the maintenance, by AT&T, of Sky Brazil and Time Warner’s programming channels as independent companies with their own governance and administration structures.

Knorr-Bremse Japan/Bosch Corporation Japan

Knorr-Bremse intended to acquire certain assets related to components and equipment pertaining to Bosch Japan. Although the targeted market was only operating in Asia, having no effects in the Brazilian territory, the parties submitted the transaction for CADE’s approval due the fact that the double threshold requirement was met. CADE decided not to assess the case in view of the lack of effects, even if potentially, in the national market.

Notifiable transactions

The Competition Law sets forth, in Article 90, that a notifiable transaction occurs upon (1) the merger of two or more companies; (2) the acquisition of direct or indirect control of companies through the acquisition of shares or assets or any other means; or (3) the entering into of an associative agreement, consortia or joint ventures, except if created for the specific purpose of participating in public bids.

3 Merger Case No. 08700.001390/2017-14 – decision by CADE’s Tribunal dated 18 October 2017.
In respect of transactions that have met the double turnover threshold requirement and relate to an acquisition of equity participation which falls under the specific event provided item (2) of the previous paragraph, CADE’s regulation sets forth that any such transaction shall be mandatorily notified whenever:

a. it results in the purchase of sole or joint control of the target;

b. there is no horizontal overlap or vertical integration and:
   • the acquisition grants the purchaser at least 20 per cent of the target’s total or voting capital; or
   • in case the purchaser already holds 20 per cent equity participation and the acquisition grants such purchaser at least additional 20 per cent of the target’s total or voting capital;

c. there is horizontal overlap or vertical integration and:
   • the acquisition grants the purchaser at least 5 per cent, direct or indirect, equity participation in the target’s total or voting capital; or
   • in case the purchaser already holds 5 per cent equity participation, the acquisition (by means of one or a series of transactions) grants such purchaser at least additional 5 per cent participation in the target’s total or voting capital (Resolution No. 2/2012, as amended by Resolution No. 9/2014).

Resolution No. 2/2012, as amended, also provides that the acquisition of equity participation in the target’s capital by a company that already has sole control of the target is not subject to mandatory pre-merger notification.

Resolution No. 17/2016 amended the concept of associative agreements, providing that any agreement with a term of two or more years shall be deemed as an associative agreement in case it establishes a joint venture for the development of a business activity, provided that, cumulatively: (1) such agreement establishes the sharing of risk and outcome derived from the business activity; and (2) the parties are competitors in the market that is the subject matter of the agreement. CADE emphasised that the notification of short-term agreements is dispensable due to the low impact that they create in the market, while associative agreements that have a term of, or which term is extended to, two or more years are notifiable given the impact they can create in market structures.5

In this sense, the Resolution provides that agreements, the terms of which correspond to less than two years, but are subject to renewal, or agreements for undetermined periods of duration, are subject to notification prior to its renewal or whenever it achieves a duration of two years.

According to such Resolution governing associative agreement, vertical integration between the contracting parties (for instance, supply and distribution agreements) is no longer a trigger, per se, for the notification of associative agreements with CADE (as was provided under former Resolution No. 10/2014, revoked by Resolution No. 17/2016).

5 Merger Case No. 08700.002699/2017-13, whereby CADE rejected a request for a provisional authorisation to extend the term of an associative agreement between companies Hamburg Südamerikanische Dampfschiffahrt-Gesellschaft KG, Aliança Navegação e Logística SA and MSC Mediterranean Shipping Company SA CADE argued that applicable law requires the prior notification of such transaction and that awaiting CADE’s decision would not result in financial losses to the companies involved.
Acquisition of convertible securities and stock exchange transactions

Resolution No. 9/2014 introduced rules applicable to the acquisition of convertible securities, providing that such acquisition is subject to mandatory notification whenever: (1) a future conversion into shares would result in the acquisition of control over the target company or falls under the definition of a notifiable minority shareholdings (acquisition of minority participation of 20 or 5 per cent, as the case may be, as provided under Resolution No. 2/2012); or (2) the convertible securities already provide the right to participate in the administrative bodies of the target company, or provide veto or voting rights in respect of matters that are relevant under competition law.

Should the acquisition of convertible securities meet the above criteria and the applicable notification thresholds, at the time of its conversion, the transaction will be subject to notification at such time. In the event of a public offering of convertible securities, the subscription does not require a prior clearance by CADE, but the acquirer shall only exercise the relevant voting rights upon clearance. Pursuant to Resolution No. 8/2014, the same is applicable for transactions done via the stock exchange, which are exempted from pre-merger clearance, on the same terms applicable to public offerings (i.e., that the relevant voting rights may not be exercised prior to clearance), provided that CADE may, however, exceptionally authorise the exercise of voting rights, in order to protect the full value of the investment (Resolution No. 8/2014).

Exemption

Exemptions to the pre-merger notification obligation exist for joint ventures, consortia or associative agreements created for the specific purpose of participating in public bids, provided that the voting rights derived from such transactions shall not be exercised until CADE’s clearance.

Definition of control

The Competition Law does not provide a definition of control. Decisions rendered by CADE deem that an acquisition of control occurs whenever the acquirer of participation in the target company becomes its sole main investor or acquires significant influence on the business strategy of the target company, through the right to appoint managers, to determine or influence commercial and sensitive competition policies, or veto rights in respect of any commercial and sensitive competition-related decisions.

The current case law understanding on the concept of control comprises effects mainly within a corporate aspect, and such definition is currently under discussion. Recent doctrines defend that ‘control’, for competition purposes, should be the power of an individual or legal entity to define, directly or indirectly, even if temporarily, on actions of a company or group of companies in the market. Accordingly, it would also be important to provide a definition of ‘influence’, given that the power of an individual or legal entity to determine acts of a certain company that produce competitive effects in the market, would thus characterise a notifiable transaction.

Gun jumping

Brazilian antitrust law prohibits the consummation of transactions (and any part thereof) before clearance of the transaction by the antitrust authorities.
According to the Competition Law (Article 88), and the Guidelines for the Analysis of Previous Consummation of Merger Transactions the following acts may be deemed as ‘consummation acts’:

- exchange of commercially sensitive information between the parties involved in the transaction in excess of that strictly necessary for the execution of a binding agreement and that is non-historical (typically, more recent than one to three months, depending on the specific relevant market) and disaggregated (typically, information in respect of less than three competitors in the relevant geographic market);
- establishment of contractual clauses that regulate the relationship between the parties; and
- acts performed by the parties, anticipating the implementation of the merger, before clearance, such as:
  - asset or share transfers;
  - payment of the purchase price;
  - exertion of influence over the target company; or
  - carrying out joint sales, marketing activities, product R&D, or reciprocal licensing of intellectual property.

CADE’s recent case law deems the following information as sensitive, among others: disaggregated and non-historical data in respect of production costs, production capacity, marketing and commercial strategies, expansion plans, prices and rebates, main clients, main suppliers and supply conditions, employee wages, and R&D data.

Certain transactions may be implemented before CADE’s clearance upon an exceptional approval, when at least one of the following requirements are met: (1) the transaction does not cause irreparable damages to the competition market; (2) the acts involved are entirely reversible; or (3) irreversible and imminent damages would be caused to the target company if the exceptional approval is not granted. The criteria for imposition of fines for gun jumping are detailed in Section IV.ii below.

**Review proceedings – fast-track or close-scrutiny review**

Transactions submitted to CADE’s pre-merger analysis shall be subject either to a fast-track or close-scrutiny review proceeding.

Fast-track proceedings are applicable whenever there is low market concentration, pursuant to Resolution No 2/2012, as amended, (i.e., the transaction derives a market share corresponding to less than 20 per cent of the relevant market in respect of transactions with horizontal overlap and 30 per cent in the case of transactions involving vertically integrated relevant markets) or whenever there is a variation of the Herfindahl-Hirschman Index (HHI) lower than 200 points.

Resolution No. 2/2012 (as amended) provides that transactions that involve one of the following aspects are eligible for a fast-track review:

- classical or cooperative joint ventures;

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7 Opinion edited by the Department of Economic Studies at the request of Sindicato Nacional da Indústria do Cimento, attached to the case records of Administrative Proceeding No. 08012.011142/2006-79.
replacement of the economic agent – whenever, before the transaction, the acquirer (or its economic group) was not engaged in the seller’s relevant market, or in the seller’s vertically related markets, or in other markets in which the seller or its economic group have participated;

horizontal overlap with a low market share – when the transaction results in a market share up to 20 per cent in the relevant market, at the discretion of the SG, which may deem such transaction as irrelevant from a competition standpoint even when a party to the transaction ends up holding more than 20 per cent of the market share in the relevant market;

vertical integration with low market share – when none of the applicants (or the relevant economic group) provenly controls more than 30 per cent of any of the vertically integrated relevant markets;

lack of causation – horizontal concentrations which result in a HHI variation lower than 200 points, provided that the transaction does not result in the control of the market share in excess of 50 per cent of the relevant market; and

other cases that, although not comprised in the above categories, may be deemed by the SG as simple enough so as to not require a thorough analysis.

In cases of transactions that fall within the above, and thus the effects of which do not raise competition concerns, SG may render a definitive decision, approving the transaction without any restrictions, thus terminating the proceeding without its remittance to Cade’s Tribunal.

Conversely, the H Guidelines expressly set out the grounds for a decision to initiate a close-scrutiny proceeding, incorporating Cade’s practice in recent cases: transactions that derive a high variation in market concentration, assessed by reference to the HHI, whenever such variation exceeds 200 points. In the close-scrutiny proceeding the following shall be assessed by Cade, in addition to the information provided under a fast-track proceeding: relevant market under an offer structure and a demand perspective; analysis of monopsony conditions; conditions of entry in market, barriers and rivalry; analysis of coordinated power.

Proof of efficiencies shall be assessed under the rule of reason, in practice, only in a close-scrutiny proceeding, due to the high costs involved in an investigation thereof. The competition authorities have the burden of proof of detrimental effects, if any, in which case the parties to the transaction have the burden of proof in respect of efficiencies deriving from the transaction, which are passed through to the consumers. Typically accepted by the competition authorities as efficiencies that are passed through to consumers are marginal cost reductions. Marginal costs are equivalent to the average variable costs, such as reduction of input prices and quality gains. For their acceptance by the competition authorities, the parties must show causation between the transaction and efficiency gains that are specific to this particular transaction. In cases where the efficiencies are insufficient for an approval of the transaction without restrictions, they may justify the imposition of less stringent behavioural or structural remedies.8

Complex cases will be subject to Cade’s tribunal review after the issuance of the SG’s non-binding opinion.

Other factors, other than market concentration, may be taken into consideration on a case-by-case basis, such as market structural conditions, previous decisions, willingness by the parties, clients or competitors to cooperate with the competition authorities.

CADE may impose structural or behavioural restrictions on the transaction and, in extreme cases such as monopoly resulting from the transaction, the transaction may be blocked.

**Market share in the relevant market**

In order to assess the market share in a relevant market, it is first necessary to understand the concept of ‘relevant market’.

Relevant market means, from a product standpoint, the group of products the consumers consider interchangeable or substitutable, that is, if one of them is not available, it is subject to substitution for other products based on the characteristics, price and use of such other products. From a geographic standpoint, the relevant market means the area where the companies offer their products or where the products are available – for instance, the international market or the Brazilian territory.

In accordance with CADE’s H Guidelines, to assess the relevant market in terms of geographic area, CADE may take into consideration factors such as: where the parties to the transaction are located; where their competitors are located; where the customers are located; where the sales take place; purchase habits of the customers – if customers go where the products are or the sellers go where the customers are, or both; the distance that the customers usually go to purchase the products; difference in the offer or prices among neighbouring geographic areas, including the possibility of imports; costs in relation to the product price, distribution or transport; required time and other difficulties in the transport of the products (in terms of transport security, feasibility of transport, and issues related to regulation and tax); costs involved in the change of suppliers located in other geographic markets; need for proximity of suppliers in relation to the customers; participation in the domestic offer; and evidence of migration of customers among different geographic areas in response to a price increase or changes in relation to commercialisation.

**Remedies**

The Competition Law expressly allows CADE to enforce measures deemed as necessary to remedy damages that would be caused by a transaction, including behavioural commitments, such as prohibition to impose exclusivity on sales and structural obligations such as partial or full divestments, dissolution or break-up of a company. The relevant behavioural and structural remedies ensure that a given transaction does not lead to anomalies in a given market by counterbalancing competitive concerns identified by the authorities.

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9 The International Competition Network (ICN), in its Merger Remedies Guide (2016), explains that ‘competition authorities are responsible for ensuring that remedies are necessary, clear, enforceable, effective, sufficient in scope and capable of being effectively implemented within a short period of time’. The relevant Guide is available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf.

In 2017, CADE approved certain transactions that were conditioned to behavioural and structural remedies, such as the Itaú Unibanco/Citibank,11 BM&F Bovespa/Cetip12 and the above-mentioned AT&T/Time Warner transactions.

Recently, CADE rejected two high-profile transactions (Estácio/Kroton and Alesat/Ipiranga, as explained in Section III.i below) based on detrimental effects that they would cause to the Brazilian market, and discussions involving remedies became more frequent. CADE submitted on 23 May 2018 a draft of guidelines on antitrust remedies for public consultation, so as to establish a pattern in the application of remedies in complex merger cases.

III YEAR IN REVIEW

Although no material changes to the law and rules related to merger control in Brazil has occurred since 2016, it is noteworthy mentioning that the Bill of Law No. 350/2015, approved by the Senate on April 2018, and submitted to the House of Representatives, which approval may occur this year, provides that merger transactions involving financial institutions shall become notifiable not only to CADE, but also to the Brazilian Central Bank (BACEN). In early 2018, these two authorities executed a memorandum of understandings to line up actions to stimulate competition in the regulated markets, to ensure greater coordination and consistency in the assessment of the proceedings and in the enactment of standards of common interest.

Currently, pursuant to Law No. 4,595/1964, BACEN is responsible for supervising the national financial system and protecting the Brazilian economy from any harmful situations and, thus, it has authority to approve corporate transactions involving financial institutions and to regulate competition conditions between such entities. Accordingly, the Competition Law sets forth that CADE is the competent authority to analyse and authorise corporate transactions, not specifying or restricting the nature thereof. Due to such conflict, certain companies were notifying transactions involving financial institutions solely to one of the competent authorities, which resulted in judicial discussions.

If the relevant bill of law is approved, transactions involving financial institutions shall become notifiable to both BACEN and CADE. Nevertheless, BACEN should be allowed to unilaterally decide on cases that may present significant risks to the stability of the national financial system, provided that it notifies CADE about the rationale of its decision.

Also, the initiatives to define certain concepts and inconsistencies, such as the definition of control mentioned above, represents the preoccupation to have clearer rules to promote legal certainty and more efficient proceedings.

i Significant cases of merger filings

On 8 March 2017, CADE approved, with restrictions, the joint venture between TAM, Latam Airlines Group, Iberia and British Airways13 in respect of cargo and passenger air transport between Europe and South America. By means of an ACC, the parties committed to, among other obligations, (1) making available without cost to potential competitors slots (timetable of arrivals and departures) at London Heathrow airport or at London

11 Merger Case No. 08700.001642/2017-05, approved on 16 August 2017.
12 Merger Case No. 08700.004860/2016-11, approved on 22 March 2017.
13 Merger Case No. 08700.004211/2016-10.
Gatwick airport, according to the choice of the potential entrant; and (2) formalise interline agreements with the potential entrant, in the best conditions signed with a third party, from the cities of São Paulo and London.

On 17 May 2017, CADE approved, with restrictions, the merger between companies Dow Chemical and DuPont de Nemours.14 Due to the high concentration of market share related to materials science used in a large variety of end-use applications and several crops, the parties executed an ACC, whereby: (1) the parties undertake to divest Dow’s acid copolymer global business, such as the corn seed business in Brazil, to redress the overlap between the activities of the companies in these specific markets; (2) the parties propose to divest assets of DuPont’s herbicides and insecticides business; and (3) minimum requirements for potential buyers were established, aiming at defining the profile of the economic agent that would be capable of effectively competing with the new company.

On 28 June 2017, CADE rejected, by majority, the acquisition of Estácio Participações SA by Kroton Educacional SA.15 The transaction would result in the merger of the two biggest private higher education institutions in Brazil. CADE’s Tribunal considered that the remedies proposed by the parties were not satisfactory to solve or mitigate the potential competitive impacts identified during the assessment of the transaction, based on the lack of sufficient rivalry in eight Brazilian municipalities. Therefore, the merger control agreement (ACC) proposed by the parties was rejected.

On 2 August 2017, CADE rejected the acquisition of the fuel distributor Alesat Combustíveis SA by its competitor Ipiranga Produtos de Petróleo SA.16 According to CADE’s analysis, considering that Alesat is the largest regional fuel distributor in Brazil, the transaction would eliminate the main supplier to ‘white flag’ stations, and reduce the number of suppliers from four to only three national distributors available to these stations. Accordingly, the parties did not accept the adoption of certain remedies capable of mitigating the risks verified during the assessment of the transaction, such as the divestiture of Alesat’s assets in the problematic markets. The proposed ACC was considered by CADE as not sufficient to address the relevant concerns and was, therefore, rejected.

On 18 October 2017, CADE rejected the acquisition of the total capital stock of Fratelli Dorazio Investimentos Ltda (current Mataboi Participações Ltda) by the company JBJ Agropecuária Ltda.17 In this case, CADE considered that the transaction would result in vertical integration in the markets of cattle breeding, cattle slaughtering, trading of boneless fresh beef for the wholesale and trading of fresh meat in retail, as well as horizontal overlap in two stages of the chain. Additionally, the low level of rivalry and high entry barriers in the relevant market also triggered competition concerns in this case.

On 7 February 2018, CADE approved, with restrictions, the acquisition of Votorantim Siderurgia SA by its competitor ArcelorMittal Brasil SA.18 Since the transaction would generate a high probability of abuse of market power regarding the manufacturing and commercialisation of common long steel, common wire rods, welded mesh and others, in a market that the entry and the rivalry among competitors are not sufficient to prevent an

14 Merger Case No. 08700.005937/2016-61.
15 Merger Case No. 08700.006185/2016-56.
16 Merger Case No. 08700.006444/2016-49.
17 Merger Case No. 08700.007553/2016-83.
18 Merger Case No. 08700.002165/2017-97.
eventual abuse of dominance, the merger was conditional on the execution of an ACC. In the ACC, the parties undertook the obligation to divest two packages of assets, one related to the production of drawn and ordinary long-rolled steel, and the other related to the markets of wire drawing and steel wire rod machines, so that the acquiring companies cannot have more than 20 per cent of market share in both such markets.

iii Gun-jumping cases
On 23 November 2017, CADE’s Tribunal imposed a fine on União Transporte Interestadual de Luxo SA and Expresso Gardênia Ltda for executing a series of administrative authorisations for the operation of road transport lines (which characterised a monopoly of routes and destinations of road transport lines), without CADE’s final approval, which was considered gun jumping. The total fine imposed in this case was of 1 million reais.

Although this proceeding relates to 2016 (and not to 2017 under review here), it is worth noting that CADE’s Tribunal imposed a fine on Cisco Systems Inc and Technicolor SA for closing a transaction without the CADE’s final approval, which was considered gun jumping. Even though the parties executed a carve-out agreement, for the objective of preventing effects in a determined jurisdiction where the transaction was not yet approved – and that, according to the parties, would maintain the competitive conditions in Brazil, CADE did not consider it as effective compliance with the parties’ obligation not to consummate merger acts before competition clearance. The imposed fine was of 30 million reais, representing the higher fine amount in relation to other gun-jumping cases analysed by CADE. After such transaction, no other proceedings based on carve-out agreements were analysed by CADE.

There are no provisions under the Brazilian law that allow carve-out agreements as a means of avoiding gun-jumping. Based on the current understandings of foreign antitrust authorities, CADE has unofficially stated that they would be unlawful, in principle, but considering that its jurisdiction is limited to acts with effects (even if potential) to the Brazilian market, it should be possible to argue that partial foreign closings, with no effects whatsoever in the Brazilian territory, would be permitted. However, parties are advised to be extremely careful when assessing the possibility of carve-outs as it is still unclear how CADE will deal with this matter.

19 In Brazil, although the abuse of dominant position is assumed when a company or group of companies is able to unilaterally or jointly change market conditions or when it controls 20 per cent or more of the relevant market, CADE’s recent understanding is that whenever such dominance is achieved by a natural process (and by being the most efficient economic agent in relation to other competitors), such dominance does not characterise a violation to the economic order. The violation provided in the Competition Law depends on several other aspects other than the dominance, such as exercising its dominant position in a way that could, even if potentially, result in any anticompetitive act, such as impairing competition, setting abusive prices, creating barriers for the entering of other players in the relevant market, among others.

20 Administrative Proceeding for Assessment of Concentration Act (APAC) No. 08700.011294/2015-12.

21 Administrative Proceeding for Assessment of Concentration Act (APAC) No. 08700.011836/2015-49.

22 In comparison to the gun-jumping cases in the transaction between OGX Petróleo e Gás and Petróleo Brasileiro SA (Merger Case No. 08700.005775/2013-19); Aurilúnea Petróleo and UTC Óleo e Gás (Merger Case No. 08700.008289/2013-52); and Potiúleo SA and UTC Óleo e Gás SA (Merger Case No. 08700.008292/2013-76).

23 Such as from the European Union, Canada, the United States and Germany.
Preliminary authorisation to close a transaction

On 13 December 2017, CADE’s Tribunal authorised the closing of the transaction between Excelence BV and Odebrecht, whereby Excelence acquired from Odebrecht a 60 per cent stake in Rio de Janeiro Aeroportos, which is the concessionaire of Galeão Airport. The Brazilian Aviation Agency (ANAC) stipulated the deadline for the payment of the concession’s first instalment on 20 December 2017 and the lack of payment thereof would lead to the interruption of the airport’s activities. Since such deadline would end prior to CADE’s concentration act revision period, CADE understood that the requirements for the granting of an exceptional and prior authorisation were met, as no detrimental effects to the competition in this market would result from the relevant injunction and, even if there were harmful effects, they would be reversible, unlike the substantial and financial losses that the concessionaire would suffer if the injunction was not authorised.

IV THE MERGER CONTROL REGIME

Transactions must be submitted for CADE’s analysis any time prior to its closing (or before the consummation of relevant acts related to the transaction) and, preferably, upon the execution of the final binding agreement. The overall statutory period to clear a transaction will be limited to 30 days for fast-track proceedings and 240 days for close-scrutiny proceedings – subject to an extension of 60 to 90 days upon request of the parties or of CADE. In practice, CADE has been clearing transactions up to 20 days for fast-track proceedings and up to 80 days for close-scrutiny proceedings.

In fast-track proceedings, in which the SG is solely in charge of deciding whether to approve or reject a transaction, the parties are required to stand still for an additional 15 days, during which the decision may be challenged by CADE’s Tribunal. If the transaction is not challenged, then it may be completed by the parties.\(^25\)

The implementation of a transaction before the issuance of CADE’s final decision and the expiration of the 15-day term described above may be considered as gun jumping, in which case the parties will be subject to the sanctions mentioned in Section IV.ii, below.

The notification contains a significant amount of information, including but not limited to the following: (1) a description of the transaction of up to 500 words; (2) all the applicants’ information (corporate and financial data); (3) the relevant information about the transaction; (4) a copy of the documents in respect of the applicants and the transaction (agreements, MOU, companies’ annual reports, the direction chart, shareholders’ agreement, etc.); (5) a definition of the relevant market; (6) a description of the business and products offered by the companies; (7) structure of the demand; (8) assessment of monopoly in purchase power; (9) assessment of entry and rivalry conditions, (10) assessment of coordinated power; and (11) comments or information considered relevant.

24 Merger Case No. 08700.007756/2017-51.
25 Depending on the case, CADE may impose remedies as a condition for clearance. These remedies can be, but are not limited to, structural and behavioural aspects. In these cases, CADE’s Attorney General Office is responsible for monitoring the compliance of CADE’s decision by the parties.
i  Confidential information
As a rule, the case records are public. CADE may treat certain parts of the transaction act as confidential such as:
\begin{itemize}
  \item a  commercial bookkeeping;
  \item b  the economic and financial situation of the company;
  \item c  tax or banking secrets;
  \item d  the production process and industry secrets, notably industrial processes and formulas for the manufacturing of products;
  \item e  revenues of the interested person;
  \item f  date, amount and method of transaction payments;
  \item g  documents that formalise a merger;
  \item h  annual reports to shareholders or quotaholders, except when such document has a public aspect;
  \item i  value and volume of sales and financial statements;
  \item j  clients and suppliers; and
  \item k  costs and expenses with research and development of new products or services.
\end{itemize}

ii  Fines for gun jumping
The consummation of a transaction prior to CADE’s clearance subjects the parties to the sanction of nullity of the transaction and the imposition of fines ranging from 60,000 to 60 million reais, depending on the peculiarities of the case (such as the economic condition and bad faith of the parties and the anticompetitive potential of the transaction). CADE may also initiate antitrust investigations and impose fines ranging from 0.1 to 20 per cent of a company’s (group of companies’ or conglomerate’s) gross revenue generated in the field of activity affected by the violation in the year prior to the commencement of the investigation.

iii  Administrative proceeding for assessment of merger transactions
The procedural rules concerning gun-jumping infractions and investigations of transactions were provided by Resolution No. 13/2015. This Resolution governs the investigation of:
\begin{itemize}
  \item transactions that were filed with CADE, but that produced effects prior to CADE’s clearance;
  \item transactions that were not submitted to CADE and produced effects without CADE’s analysis and decision; and
  \item transactions that were not caught by the filing criteria but whose submission is requested by CADE.
\end{itemize}

The SG is in charge of the initiation of an administrative proceeding for assessment of a concentration act (APAC) \textit{ex officio}, by request of any member of CADE’s Tribunal, or due to a duly substantiated complaint by a third party. Upon the initiation of an APAC, the analysis of the concentration act shall be suspended until a decision regarding the gun jumping is rendered.

iv  Challenges in court
The Competition Law allows for a second review by the competition authorities in the event of false or misleading information, default on obligations undertaken before the competition authorities, or if the intended benefits have not been attained.

The parties may challenge CADE’s decision in court mainly on the grounds of procedural matters. The extent of a review in court on the merits of CADE’s decisions is still uncertain.
V OTHER STRATEGIC CONSIDERATIONS

i Multi-jurisdictional cases and cooperation with foreign authorities

In 2017, at least 114 transactions submitted to CADE had effects in multiple jurisdictions, such as United States, the European Union, Japan and China. All of these transactions, except for one (as it was shelved due to the lack of grounds), were approved without restrictions and in an average time of analysis of 95 days for close-scrutiny proceedings and 15 days for fast-track proceedings.

The main multi-jurisdictional cases notified in 2017 were the following: TAM/Iberia/British Airways (subject to other jurisdictions such as Chile, Colombia and EU), approved by CADE on 14 March 2017; Dow/Du Pont (subject to other 24 jurisdictions), approved by CADE on 17 May 2017;26 Agco/Monsanto (subject to approval in other jurisdictions such as USA, Ukraine and Argentina), approved by CADE on 24 July 2017; and AT&T/Time Warner (subject to approval in other jurisdictions such as Canada, China, the European Union, Mexico and the United States),27 approved by CADE on 18 October 2017.

VI OUTLOOK & CONCLUSIONS

In 2017, the number of mergers assessed by CADE’s Administrative Tribunal increased, along with the number of rejected transactions and merger cases analysed under the close-scrutiny procedure. This indicates that the Brazilian authority is aiming at a better economic assessment of complex transactions and, consequently, a better regulation of the national market.

Even though the Competition Law provides for the review of transactions with basis on the rule of reason, due to the high costs involved in an investigation, the review of transactions is subject to assumptions as to the occurrence of detrimental effects to competition. Those assumptions are applicable upon achievement of thresholds deriving from the application of the HHI or C4 index.

The rule of reason (i.e., the assessment of efficiencies that would prevail over the transaction’s detrimental effects), is as a rule only applicable to more complex cases (close-scrutiny cases).

Extreme cases where the transaction would lead to a monopoly in the market tend to be blocked by Brazilian authorities. In cases where there are competition concerns (but which would not lead to a monopoly), the Brazilian authorities tend to approve the transaction by imposing restrictions such as structural (for instance, divestiture of assets or trademarks, or veto of part of the transaction) or behavioural remedies, which shall be the subject matter of a new guideline to likely be issued by CADE in 2018.

26 Merger Case No. 08700.005937/2016-61.
27 Merger Case No. 08700.001390/2017-14.
Chapter 12

CANADA

Julie A Soloway, Cassandra Brown and Julia Potter

I INTRODUCTION

Over the course of 2017 and the first half of 2018, the Competition Bureau (the Bureau), led by the Commissioner of Competition (the Commissioner), continued to pursue a rigorous enforcement strategy in all merger reviews: aggressively monitoring the media for information in connection with non-notifiable transactions and issuing a large number of formal and informal information requests during its reviews (including supplementary information requests (SIRs), which are analogous to US second requests). At the same time, while a few major transactions received close scrutiny by the Bureau, ultimately most of these transactions were cleared with no remedies required.

This period also saw amendments to the Competition Act (the Act) that will affect merger reviews going forward. In particular, a revised definition of ‘affiliate’ in the Act came into effect on 1 May 2018, which removed asymmetries in the affiliation rules as between corporate and non-corporate entities, such that corporate and non-corporate entities are now treated in the same manner. The change to the affiliation rules will impact the determination of: (1) whether a transaction is subject to notification; and (2) the content of pre-merger notification filings.

II YEAR IN REVIEW

The number of merger reviews in Canada increased during the 2017–2018 year, with the average number of filings per month in 2017–2018 (19) being slightly higher than the next highest average (18 in 2008–2009). The Bureau reports having concluded 231 merger reviews during this period, an increase of approximately 4.1 per cent over its reported figures for the previous fiscal year. Of those 231 transactions, 70 were classified as ‘complex’, and only six transactions resulted in a consent agreement.

Although the Bureau initially anticipated issuing SIRs only in the case of ‘those very few mergers that raise significant potential issues’, in 2017–2018, 10 SIRs were issued, representing approximately 4.3 per cent of the transactions reviewed. An SIR is not the Bureau’s only method for obtaining large volumes of additional data and information in respect of a transaction. On the contrary, it is routine for the Bureau to issue voluntary

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1 Julie A Soloway and Cassandra Brown are partners and Julia Potter is an associate in the Competition, Antitrust and Foreign Investment Group at Blake, Cassels & Graydon LLP.
information requests to the parties where no SIR is forthcoming. The Bureau reports that it continues to clear more than 93 per cent of the transactions it reviews within its target time frame according to the complexity of the review (called a ‘service standard’) – and notes that it takes an average of 10.62 days to review a non-complex transaction and 53.48 days to review a complex transaction. However, the Bureau’s statistics do not account for transactions where the parties and the Commissioner have entered into a timing agreement.

The issuance of an SIR does not signal that the Bureau will require a remedy. On the contrary, the Bureau has issued 10 SIRs over the 2017–2018 period and entered into consent agreements in only six of those cases. One further case was concluded with issues, but no Canadian consent agreement was required.

The Bureau released one new interpretation guideline related to merger review in 2017 that provides guidance on creditor acquisitions where the business being acquired is defunct, temporarily closed, or has suspended operations.3 The Bureau also continues to issue position statements describing its analysis in complex mergers and key transactions. From 2017 to present, the Bureau has issued 10 position statements.

Major transactions reviewed from 2017 to mid-2018 include the following.

**Corus Entertainment Inc/Bell Media Inc**

On 17 October 2017, Corus Entertainment (Corus) announced an agreement to sell French language specialty channels Historia and Séries+ to BCE Inc (Bell). On 25 May 2018, the Commissioner informed Bell that the transaction would not be approved. Bell’s 50 per cent interests in Historia and Séries+ were originally divested to Corus in January 2014 pursuant to a consent agreement between Bell and the Commissioner. Bell was required to divest these and other assets to address the Commissioner’s concerns regarding Bell’s acquisition of Astral Media Inc in 2013. The consent agreement further provided that Bell could not reacquire a divested programming service for 10 years without the prior written approval of the Commissioner. The Commissioner took the position that the relevant test to be applied for the proposed transaction was whether the conditions the led to the original consent agreement (for the supply of French language television programming services to programming distributors) had materially changed, rather than whether the new transaction would prevent or lessen competition substantially compared to the prevailing conditions in the marketplace. The Commissioner ultimately found that the conditions the led to the original consent agreement had not materially changed, and did not approve the reacquisition.4

**Bayer/Monsanto**

On 30 May 2018, the Competition Bureau announced that it had reached a consent agreement with Bayer AG (Bayer) in respect of its proposed acquisition of Monsanto Company (Monsanto), announced on 14 September, 2016. Bayer is a global pharmaceutical, consumer health, animal health and crop protection science company and Monsanto is a

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3 Competition Bureau, ‘Pre-Merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (SubSection 108(1) and Paragraph 111(d) of the Act)’ (26 October 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04309.html.

global provider of agricultural products. The Commissioner was concerned about the proposed acquisition’s potential effects on competition and innovation in the agricultural sector. An extensive review by the Bureau found that the acquisition was likely to substantially lessen and prevent competition in Canada with respect to the supply of several seeds, traits and treatments. To address the Commissioner’s concerns, the consent agreement requires that Bayer sell its canola seed and traits business, soybean seed and traits business, carrot seed business, nematode seed treatment business, glufosinate-ammonium herbicide business, LibertyLink herbicide tolerance technology, assets related to the Centurion herbicide, and digital farming business in Canada. Given that Bayer and Monsanto’s businesses operate in many countries and the global nature of the transaction, the Bureau coordinated its review with other jurisdictions, including the European Commission and the US Department of Justice. The Bureau continues to review the suitability of Bayer’s proposed buyer of the assets.5

**Metro Inc/Jean Coutu**

On 23 April 2018, the Commissioner entered into a consent agreement with Metro Inc (Metro) regarding the acquisition of the Jean Coutu Group (PJC) Inc (Jean Coutu). Prior to the agreement, the Bureau extensively reviewed the proposed acquisition, analysing over 150 local markets where both parties provide distribution and franchise services to independent pharmacists. The Bureau focused its analysis on whether the transaction would enable Metro to increase the charge to pharmacists for franchise royalties, wholesale goods prices, distribution fees, and other payments. The Bureau found that post-transaction, Metro would have the incentive to increase prices and decrease the quality of services provided in eight markets located in the Province of Quebec.6 To address these concerns, Metro agreed to divest all of its rights in 10 pharmacies in the eight problematic markets.7

**Abbott/Alere**

On 1 February 2017, Abbott Laboratories (Abbott), a global health company, announced that it would acquire Alere Inc (Alere), a global medical diagnostics company. The Bureau's review of this transaction focused on the parties’ products in point-of-care testing. The Bureau found that Abbott and Alere products were the largest competitors in both bedside blood gas testing and bedside cardiac marker testing. It was also found that the barriers to entry in these markets for new competitors were high. The Bureau's findings were similar with respect to the parties’ related offerings for the veterinary market. The Bureau, Abbott and Alere reached a consent agreement requiring the sale of Alere’s businesses relating to these products, including


6 Competition Bureau, ‘Competition Bureau Statement Regarding METRO Inc.’s Acquisition of The Jean Coutu (PJC) Group Inc.’ (16 May 2018); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04363.html.

Alere’s manufacturing facilities for the products and any intellectual property relating to the systems. Rather than relying on remedies from foreign jurisdictions, a specific remedy was ordered in Canada, for reasons including the existence of manufacturing assets in Canada.8

**Superior Plus LP/Canwest Propane**

On 13 February 2017, Superior Plus LP (Superior) announced a proposed acquisition of Canwest Propane (Canwest). At the time of the transaction, Superior was Canada’s largest national propane retailer and Canwest operated in the retail bulk propane distribution business in western Canada. The Bureau’s review of this transaction involved considering the efficiency exception under Section 96 of the Act. Section 96 prohibits a remedial order where the parties can demonstrate that the likely efficiency gains from the merger would outweigh and offset the merger’s likely anticompetitive effects. The Bureau’s approach was to analyse the anticompetitive effects of the merger in each of 25 relevant geographic markets for the retail sale of bulk propane. The Bureau found that competition was likely to be substantially lessened in 22 of the markets. The Bureau also analysed the efficiency trade-offs in each local market and concluded that there would be no remedy required in 10 local markets due to the trade-offs. In regards to the remaining 12 markets, the Bureau announced a consent agreement with the parties on 28 September 2017, which required the sale of assets in all 12 regions and the sale of a portion of customer contracts in several regions. Superior also agreed to waive contract terms preventing customers from switching suppliers in several regions.9

**Agrium/Potash Corporation of Saskatchewan**

On 11 September 2017, the Bureau issued a no action letter (NAL), concerning a proposed merger between Agrium Inc (Agrium) and Potash Corporation of Saskatchewan Inc (PCS), indicating that the Commissioner did not intend to make an application under Section 92 of the Act at that time. Agrium and PCS were both global manufacturers and suppliers of fertilizer products. In the course of its merger review, the Bureau investigated multiple products produced and sold by each party including potash fertilizer, dry or liquid phosphate fertilizer and nitric acid. The US Federal Trade Commission also reviewed the transaction and coordinated closely with the Bureau. The Bureau’s approach in this review focused on the strength of remaining competitors in each of the fertilizer markets. The Bureau concluded that as a result of effective remaining competition and the entry of a new competitor in potash, the proposed transaction was not likely to lead to a substantial lessening of competition.10

**Couche-Tard/CST/ Parkland**

On 27 June 2017, the Bureau announced that it had reached separate consent agreements with Alimentation Couche-Tard Inc (Couche-Tard) and Parkland Industries Ltd (Parkland)

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8 Competition Bureau, ‘Competition Bureau Statement Regarding the Acquisition by Abbott of Alere’ (28 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

9 Competition Bureau, ‘Competition Bureau Statement Regarding Superior Plus LP’s Proposed Acquisition of Canwest Propane from Gibson Energy ULC’ (28 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

10 Competition Bureau, ‘Competition Bureau Statement Regarding Proposed Merger between Agrium and Potash Corporation of Saskatchewan’ (11 September 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.
regarding Couche-Tard’s acquisition of all issued and outstanding shares of CST Brands Inc (CST) and the subsequent sale of the majority of CST’s Canadian assets from Couche-Tard to Parkland. CST was involved in retail fuel and related businesses in eastern Canada and parts of the United States. The Bureau focused its review on the market for the retail sale of gasoline, and determined that the relevant geographic markets were local in nature. The Bureau assessed whether the transactions were likely to substantially lessen competition in these local markets through unilateral or coordinated effects, finding that each transaction raised the risk of unilateral price increases and coordination between retail gas stations in a number of local markets. The Bureau’s approach resulted in divestitures in several markets despite the fact that the parties’ combined post-merger market share did not exceed the 35 per cent unilateral effects threshold set out in the Bureau’s ‘Merger Enforcement Guidelines’. As the Bureau determined that both transactions would likely result in a substantial lessening of competition in several markets, the consent agreements required Couche-Tard to sell 366 retail gasoline sites and contracts to Parkland, Parkland to sell nine dealer contracts to a third party, and Parkland to divest its own assets in two local markets where the Bureau concluded that Parkland was not a suitable purchaser.11

**Sherwin-Williams/Valspar**

On 20 March 2016, Sherwin-Williams Company (Sherwin Williams) announced a proposed acquisition of Valspar Corporation (Valspar), valued at approximately US$11.3 billion dollars. Sherwin-Williams and Valspar were both global companies that developed, produced, distributed and sold architectural and industrial paint coatings to consumers. The Bureau stated that the parties were close competitors in the supply of industrial wood coatings used by original equipment manufacturers. The Bureau determined that industrial wood coating customers were segmented into those that required customised, small-batch shipments and those that required a long-term supply of large-batch shipments. While the Bureau found that, post-merger, there would be effective remaining competition for customers in Canada sourcing small-batch shipments, the transaction was likely to substantially lessen competition for customers requiring a long-term supply of large-batch shipments. The parties entered into a consent agreement to address the Bureau’s concerns, and agreed that Valspar’s Canadian and US assets used primarily for the supply of industrial wood coatings in Canada would be sold to Axalta Coating Systems, a new entrant to the market.12

**Dupont/Dow**

On 27 June 2017, the Bureau entered into a consent agreement with E.I. du Pont de Nemours and Company (Dupont) and the Dow Chemical Company (Dow), regarding the proposed merger between the two parties. The Bureau was concerned about this merger due to the potential loss of rivalry in agricultural product markets in western Canada (broadleaf herbicides for cereal crops and pre-seed burn-off additives for cereal crops), and specialised plastics markets in North America (acid copolymers and ionomers). The Bureau

11 Competition Bureau, ‘Competition Bureau Statement Regarding Couche-Tard’s Acquisition of CST and Divestiture of Certain Assets to Parkland’ (6 July 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04252.html.

12 Competition Bureau, ‘Competition Bureau Statement Regarding the Acquisition of Valspar by Sherwin-Williams’ (26 May 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04244.html.
Canada

was particularly concerned about the effect on innovation in the agricultural sector. In the course of its review, the Bureau found that this merger concerned two close and principal competitors in various product markets and was likely to result in the loss of innovation rivalry. The Bureau also concluded that these effects would likely result in higher prices for both farmers and packaging firms and reduce the incentive to innovate in respect of product offerings. To address these concerns, the consent agreement required DuPont to divest its global cereal herbicides to FMC Corporation and sell its global acid copolymer and ionomer business to SK Global Chemical Co Ltd. The Bureau concluded that both buyers could compete effectively and support innovation in Canada.

BCE Inc/Manitoba Telecom Services

On 15 February 2017, the Bureau announced that a consent agreement had been reached regarding BCE Inc’s (Bell) proposed acquisition of Manitoba Telecom Services (MTS) valued at C$3.9 billion. Bell had also entered into a separate agreement with TELUS Corporation (TELUS) to sell TELUS a number of MTS’ post-paid wireless subscribers and assign TELUS one-third of the MTS dealer locations. The Bureau was concerned about the effects of the merger on mobile wireless services in Manitoba, as both Bell and MTS operated in that province. The Bureau’s position was that, as a result of coordinated behaviour between Bell, TELUS and Rogers, wireless prices in Canada were higher in regions where there was not a strong regional competitor. As MTS was the incumbent mobile wireless carrier in Manitoba with a strong position in the market, the Bureau found that the proposed transaction would lead to a unilateral exercise of market power and a substantial increase in the price for mobile wireless plans. To address this concern, Bell agreed to complete its agreement with TELUS and to divest assets and provide transitional services to Xplornet, a carrier of rural broadband internet through fixed wireless and satellite networks throughout Canada with plans to enter into the mobile wireless market in Manitoba.

ChemChina/Syngenta

On 14 February 2017, the Bureau issued a NAL indicating that the Commissioner did not intend to make an application under Section 92 of the Act with respect to the proposed acquisition of Syngenta AG (Syngenta) by China National Chemical Corp (ChemChina). ChemChina owns ADAMA Agricultural Solutions (ADAMA), which, like Syngenta, supplied pesticides for crops and turf in Canada. At the time of the proposed acquisition, ADAMA was a recent entrant to the Canadian market, offering off-patent products without operating any research facilities, whereas Syngenta operated a number of research facilities across Canada. Through an investigation of the parties’ crop and turf pesticides, the Bureau

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13 Competition Bureau, ‘Competition Bureau Statement Regarding the Merger between Dow and DuPont’ (27 June 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html.
14 Competition Bureau, ‘Competition and Innovation are Preserved Following Major Agricultural Merger’ (27 June 2017); available online at: https://www.canada.ca/en/competition-bureau/news/2017/06/competition_and_innovationarepreservedfollowingmajoragricultural.html.
15 Competition Bureau, ‘Competition Bureau Statement Regarding Bell’s acquisition of MTS’ (15 February 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html.
found that there was rivalry between Syngenta’s branded and ADAMA’s generic products, but concluded that the parties’ products were not close substitutes and that there would be sufficient remaining competition in the market post-transaction.16

III THE MERGER CONTROL REGIME

The Act contains two parts that apply to mergers. Part IX contains the pre-merger notification provisions and Part VIII contains the substantive merger review provisions.

i Pre-merger notification

A transaction that exceeds certain thresholds is subject to pre-merger review and may not be completed until the parties have complied with Part IX of the Act. Under Part IX, the parties must file a pre-merger notification with the Bureau and wait until the applicable waiting period has expired, been waived, or been terminated. Failure to file ‘without good and sufficient cause’ is a criminal offence, punishable by a maximum fine of C$50,000.17 Where the parties close prior to the expiry of the waiting period, the Commissioner can apply to the court for a range of remedies, including fines of up to C$10,000 per day for each day that the parties have closed in advance of the expiry of the waiting period.18

For a pre-merger notification to be required under the Act, a transaction must exceed certain thresholds. For acquisitions of shares or interests in combinations, the size of transaction threshold will be exceeded if the target (and any entities it controls) has assets in Canada, or revenues in or from Canada generated by assets in Canada, in excess of C$92 million.19 The size of parties test is met if the parties to the transaction, together with their respective affiliates, have assets in Canada or revenues in, from or into Canada in excess of C$400 million. For share transactions, the notification requirement is triggered by the acquisition of 20 per cent of the voting shares of a public company or 35 per cent of the voting shares of a private company (or, in each case, 50 per cent of the voting shares if the acquirer already owns the percentages stated above).20

Certain classes of transactions are exempted from notification, including transactions where all parties are affiliates of each other;21 an acquisition of real property or goods in the ordinary course of business;22 acquisitions of share interests in a combination for the sole purpose of underwriting the share or interest;23 acquisitions of collateral or receivables made

16 Competition Bureau, ‘Competition Bureau Statement Regarding the Proposed Acquisition of Syngenta by ChemChina’ (14 February 2017); available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsfleng/04197.html.
17 Section 65(2) of the Act.
18 Section 123.1 of the Act.
19 This threshold is subject to adjustment for inflation, and annual adjustments are published in the Canada Gazette. C$92 million is the applicable threshold as of 2018.
20 Section 110(3)(b) of the Act.
21 Section 113(a) of the Act.
22 Section 111(a) of the Act.
23 Section 111(b) of the Act.

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by a creditor pursuant to a good faith credit transaction in the ordinary course of business,24 certain joint ventures,25 and where the Commissioner has issued an advance ruling certificate (ARC).26

The filing of a notification requires information relating to the nature of the parties’ businesses and affiliates, principal customers and suppliers of the parties and their affiliates and general financial information. Other than in the case of a hostile bid (where special timing rules apply),27 each party to the transaction must submit its completed notification form for the waiting period to begin. The information and documentation to be supplied with the form largely mirrors requirements in the United States, namely, all documents evaluating the proposed transaction with respect to competition (known as ‘4(c)’ documents in the United States) as well as the most recent version of any legal documents to be used to implement the proposed transaction.

A transaction that is subject to notification cannot be completed until the expiry of the applicable statutory waiting period. Following the receipt of completed filings by both parties to a transaction, there is a 30-day waiting period. Within that initial 30-day period, the Bureau may issue an SIR if it determines that further information is required to complete its review.28 This power is discretionary and not subject to oversight by the Competition Tribunal (Tribunal) or courts.

The issuance of an SIR triggers a second 30-day waiting period, which commences when both parties have substantially complied with the SIR. A proposed transaction may not close until the expiry of this second waiting period (subject to certain exceptions).29

Upon expiry or waiver of the applicable waiting period, the transaction may be completed, unless the Tribunal has issued an order enjoining the completion of the transaction or the parties have otherwise agreed with the Commissioner to defer closing. The Tribunal will only make an order delaying closing where its ability to remedy the merger would be substantially impaired by closing. The waiting period may be terminated earlier if the Commissioner notifies the parties that he or she does not intend, at that time, to make an application to the Tribunal under the substantive merger provisions (by issuing an NAL), or if the Commissioner issues an ARC. The waiting period may be extended if the Commissioner seeks, and is granted, an order from the Tribunal delaying closing.30

The Bureau’s non-binding Merger Review Process Guidelines (Process Guidelines) provide guidance on the Bureau’s administrative approach to the merger review process. The Bureau aims to obtain the information it requires to complete its assessment as early in the

24 Section 111(d) of the Act.
25 Section 112 of the Act.
26 Section 113(b) of the Act.
27 In hostile transactions, the 30-day waiting period begins to run when the offering party files a notification. A target company must still file a notification within 10 days of receiving notice from the Bureau to do so. In this way, a target cannot extend the timing of the waiting period by holding up its notification.
28 Section 114(2) of the Act.
29 Exceptions include situations where the transaction involves a hostile bid, where the parties receive a waiver that terminates the second statutory waiting period, and where the parties conclude a consent agreement with the Commissioner.
30 Section 100 of the Act. The Tribunal may only grant such an order in the limited circumstances set out in Paragraphs 101(1)(a) and 101(1)(b) of the Act.
process as possible. During the initial 30-day period, the parties to the transaction may wish to engage in consultations with the Commissioner, who may also request that the parties provide further information on a voluntary basis.\textsuperscript{31}

Compliance with these requests may reduce the scope of, or potentially even the need for, an SIR. Where parties intend to rely upon exceptions set out in the Act, such as efficiency gains likely to result from the transaction, the Bureau encourages the parties to provide substantiating claims regarding those exceptions as early as possible during the review process. The Bureau may also seek information from third parties by issuing a voluntary information request or by obtaining court orders under Section 11 of the Act directing a third party to provide certain information in connection with the Bureau’s review of the transaction.

The Process Guidelines establish standards for the scope of an SIR, including the relevant time frame for which the Bureau will generally request data, the number of custodians in respect of which records may be collected, and the potential for timing agreements, by which the parties and the Bureau may agree upon voluntary extensions to the review period. One aspect of the Bureau’s dialogue with the parties prior to issuing a SIR centres on the appropriateness of requests the Bureau intends to make in the SIR. For example, the Bureau may seek feedback to determine whether the parties maintain data in the form in which the Bureau intends to request it and with whom or how such data is held. In addition, the Bureau may seek to identify any confidentiality concerns associated with the provision of such data, and ascertain whether there are any other issues that might impair the ability of the parties to comply with the SIR as a result of ambiguities or inconsistent terminology. Dialogue prior to the issuance of an SIR does not preclude post-issuance dialogue for the purpose of further narrowing issues or scope for production.

The number of custodians for the purposes of collecting records related to the transaction can be an important factor in the overall cost of complying with an SIR, and it is in the parties’ interest to attempt to limit the number of custodians as much as possible. The Process Guidelines state that the Bureau will generally cap the number of record custodians to be searched in preparing a response to an SIR at a maximum of 30 individuals.\textsuperscript{32} However, this does not preclude the Bureau asking for information contained in central files (such as budgets, contracts and financial reports), in the files of predecessors and assistants of custodians (during the search period identified by the Bureau), and in the files of employees operating at the local level where it has determined that local markets are relevant to the merger review. In some situations, such as where operations are run at the North American level and there are no issues unique to Canada, the Bureau may agree to align custodians with those identified by US authorities for the purposes of a second request under the HSR Act. Generally, the Bureau limits the time period for the collection of records prepared by the party to the two calendar years immediately preceding the issuance of the SIR, and limits data requests to the three calendar years immediately preceding the issuance of the SIR.

The Process Guidelines also purport to establish an internal appeals process to deal with disputes over an SIR. If a party objects to the scope of an SIR and cannot resolve the issue with the relevant assistant deputy commissioner, the party may submit a written notice of appeal. The notice is forwarded to a senior Bureau official outside the mergers branch.


\textsuperscript{32} Ibid, at Section 3.4.2.
who, after hearing from the party and relevant assistant deputy commissioner, will either confirm the SIR or modify it. The same process can be used if the party and assistant deputy commissioner disagree over whether there has been compliance with the SIR (and therefore disagree over whether the second waiting period has commenced). If that disagreement persists, the Bureau may apply to a court33 for a determination on the question of compliance.

The Process Guidelines also emphasise the Bureau’s desire to cooperate with its counterpart agencies in other jurisdictions. The Bureau’s position is that it may share information with such agencies as required for the enforcement of the Act, and parties should assume that the Bureau will share information with any other jurisdiction where the parties have notified their transaction.

ii  Substantive considerations

Regardless of whether a transaction is subject to pre-merger notification, the substantive provisions of the Act apply to all mergers. The substantive test the Bureau applies in reviewing transactions is whether the transaction is likely to prevent or lessen competition substantially in a relevant market. There is an express efficiency defence to anticompetitive mergers, which applies to cases where the efficiencies from the merger are likely to be greater than, and offset any effects of, the prevention or lessening of competition. Mergers may be challenged only by the Commissioner, who can apply to the Tribunal to delay or block closing and to unwind or seek other remedies for completed mergers for up to one year after their completion.

The expiry of the applicable statutory waiting period does not always mean that the Bureau has completed its substantive review of a transaction. It is often the case that the Bureau’s review will extend beyond the waiting period in complex cases. However, unless the Commissioner is successful in obtaining an injunction under the Act to prevent the parties from closing, as a legal matter, the parties are free to close after expiry of the waiting period, or any extension thereof.

The Bureau has adopted non-binding service standards to indicate the expected time for the completion of its substantive review of a merger. ‘Non-complex’ transactions carry a 14-day time frame for review. ‘Complex’ transactions carry a 45-day time frame for review or, if an SIR is issued, the time frame is extended to 30 days from the date of compliance with the SIR.

IV  OTHER STRATEGIC CONSIDERATIONS

On 1 May 2018, legislative amendments to the Act came into effect that broadened the Act’s affiliation rules. Previously, the affiliation rules were asymmetrical as between corporate and non-corporate entities, such as partnerships, sole proprietorships and trusts; two corporations could be considered affiliates under the Act, whereas a corporation and a non-corporate entity – or two non-corporate entities – would not be considered affiliates despite a functionally identical relationship. The amendments have eliminated the existing asymmetry by expanding the Act’s definition of affiliation to treat corporate and non-corporate entities in the same manner. Affiliation plays an important role in determining: (1) whether a transaction is subject to notification (a pre-merger filing); and (2) the content of pre-merger

33 Sub-Section 123.1(4) of the Act defines ‘a court’ for this purpose to mean the Tribunal, the Federal Court or the superior court of a province.
notification filings (as customer and supplier information must be included for all relevant affiliates). While the revisions to the affiliation rules will reduce the number of ‘technical filings’ resulting from internal reorganisations involving partnerships that would now be exempt, these revisions are also likely to result in some transactions that were not notifiable under the previous affiliation rules becoming notifiable in the future.

Effective 31 May 2018, former Assistant Crown Attorney Matthew Boswell was appointed as the new Interim Commissioner of Competition. Mr Boswell joined the Competition Bureau in 2011 and has held the role of Senior Deputy Commissioner since September 2012. Mr Boswell is replacing former Commissioner John Pecman, who retired at the end of May, and will hold the title for up to one year until a permanent Commissioner is appointed.

V OUTLOOK & CONCLUSIONS

The Bureau continues its practice of actively scanning the Canadian marketplace for, and reviewing and challenging, mergers – even where they do not trigger a notification requirement under the Act. This highlights a number of considerations that parties contemplating a transaction should keep in mind, including the following.

a Regardless of whether a merger triggers a pre-merger notification requirement under Part IX of the Act, it may be challenged by the Bureau for up to one year after its completion. As such, substantive due diligence is critical in mergers between competitors and between suppliers and customers, even in circumstances where formal advance notice need not be given to the Bureau.

b Parties to a merger should be aware of the importance of documents in the Bureau’s review of mergers, as a review of the parties’ internal documents can affect both the length and outcome of the Bureau’s assessment of a transaction.

c The Bureau is receptive to receiving the views of market contacts on mergers, whether those parties are customers, suppliers, competitors or others. While the Bureau is sensitive to strategic complaints, it will follow up on complaints and follow the evidence as appropriate in any given case.

The Bureau closely coordinates merger reviews with foreign agencies, particularly with the US Department of Justice and Federal Trade Commission as well as the European Commission. Coordination between the Bureau and foreign agencies generally involves a request that merging parties grant a waiver to foreign agencies reviewing the transaction to allow those agencies to share any information they receive with the Bureau. This facilitates the coordination of the agencies’ reviews, including sharing analysis and holding frequent update calls or meetings.34 The Bureau will take into account remedies imposed in other jurisdictions to the extent that such remedies address competition concerns in Canada; however, the Bureau will continue to require separate or additional remedies in Canada where these are necessary to address Canadian specific concerns.

34 It is the Bureau’s view that it does not require a waiver to provide confidential information to foreign agencies if done for the purposes of the administration or enforcement of the Act (Section 29 of the Act).
One word of caution, however: while coordination and cooperation with international agencies is on the rise, and the Bureau generally makes efforts to keep the length of its review in step with foreign agencies, the Commissioner’s review can extend beyond the time for obtaining clearance in other jurisdictions, particularly where a merger raises unique substantive issues in Canada.
I INTRODUCTION

The following authorities deal with mergers:

a. the Anti-monopoly Bureau within the Chinese Ministry of Commerce (MOFCOM) is responsible for reviewing and clearing merger filings; and

b. the Anti-monopoly Commission (a division of the State Council) is responsible for formulating and issuing merger guidelines (it is also the coordinating government agency between MOFCOM and the two other antitrust enforcement agencies, the National Development and Reform Commission and the State Administration for Industry and Commerce).

It is worth noting that China is in the process of a State Council reshuffle, which includes the proposed establishment of a new comprehensive department, the State Administration of Market Supervision (SAMS). The SAMS will consolidate the country’s three antitrust agencies, namely, the NDRC, the SAIC and the MOFCOM. Under the new plan, the SAMS will be the direct subordinate agency under the State Council. This new setting, which is almost complete as of the time of writing, will have a decisive influence on China’s future anti-monopoly law enforcement landscape.

In China, pre-merger notification is required when the entities participating in the merger possess a certain amount of turnover. Specifically, pre-merger notification is mandatory when, during the previous fiscal year:

a. the total global turnover of all business operators participating in the concentration exceeded 10 billion yuan, and at least two of these business operators each had a turnover of more than 400 million yuan within China; or

b. the total turnover within China of all the business operators exceeded 2 billion yuan, and at least two of these operators each had a turnover of more than 400 million yuan within China.

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1 Susan Ning is a senior partner at King & Wood Mallesons. The author would also like to recognise Hazel Yin (a former partner at the firm) and Gong Ting (an associate at the firm) for their contribution to this chapter.
II YEAR IN REVIEW

i Legislation

The Anti-monopoly Law (AML) is the primary antitrust legislation that governs the merger control regime. Since the AML was enacted in August 2008, a number of regulations and guidelines relating to the merger control regime have been promulgated in 2015, including:

a the Remedy Trustee Agreement Template for Merger Review (Merger Remedy Trustee Template), which was released on 27 November 2015;²

b the Guiding Opinions of the Anti-Monopoly Bureau of the Ministry of Commerce on Regulating the Titles of Cases on the Declaration of Concentration of Business Operators, which were released on 6 February 2015;³ and

c the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (Provisions on Imposing Restrictive Conditions), which were released on 4 December 2014 and came into effect on 5 January 2015.⁴

ii Enforcement

Administrative clearances of merger control filings

In 2017, a total of 400 merger cases were notified to MOFCOM with 353 cases being accepted. Three hundred and forty-four transactions were approved, among which 337 were cleared unconditionally and seven cases were given conditions. Ninety-seven point eight per cent of the transactions filed by simplified procedure were approved within Phase I. In addition, penalties were imposed in six cases for failure to notify. Below is a brief description of the one merger involving pharmaceutical industry that was cleared with conditions in 2017.

Merger of Becton, Dickinson and Company and C R Bard, Inc

On 27 December 2017, MOFCOM conditionally approved the proposed merger of Becton, Dickinson and Company (BD) and C R Bard, Inc (Bard).

In this case, MOFCOM was concerned that the proposed transaction may have the impact of eliminating or restricting competition in the Chinese market of core needle biopsy devices. After the transaction, the parties will secure a stronger control over the relevant markets in China, and the transaction may have an adverse impact on technological advancements in the relevant markets. In addition, due to considerable market entry barriers in the core needle biopsy device market, new competitors are unlikely to enter in the short term.

Therefore, MOFCOM required the parties to split up the global product line and the R&D product line of BD’s core needle biopsy devices business, including ‘R&D product A’.

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² The Merger Remedy Trustee Template applies where MOFCOM imposes structural and behavioural conditions and was published by MOFCOM to facilitate MOFCOM to entrust a third party carrying out the supervision.

³ The Guiding Opinions set forth unified titles of cases that undertakings shall use on the concentration of undertakings in declaration materials.

⁴ The Provisions on Imposing Restrictive Conditions set forth the determination, implementation and supervision regime for restrictive conditions.
and all tangible and intangible assets related to the core needle biopsy devices product line. The parties are required to sign a sale agreement and transfer the businesses to be divested within three months from the date of the announcement to qualified buyers.

**Administrative penalty decisions**

In 2017, MOFCOM published six administrative penalty decisions imposed against Cummins (China) Investment and Xiangyang Kanghao Mechanical & Electrical Engineering, OCI, Guangdong Rising HK (Holding), Meinian Onehealth Healthcare (Group), Wuhu Construction Investment, Chery New Energy Automotive Technology, and Yaskawa Electric, Shwitzer (Asia) and Binhai County Binhai Port Investment and Development on its website. Cummins (China) Investment and Xiangyang Kanghao Mechanical & Electrical Engineering were fined 150,000 yuan respectively for setting up a joint venture without notification. OCI was fined 150,000 yuan for failure to notify the authority of its acquisition of Tokuyama Malaysia. Guangdong Rising HK (Holding) was fined 150,000 yuan for failure to notify the authority of its acquisition of PanAust. Meinian Onehealth Healthcare (Group) was fined 300,000 yuan for failure to notify the authority of its acquisition of Ciming Health Checkup. Wuhu Construction Investment, Chery New Energy Automotive Technology, and Yaskawa Electric were fined 150,000 yuan respectively for setting up a joint venture without notification. Shwitzer (Asia) and Binhai County Binhai Port Investment and Development were fined 150,000 yuan respectively for setting up a joint venture without notification.

### III THE MERGER CONTROL REGIME

#### i Fast-track process

The Interim Provisions on the Standards for Simple Cases, which became effective on 12 February 2014, set forth the substantive criteria for determining which cases may be treated as a simple case. For example, the market share threshold for horizontal mergers is 15 per cent, and for other mergers, including vertical mergers and those that are neither horizontal nor vertical, it is 25 per cent. For notifications involving joint ventures or where the acquisition targets are located offshore, mergers will qualify for the simplified procedure if the joint venture or acquisition target does not engage in business operations in China.

Despite meeting the above criteria, a notification may still be ineligible for a simplified procedure due to reasons such as the relevant market being difficult to define, or if the concentration may adversely affect market entry, technology development, consumers or national economic development.

It is worth noting that MOFCOM may cancel the application of the simplified procedures under certain circumstances.

In accordance with the Guidelines for the Notification of Simple Cases, after the official acceptance of a case filed under simplified procedures, MOFCOM must publish an announcement of the simple case on its website for a period of 10 days. Any entity or individual (third party) may lodge an objection with MOFCOM, and provide any relevant evidence during the announcement period. Where the Anti-monopoly Bureau finds a case should not be qualified for simplified procedures, it shall require the notifying party to withdraw the case and refile under normal procedures.

#### ii Waiting periods and time frames

There are broadly two review phases that a merger filing would have to go through with MOFCOM: the pre-acceptance phase and the formal review phase.
Pre-acceptance phase

When entities submit a merger filing to MOFCOM, a ‘pre-acceptance’ case handler within MOFCOM will determine whether MOFCOM is able to formally accept the filing. This case handler will review the filing for completeness, and may also seek clarifications or ask for more details in respect of the filing if certain aspects of the filing are unclear or need to be supplemented. From our experience, this pre-acceptance period generally takes six to eight weeks. In some cases (for instance, in the WD/Hitachi case), this phase may even ‘stretch’ to two or three months.

Formal review phase

Pursuant to the AML, there are two phases within the formal review phase: Phase I (the preliminary review period) and Phase II (the further review period).

Phase I lasts 30 calendar days. During this phase, MOFCOM will attempt to review the merger filing and make a decision as to whether the filing should be cleared.

Phase II lasts 90 calendar days. If MOFCOM has made a decision that a merger filing warrants further review, it will inform the parties (in writing) before or at the expiry of Phase I that the review period is being extended into Phase II.

Furthermore, MOFCOM may extend the Phase II period by another 60 calendar days at the most, provided that the merging parties agree to extend the time limit for the review; the documents submitted by the parties are inaccurate and require further verification; or the circumstances relating to the filing have significantly changed after notification by the parties.

If MOFCOM fails to make a decision upon the expiry of each set time period as stated above, the parties may execute the transaction.

The following table summarises the various waiting periods as described above and possible outcomes of the review (i.e., approved, approved with conditions or prohibited).

<table>
<thead>
<tr>
<th>Phases</th>
<th>Duration</th>
<th>Possible results</th>
<th>Clearance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase I (preliminary review)</td>
<td>30 days</td>
<td>Decision for further review</td>
<td>Pending</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Decision for no further review</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Attachment of restrictive conditions</td>
<td>Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No restrictive conditions</td>
<td>Obtained</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>Obtained</td>
</tr>
<tr>
<td>Phase II (further review)</td>
<td>90 days (plus possibly 60 additional days)</td>
<td>Decision of prohibition</td>
<td>Denied</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Decision of not prohibiting the transaction</td>
<td>Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Attachment restrictive conditions</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>No restrictive conditions</td>
<td>Obtained</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>Obtained</td>
</tr>
</tbody>
</table>

Parties’ ability to accelerate the review procedure

Most mergers are time-sensitive, and as a result, most merging entities generally wish for the merger review period and procedures to proceed as swiftly as possible. To assist MOFCOM in clearing merger filings smoothly and efficiently, we recommend the following approaches: first, articulate why the merger is time-sensitive (e.g., one entity is a failing firm); second, ensure that the merger filing report is complete (according to the MOFCOM requirements) and accurate; and third, if MOFCOM asks any supplementary questions or asks for clarifications, respond to these further questions swiftly.
Third-party access to the file and rights to challenge mergers

Third parties do not possess a statutory right to access merger control files, but they do possess a right to challenge mergers in the process of review.

In its review process, MOFCOM may seek opinions from third parties (including government agencies, industry associations and other entities) in respect of the proposed acquisition, and third parties may voice their opinions through these consultations.

In addition, pursuant to Articles 6 to 8 of MOFCOM’s Measures for Inspecting Concentration of Business Operators, third parties may be involved in the merger control review process if MOFCOM decides to conduct hearings. Participants in these hearings may include entities involved in the filing; competitors; representatives of upstream and downstream entities (and other related entities); experts; representatives of industry associations; representatives of relevant government authorities; and consumers. Third parties may therefore express their opinions on the proposed merger or acquisition through these hearings.

Resolution of authorities’ competition concerns, administrative reconsiderations and judicial review

Pursuant to Article 29 of the AML, MOFCOM has the right to impose conditions in respect of mergers to alleviate the negative impact of a merger on competition. This gives MOFCOM wide discretion to impose a variety of conditions, including structural and behavioural conditions.

Further, according to the Provisions on Imposing Restrictive Conditions, the notifying party can propose restrictive conditions either before or after competition concerns are raised by MOFCOM. MOFCOM will then consult with the notifying parties in respect of such restrictive conditions, seeking relevant opinions and conducting an evaluation before making a decision.

Pursuant to Article 53 of the AML, entities that are not satisfied with a MOFCOM decision in respect of merger control may seek a review of the decision (i.e., administrative reconsideration). We understand that this review process and decision will be undertaken by the Treaty and Law Department of MOFCOM.

Entities who are dissatisfied with the decision of the Treaty and Law Department of MOFCOM may then seek a further review of the Treaty and Law Department’s decision by the State Council of the People’s Republic of China, or bring administrative proceedings before the courts (i.e., judicial review). In the former case, the administrative decision of the State Council will be the final and binding decision.

Entities may only seek a review of MOFCOM’s decisions based on an error of law (including because administrative procedures are in violation of the law, administrative discretionary power has been abused or the result of the merger control review is unjust).

Effect of regulatory review

MOFCOM is the sole authority formally in charge of reviewing mergers. Therefore, it is not obligated by law to consult with or seek the opinions of other authorities or regulators.

However, MOFCOM does consult with other government agencies on certain mergers. For instance, MOFCOM may consult with the State Administration of Radio, Film and Television (SARFT) and obtain SARFT’s opinions in respect of a merger within the broadcasting industry; with respect to a merger within the semiconductor industry, MOFCOM may consult the Ministry of Industry and Information Technology for its...
opinions. Such consultation procedures will take time, and this is a factor that entities must consider when submitting a merger filing. MOFCOM may consider that such consultations are important, and a merger filing may therefore lapse into Phase II if MOFCOM is awaiting responses from other government agencies.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions

In recent years, MOFCOM has enhanced its cooperation with antitrust authorities in other jurisdictions.

On 27 July 2011, MOFCOM signed an antitrust memorandum of understanding (MOU) with its US counterparts (i.e., the US Federal Trade Commission and Department of Justice). The MOU lists several specific areas for cooperation, including exchanging experiences on competition law enforcement, when appropriate; and seeking information or advice from one another regarding matters of competition law enforcement and policy.

Since 2008, MOFCOM has also signed antitrust MOUs with competition authorities in the EU, the UK, Korea, Russia, Australia and Kenya.

We understand that MOFCOM regularly consults with the competition authorities from more experienced jurisdictions such as the United States and European Union. The competition authorities from these jurisdictions also conduct capacity building or technical assistance programmes for MOFCOM officials.

In practice (in the context of multi-jurisdictional filings), MOFCOM monitors the progress of merger control reviews in other jurisdictions closely. MOFCOM may also ask the entities involved in the proposed transaction to provide information on the status of their filings in other jurisdictions. In 2017, MOFCOM cooperated with foreign jurisdictions, such as competition authorities in the United States, the European Union, South Africa and India, in more than 20 cross-border mergers and acquisition cases.

ii Special situations

Financial distress and insolvency

Previously, foreign entities that wished to purchase domestic entities in financial distress or insolvency could apply to MOFCOM for an exemption (in respect of notification or review). Despite the fact that there are no statutory exemptions (pursuant to the AML or in related regulations and rules) in respect of acquiring entities in financial distress or insolvency, MOFCOM will take this factor into consideration when undertaking the merger review (in particular, in terms of allocating a time frame for the review). In accordance with Article 12 of the Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition, whether the business operator concerned is an enterprise on the brink of bankruptcy is one of the factors to be considered in assessing the impact of concentration.

Hostile transactions

The AML (nor its related regulations or rules) does not clearly address the manner in which a hostile transaction shall be reviewed. The acquiring party may be faced with some practical
problems. First, most of the parties do not sign any formal transaction agreements in the case of public tenders, which are normally required by MOFCOM to be part of the filing materials. However, in recent practice, MOFCOM may accept the public tender offer in lieu of signed transaction agreement pursuant to Article 14 of the Guiding Opinions. Secondly, in a hostile transaction, the acquired target may not be cooperative in providing the information required in the filing, meaning that some non-public information, including the market data of the acquired target, may be difficult to obtain without the cooperation of the target. Even though Article 13 of the Guiding Opinions has provided that the acquired target shall have the obligation to assist with the acquirer’s filing, there are no specific rules about the legal liabilities for breaching such obligation to assist. As a possible solution, based on our experience, the acquiring party may apply for pre-notification consultation with MOFCOM under such circumstances, and MOFCOM would take a case-by-case approach to reviewing the notification.

Minority ownership interests
There are no provisions under the AML or in its related regulations and rules that address the acquisition of minority ownership interests. However, acquisition of minority interests may also give rise to a notifiable transaction, depending on whether such acquisition may confer ‘control’ of the target company on the acquirer.

MOFCOM may also consider minority ownership interests in the substantive review process. For instance, in MOFCOM’s decision regarding the acquisition by Penelope of Savio, MOFCOM mainly raised competition concerns about Uster Technologies Co, Ltd (Uster) and Loff Brothers Co, Ltd (Loff), which were the only two manufacturers of electronic yarn cleaners for automatic winders in the world. Loff was a wholly owned subsidiary of Savio, the target company. However, Alpha Private Equity Fund V (Alpha V), as the parent company of the acquiring party, Penelope, only held a 27.9 per cent stake in Uster. Even so, MOFCOM held that it cannot ‘rule out the possibility that Alpha V may get involved or influence the business operations of Uster’.

V OUTLOOK & CONCLUSIONS

i Pending legislation
The following measures are still in draft form:

- Tentative Measures for Investigation and Handling of Concentration of Business Operators Not Satisfying Notification Thresholds But Involving Alleged Monopoly Acts;
- Tentative Measures for Collection of Evidences on Concentration of Business Operators Not Satisfying Notification Thresholds But Involving Alleged Monopoly Acts; and
- Merger Review Procedure (revision in process).

ii Unresolved issues
It would be useful if MOFCOM clarified matters pertaining to companies with variable interest entities (VIE) structure. As the legality of the VIE structure is still unclear under Chinese law, normally MOFCOM would not accept notifications of concentrations involving companies with VIE structures. It remains unclear how MOFCOM will deal with this issue in the future.
In addition, it would be helpful if MOFCOM issued merger clearance decisions with more details (such as proposed market definition and a summary of its competition analysis). MOFCOM currently publishes its decisions for cases that it has approved with conditions or prohibited, and a brief summary of cases under simplified procedures for the purposes of public announcement. However, for unconditionally approved decisions, it only publishes the name of the transactions without mentioning any substantive details. If MOFCOM disclosed more details of its unconditionally approved decisions, it would be useful for building jurisprudence and improving the transparency of the merger clearance process.
Chapter 14

COSTA RICA

Edgar Odio

1

I INTRODUCTION

The Law for the Promotion of Competition and Consumer Protection No. 7492 (Competition Law or Law) was enacted in Costa Rica in 1994 and came into effect in January 1995. The Law contains provisions related to deregulation, competition, unfair competition, consumer protection, comparative advertising and strict liability. It also created the institutional arrangements for the competition regime and for consumer protection by creating two separate bodies ascribed to the Ministry of Economy, respectively the Competition Promotion Commission (COPROCOM) and the National Consumer Commission. While these bodies are part of the Ministry, they are independent on technical matters. This means that the decisions of COPROCOM can neither be appealed nor revoked by the Minister of Economy. The Law is based on Article 46 of the Constitution. Furthermore, Costa Rica’s free trade agreement with Canada contemplates a commitment by both countries to establish mechanisms to deal with anticompetitive conducts and concentrations.

The merger control regime contained in the Law was enacted as an ex post system. In 2012, the legislature finally passed an amendment to the Competition Law that includes pre-merger notification provisions. The Law has been complemented by regulations issued by the government and by the Guidelines issued by COPROCOM. Merger control has absorbed much of COPROCOM’s resources to the detriment of other anticompetitive cases.

In the telecommunications sector, General Telecommunication Law No. 8642, issued in 2008, contemplates specific competition regulations that include pre-merger notifications. Filings must be made before SUTEL, the telecommunications authority; and SUTEL must then request a technical opinion from COPROCOM prior to issuing its final decision. COPROCOM’s opinion is not binding for SUTEL. The same applies to SUGEFE in the banking sector, SUGEVAL regarding the stock markets, SUPEN in the pension funds sector and SUGESE regarding the insurance markets; according to the Competition Law, all these regulatory agencies must request COPROCOM’s technical opinion prior to approving a concentration. COPROCOM must issue its opinion within 15 days of receiving a request. Again, this opinion is not binding; however, if a regulatory agency does not agree with COPROCOM’s opinion and is not going to act upon it, it must explain the reasons why it will not do so.

1 Edgar Odio is a founding partner of Pragma Legal. Associate Juan Pablo Lara also contributed to the research for this chapter.
II YEAR IN REVIEW

The following is the list of concentrations filed and reviewed by COPROCOM during 2107 and the first months of 2018.

<table>
<thead>
<tr>
<th>Vote number</th>
<th>Date</th>
<th>Parties</th>
<th>Relevant market</th>
</tr>
</thead>
<tbody>
<tr>
<td>02-2017</td>
<td>17/1/2017</td>
<td>China National Agrochemical Corporation-Adama Agricultural Solutions, Ltda.</td>
<td>Crop protection</td>
</tr>
<tr>
<td>10-2017</td>
<td>7/2/2017</td>
<td>Abbott Laboratories – St. Jude Medical, Inc.</td>
<td>Medical devices</td>
</tr>
<tr>
<td>11-2017</td>
<td>7/2/2017</td>
<td>Koch Equity Development LLC – Golden Gate Capital</td>
<td>Technology investment</td>
</tr>
<tr>
<td>20-2017</td>
<td>7/3/2017</td>
<td>Materiales El Lagar S.A – Los Constructores Rojas y Monge</td>
<td>Retail marketing of construction materials, hardware and finishing materials</td>
</tr>
<tr>
<td>38-2017</td>
<td>16/5/2017</td>
<td>3-101-731314 subsidiaria de la compañía ‘Cuestamoras Salud Costa Rica, S.A. y la cadena de farmacias La Bomba</td>
<td>Retail distribution of restricted-sale drugs in the GAM</td>
</tr>
<tr>
<td>39-2017</td>
<td>23/5/2017</td>
<td>Siemens AG – Gamesa Corporación Tecnología, S.A.</td>
<td>Marketing of wind turbines to be used on land</td>
</tr>
<tr>
<td>41-2017</td>
<td>6/6/2017</td>
<td>ICU Medical Inc. – Pfizer</td>
<td>Medical devices</td>
</tr>
<tr>
<td>44-2017</td>
<td>16/6/2017</td>
<td>Bayer Aktiengesellschaft – Monsanto Company</td>
<td>Seed and Crop Protection</td>
</tr>
<tr>
<td>45-2017</td>
<td>20/6/2017</td>
<td>Pollos de Mi País S.A., Chakana S.R.L., Ángel Fedeli Milanta y Silvia Fedeli Rivera – Corporación Multi-Inversiones Hispania S.L.</td>
<td>Chicken meat (fresh or frozen, whole and clean) and sausages</td>
</tr>
<tr>
<td>50-2017</td>
<td>11/7/2017</td>
<td>3-101-675402 S.A – Calakial KSB, S.A.</td>
<td>Clinical chemical analysis laboratories</td>
</tr>
<tr>
<td>84-2017</td>
<td>12/12/2017</td>
<td>NAE HK -Shepherd WW. (Country Day School)</td>
<td>Private and semi-private education at the preschool, primary and secondary level in the GAM</td>
</tr>
<tr>
<td>01-2018</td>
<td>16/1/2018</td>
<td>Envases Comerciales SA-Onex Corporation.</td>
<td>Rigid packaging in the Central American territory</td>
</tr>
<tr>
<td>04-2018</td>
<td>16/1/2018</td>
<td>Applus Galicia – RITEVE SYC S.A.</td>
<td>Vehicle technical inspection services in Costa Rica</td>
</tr>
<tr>
<td>Vote number</td>
<td>Date</td>
<td>Parties</td>
<td>Relevant market</td>
</tr>
<tr>
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<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>09-2018</td>
<td>13/2/2018</td>
<td>3-101-675402 – Labiclin SA</td>
<td>Clinical chemical analysis laboratories</td>
</tr>
<tr>
<td>16-2018</td>
<td>16/3/2018</td>
<td>METALCO - Aceros Abonos Agro SA</td>
<td>Ceilings and accessories, profiles and pipes, rods, platinas and angles, beams, smooth sheets, trefliados</td>
</tr>
</tbody>
</table>

The most important case was the one in which a subsidiary of Cuestamoras bought a drugstore chain called La Bomba. Cuestamoras is the holding company of a large drugstore distributor, which had acquired the largest drugstore chain in the country. La Bomba was an independent drugstore chain known as the most price-aggressive player in the market, whereas Cuestamoras drugstores have a reputation of being the most expensive in the market. The case gained a lot of attention because Cuestamoras spent several months fighting against the participation of one of the members of COPROCOM who had initially inhibited herself based on a conflict of interest, but later entered into the case.

This was challenged by Cuestamoras, which was able to win the annulment of the part of the proceeding in which this member participated but could not win the argument that the time for COPROCOM to issue the opinion had elapsed and automatic approval was in order. After the annulment COPROCOM proceeded with the case and found the concentration would cause anticompetitive effects both in the distribution and in the retail levels of the market. Following the regulations COPROCOM asked Cuestamoras to offer appropriate remedies to the anticompetitive effects. Cuestamoras did not agree with the findings but still offered remedies to the alleged anticompetitive effects of the concentration. All remedies were behavioural remedies. COPROCOM accepted the remedies offered by Cuestamoras but unfortunately was not clear enough when explaining why and how the remedies were adequate to reduce the anticompetitive effects of the concentration identified by COPROCOM. COPROCOM also failed to establish an effective monitoring system to ensure Cuestamoras will comply with the remedies.

### III THE MERGER CONTROL REGIME

The Law defines concentrations as any change in control of an entity or of productive assets, as a result of a transaction between two independent entities. The Commission shall approve:

a) concentrations that do not have the object or effect of creating or significantly incrementing market power when this may result in a limitation or reduction of competition;

b) concentrations that do not facilitate express or tacit coordination among competitors, or that may not result in adverse effects for consumers; and

c) concentrations that do not reduce, damage or prevent competition and concurrence on similar or closely related goods or services.

### i Thresholds and deadline to notify

All concentrations where the amount of the assets of the entities involved, and those of their respective parent companies, exceed 30,000 minimum wages (about US$15 million),
or where the total income generated in Costa Rica during the last fiscal year of all entities involved in the concentration exceeds that amount, must be notified to COPROCOM. Concentrations must be notified to COPROCOM before closing, or within five calendar days after closing.

The Government Decree\(^2\) narrows this threshold, indicating that concentrations shall be notified to COPROCOM where at least two of the entities involved have operations in Costa Rica, and also indicating that when the purpose of the concentration is the acquisition of part of the assets or a specific operation of an entity, then, only the value of those assets or the income of said part of the operation shall be considered. The Government Decree also clarifies that only productive assets registered in the last annual financial statement shall be considered, but they must include the value of the productive assets of all affiliates that have had business activity in Costa Rica during the two years prior to the concentration. Income shall also include sales by all affiliates in the country (excluding sales among affiliates).

Once approved, COPROCOM cannot review a merger again, unless approval was granted based on false information, or the parties do not comply with the conditions or remedies imposed by COPROCOM.

The application may be filed by any of the entities involved in the concentration, and must include:

- a detailed description of the transaction;
- a description of the entities involved;
- audited financial statements of the past three years; and
- a description of the relevant markets, competitors and market shares, and the economic justification for the transaction.

The application must also include an analysis of the possible anticompetitive effects of the concentration, and a proposal to counterbalance such effects. The Government Decree includes a more detailed list of requirements, including a description of the barriers to entry.

\(\text{ii Analysis of COPROCOM}\)

In the analysis of each concentration, COPROCOM shall determine whether the concentration is needed to achieve economies of scale or develop efficiencies that may offset the anticompetitive effects. If COPROCOM finds that the concentration may cause anticompetitive effects, it must also determine if such effects may be counterbalanced by structural or behavioural remedies or conditions. The Commission may also approve a concentration, even if it may cause anticompetitive effects, if it finds any other circumstance that may protect the interest of local consumers, including if the merger prevents productive players from leaving the market.

Efficiencies must be directly generated by the concentration, not achievable by less restrictive means, verifiable, and enough to counterbalance the potential anticompetitive effect of the concentration.

According to the Government Decree, some concentrations do not create anticompetitive effects and shall therefore be approved by COPROCOM. This will happen in concentrations where:

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\(^2\) In September 2013, the regulations were published as a Government Decree for the proper implementation of the amendment of the Law.
the parties involved do not participate in the same relevant market, horizontally or vertically, when the market share of the parties is less than 25 per cent jointly, or less than 40 per cent if the delta is less than 2 per cent;

b when the parties do not reach a 30 per cent market share in a vertically related market where one of them has operations;

c when the concentration is to complete ownership of an entity already controlled by the buyer; and

d when the entity created does not have or will not have business in the local territory.

This presumption shall not apply if the current market share of the parties is reasonably likely to increase, when there are indications of coordination among competitors, or when COPROCOM determines that the presumption shall not apply.

The Government Decree also allows concentrations under the failing firm scenario. In this case, the concentration shall be authorised regardless of its effects, provided the financial situation of the target entity is such that it will exit the market in the short term if it cannot be reorganised under any insolvency proceeding; and when, prior to the concentration, efforts have been made to seek other purchasers or alternatives to the concentration.

### Remedies and conditions

If COPROCOM finds that the concentration may cause anticompetitive effects, it may approve the concentration subject to one or more of the following conditions:

a transfer or sale of assets;

b limiting the sale of products or services;

c an obligation to provide or sell certain products or services;

d introduction, amendment or elimination of certain contractual provisions; and

e any other condition that may be required to prevent, reduce or counterbalance the anticompetitive effects.

Conditions and remedies must have a maximum term of ten years, which may be extended for five additional years if there are still anticompetitive effects. The conditions imposed by COPROCOM must be to address the specific effects of the concentration, and not to improve existing market conditions.

### Time frames

The application may be filed by any party involved in the concentration before closing, or within five days after closing. After filing, COPROCOM has 10 days to request additional information, which must be filed by the parties within 10 days. Parties may request an extension, which is usually granted. The Commission has started to dismiss cases if the additional information is not filed before the deadline.

The Commission has 30 calendar days to issue the resolution. However, in cases that are particularly complex, COPROCOM may extend this term prior to its expiration for an additional 60 days. Only one extension is allowed. In the telecommunications sector, the extension is only 15 working days.

If COPROCOM fails to issue the resolution within said time frames, the concentration is automatically approved.
According to the proposed regulations, temporary acquisitions do not have to be notified. This includes acquisitions where assets are subsequently sold to a third party within a year, and where the buyer does not participate in any decision-making in spite of its ownership.

v Parties’ ability to accelerate the review procedure, tender offers and hostile transactions

It is important to include all information requested by the Law and the regulations, and any additional information that may make it easier for COPROCOM to determine that there will be no anticompetitive effects so that the case may be completed in 30-day term.

The application must include a description of the concentration and the possible anticompetitive effects of the concentration. Parties may also include proposals to counterbalance these anticompetitive effects. This seems to be the only way to expedite the procedure in cases where anticompetitive effects may be easily identified. If COPROCOM agrees that the concentration may cause the effects described by the applicants and determines that the proposals supplied by them will be effective in counterbalancing the anticompetitive effects, it must approve the concentration subject only to the remedies or conditions proposed by the applicants.

If COPROCOM determines that the proposal is insufficient to counterbalance the anticompetitive effects, it will notify the parties, and they will then have an additional ten day term to submit a second proposal. If COPROCOM is still unconvinced by the proposals of the parties, it will decide whether the concentration is authorised subject to different remedies or conditions, or whether it is not authorised.

Implementing the possibilities of parties to propose remedies and conditions depends on the ability of COPROCOM to quickly understand the market and the rationale of the concentration. In this sense, the parties need to be able to approach COPROCOM to explain and discuss ideas for the proposal, and to try to anticipate what the authority's reaction might be. While approaching administrative and judicial authorities in somewhat informal meetings to discuss matters before them is quite usual in Costa Rica, the Government Decree offers a more formal approach. Both the applicants and COPROCOM’s staff may take the initiative to request a meeting to clarify information filed by the parties, and a summary of the meeting must be signed by all participants at the end of the meeting. This should facilitate more realistic and effective proposals from parties.

vi Third-party access to the file and rights to challenge mergers

COPROCOM shall order the applicant to publish a brief description of the concentration in a newspaper, including a list of the parties involved. The Government Decree aims to expedite this step by indicating that applicants must make such publication within three working days after filing, and send a copy to COPROCOM within three working days after the publication. Third parties shall have ten days to file information and evidence before COPROCOM. There is a case in which a third party intervened and appealed COPROCOM’s decision to approve the transaction.

The Commission can also request information from third parties (e.g., competitors, suppliers and clients of the parties involved in the transaction), and these third parties must respond within the term granted by COPROCOM. The Government Decree establishes that this term shall be five working days.
vii Resolution of competition concerns of the authorities, appeals and judicial review

As explained above, decisions of COPROCOM cannot be revoked by the Minister of Economy. Appeals are made before COPROCOM itself to reconsider its own opinion. Opinions can also be challenged in court.

Judicial review may include both the formalities and the substance of the case. In the cases ruled up to date by the Judiciary, Courts have focused on procedural matters, but have also made some considerations on the substance of cases, which is an indication that judges have a good understanding of competition matters.

viii Effect of regulatory review

Concentrations on regulated markets (i.e., telecommunications, banking, stock, pension funds and insurance) are examined and decided by the regulatory agencies. In all cases, the regulatory agency must request COPROCOM’s technical opinion and justify its own decision if it differs from COPROCOM.

ix The Merger Guidelines (Guidelines)

The Guidelines, were issued by COPROCOM on 28 May 2014. They are not binding; they were issued to give stakeholders an indication of the economic analysis COPROCOM will use in merger control analysis. The Guidelines are extensive and detailed; therefore, reference is made here to the most relevant topics covered by the guidelines. Besides, application of the guidelines by COPROCOM has not been apparent.

The Guidelines include definitions of some concepts that are not covered herein (e.g., a definition of economic control, plus suggestions of a variety of ways in which a change of control may take place), and a definition of the different types of mergers and how they are likely to impact competition.

In horizontal mergers that involve intermediate goods, if COPROCOM finds a negative impact for the clients, it will assume that such impact will also affect consumers of the final goods. However, if the merger is vertical or conglomerate, COPROCOM shall seek to determine the impact on consumers.

Market shares and market concentration will be more significant in the analysis of more stable markets. With regard to market power and the calculation of market shares, COPROCOM will generally use annual sales. However, in certain markets this may not be appropriate, such as very dynamic markets or markets where transactions are rather sporadic (i.e., wind turbines); therefore, different periods of sales might be used. In some cases, units sold or production capacity will also be used instead of sales.

In mergers that involve an entity with a large market share and a recent entrant to the market, COPROCOM will also look at the potential of the entrant to challenge the established competitors. Similarly, in mergers involving a maverick, COPROCOM will look more closely at the transaction.

The general standard based on the HHI will be:

a no anticompetitive effects: HHI variation <100 and HHI <1,500;

b potential anticompetitive effects: in markets with moderate concentration (1,500–2,500), HHI variation >100, and in highly concentrated markets (HHI >2,500), HHI variation 100–200; and

c where market power can be increased: in highly concentrated markets (HHI >2,500), HHI variation >200, particularly if market share exceeds 50 per cent.
The Guidelines list in detail the criteria COPROCOM will use to evaluate unilateral and coordinated effects, including the specifics of bid markets. This is conducted separately for each type of merger.

With regard to efficiency gains, consumer welfare shall prevail over internal efficiencies; thus, efficiencies should create benefits for consumers. Evidence must be based on studies conducted through sound technical methodology, and the studies should probe specificity, cost estimates, likelihood, when and how benefits will be transferred to consumers, how they stimulate capacity to compete, which consumers will benefit, and any other evidence requested by COPROCOM. Reductions in variable costs will be more appreciated than reductions in fixed costs, although the latter will not be ignored.

Finally, the Guidelines include some particularities regarding the analysis of mergers in specific markets such as telecommunications, air transport, energy and financial services. For instance, according to the Guidelines, with regard to telecommunications the definition of markets made by SUTEL is for regulatory purposes only. For competition purposes, such definition is not binding, although it might be used as a reference point by COPROCOM in its definition of the relevant market on a case-by-case basis, where COPROCOM will favour supply substitution over demand substitution.

IV OTHER STRATEGIC CONSIDERATIONS

The merger control system is more a hybrid than a pure pre-merger system. The possibility to notify within five days after closing poses a challenge to everyone involved. This is not an issue in regulated markets, where pre-closing notification is compulsory for all mergers. If parties notify after closing, it is likely COPROCOM will face the same challenges that it was used to under the ex post merger control that existed prior to the amendment of the Law. Likewise, the parties should be ready to face post-closing scrutiny that may end in an order to partially or totally undo the concentration.

Notifying prior to closing was a concern in local trade associations when the bid was being discussed in Congress. Many felt that notifying prior to closing would allow third parties to intervene, putting the transaction at risk. Thus, in those concentrations where local entities are involved, if they are not used to merger control and comparative law, it is likely they will want to notify after closing. Local entities are usually on the selling side of the transaction, and the decision of when to make the filing is more likely to fall on the buyer’s side. Therefore, this has not been an issue.

In addition to the difficulties discussed above, the possibility of filing after closing makes coordination with authorities from other countries more difficult if other jurisdictions are involved, because in most other countries there is a pre-merger control system, and by the time they make their decisions, the application may not have been filed in Costa Rica.

If that is not an issue and all parties agree to notify before closing, then it is important to determine whether the possible anticompetitive effects are similar in all jurisdictions. If the possible anticompetitive effects are similar in all jurisdictions, the local authority may accept and adopt similar remedies or conditions imposed by more experienced authorities. However, because the time frame to reach a final decision is usually longer in other jurisdictions than that contained in Costa Rican law, parties to a multi-jurisdictional concentration may want to schedule the filings so that they receive a resolution from a more experienced agency first, which may then be used as reference by the less experienced agencies.
V OUTLOOK & CONCLUSIONS

COPROCOM’s response continues to be up to the challenge in many respects. On the merger control front, COPROCOM managed to complete its review of all the cases filed before it within the term established in the Law. With regard to the substantial analysis, there were cases where more in-depth discussion was necessary regarding key issues.

Costa Rica is seeking to be accepted as a member of the Organisation for Economic Co-operation and Development (OECD). As part of this process, the country is being evaluated in many aspects by the OECD’s experts. Competition is one of the areas undergoing this evaluation. The OECD has conducted two peer reviews. The first one was published in 2014,3 and the second one was conducted in.

The conclusions and recommendations of the experts point particularly to the lack of independence of COPROCOM, and advise that COPROCOM be transformed into an entity that is independent from the Ministry, and that full-time commissioners be established to promote specialisation and avoid conflicts of interest. As a result of the OECD recommendations, the government has published a bid to amend the Competition Law to eliminate COPROCOPM and create an Administrative Competition Tribunal, which will have three full-time members. The draft also includes leniency provisions and the elimination of the possibility to notify mergers after closing. The bid has been under discussion for more than a year and many modifications have been made, including the name of the new authority, which will be the National Council of Competition. Even though the government has worked hard in the process with the OECD there are still many open items in other areas that are not as advanced as competition. So, it is not clear whether the new government is going to have the ability to push the bid in Congress.

In the longer term, all stakeholders face a major challenge. The association agreement signed by the Central American countries and the European Union contains a competition chapter (Chapter VII), according to which all countries in the region must have in place a competition law that includes regulations regarding horizontal and vertical conducts and merger control. If a country does not have a competition law in place (like Guatemala), it should enact one within three years of the ratification of the Agreement by all countries. In addition, within seven years Central America must have a single competition law and competition authority. While this may be far in the future, as time passes we should begin to see greater coordination and teamwork between the competition authorities of the region.

INTRODUCTION

The general authority for merger control in Croatia is the Croatian Competition Agency (the Agency). Contrary to popular public perception, the Agency is not a regulator, but rather a public entity vested with public authority powers to ensure the application of the competition law regulation.2

There are specific authorities in Croatia authorised to oversee a broad variety of issues arising in a specific market within their purview, including matters of market regulation and control over the undertakings acting in the specific market. Examples of these markets include the energy market, supervised by the Croatian Energy Regulatory Agency; the telecommunications sector, supervised by the Croatian Regulatory Agency for Network Industries; the financial sector, supervised by the Croatian Financial Services Supervisory Agency; and the electronic media sector, supervised by the Agency for Electronic Media.

However, the Agency is the sole entity authorised to ensure compliance with the relevant provisions of competition law in any sector.

This means that irrespective of the role each market regulator has within its respective field, the supervision of mergers and other competition issues remains firmly under the authority of the Agency.

The main legal provisions on merger control are set out in the Competition Act (Official Gazette No. 79/2009, 80/2013) (CA). This legislation provides very detailed procedural provisions, and the Act sets out for the subsidiary application of the General Administrative Proceedings Act (Official Gazette No. 49/2009).

The Amendments to the Regulation on the Criteria for Setting of Fines were passed by the Croatian government in February 2015. The main purpose of the amendments is to grant the Agency the authority to impose fines to the participants of the cartel, in a way that ensures the final amount of fines is proportional to the severity of the violation of the Competition Act, the consumer interests and the market strength of the undertaking involved in the breach.

The Croatian competition law regulations must be applied and interpreted in accordance with the legal provisions of the competition law of the European Union.

1 Goran Durmiš is a partner and Tea Radmilo and Ivana Ostojić are senior associates at Bekina, Škurla, Durmiš and Spajić Ltd.
With regard to merger control, specific requirements may need to be fulfilled in order to gain approval by specific market regulators. Accordingly, relevant licences must be obtained by undertakings wishing to participate in the energy market, as stipulated by the provisions of the Energy Act.

In a similar fashion, undertakings must obtain adequate approvals to participate in the financial services sector. Hostile takeovers are particularly scrutinised by the Croatian Financial Services Supervisory Agency.

Pursuant to the provisions of the Electronic Media Act, any change in ownership in broadcasting companies must be notified to the Council for Electronic Media. Additionally, all concentrations in this sector must be notified to the Agency, whether the relevant thresholds are met or not.

In general terms, pre-merger notification is required whenever there is a change of control occurring on a lasting basis, and certain thresholds are met.

The Croatian Competition Act does not set out a specific definition of a concentration, but defines the various legal forms a concentration may take in practice.

A concentration occurs through:

1. a merger of undertakings;
2. an acquisition of undertakings; or
3. an acquisition of direct or indirect control or prevailing influence of one or more undertakings over another undertaking or a part or several parts of an undertaking, in particular by:
   - acquisition of majority shares;
   - acquisition of majority voting rights; or
   - any other way pursuant to the provisions of the Companies Act and other regulations.

An acquisition of control occurs by the transfer of rights, contracts or other means through which one or more undertakings, whether acting separately or jointly, taking into account all the relevant legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more undertakings on a lasting basis.

A joint venture may also fall within the scope of the merger control regime, provided it constitutes an independent economic entity, acting on a lasting basis. This legal concept corresponds to the idea of the ‘full function merger’, as understood by the EU Merger Regulation.

Not all concentrations are caught by the merger control provision. The obligation of pre-notification arises only in those instances where the required thresholds are met.

The aforesaid shall occur only when the following criteria are cumulatively met:

1. the combined aggregate worldwide turnover of all the undertakings concerned, arising from the sales of goods or services, is at least 1 billion kuna in the financial year preceding the concentration, provided that at least one party to the concentration has a registered seat or a branch office in the Republic of Croatia; and
2. when the aggregated turnover of each of at least two participants of the concentration arising from the sales of goods or services on the market of the Republic of Croatia is at least 100 million kuna.

Accordingly, the total turnover must be calculated, taking into account the aggregated turnovers of all the associated companies of the undertaking on the group level, other than the turnover arising out of the sale of goods and services of the companies forming part of the group.

In the event that the concentration consists of a merger or acquisition of part or several parts of one or more undertakings, irrespective of their legal status, only the turnover of the parts that are subject to the concentration is calculated.

Two or more transactions consisting of the acquisition of part or parts of an undertaking executed within a time period of one year shall be deemed to be a single concentration, executed on the day of the last acquisition.

As previously mentioned, notification of mergers in the broadcasting sector is mandatory, whether the thresholds are met or not.

As an exception, even if the applicable merger control thresholds are met, the concentration is not subject to the jurisdiction of the Agency, provided that notification to the European Commission is mandatory in the same instance.

The obligation of merger pre-notification to the Agency arises following the signing of the agreement acquiring the control or prevailing influence over an undertaking or parts of an undertaking, or the making of a takeover bid, but prior to the implementation of the concentration.

The merger pre-notification must be made immediately, and within a time period of eight days at the latest.

The aforementioned deadline does not prevent the parties to the concentration from approaching the Agency to pre-emptively discuss certain issues that may arise should a merger be executed. However, the opinions the Agency states during these informal consultations are not legally binding and the position of the Agency may differ from the official position the Agency will take following an official notification.3

II YEAR IN REVIEW

In 2015, the Agency marked the 20th anniversary of its establishment and enactment of the first Croatian Competition Act, as well as the 18th anniversary of its actual functioning. During the past two years, the Agency has actively promoted the importance of compliance with competition policies. In its report for 2016, published in July 2017, the Agency cited as a cause of concern that risks related to market competition, in particular those linked to a potential entry of new market participants had been identified in independent surveys as the second highest risk in Croatian economy.4 Therefore, it is to be inferred that more scrutiny and better monitoring in compliance with merger control requirements shall continue to be in the focus of the Agency.


Pursuant to Article 49 of the Competition Act, a party to the proceedings may offer to undertake commitments such as implementation of certain measures and conditions, as well as deadlines for the respective implementation, so as to eliminate any negative impacts that its actions had on the competition. The Agency often accepts such offers for commitments as this significantly eases the entire procedure – there is no need to determine whether the breach of CA has occurred, and there are no sanctions for undertakings and no costs for the Agency.

According to the publicly available documents on the scope of the activities undertaken by the Agency, the time period from mid-2016 demonstrates an increase in the number of merger and acquisition deals being notified and addressed by the Agency, with a majority of notified concentrations being cleared by the Agency. The decisions in merger control cases are made publicly available on the website of the Croatian Competition Agency.

Before addressing the merger control cases that had only come to the attention of the Agency in the course of 2017, it should be noted that the Agency also dealt with the consequences of the extraordinary administration proceedings initiated over one of the largest Croatian groups, Agrokor.

The merger of Croatian joint-stock retail company Agrokor d.d. and Slovenian joint-stock retail company Poslovni Sistemi Mercator d.d. was originally approved in 2014, and the Agency had continued with the monitoring of this transaction throughout 2017, as the Agency only approved these concentrations conditionally. All the parties concerned have committed to implementing certain measures and meet certain conditions under the conditional approval of their respective concentrations.

Even though the Agency assessed the implications of these concentrations as negative for the competition, it deemed that they may be allowed after a thorough implementation of structural and behavioural measures that continued up to mid-2017 and the report of the trustee found that Agrokor complied with all divestment and other structural requirements, with the concentration having an overall beneficial effect to the market.5

A practical consequence of the opening of the extraordinary administration proceedings over Agrokor d.d. is the fact that on the basis of the Act on the Extraordinary Administration Proceedings in Companies with Systemic Importance for the Republic of Croatia (Official Gazette No. 32/2017) is that a proceedings in which Agrokor d.d. or an Agrokor affiliated company (any company in which Agrokor d.d. has at least 25 per cent share in) is legally required to be a party to, may not be brought before the Croatian Competition Authority. That effectively means that merger control proceedings may not be initiated in the case of any acquisition by Agrokor of another company or a merger in which Agrokor affiliated company should participate in as a party.

Therefore, the monitoring of the Agrokor/Mercator Poslovni sistemi merger is currently suspended, as the Agency is currently unable to conduct administrative proceedings over Agrokor d.d.

Below is a brief outline of the most notable merger control cases in 2017.

i VIPnet/Metronet Telekomunikacije

The Agency approved the merger between VIPnet and Metronet Telekomunikacije, both telecommunication services providers. Although there is horizontal overlap of these two

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companies in the landline telecommunications sector, the Agency established that the concentration would increase the availability of landline networks in another 30 cities across Croatia, which will create a beneficial effect for consumers, as Metronet had previously been focused on the business segment and will now aim to provide their services in residential areas.

Another argument for a positive clearance of the Agency had been the fact that there had been no reactions from the market following the public invitation to comment of the Agency.

### ii Spar/Billa

In February 2017 the Agency approved the merger of Spar (AG) and Billa, Billa nekretnine and Minaco of Zagreb. Through the transaction Spar will overtake the entire business operation of Billa in the Croatian market. The merger has horizontal overlaps in the retail market. However, on the basis of a study undertaken in 2015, it has been demonstrated that the joint market share of the market participants, following the transaction would be below 10 per cent in the geographic market of Croatia, with the shares being higher in several counties, such as the city of Zagreb. Spar had previously not been present in a number of counties in Croatia, with the concentration having no effects in the relative geographic markets of three counties in Croatia.

There had been no reactions following the Agency’s public invitation to interested parties for comment and in the assessment of the Agency this merger would have overall positive effects on market competition and would contribute to market diversification.

### iii Mueller/Kozmo

The merger of two companies with horizontal overlaps in the market of cosmetic and hygienic products, Mueller and Kozmo had also been approved by the Agency in February 2017, with the parties to the concentration having retail stores at 13 different counties in Croatia.

The Agency determined that although the proposed the transaction would increase the market share of Mueller to 20–30 per cent of the overall market, it would have beneficial effects on market competition as it would close the gap with dm-drogerie markt d.o.o., the dominant company in this relevant market. Therefore, the Agency concluded that allowing this merger would increase the competition in the relevant market.

### iv OTP/Société Générale

In April 2017, the Agency cleared the concentration of two credit institutions, OTP Bank Hrvatska and Société Générale, Through this transaction Société Générale acquired direct control over Splitska banka and indirect control over SG Leasing, SB Zgrade and Société Générale Insurance. The Agency concluded that by executing the merger, a fourth legal entity would be created, with an overall market share of more than 10 per cent. However, they decided this might have a beneficial market effect as it would increase the competition between three other major players – Zagrebačka banka, PBZ and Erste, creating an overall positive effect for the consumers, which may result in lowering of the credit rates.

No reactions had been received by the Agency upon their public invitation for the interested parties to deliver their comments and in the assessment of the Agency this merger would have overall positive effects on market competition and would contribute to market diversification.
v Časnik Finance/Business Media Croatia

The Agency approved the concentration of two entities competing in the relevant legal market of B2B press and advertising. As the merger would result in an entity that would have a significantly lower market share when compared to the dominant undertakings in the relevant market, the Agency concluded that the proposed concentration would have no negative market effects.

vi Arriva/Autotrans

In July 2017, it had been announced that Arriva a line bus service operator owned by Deutsche Bus of Berlin, would acquire Autotrans, a dominant undertaking in the relevant market of line bus service operators. The proposed merger pertains to public lines operation. However, it had been determined that this will have no significant market effects due to the high saturation and market competition, and will in fact enable better coverage across the Croatian territory, with very few lines being terminated.

It was also determined that competition in the relevant bus terminal market, with 16 bus terminals being operated by Arriva, would also not be affected, as bus terminals are legally obligated to provide equal services to all operators in accordance with applicable legal provisions.

In addition, the Agency received no comments following their public invitation for interested parties to deliver their comments.

vii RWE/Koprivnica Plin and Koprivnica Opskrba

The Agency approved the acquisition of Koprivnica Plin and Koprivnica Opskrba by RWE. It was assessed that following the concentration, their overall market share would be up to 5 per cent. In comparison, market leaders have 25–30 per cent. It was also assessed the concentration would have clear economic efficiencies as it would enable Koprivnica Opskrba to procure natural gas at a lower rate, which would decrease transport costs.

In the opinion of the Agency, the concentration contributes to the further liberalisation of the natural gas market that might lead to direct consumer benefits via lower rates.

viii Optima Telekom/HT

Following an initial opening of proceedings and extensions, the Agency reached a decision ordering HT to divest all its Optima Telekom shares in January 2020, with them undertaking an obligation to initiate the sale of shares by 1 July 2019. Unless HT is able to sell the shares despite their best efforts in a non-discriminatory and transparent manner by 10 July 2021, the shares of Optima still owned by HT shall be automatically transferred to either Zagrebačka banka or another non-related legal entity.

This decision partially revokes the decision of the Agency from 2014, as certain conditions and obligations undertaken at that time could not be met due to a change of circumstances that could not have been foreseen. Therefore, new and additional monitoring measures have been determined, and a new trustee shall be appointed to monitor the transaction. Along with the decision on the continuation of HT Optima Merger, the Agency reached a decision on the conditional approval of the H1/Optima merger.

Special attention should be drawn to concentration control in the media and electronic media sectors. Notably, pursuant to Article 36 of the Media Act, the Agency has to be notified on all concentrations in the media sector regardless of the turnover thresholds. Where
undertakings fail to comply with their legal obligation to file a notification of concentration, the Agency initiates the respective clearance proceedings *ex officio*, at the same time imposing fines amounting to 1 per cent of the total income that the undertaking party has generated in the year preceding the concentration.

A brief overview of the Agency’s activities concerning merger control in the past year indicates that there was an increase in the Agency’s rationalisation and overall effectiveness.

### III THE MERGER CONTROL REGIME

As outlined above, a merger notification must be made within eight days of the day of the signing of the agreement acquiring a majority share or prevailing influence over an undertaking, or making a takeover bid. The parties to the concentration may, as an exception to the general rule, file a pre-notification before the signing of the agreement or the publication of a takeover bid if they, acting in good faith, prove a real intention to enter into an agreement or make a public offer.

The notification is given in a detailed form, set out by the Regulation on the manner of notification and the criteria on the assessment of the concentration of the undertakings (Official Gazette No. 38/2011). The following should be enclosed with the concentration notification:

- *a* the original or a notarised copy; or if the original document is not drafted in the Croatian language, a certified translation of the document constituting the legal grounds for the concentration;
- *b* annual financial statements of the parties to the concentration for the financial year preceding the concentration; and
- *c* other legally mandatory documentation and data.

When filing the notification, it must be stated whether the concentration notification must also be filed to a competition authority in a jurisdiction other than the Republic of Croatia, and if any such body has previously made a decision regarding the concentration, the aforesaid decision must be sent to the Agency.

A simplified form of the notification may be submitted to the Agency, in the following instances in particular:

- *a* no party to the concentration competes in the same relevant product market or the same geographical market, and no horizontal overlap occurs; and no party to the concentration is engaged in business activities in a product market that is upstream or downstream from a product market in which any other party to the concentration is engaged, resulting in a lack of vertical integration;
- *b* two or more parties to the concentration are engaged in business activities in the same product and geographic market, but their combined market share is less than 15 per cent; or one or more parties to the concentration are engaged in business activities in a product market that is upstream or downstream from a product market in which any other party to the concentration is engaged, but their sole or combined market share in a single market is less than 25 per cent;
- *c* a party to the concentration acquires independent control over an undertaking over which they had previously exercised joint control; or
d in the event that two or more undertakings acquire control over a joint venture, with no significant activities in the Republic of Croatia, or such significant activities are not planned in the foreseeable future.

The applicable thresholds for simplified merger notification are lower than those proposed by the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004.

When submitting the notification, certain data may be designated as a trade secret.

The participants of the concentration jointly make the pre-notification. However, if a single undertaking acquires control over an undertaking or parts of an undertaking, the notification of the concentration must be made by that undertaking.

When the notification is filed to the Agency, a temporary prohibition of the concentration implementation enters into force.

The concentration may only be implemented either following the lapse of 30 days from the day of the receipt of the full merger notification or, in the event that a decision to initiate the concentration clearance proceedings was rendered, on the day of the delivery of the Agency decision granting the approval or conditional approval of the concentration.

The notification is considered filed on the day of the receipt of the required documentation in full. The Agency shall issue appropriate confirmation of the receipt of the complete documentation.

When the Agency receives the complete merger documentation, it publishes a public invitation, asking all interested parties to submit their written remarks and opinions on the proposed concentration within eight to 15 days.

The merger will be assessed in respect to the effect of the potential concentration on the relevant market. The concentrations are prohibited when they may significantly restrict, impair or distort the competition, in particular if the concentration creates or strengthens the dominant position of one or more undertakings, whether individually or jointly.

The Agency may request any additional information from the parties to the concentration at all times, and the parties to the concentration are free to deliver to the Agency any data they may consider relevant to the assessment of the concentration, as the burden of proof of the existence of the positive market effects of the concentration is upon the parties to the concentration.

If, following a review of the submitted documents, the Agency finds that they may not reasonably assume that the concentration impairs, restricts or distorts the competition in the relevant market, then the concentration will be considered to be cleared after 30 days. The Agency will immediately issue the appropriate decision stating the concentration is allowed, and deliver it to the party that submitted the notification. The decision is also published on the Agency’s website.

However, if the Agency finds that the concentration may have a significant effect on competition in the relevant market, then the Agency shall initiate Phase II proceedings on the assessment of the concentration, launching an in-depth review.

The in-depth assessment of the concentration may be concluded by a decision stating the concentration is prohibited, allowed or conditionally allowed. This decision must be rendered within three months following the day of receipt of the complete notification of the concentration. This three-month period may be extended for an addition three-month period if the Agency deems it necessary for determining the full facts of the case and the assessment
of the submitted evidence. During the entire course of the proceedings, the parties may
approach the Agency and suggest the implementation of measures and conditions to alleviate
the negative effects the concentration may have on competition.

A hearing, which the general public is not permitted to attend, may be scheduled
during Phase II of the proceedings should the Agency consider it to be useful.

Prior to the hearing, the parties to the concentration may request an insight into the
Agency’s case file. Drafts of the decisions, minutes from the meetings of the Competition
Council, internal notes and instructions, correspondence between the Agency and the
European Commission may not be reviewed.

A notice on the preliminary determined facts will be delivered to the parties to the
concentration prior to the scheduling of the oral hearing. The parties may respond to the
notice in writing, within one month from the day of receipt of the notice.

A stop-the-clock provision is in effect in this instance, and the three-month time
period for the rendering of the decision of Agency is halted from the day the notice on the
preliminary determined facts is delivered to the parties until the day the agency receives the
written response from the parties proposing adequate measures and conditions.

The participation of third parties is limited, for example, to the submission of their
opinions on the proposed concentration upon the Agency’s invitation.

Even in instances where third parties have proven their legal interest, and have been
granted certain procedural rights, they are not authorised to review the case file during the
pending procedure, but only to receive a written notice on the preliminary determined facts
in simplified form, upon request.

There is no appeal of an Agency’s decision, but the parties may lodge an administrative
claim against the decision before the High Administrative Court of the Republic of Croatia
within 30 days of receipt of the decision.

Only parties to the proceedings, or persons the Agency granted the same rights as
the party in the course of proceedings, are entitled to lodge an appeal against the Agency’s
decision.

Initiation of the judicial review proceedings does not have a suspensory effect, unless it
pertains to imposed fines.

The Agency may annul a decision on the assessment of a concentration if the decision
was made with inaccurate or false data, and such data were material to the decision; or if any
participant to the concentration has failed to fulfil their obligations as set out in the Agency’s
decision.

Measures, conditions and deadlines for the parties to the concentration to restore
competition in the relevant market will be outlined in the new decision, and the appropriate
fines will be imposed.6

The statute of limitations for review of mergers is five years. Each procedural action of
the Agency in this respect halts the statute of limitations, but in any case the period may not
exceed 10 years.

The maximum fine for failure to notify a merger to the Agency is 1 per cent of the
annual turnover of the undertaking, according to the last published financial statements.

6 In the event of the implementation of the prohibited concentration, the Agency may order the sale or
transfer of the acquired shares, or prohibit or restrict the use of voting rights associated with the acquired
shares.
The maximum fine for participation in the prohibited concentration is 10 per cent of the annual turnover of the undertaking, according to the last published financial statements.

IV OTHER STRATEGIC CONSIDERATIONS

It has been an ongoing goal of the Agency to align and equalise the practice of undertakings assuming obligations to repair the damage to competition, through acceptance of measures and conditions.

The measures and conditions to alleviate the negative effects to the competition are already rooted in the merger control regime, and have been successfully used in the past. The Croatian legislator facilitates the use of these measures by encouraging the participants of the concentration to take a proactive approach and propose measures and conditions during the entire course of the proceedings.

This concept is further reinforced by the fact that the parties to the concentration are explicitly invited to submit their written proposals of the measures and conditions to the Agency within one month of the receipt of the notice on the preliminary determined facts. The measures and conditions proposed to alleviate the negative impact of concentration may be divided in three groups: behavioural remedies, structural measures and quasi-structural measures.7

Behavioural remedies determine whether the participants comply with the set conditions in a designated time frame. The length of this time frame is determined on a case-by-case basis, usually depending on the state of the relevant market. In several prominent cases, the Agency has appointed an independent trustee to oversee participants’ adherence to the conditions.

Structural measures are far more complicated, but are also considered to be more effective by the Agency. These measures may include sale of company assets (divestiture); sale of the overlapping assets of the concentration’s participants (mix-and-match remedies); carve out; or sale of the most valuable assets of the participants of the concentration (crown jewels).8

Quasi-structural measures provide for a combination of structural or behavioural measures.

Increase in the adoption of these measures may prove to serve to the mutual benefit of both the undertakings involved in the concentration and the Agency, as the undertakings themselves, in cooperation with the Agency, assume the obligation to alleviate potentially harmful effects to the competition, which could also contribute to the reduction of the length and the associated costs of the concentration assessment proceedings.

V OUTLOOK & CONCLUSIONS

Throughout 2017 the Agency has continued its endeavours to improve competition in Croatia. This is done in particular through ongoing education, as well as following trends

8 Ibid., p. 337.
and new developments in the region and the European Union. Croatian competition law aims to be fully harmonised with the *acquis communautaire* and any changes thereof should expect to be promptly reflected in the Croatian national legislation.

The increased dynamic of the merger control cases in Croatia continue to highlight the importance of the role of Agency in addressing and monitoring market competition issues. The fact that this will indeed continue to be in the focus of the Agency is highlighted by the statement of the Agency citing the market competitiveness as one of their main concern. The completion of the extraordinary administration will certainly bring about new challenges and developments and will increase the dynamics and activity in the merger control sector.
Chapter 16

CYPRUS

Anastasios A Antoniou and Christina McCollum

I INTRODUCTION

The Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), is the legislative instrument governing the control of concentrations between undertakings in Cyprus.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC), initially established in 1990 and re-established pursuant to the provisions of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014.

The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations. On assessing a report prepared by its civil service (the Service), the CPC declares that a concentration is compatible or incompatible with the functioning of competition in the market.

II YEAR IN REVIEW

A number of important issues have been considered by the CPC over the past year, which have shed more light on its decision-making practice.

Specifically, the CPC dealt with the first non-performing loans servicing transaction in Cyprus, which essentially created the relevant market. In the APS/Hellenic Bank case, the CPC defined the relevant product market as being (1) the management of immovable property acquired by credit institutions through enforcement proceedings or payment of credit rights derived from mortgages and (2) the management of non-performing loans granted by credit institutions or other persons.

In the VLPG case, in which the CPC carried out a full investigation, clearance was granted subject to commitments by the undertakings concerned. The case concerned the creation of a joint venture by Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd, Intergaz Ltd and Synergkaz Ltd, in which the said undertakings shifted part of their activities relating to the storage and handling of liquefied petroleum gas to the joint venture. The joint venture was held to potentially have the ability and motivation to exploit its dominant

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position and to hinder the expansion of other companies and potential competitors. The CPC also highlighted the potential for significant obstruction of competition as a result of the creation of the joint venture’s dominant position.

The transaction was cleared subject to a number of remedies, including the exclusion of members of the boards of the parent undertakings from sitting on the board of the joint venture, confidentiality undertakings by the joint venture in relation to the parent undertakings, the appointment of a trustee and the introduction of criteria for the assessment of storage capacity requests from third parties, together with providing any new entrant that constructs LPG storage facilities in the area, access to the anchor and unloading pipes, to the extent that it will be under the control of the joint venture.

III THE MERGER CONTROL REGIME

i Ambit

Transactions that result in a permanent change of control and satisfy the jurisdictional thresholds fall under the ambit of the Law. Pursuant to Section 6(2) of the Law, ‘control’ is defined as control stemming from any rights, agreements or other means which, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

a ownership or enjoyment rights over the whole or part of the assets of the undertaking; or

b rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

As such, the Law applies to mergers of two previously independent undertakings or parts thereof, and acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, of control of one or more other undertakings.

Joint ventures performing all functions of an autonomous economic entity in a permanent manner are caught under the Law.

ii Thresholds

For the purposes of the Law, a concentration of undertakings is deemed to be of major importance and therefore meets the jurisdictional thresholds if:

a the aggregate turnover achieved by at least two of the undertakings concerned exceeds, in relation to each one of them, €3.5 million;

b at least two of the undertakings concerned achieve a turnover in Cyprus; and

c at least €3.5 million of the aggregate turnover of all undertakings concerned is achieved in Cyprus.

Foreign-to-foreign mergers are caught under the Law. The test as to whether a foreign-to-foreign merger is caught as a concentration of major importance is satisfied where the jurisdictional thresholds are met, with the local effects dimension being the achievement of a turnover of at least two undertakings concerned in Cyprus and the Cyprus-achieved turnover of all undertakings concerned being at least €3.5 million.
The Law vests the Minister of Energy, Commerce, Industry and Tourism with the power to declare a concentration as being of major importance even where the thresholds are not met.

iii  Filing

Filing of concentrations of major importance is mandatory. However, notification is not required in the following cases where, pursuant to Section 6(4)(a) of the Law, a concentration between undertakings is not deemed to arise:

a  where a credit or financial institution or an insurance company, the normal activities of which include transactions and dealing in securities on its own account or for the account of third parties, holds on a temporary basis securities that it has acquired in an undertaking with a view to reselling them, provided that the institution does not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that it exercises such voting rights only with a view to facilitating the disposal of all or part of that undertaking or of its assets or the disposal of those securities, and that any such disposal takes place within one year of the date of acquisition – a period that can be extended by the CPC on request, where it can be shown that the disposal was not reasonably possible within the period set;

b  where control is exercised by a person authorised under legislation relating to liquidation, bankruptcy or any other similar procedure;

c  where the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;

d  where property is transferred due to death by a will or by intestate devolution; or

e  where it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

Notification can also take place where the undertakings concerned prove to the Service their *bona fide* intention to conclude an agreement or, in the case of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such offer.

Concentrations of major importance must be notified to the Service in writing, either jointly or separately by the undertakings participating in a merger or in the joint acquisition of control of another undertaking. In all other cases, the party responsible for notification is the undertaking acquiring control.

Filing fees are fixed by the Law at €1,000. Where a concentration becomes subject to a full investigation (Phase II), the undertakings concerned are required to pay a fee of €6,000 to the CPC.

iv  Timetable

Concentrations of major importance must be notified to the Service prior to their implementation, following the conclusion of the relevant agreement or the publication of the relevant takeover or the acquisition of a controlling interest.

The Service shall, within one month from the date of receipt of the notification and the filing fees or from the date on which the Service receives additional information necessary
towards achieving conformity of the notification to the requirements of the Law, inform the notifying undertakings regarding the decision of the CPC of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the aforementioned time frame, it shall, within seven days prior to the lapse of the one-month period, inform the notifying undertaking of an extension to the said period by a further period of 14 days.

The Law does not provide for a fast-track procedure of clearance of concentrations.

The Law expressly prohibits the partial or entire implementation of the concentration prior to clearance, infringement of which prohibition entails administrative fines.

Upon becoming aware of a concentration of major importance that ought to be notified but the undertakings concerned have failed to do so, the Service immediately notifies the undertakings concerned of their obligation to proceed with notifying such concentration in accordance with the provisions of the Law. The time limit for the assessment of the concentration would then commence at the time of the Service receiving such notification.

v Sanctions

Although failure to notify a concentration does not by itself give rise to sanctions, where the concentration has been partially or entirely implemented in the absence of clearance by the CPC, administrative fines may be imposed.

The CPC has the power to order the partial or total dissolution of a concentration of major importance in order to secure the restoration of the functioning of competition in the market, provided that the requirements of the Law are met.

Where a concentration is either partially or entirely implemented prior to the clearance by the CPC or prior to the lapse of the time frame within which the Service ought to inform the notifying undertaking of whether the concentration is cleared or is to be fully investigated but the Service has not so informed, administrative sanctions may be imposed by the CPC.

An administrative fine of up to 10 per cent of the aggregate turnover achieved by the notifying undertaking during the immediately preceding financial year may be imposed on the notifying undertaking for the aforementioned infringement, which may be followed by additional administrative fines of €8,000 for each day the infringement persists.

There have been no cases where the undertakings concerned implemented a concentration prior to clearance by the CPC under the new regime. Nevertheless, taking into account the approach followed under the previous framework, the CPC is likely to exercise its powers in relation to the implementation of concentrations in violation of the statutory provisions in a rigorous manner.

Moreover, the CPC has the power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance by the CPC.

Implementation of a concentration prior to clearance is not possible unless the Service fails to inform the notifying undertaking of whether the concentration is cleared or whether a Phase II investigation will be carried out within one month, in which case the concentration is deemed as cleared.

Nevertheless, a temporary approval of a concentration is possible pursuant to the provisions of Section 31 of the Law, in the case where a full (Phase II) investigation is deemed to be required by the CPC, where the undertakings concerned can establish, upon a relevant application to the CPC, that they shall suffer substantial damage as a result of any additional
delay to the concentration. Such temporary approval may be accompanied by conditions imposed on the undertakings decided at the CPC’s discretion and it does not affect the final decision of the CPC.

A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.

vi Substantive assessment

The substantive test for compatibility of a concentration with competition in the market is that such concentration does not significantly impede effective competition in Cyprus or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

In assessing the compatibility of a concentration, there are no special circumstances that would be taken into account. The CPC takes into consideration the following criteria:

a the need to maintain and develop conditions of effective competition in the relevant markets, taking into account, inter alia, the structure of the affected markets, other markets upon which the concentration may have significant effects and the potential competition on behalf of undertakings within or outside Cyprus;

b the position in the market of the undertakings concerned and undertakings connected to it in a manner prescribed under Annex II to the Law;

c the financial power of such undertakings;

d the alternative sources of supply of products or services in the affected markets or other markets upon which the concentration may have significant effects;

e any barriers to entry to the affected markets or other markets upon which the concentration may have significant effects;

f the interests of the intermediate and end consumers of the relevant products and services;

g the contribution to technical and economic progress and the possibility of such contribution being in the interest of consumers and not obstructing competition; and

b the supply and demand trends for the relevant markets.

To the extent a joint venture that constitutes a concentration has as its object or effect the coordination of competitive conduct of undertakings that remain independent, this coordination is examined in accordance with the provisions of Sections 3 and 4 of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014.

In assessing a joint venture, the Service shall particularly take into account:

a whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market that is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and

b whether the coordination that directly emanates from the creation of the joint venture provides the undertakings concerned the ability to eliminate competition for a substantial part of the relevant products or services.

The European Court of Justice (ECJ) ruled in Austria Asphalt4 that when there is a change in the type of control over an existing undertaking from sole to joint control, the criterion of

a concentration within the meaning of the EU Merger Regulation (EUMR) is only fulfilled when the arising joint venture performs on a lasting basis all the functions of an autonomous economic entity. The said judgment of the ECJ has been adopted in the CPC’s practice.

vii Remedies and ancillary restraints

Before reaching its final decision and subject to the time limits provided by the Law, the CPC may, if it considers it expedient to do so, carry out negotiations, hearings or discussions with any of the interested parties or other persons. Furthermore, the CPC has wide investigative powers when assessing a concentration, including access to any premises, property, means of transport, books or records in the possession of the undertakings concerned or third parties.

In declaring a concentration compatible with the operation of competition in the market, the CPC may impose conditions or remedies in relation to the implementation of the transaction, thus having the ability to interfere with the essence of the transaction.

The CPC has at any given time the power to revoke decisions related to the compatibility of any concentration and to amend any of the terms of its decision if it determines that:

a its initial decision was based on false or misleading information or that necessary information relating to the concentration at hand was withheld by the notifying party or by any other undertaking concerned or by any interested person; or

b any condition attached to the decision and imposed on the participants to the concentration has not been satisfied or has ceased to be satisfied.

Where the CPC exercises its power of revocation, it may, following a study of the Service’s report, order either a partial or complete dissolution of the concentration to secure the restoration of the competitive market. It may do this either in the course of exercising its powers of revocation of a previous decision of clearing a concentration or upon establishing that a concentration has been implemented in violation of an obligation to notify such concentration to the CPC or is duly notified but implemented prior to clearance by the CPC. The CPC also has the power to prohibit a concentration by declaring it incompatible with the operation of competition in the market.

Competition issues can be remedied through the CPC exercising its discretionary power. In the course of remedying competition issues, the CPC may order the dissolution or partial dissolution of the concentration concerned in order to secure the restoration of the functioning of competition in the market, through the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

If the CPC ascertains that the notified concentration falls within the scope of the Law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such an event, the Service will request further information from the participants as well as other entities involved in the specific sector for the purpose of completing its investigation. The Service also notifies the participants that they may make suggestions to undertake remedies that will remove the CPC’s concerns regarding the compatibility of the transaction within the time limit defined by the Service.

The CPC accepts both divestiture and behaviour remedies. If, following its review of the additional information provided to it, the CPC’s doubts as to compatibility remain,
the Service will commence negotiations with the participating undertakings if it finds any
differentiations or modifications in the circumstances under which the concentration was
established that could result in the removal of such doubts.

The CPC is required to provide written notification to the undertakings concerned of
any remedies as part of its decision, which it is bound to issue within four months from the
date of receiving the notification of the concentration and payment of the filing fees. Should
the merger be cross-border, the CPC may liaise with the relevant foreign authority in relation
to applicable remedies. Any remedies must be limited to those that are reasonably necessary
for the protection of the competitive market.

viii  Involvement of other parties or authorities

Parties having a legitimate interest may be invited to comment, but only in the event of a full
investigation. Parties having a legitimate interest may on a voluntary basis submit views at any
phase of the evaluation of a concentration or they may be asked to supply information by the
Service of the CPC. In the case of a full investigation, the Service is required to provide any
person having a legitimate interest, but who is not a participant in the concentration, with
an appropriate opportunity to submit their views at the second phase of the investigation.

The undertakings concerned may request that any part of the decision remains
confidential and the CPC will decide whether such information should be treated as
confidential. The party to which the CPC addresses a written request for information
should identify documents, statements and any material it considers to contain confidential
information or business secrets, justifying its opinion, and provide a separate, non-confidential
version within the time limit set by the CPC for the notification of its opinion.

The CPC and the Service are under a statutory duty of confidentiality, infringement of
which is a criminal offence punishable with imprisonment of up to six months or a fine of
up to €1,500 or both.

ix  Judicial review

The decisions of the CPC are administrative executive acts issued by a public authority. As
such, an aggrieved party having legitimate interest and seeking to annul a CPC decision has
the right to file for administrative recourse to the Administrative Courts under Article 146 of
the Constitution of the Republic of Cyprus.

IV  OTHER STRATEGIC CONSIDERATIONS

A regular misconception about the Cypriot merger control regime is that a strong local market
nexus is required to trigger a filing. The only test determining whether a foreign-to-foreign
merger is caught as a concentration of major importance is the jurisdictional threshold test.
The local effects dimension is the achievement of a turnover of at least two undertakings
concerned in Cyprus and the Cyprus-achieved turnover of all undertakings concerned being
at least €3.5 million.

Cyprus is increasingly on the radar of transacting parties and their counsel, given the
relatively low thresholds that are easily met across a range of different types of transactions
even where the transaction is entirely unrelated to Cyprus.
Global transactions are increasingly assessed as to whether they require filing and clearance in Cyprus, particularly given the level of sanctions that the CPC is able to impose, as well as the CPC’s power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance.

The CPC cooperates with other national competition authorities in the EU and the European Commission on the basis of the system of parallel competences and the exchange of views and information between them via the European Competition Network. It is, therefore, inevitable that transactions filed in other EU member states are visible to the CPC.

V OUTLOOK & CONCLUSIONS

An issue that has preoccupied the CPC on more than one occasion is the exchange of information in joint ventures in cases where directors are appointed on the joint venture’s management body by the parent undertakings. This has proved to be an issue where the CPC is keen to explore commitments from the parties.

The CPC is demonstrating increased activity and filings are on the rise. Phase II investigations are also becoming more regular, particularly in respect of local transactions between dominant market players.
I INTRODUCTION

The Organic Law for the Regulation and Control of Market Power (Law) was enacted on October 2011, implementing the first domestic competition regime in the country. The Law created the Superintendency of Market Power Control (Superintendency or Authority) as its governing administrative authority in charge of the application of the Law, and a separate regulatory body, the Regulation Board, in charge of, inter alia, issuing regulations and sector-wide recommendations, and implementing economic thresholds for mergers.

Merger notifications are filed with the Intendancy for Concentration Control (Merger Control Intendancy), an investigative authority which must issue a recommendation report for resolution by a three-person resolution panel, the First Instance Resolution Commission (Commission). The Merger Control Intendancy is vested with the powers of investigation of notified transactions and non-notified transactions, as well as for issuing its recommendation report to clear, condition or deny transactions subject to its control. The Intendancy is authorised to act ex officio in the case of non-notified transactions that come to its attention. The Superintendency is organised into four investigative intendancies. These intendancies perform their analysis and investigations independently and issue recommendation reports to the Commission. The Merger Control Intendancy is in charge of analysing notified transactions and issuing final recommendation reports, which contain economic analysis of the competitive landscape, the transaction’s potential impact on this competitive structure, and its final recommendation as to the clearance, conditional clearance subject to conditions, or denial of the transaction. The analysis and evaluation performed by the Intendancy in all transactions subject to its control has reflected a rigour and in-depth analysis similar to that of a Phase II investigation by the European Commission (unfortunately, there is no equivalent to a Phase I review under Ecuadorian law). The Commission must then evaluate this recommendation report and issue its final decision.

The basic principles of the merger control regime are set forth in Chapter II, Section 4 of the Law, making any act deemed a ‘concentration operation’ subject to merger control. Although ‘exemplary acts’ are broadly defined, any act granting control of or substantial influence in another party on a lasting basis exceeding either of the economic or market share thresholds may be subject to mandatory merger control notification and prior clearance before its execution in Ecuador. Mergers and acquisitions, full-function joint ventures, common administration agreements, and assignments of the effects of a trader, inter alia, are

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1 Diego Pérez-Ordóñez is a partner, Luis Marín Tobar is a senior associate and Mario Navarrete-Serrano is an associate at Pérez Bustamante & Ponce.
defined as ‘concentration operations’, although the broad scope of the law may determine that other forms of agreements could be subject to notification in this jurisdiction, and may therefore merit further legal analysis with local counsel when the economic or market share thresholds are met.

In addition to the competition perspective, under which merger control regulation has only been effective since October 2011, mergers and acquisitions where a local business presence exists may also be subject to corporate and tax implications, and governed by the Superintendency of Companies, Securities and Insurance and the Internal Revenues Service. It is worth noting, however, that even if the parties do not have a direct business presence in Ecuador, the merger control regulation may be mandatory, considering the effects-based approach instated by the Law.

II   ECUADORIAN LEGISLATION

The Law was enacted on 13 October 2011. On 23 April 2012, the President signed Executive Decree No. 1152, published in the Official Register of 7 May 2012, comprising Regulations to the Law (Regulations). The Superintendent of Market Power Control was appointed in July 2012, at which time the administrative structure of the Authority began to be organised and the Law was implemented. The first term of the Superintendent Pedro Páez expired in 2017, currently there is a caretaker authority in place until a new Superintendent is appointed.

i   Transactions subject to prior control

Ecuador’s prior control and approval regime for concentration operations can be generally summarised as follows:

a   economic concentrations are defined as a change in or takeover of control on a lasting basis in one or several economic operators through the following acts:

• mergers;
• assignment of assets of a trader;
• direct or indirect acquisition of shares, equity or debt certificates if they grant influence over the other operators’ decisions, thereby giving the acquirer control or substantial influence in the other operator;
• joint-venture and administration agreements; or
• any other act or agreement transferring the assets of an economic operator, or granting control or determinant influence on an economic operator’s adoption of regular or extraordinary administration decisions;

b   the above-mentioned exemplary acts, and others falling within this scope, will require the prior authorisation of the Superintendency before their execution; and

c   ‘control’ is defined by the Law as control over any contract, act or, bearing in mind the de facto and de jure circumstances, circumstances that confer the possibility of exercising substantial or determinant influence over an undertaking. This control may be joint or exclusive. Substantial influence has been defined as the possibility of making or blocking strategic commercial decisions of an undertaking.

ii   Thresholds

When an act is considered to be a ‘concentration agreement’ under the terms of the Law, notification and prior approval will be mandatory if either of the following alternative thresholds is exceeded.
Ecuador

**Economic threshold**

The economic threshold will be reached in cases where the combined annual turnover of the undertakings in Ecuador in the year preceding the transaction exceeds an amount fixed by the Regulation Board. The Regulation Board modified the previous threshold through Resolution No. 009 of 25 September 2015. The turnover threshold is currently as follows:

<table>
<thead>
<tr>
<th>Type</th>
<th>Amount of unified basic remuneration*</th>
<th>Value (in US$)†</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Concentrations involving financial institutions and entities that participate in the stock exchange.</td>
<td>3.2 million</td>
</tr>
<tr>
<td>b</td>
<td>Concentrations involving insurance and reinsurance companies.</td>
<td>214,000</td>
</tr>
<tr>
<td>c</td>
<td>Concentrations involving undertakings not contemplated in (a) and (b).</td>
<td>200,000</td>
</tr>
</tbody>
</table>

* The unified basic remuneration in Ecuador for 2018 is US$386.
† The unified basic remuneration changes yearly; thus, the amount in US dollars provided above will change on a yearly basis.

**Market share threshold**

The market share threshold will be reached in the case of concentrations where the parties will acquire a market share equal to or greater than 30 per cent within the relevant market in Ecuador. Contrary to turnover information, the notifying undertakings must produce updated market share information.

A transaction must be notified if one of the parties holds a share equal to or superior to 30 per cent of the market share, regardless if the transaction reinforces this share.

**iii Timing**

Concentration operations that exceed either of the above-mentioned thresholds require clearance from the regulator to be executed. Notification must be made within eight calendar days from the date of the ‘conclusion of the agreement’. Generally, conclusion of the agreement will take place on the date when the general terms and conditions of a transaction are accepted by the parties through their governing bodies or the appointment of local administrators. The Regulations to the Law provides further guidance in respect of the ‘conclusion’ concept, and stipulates that it should occur at the following times:

- a) for mergers: from the time when at least one of the participants at the shareholders’ meeting has agreed to the merger;
- b) for an assignment of assets of a trader: from the time the entities agree to the operation, and determine the form, term and conditions thereof. In the case of companies, as of the moment that the assignment is approved by the shareholders’ meeting;
- c) for a direct or indirect acquisition of shares, equity or debt certificates: from the time that the participants consent to the operation giving rise to the concentration, and determine the form, term and conditions for its performance. In the case of companies, as of the moment the assignment is approved by the shareholders’ meeting;
- d) for joint-venture and administration agreements: from the time that the administrators have been designated by the shareholders’ meeting; and
- e) for any other act or agreement that grants control or determinant influence: from the time the parties consent to the operation giving rise to the concentration, and determine the form, term and conditions for its performance.
iv Requirements for notification

Merger notifications must be submitted by the party that acquires control. If several undertakings are acquiring joint control, notice must be given jointly through a common attorney in fact. The Superintendency issued a filing form template on 9 May 2013, which must be completed and used in all mandatory merger control filings. The requirements and mandatory accessory documents are fixed by the Regulations of the Law, and generally require information regarding, *inter alia*, the notifying entities, the transaction, the market structure, barriers to entry, efficiencies and the rationale for the transaction. Accompanying documents principally relate to the corporate existence of the parties to the transaction, their financial statements, a power of attorney to represent the entities in the merger notification, and a sworn affidavit attesting to the veracity of the information being provided and the good faith calculation of the figures submitted to the Authority.

v Deadlines and filing fee

As of the date of admittance to file as complete, the Superintendency has 60 working days to approve, deny or impose conditions on a transaction. That period can be extended by the regulator for an additional period, although it is still under discussion if this additional term is of 60 or 120 days. It is frequently the case that the Merger Control Intendancy issues one or more requests for information (RFIs) prior to the admittance of the file as complete. Hence, the starting of the clock is frequently delayed for several weeks following the original submission, or the term is suspended, while new RFIs are issued. In practice, it can take an average of between five and seven months from the date of filing until a clearance decision is issued for a merger.

The Regulation grants the Superintendency the right to determine official fees for the evaluation of a concentration notification. On 9 May 2013, the Superintendency published regulations containing the parameters that will be used to determine the fee that will be charged for the processing of each concentration notification. The regulations establish that the processing fee will be the greatest of the following:

\[ a \] 0.25 per cent of the income tax paid in the previous fiscal year in Ecuador;

\[ b \] 0.005 per cent of sales obtained in the previous fiscal year from the undertakings’ activities in Ecuador;

\[ c \] 0.01 per cent of the assets in Ecuador; or

\[ d \] 0.05 per cent of the book equity in Ecuador.

Through a new instructive for filing fee payment from February 2017, prior rules governing payment of the filing fee were modified and clarified, now requiring parties to validate their methodology of payment prior to making any disbursements. This manual now clarifies what was the generally admitted practice in acquisitions where the figures must be applied to the combined entities in the case of mergers, and to the acquired or target entity in the case of acquisitions.

vi Exemptions

Article 19 of the Law and 13 of the Regulations establishes that the following operations are exempted from the obligation to notify:

\[ a \] acquisitions of shares without voting rights, bonds, securities or any other right convertible to shares without voting rights;
acquisitions of undertakings or economic operators that have been liquidated, or that have not had economic activity in the country in the past three years;

acquisitions of shares with the intent of reselling them within a year (any holding of more than a year must be authorised by the regulator);

acquisitions of failing firms. In Ecuador, the failing-firm doctrine requires prior authorisation of a public authority. It has not been clarified what public body must authorise the acquisition of a failing undertaking; and

acquisitions of undertakings in the course of judicial or administrative proceedings, such as seizure.

These exceptions have served as a safe harbour for recent global transactions where the acquiring entity alone exceeded the mandatory thresholds, but the acquired entity did not have economic activity in the past three years.

III CONCENTRATION OPERATIONS

The regulator has approved a large number of global transactions subject to multi-jurisdictional control and that required prior approval in Ecuador. Statistically, only one transaction that was originally denied on formal grounds was later approved on appeal, only a handful of transactions were denied on anticompetitive concerns, and, to date, few global transactions have been subjected to structural remedies: one was subsequently closed because of the termination of the original merger, other is still pending completion after the implementation of a monitoring trustee to supervise compliance with the imposed remedies, and others have been cleared after complying with the proposed conditions.

The following table depicts transactions that have been subject to notification in Ecuador following the enactment of the merger control regime in 2011:

<table>
<thead>
<tr>
<th>Operators</th>
<th>Industry</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nutreco/Gisis</td>
<td>Fish feed</td>
<td>2013</td>
</tr>
<tr>
<td>Metlife/Genesis</td>
<td>Insurance</td>
<td>2013</td>
</tr>
<tr>
<td>Veolia/Interagua</td>
<td>Water services</td>
<td>2013</td>
</tr>
<tr>
<td>Arcel/Toni</td>
<td>Food and beverages</td>
<td>2014</td>
</tr>
<tr>
<td>Cabcorp/Teralia</td>
<td>Beverages</td>
<td>2014</td>
</tr>
<tr>
<td>Pnaamérica/Produbanco</td>
<td>Financial</td>
<td>2014</td>
</tr>
<tr>
<td>Nestlé/Ecuajugos</td>
<td>Beverages</td>
<td>2014</td>
</tr>
<tr>
<td>AerCap/Aig</td>
<td>Aircraft financing</td>
<td>2014</td>
</tr>
<tr>
<td>Bimbo/Sapan</td>
<td>Bread</td>
<td>2014</td>
</tr>
<tr>
<td>Hapag-Lloyd/Cia</td>
<td>Container liner shipping</td>
<td>2014</td>
</tr>
<tr>
<td>Indurria/Swingsas</td>
<td>Industrial gas</td>
<td>2014</td>
</tr>
<tr>
<td>AT&amp;T/T/DirecTV</td>
<td>Telecommunications</td>
<td>2014</td>
</tr>
<tr>
<td>Banco Del Pacifico/lece</td>
<td>Financial</td>
<td>2014</td>
</tr>
<tr>
<td>LaFarge/Unacem</td>
<td>Cement</td>
<td>2014</td>
</tr>
<tr>
<td>Burlington/Chiquita</td>
<td>Banana production</td>
<td>2014</td>
</tr>
<tr>
<td>Hamburgu Sud/Ceni</td>
<td>Container liner shipping</td>
<td>2014</td>
</tr>
<tr>
<td>Hebei Iron &amp; Steel/Ipex</td>
<td>Steel processing</td>
<td>2014</td>
</tr>
<tr>
<td>Corporación Favorita/Librimundi</td>
<td>Book distribution</td>
<td>2014</td>
</tr>
</tbody>
</table>
### IV FINES

The Law is very severe in its the application of fines for lack of, or late notification of, transactions subject to its control. The amount of fines will depend on the state of execution of the transaction once the regulator commences its investigation into the lack of notification. Late notification (that is, notification outside the eight-day term from execution) is considered a minor offence under the Law, whereas execution prior to notification, or prior to approval, is considered a serious offence under the Law. Execution of acts or agreements

<table>
<thead>
<tr>
<th>Operators</th>
<th>Industry</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bayer/Merck</td>
<td>Consumer care products</td>
<td>2014</td>
</tr>
<tr>
<td>Abbots/CFR Pharmaceuticals</td>
<td>Pharmaceuticals</td>
<td>2014</td>
</tr>
<tr>
<td>Colonial/Seguros Oriente</td>
<td>Insurance</td>
<td>2014</td>
</tr>
<tr>
<td>Concel/Ecuadortelecom</td>
<td>Telecommunications</td>
<td>2015</td>
</tr>
<tr>
<td>Ab Electrolyte/General Electric</td>
<td>Home appliances</td>
<td>2015</td>
</tr>
<tr>
<td>Imbatuto/Vallejo Aranjo</td>
<td>Vehicle distribution</td>
<td>2015</td>
</tr>
<tr>
<td>Yuna/EPCE</td>
<td>Cement</td>
<td>2015</td>
</tr>
<tr>
<td>Nokia/Alcatel-Lucent</td>
<td>Telecommunications</td>
<td>2015</td>
</tr>
<tr>
<td>Sigma/Ecarni</td>
<td>Meat products</td>
<td>2015</td>
</tr>
<tr>
<td>Casabical/Autoconfianza</td>
<td>Vehicle distribution</td>
<td>2015</td>
</tr>
<tr>
<td>Casacasa SA/Unacem</td>
<td>Cement</td>
<td>2015</td>
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<td>Colonial/Seguros oriente</td>
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<td>Sugar and alcoholic beverages</td>
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<td>Pharma</td>
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prior to notification or prior to approval is considered a serious offence under the Law. Minor offences are subject to a fine amounting to 8 per cent of the annual turnover in Ecuador of the combined entities in the year preceding the imposition of the fine; serious and very serious offences are subject to 10 per cent and 12 per cent fines corresponding to the annual turnover, respectively. The regulator has initiated several *ex officio* proceedings to pursue alleged gun jumping following publication of global transactions in international news, and has summoned parties to justify the lack of notification in relation to global transactions with a direct or indirect impact in Ecuador.

In addition to these exorbitant fines, the Authority can also order the divestment or unwinding of the transaction in cases where the effects of the non-notified transaction are considered anticompetitive in order to restore the competitive process. The statute of limitations of the authority to gain knowledge of non-notified transactions expires four years from the date when it comes to know that a transaction subject to its control was not notified, thus making the risk of lack of notification or gun jumping practically indefinite.

V THE MERGER CONTROL REGIME

Mergers and acquisitions of commercial companies are governed by the Companies Law and the Commercial Code. The following types of procedures are available under local law: mergers by union or takeover; acquisitions by assignment of business; and acquisitions by assignment of shares or share participations.

Merger procedures

According to corporate legislation, a merger can take place in one of two ways: two or more companies join to form a new company that succeeds them regarding their rights and obligations (merger by union); or one or more companies are taken over by another company that continues post-takeover (merger by takeover).

For a merger of any company (or companies) into a new company (merger by union) to take place, it is first necessary to agree the former’s dissolution and then to transfer all the corporate assets in bulk to the new company. If the merger results from a takeover of one or more companies by another existing company, the existing company must likewise acquire the assets of the company or companies taken over by means of capital increase.

In the event of a merger by takeover, the company taking over must approve the basis for the operation and the amended incorporation charter during a special shareholders’ meeting specifically called for that purpose. The companies that will be taken over or that merge to create a third company must likewise approve the merger in the same manner (that is, by calling a shareholders’ meeting).

Either type of merger must be recorded in a public deed to which the balance sheets of the absorbed companies must be attached. The Superintendency of Companies, Securities and Insurance must approve such public deed. Finally, for the merger to take effect, an excerpt of the deed must be published, and the deed must subsequently be registered with the Mercantile Registry.

The effects of a merger of two or more companies, as the case may be, are the following:

* in the case of a merger by union, the major effect is the appearance of a new juridical person that is the successor of the rights and obligations of the merged companies; and
in the case of a merger by takeover, the company that takes over will be in charge of paying the liabilities of the company taken over, and must assume the responsibilities inherent to a liquidator with respect to the creditors of the company that was taken over.

From a taxation standpoint, the Tax Code provides that those who acquire businesses or enterprises are responsible as successors of the absorbed company’s liabilities, and thus will be liable for all taxes owed by the transferor, and for the taxes generated from the business or enterprise being transferred during the year the transfer takes place and for the two preceding years. Liability is limited to the value of the assets.

Merger transactions are not taxable, except for tax on immovable property transfer in some types of mergers. For instance, merger by union of capital stock companies shall not bear any tax on immovable property transfer; however, the merger by union of limited liability companies and mergers by takeover of limited liability companies and of capital stock companies is subject to a 1 per cent tax on the immovable property transfer price.

Transfers of assets and liabilities in mergers are not subject to income tax, and the greater or lesser value reflected in the value of the shares of merged companies is not taxable or deductible. Transfers of assets (tangible or intangible) may take place at present value or at market value.

ii    Acquisition by assignment of business

Another form of acquisition that differs from the already-mentioned merger alternatives is the sale of all or part of the business of a business person, which is governed by the Commercial Code. In practice, this system has been used to purchase and sell all assets and liabilities of a commercial corporation (i.e., a company controlled by the Superintendency of Companies, Securities and Insurance) or of the branch of a foreign company.

It should be noted that this system does not result in the union of two or more juridical persons, or in the takeover of one or more of them by a third party, such as is the case for mergers ruled by the Law on Companies; rather, it is a commercial purchase and sale contract provided that it involves all the merchandise or assets of a business person.

The only formality to perfect these contracts is that, under penalty of annulment, they must be executed through a public deed. It is not necessary to register them with the Mercantile Registry.

From a taxation standpoint, the acquirer of the businesses is responsible as successor for the taxes generated from the business or enterprise being transferred during the year the transfer takes place and for the two preceding years. Liability is limited to the value of the assets.

The sale of a business transferring all assets and liabilities is not subject to value added tax. However, it is subject to income tax withholding at a rate of 2 per cent in a local transfer.

iii    Acquisition by assignment of shares or share participations

Shares assignment

Another way to acquire an Ecuadorian commercial company is through a transfer of shares (capital stock companies) or share participations (limited liability companies).

Shares – whether common or preferred – are freely transferable, and their transferability cannot be avoided even in the case of a contract between parties limiting their transferability.
For instance, in cases of a breach of a contractual limitation of the transferability of shares, the transfer cannot be undone, but there can be a contractual penalty applicable against the default party.

Ownership of shares in a stock corporation is transferred by means of an assignment letter signed by the transferor or by a securities trading company that represents the transferor. The assignment must be written on the corresponding share certificate or on a sheet attached thereto. In the case of share certificates delivered for custody at a centralised securities clearing and liquidation deposit, the assignment may take place pursuant to mechanisms established by such centralised deposits. An assignment of shares or a transfer of ownership takes effect via the company and third parties only as of the date it is registered in the book of shares and shareholders of the company. Registration is made with the signature of the company’s legal representative upon delivery of a joint (or individual) communication from the assignor and the assignee.

If the shares are immobilised in a centralised securities clearing and liquidation deposit, they will be registered in the book of shares and shareholders by the centralised deposit upon submission of an assignment form signed by the securities trading company acting as an agent. The centralised deposit must keep files and records of transfers, and must give notice thereof to the company on a quarterly basis.

Stock corporations must be incorporated with at least two shareholders. The company’s legal existence begins upon such registration.

If the shares of a stock corporation are not listed in a stock exchange, their transfer requires no formality other than that described above (that is, by means of an assignment document and registration of the assignment in the book of shares and shareholders). On the other hand, if the shares are listed in a stock exchange, several Stock Market Law rules must be observed.

From a taxation standpoint, shares assignment is subject to income tax.

**Share participations assignment**

Given the different juridical nature of limited liability companies – that is, they are partnerships involving persons and not capital – the assignment of share participations is governed by different rules with respect to an assignment of shares. Share participations are quotas (contributions) in the company’s capital. Since share participations are not documents of title, they lack the characteristics inherent to shares (e.g., their free circulation and valuation in the market).

Share participations are transferable by an act *inter vivos* for the benefit of another partner or partners of the company or of third parties if the unanimous consent of the capital is obtained according to Article 113 of the Law on Companies.

An assignment of share participations must be carried out by means of a public deed. The notary will include in the protocol a certificate from the company’s legal representative evidencing that the requirement mentioned in the preceding paragraph has been met. The assignment will be recorded in the books of the company.

From a taxation standpoint, share assignment is subject to income tax.

Thus, mergers and acquisitions are governed in Ecuador by the Law on Companies and the Commercial Code with respect to their formalisation, and in most cases they require prior authorisation. All of the above-described forms of concentration are subject to notification and authorisation by the Superintendency if they surpass the thresholds set in the Law.
VI  OUTLOOK & CONCLUSIONS

From the competition and corporate perspective, two separate rules are in force in Ecuador, and they are subject to different procedures and clearance processes. From the competition perspective, however, considering the few years of practice and the high degree of turnover of regulator staff, practice can at times be unpredictable and deadlines may be extended further than anticipated. From the perspective of global transactions being cleared in different jurisdictions, it will likely be the case that a merger notification will be filed in Ecuador far in advance of other jurisdictions, merely because of the country’s strict deadlines for notification and prior approval. In our opinion, a reform should take place regarding Ecuador’s strict eight-day deadline, considering that it is in the parties’ interest to submit complete notifications as far in advance as possible, and considering the requirement to have approval in order for the closing of transactions. A bill was sent to the National Assembly last year proposing to eliminate the monetary threshold, in an alleged effort to simplify contracting procedures in Ecuador. We believe this would generate uncertainty in global transactions where relevant market analysis is not typically performed in the local market until after a filing obligation based on the monetary threshold is met. It would likely lead parties having to notify otherwise non-notifiable transactions, based on the concern that a different market definition could lead them to a contingency for gun jumping in Ecuador.
Chapter 18

FRANCE

Hugues Calvet, Olivier Billard and Guillaume Fabre

I INTRODUCTION

i Merger control authority

Since a major overhaul of the French merger control regime (the Law on Modernisation of the Economy), the Competition Authority (FCA) has exclusive jurisdiction in merger control cases.

The Minister for the Economy, previously in charge of merger control in France, still holds residual powers: in theory, he or she may request the opening of an in-depth investigation and may reverse the FCA’s decision on grounds of general interest.

ii Statutes, regulations and guidelines

Rules on French merger control procedure are set out in the French Commercial Code (FCC) under Articles L430-1 et seq and Articles R430-1 et seq (as last amended by Law No. 2015-990 of 6 August 2015).

The Authority adopted guidelines on merger control on 10 July 2013. These guidelines take into account the experience acquired by the FCA and refer to the practice of the Minister for the Economy, as well as of the European Commission (EU Commission) and to the case law of the Court of Justice of the European Union and the French Administrative Supreme Court. Answers to questions concerning both procedure and substantive issues can be found in these guidelines. Even though these guidelines are not binding, the FCA is committed to applying them in each case unless specific circumstances or general interest considerations justify a derogation.

iii Transactions that require prior approval

Notification to the FCA is required when the envisaged transaction qualifies as a concentration and, provided the Commission does not have jurisdiction, when turnover thresholds are met.

Definition of a concentration

The French definition of ‘concentration’ is similar to that set out in the EU Merger Regulation (EUMR) (i.e., it applies whenever there is a lasting change of control over an undertaking).

Accordingly, there is a concentration where:

1 Hugues Calvet and Olivier Billard are partners at Bredin Prat. Guillaume Fabre is an associate at Bredin Prat. The authors would like to thank Solène Hamon for her contribution to the research for the writing of this chapter.


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two or more formerly independent undertakings merge; or
one or several persons who already control at least one undertaking, or one or several
undertakings, directly or indirectly acquire control of the whole or parts of one or more
other undertakings; or
a joint venture that performs, on a lasting basis, all the functions of an autonomous
economic entity (a full-function joint venture) is created.

In essence, the notion of ‘control’ under French law is the same as that set out in the EUMR:
it is the ability to exercise decisive influence over the activity of an undertaking (the EU
Commission’s consolidated jurisdictional notice is therefore relevant in this regard). Legally
speaking, Article L430-1 FCC defines ‘control’ as all rights, contracts or any other means that,
either separately or in combination, and having regard to the factual or legal circumstances,
enable a party to exercise a decisive influence on an undertaking, be it on a sole or joint basis,
and in particular:

ownership rights or possession of all or part of the assets of an undertaking; or
the rights or contracts that confer a decisive influence on the composition, voting or
decisions of an undertaking’s decision-making bodies. Minority interests can be caught
by this definition of control provided that other legal or factual elements are taken into
account (e.g., veto rights).

Transactions leading to changes in the quality of control (change from sole to joint control,
and conversely, entry of an additional shareholder, replacement of an existing shareholder,
etc.) fall within the scope of French merger control.

**Jurisdictional thresholds**

**General thresholds**

French merger control applies where the following cumulative conditions are met:

all the undertakings that are party to the concentration have a worldwide aggregate
pre-tax turnover in excess of €150 million;

at least two of the parties concerned each have a pre-tax turnover in France exceeding
€50 million; and

the transaction does not fall within the scope of the EUMR.

**Specific thresholds for the retail sector**

If two or more parties involved in the transaction operate one or more retail stores, the FCA’s
prior approval is required where:

the combined worldwide pre-tax turnover of the parties exceeds €75 million;

at least two of the parties concerned each have a pre-tax turnover in France exceeding
€15 million in the retail sector; and

the transaction does not fall within the scope of the EUMR.

**Specific thresholds for the overseas territories**

When one party to the merger carries out part or all of its activity in one or several French
overseas territories, the transaction has to be submitted to the FCA if:

the combined worldwide pre-tax turnover of the parties exceeds €75 million;
each of at least two of the parties concerned achieved a pre-tax turnover exceeding €15 million (or €5 million if the retail sector is concerned) in at least one of the French overseas territories concerned. This threshold does not have to be reached by all the parties concerned in one and the same territory; and

the transaction does not fall within the scope of the EUMR.

The undertakings whose turnover are to be considered depend on the type of transaction. For instance, will be considered: the merging entities in the case of a merger, the acquirer and the target (excluding the seller) in the case of an acquisition of sole control, the controlling parent companies in the case of a newly created joint venture.

‘Turnover’ is the amount derived from the sale of products or the provision of services in the preceding financial year. Calculation of the relevant turnover may involve adjustments pursuant to Article L.430-2 V. FCC, which sets out rules similar to those of Article 5 of the EUMR. In essence, the aim is to reflect the underlying economic reality of the market, by ensuring that (1) the turnover corresponds to the entire group of companies; (2) it is properly allocated geographically speaking; (3) internal turnover is excluded; and (4) the specificities of certain sectors are taken into account (e.g., in the financial services sector).

When jurisdictional thresholds are met, pre-merger filing is mandatory and suspensive (i.e., there is a stand-still clause). This applies to all concentrations, including foreign-to-foreign transactions, even in the absence of overlap between the parties’ activities.

Individuals and companies acquiring control of all or part of an undertaking are responsible for notifying. In the case of a merger, this obligation is incumbent upon the merging entities. In the case of a joint venture, the parent companies can file a joint notification.

In case the parties fail to file a concentration or implement a concentration before the FCA clears it, the FCA may (1) order the parties to file and impose a periodic penalty payment until they do so; (2) impose a fine up to 5 per cent of the French turnover during the previous financial year (plus, where applicable, that of the acquired undertaking) for companies and up to €1.5 million for individuals. Transactions that have been completed without clearance are illegal and not enforceable. There are no criminal sanctions for not filing.

For instance, on 26 December 2013, the FCA imposed a fine of €4 million to Castel Frères, a company active in the wine sector, for failing to notify its acquisition of six companies that were part of the Patriarche group prior to closing the transaction on 6 May 2011. The Authority was informed of the acquisition by a third party, and found evidence that Castel Frères engaged in such ‘gun-jumping’ on purpose in order to close the transaction rapidly. Even though the transaction was finally notified and authorised by the FCA, the FCA specified that this did not make the breach less serious. On appeal, the Administrative Supreme Court reduced the amount of the fine to €3 million, taking into account that (1) the transaction was notified shortly after the FCA’s request; and (2) Castel Frères did not intend to bypass competition rules. This last reason appears somewhat inconsistent with the finding that Castel had deliberately failed to file.

On 8 November 2016, the FCA issued a particularly significant decision relating to Altice’s practices when it notified (as two separate cases) the acquisitions of, respectively, exclusive control over SFR and OTL. Various competitors had complained to the FCA that Altice had begun implementing both transactions before the FCA had approved them in,
respectively, June and September 2014. The FCA then carried out dawn raids at Altice, SFR and OTL’s premises. At the end of its investigation, the FCA concluded that Altice had indeed begun to interfere in the respective commercial policies of SFR and OTL before it had approved of the transactions, in particular by (1) approving the conditions at which SFR answered to a call for tender; (2) approving the conditions of a significant contract between SFR and a third party; (3) influencing SFR’s pricing policy for its commercial offers; and (4) coordinating with SFR for the acquisition of OTL. Altice and SFR also exchanged various commercially sensitive information, coordinated on the launch of a new commercial offer that marked a departure from SFR’s previous commercial strategy, so that such offer could launch as of the FCA’s clearance decision. Also, Altice and OTL similarly exchanged various sensitive information and Altice approved various operational decisions taken by OTL and it appointed OTL’s CEO before the FCA’s authorisation. The FCA therefore imposed a fine of €80 million to Altice for gun jumping. In parallel, Altice was recently fined €124.5 million by the European Commission for implementing its acquisition of PT Portugal before notification or approval by the Commission. Those two fines are among the highest fines ever enforced for such infringement.

II YEAR IN REVIEW

In 2017, 236 concentrations were reviewed and cleared by the FCA, eight of which were cleared conditionally (that is, with remedies).

This appears to be a stable trend considering that 230 cases were reviewed and cleared by the FCA in 2016.

So far in 2018, the FCA has adopted 73 decision clearing concentrations, including one conditionally.

These figures include a number of simplified decisions, in particular concerning the sector of retail distribution, due to the particularly low thresholds for notifying such concentrations (in practice, many decisions may concern a change of control over a single retail store).

Below is a presentation of main significant cases cleared by the FCA in 2017.

La Poste/Suez

On 21 December 2017, the FCA cleared, subject to conditions, the creation of a full-function joint venture between La Poste and Suez in the collection and recovery of non-hazardous office waste sector. The FCA decided to clear the merger and on the same day to close infringement proceedings opened against La Poste for abuse of dominant position involving the same activity. In both cases, the FCA identified a risk that (1) La Poste would use competitive advantages that no competitor could reproduce, thanks to the infrastructures it manages to provide universal postal services, and that (2) La Poste would offer services for the collection of non-hazardous office waste at prices below cost. Regarding both the infringement proceedings and the merger control proceedings, La Poste and Suez took commitments as regards the promotion and marketing of the new company’s services. In the infringement proceedings, La Poste committed to (1) presenting commercial proposals concerning waste collection services on materials creating no confusion with the offers under the universal

postal service, (2) setting up awareness-raising programmes for staff in contact with clients of the waste collection services, (3) deleting all reference to the notion of the sworn-in mailmen in the materials used for sales promotion for the said services, and among other things (4) also developing a cost accounting system and implementing profitability monitoring. In the merger control procedure, La Poste committed to (1) regulating its behaviour in order to prevent any confusion of means with its universal post service offers, and (2) pricing any services it provides to the full-joint venture at market price. In the context of merger control, the FCA takes thus into account other issues falling within the scope of antitrust and abuse of dominant position.

ii Concept Multimédia/Axel Springer Group

On 1 February 2018, the FCA assessed for the first time a merger between two online platforms. It unconditionally cleared the acquisition of Concept Multimédia (Logic-Immo.com) by the Axel Springer Group (SeLoger.com), in the online real estate advertising sector. The FCA conducted a market test via a vast online questionnaire, to which more than 30,000 real estate agencies replied. The aim of such a broad consultation was to assess whether current competitors (such as Le Bon Coin) and potential competitors (such as Facebook) could stimulate competition in the face of the merger of two of the main operators in the French online real estate advertising market. Based on this assessment, the FCA considered that the transaction would not significantly harm competition in the markets in question and thus cleared it without conditions.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Filing has a suspensive effect, which means that the parties cannot implement the merger before clearance is granted by the FCA. Timetable management is therefore of the utmost importance.

Pre-notification contacts

Pre-notification contacts with the FCA are in theory optional but are very strongly advisable (except perhaps in some extremely simplified cases). Pre-notification is particularly recommended when there are uncertainties as to whether the transaction must be notified, or in the event of complex concentrations, or when the parties would like to have an initial idea, on a confidential basis, of the FCA’s opinion on their project. To start this phase, parties can send a briefing memorandum on the transaction (describing in particular the parties, the envisaged transaction, the markets concerned, the competitors and the parties’ market shares) or, more generally, a draft notification form. Informal meetings can also be arranged between the FCA and the parties if necessary. The FCA may also take the initiative to contact the parties, when it sees in the press that a transaction is announced or being negotiated.

In practice, the parties can end pre-notification talks and formally notify a concentration when the FCA gives its go-ahead.

Formal filing

Filing is possible when the parties can prove their firm intention to carry out the concentration. In practice, notification usually occurs after the parties have entered into a binding agreement.
However, notification may also occur before a binding agreement is signed on the basis of, for instance, a signed letter of intent or a memorandum of understanding. In the case of a public offer, parties can file once the purchase or exchange offer is announced publicly.

In practice, notification must be made in a specific format prescribed by the FCC. The content of the notification form and the documents to be provided to the FCA are also explained in the guidelines. The information requested is overall similar to the information requested in EU Merger control proceedings (with some small specificities).

Information communicated to the FCA in the notification form and during the review process may be disclosed when the FCA’s decision is issued or in the course of its investigation (e.g., in the course of the market test). However, business secrets may be protected upon request.

**Phase I**

The Authority shall issue its decision within 25 working days of the day on which complete notification was received. To this end, the FCA may request further information from the parties. In practice, the FCA sends a letter declaring a file to be complete as from the day it received the complete file (i.e., contrary to practice at the EU level, the clock does not start to run automatically as the day of notification) and where the FCA considers that the file is incomplete it may send a letter stating that such and such information is missing thus preventing the clock from running.

The Authority will also usually conduct market tests to check information provided by the parties. Market tests are usually conducted through information requests sent to other market players (competitors, suppliers, customers).

When remedies are proposed to the FCA, the review period is automatically extended by 15 working days. Besides, parties may ask when necessary for the review period to be suspended (‘stop the clock’) for a period of up to 15 working days. Such possibility may be used to finalise commitments, for example. The Authority may also stop the clock in Phase I either when parties failed to inform of new relevant facts that occurred before the submission of the filing or failed to provide all or part of the information requested within the deadline.

At the end of this period, if no competition concern remains unsolved, the FCA will clear the concentration. Otherwise, the process moves to Phase II.

Within five working days after the notification of the FCA’s clearance decision to the Minister for the Economy, the latter can ask the FCA to open a Phase II review of the concentration.

**Phase II**

If the concentration raises serious doubts as to competition issues, the FCA will initiate an in-depth examination. The opening of Phase II usually leads to additional information requests. State-of-play meetings and hearings are generally also held. The Authority has to issue its decision within 65 working days as from the opening of Phase II. If commitments, or amendments to commitments previously submitted, are submitted less than 20 working days from the expiry of the 65-day period, the review period is extended by 20 working days from receipt of these commitments or amendments (i.e., it cannot exceed 85 working days as from the opening of Phase II). Here again, parties may ask, when necessary, to stop the clock for a period of up to 20 working days (to finalise the commitments, for example).
Authority may also stop the clock if parties failed to inform it of new relevant facts when they occurred or failed to provide all or part of the information requested within the deadline, or third parties failed to communicate information requested because of the notifying parties.

Within 25 working days from the notification of the final decision of the FCA, the Minister for the Economy can, on the basis of public interest grounds (industrial development, companies’ competitiveness in an international context, social welfare, etc.), review the case himself or herself and issue a decision based on the aforementioned grounds.

On 14 June 2018, and for the first time, the Minister for the Economy decided to use his power to re-examine an operation cleared by the FCA. On that day, the FCA had authorised the acquisition of certain securities and assets of Agripole (William Saurin) by Cofigeo. In that case, Cofigeo had obtained a derogation to the suspensive effect so that it could acquire William Saurin, which was undergoing insolvency proceedings. The FCA finally approved this acquisition subject to structural commitments. As of the day of writing, the decision of the Minister is still pending. It is, however, possible that the Minister for the Economy will try to minimise the employment consequences of the required divestment.5

ii Parties’ ability to accelerate the review procedure

French law does not provide for an accelerated procedure. However, as provided in the FCA guidelines, parties to a concentration may request to benefit from an anticipated decision, particularly in cases where a simplified notification form may be used (absence of overlap, for instance).

In two cases, the parties can proceed without having to wait for the FCA to issue its decision.

First, the parties may request an individual derogation to the duty to stand still. The parties must show that this derogation is strictly necessary. When the FCA grants this derogation (which may be subjected to conditions), the parties have to file a complete notification within three months. Should they fail to do so, the derogation becomes void. Obtaining such a derogation is exceptional. It applies mostly in the case of an offer to buy an undertaking subject to insolvency proceedings. It may also apply in some cases of acquisitions by investment funds, in the absence of overlap.

Second, there is an automatic derogation in the case of the exchange of securities on a regulated market. The rule is that takeover bids may always be implemented, provided that the acquirer does not exercise the voting rights attached to the securities at issue (this is thus similar to the rules of Article 7, Paragraph 2 of the EU Merger Regulation).

iii Third-party access to the file and rights to challenge mergers

Third parties are not directly involved in the merger control proceedings. They do not have access to the notification file. However, firstly, notifications are announced on the FCA’s website with a summary of the concentration. This opens a right for them to submit observations. Works councils of the companies involved in the concentration must be informed within three days after publication of the notification of the concentration on the FCA’s website. Secondly, the FCA has the power, during both phases, to interview any third party when

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reviewing a concentration (clients, competitors, suppliers, etc.), which it generally does by sending out detailed questionnaires and, in the course of Phase II proceedings, by organising hearings and inviting them to defend their case before the decision-making body of the FCA.

iv Resolution of authorities’ competition concerns, appeals and judicial review

Resolution of authorities’ competition concerns

Where competition problems are identified, parties to the concentration may submit remedies. Remedies can only be proposed by the parties in the course of Phase I (the FCA considers in its guidelines that it may ‘invite’ the parties to offer remedies). However, at the end of Phase II, the FCA may impose remedies in order to clear a transaction (to avoid this, parties can withdraw their notification before the end of Phase II).

In its guidelines, the FCA details and provides illustrative examples of its decision-making practice, which is characterised by a preference for structural remedies, including transfers of minority shareholdings where necessary. However, in particular in the case of transactions leading to vertical integration or to conglomerate effects, the FCA indicates that it will pragmatically accept behavioural remedies (for which it provides several examples). A review of mergers over the past years suggests that the FCA is much more willing to accept behavioural commitments than the Commission might be.

For instance in 2016, in five cases out of six, the FCA conditioned its approval only on behavioural remedies, whereas in the remaining case, structural and behavioural remedies were accepted. In 2017, out of eight cases, the FCA accepted behavioural commitments four times, and a mixture of behavioural and structural remedies for the other four. In 2018, so far, the FCA has accepted mixed remedies once.

It is also interesting to note that the FCA now has a well-established practice of requesting alternative or crown-jewels remedies (with some exceptions). In principle, such commitments remain confidential in the published decision. However, in the UGI/Totalgaz case, competitors of the merging parties lodged an appeal before the Administrative Supreme Court asking, inter alia, for the publication of the two alternative commitments. In an interim

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6 Acquisition of Société Groupe Aqualande by Société Labeyrie Fine Foods and Les Aquaculteurs Landais, decision dated 22 April 2016, Case No. 16-DCC-55; acquisition of Agri-Négoce by Axéréal Participations, decision dated 21 September 2016, Case No. 16-DCC-147; acquisition of Société Geimex by the Casino group, decision dated 14 October 2016, Case No. 16-DCC-155; merger of Sicavyl with Sicarea, decision dated 9 December 2016, Case No. 16-DCC-208; acquisition of Société Aéroports de Lyon by Société Vinci Airports, decision dated 31 October 2016, Case No. 16-DCC-167.

7 Acquisition of Darty by the Fnac Group, decision dated 27 July 2011, Case No. 16-DCC-111.

8 Merger by absorption of Ecofolia by Eco-emballages, decision dated 3 April 2017, Case No. 17-DCC-42; Acquisition of Totalgaz SAS by UGI Bordeaux Holding SAS, decision dated 3 July 217, Case No. 17-DCC-103; Merger by absorption of Coopérative agricole des Agriculteurs de la Mayenne by Terrena, decision dated 14 December 2017, Case No. 17-DCC-210; Creation of a full-function joint venture between La Poste and Suez, decision dated 21 December 2017, Case No. 17-DCC-209.

9 Acquisition of Anios by Ecolab, decision dated 31 January 2017, Case No. 17-DCC-12; Acquisition of MédiPôle-Partenaires by Elsan, decision dated 23 June 2017, Case No. 17-DCC-95; Acquisition of the Bricorama group by ITM Equipement de la Maison, decision dated 18 December 2017, Case No.17-DCC-215; Acquisition of stores owned by the Tati group (Tati, Fabio Lucci, Giga Store) by Gifi (GPG group), decision dated 18 December 2017, Case No. 17-DCC-216.

10 Acquisition of Zormat, Les Chênes and Puech Eco by Carrefour Supermarchés France, decision dated 27 April 2018, Case No. 18-DCC-65.
judgment, the Administrative Supreme Court ruled that the confidentiality of alternative commitments prevented it from controlling the legality of the decision, and thus ordered the FCA to disclose them. The disclosure of such commitments was in the end without effects on the legality of the decision (see, infra).

Whatever the type of remedy, the appointment of an independent trustee responsible for monitoring the implementation of the remedies is almost systematically required by the FCA. The trustee’s role, the provisions guaranteeing his or her independence with regard to the parties and the details of how he or she is to report on his or her assignment to the FCA are specified in the model text for commitments.

Taking its inspiration from models developed by the Commission and other competition authorities, in its guidelines the FCA presents two models: one for divestiture commitments and the other for trustee mandates. These models can be adapted on a case-by-case basis although the FCA will try to stick to its model to the greatest extent possible and thus does not offer much flexibility in practice.

The Authority carefully monitors the implementation of remedies and may withdraw an authorisation in case of non-compliance. In such a case, the parties must either restore the situation to what it was before the transaction (i.e., ‘unwind’ the operation) or re-notify the transaction to the FCA within a month (the duty to re-notify the transaction was challenged before the Constitutional Council, which affirmed its constitutionality).

If such failure to comply with the remedies is confirmed, the FCA has the power to impose financial penalties on the notifying parties of up to 5 per cent of their net turnover achieved in France. The FCA has not shied away from using this fining power. It began in 2011 when the FCA fined Canal Plus €30 million for failing to implement the behavioural commitments it had taken to obtain the green light to buy its rival TPS.

Since then, the FCA has shown its willingness to scrutinise the full range of commitments. In particular, the FCA fined Altice twice for failing to respect the commitments adopted to obtain the greenlight for its acquisition of SFR in 2014. Firstly, in April 2016, the FCA imposed a €15 million fine for non-compliance with the duty to preserve the business’s competitiveness pending its divestment. (Altice had committed to divest Outremer Telecom’s mobile telephony business and, pending such divestiture, it increased Outremer Telecom’s prices, which the FCA considered would impede its competitiveness). Secondly, in March 2017, the FCA imposed a €40 million fine on Altice for failing to respect a behavioural commitment relating to the proper performance of a contract for the creation of an optic fibre network.

Recently, on 11 September 2017, the FCA announced that it had opened ex officio proceedings to review the conditions under which the Fnac group is implementing its commitment to divest six stores in Paris and nearby. Those commitments were taken to address competition concerns in the market of retail distribution of electronic products (brown and grey products) in the context of its acquisition of rival Darty in 2016.

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12 Case No. 16-D-07.
13 Case No. 17-D-04.
Appeals and judicial review

The Authority’s decisions can be appealed before the Administrative Supreme Court within two months from the date of the notification of the FCA’s decision (for the parties) or from the publication of this decision on the FCA’s website (for third parties). Third parties will need to show they have an interest in challenging the decision.

The applicant will generally seek an annulment of the FCA decision (rendering it null and void) on procedural and substantive arguments. The appeal is not suspensive but the applicant can also bring summary proceedings requesting a stay of execution of the challenged decision (be it of the authorisation in itself as long as the transaction as not been implemented or of the remedies attached thereto as long as they have not been fully implemented). Such a stay of execution may be requested when it is urgent and there is prima facie a doubt as to the legality of the FCA’s decision.

In the event that the FCA’s decision is declared null and void (partially or totally), the FCA will have to reassess the case and an updated notification will have to be filed within a period of two months from the date of notification of the Administrative Supreme Court’s decision.

The following case is noteworthy.

Fnac/Darty

As explained above, on 27 July 2016, the FCA conditionally cleared the acquisition of Darty by the Fnac group subject to the divestiture of six stores in Paris and nearby. On 28 July 2017, the President of the FCA refused to approve the Dray group as buyer of three shops. It also refused to extend the deadline for completion of the divestment. Fnac challenged those decisions before the Administrative Supreme Court. In the context of those proceedings, the Fnac group (1) requested the Court to adopt interim measures to suspend the decision of the President of the FCA and (2) raised a preliminary ruling on constitutionality of the power of the President of the FCA to approve a buyer alone (versus requesting the board of the FCA to adopt that decision).

On 30 October 2017, the Administrative Supreme Court dismissed Fnac’s and Dray’s application for interim measures. Both argued that the refusal to approve Dray as a buyer should be suspended pending the proceedings, given (1) Fnac’s risk of being fined for its failure to implement the commitments, and (2) Dray’s ongoing cost to reorganise its business to buy these three shops. The Supreme Court dismissed these applications on the ground that there was no urgency to suspend the challenged decision (i.e., such urgency would materialise from any FCA decision that would fine the Fnac Darty group).

On 20 April 2018, the French Constitutional Council ruled that the President of the FCA could, from a constitutional point of view, adopt decisions to approve (or not) a buyer in cases that did not raise any complex issue.

The Administrative Supreme Court has yet to decide on the merits of the case, which raises issues similar to those dealt with by the General Court in the Lufthansa v. Commission case.

16 General Court, 16 May 2018, Deutsche Lufthansa AG v. European Commission, Case T-712/16.
v Regulatory review

There are some specific areas in which specific merger rules apply, such as:

a the audiovisual sector, in which, unless otherwise agreed in international conventions to which France is a party, a foreign legal entity may not hold more than 20 per cent of the capital or voting rights of a company operating an audiovisual communications system in French. There are also specific rules on cross-media ownership; and

b the press sector, in which a single individual or legal entity may not control daily publications that represent more than 30 per cent of the total circulation of similar publications on the national market; for publications in French, the above 20 per cent rule applies.

In addition, in the course of Phase II, the FCA may request non-binding opinions from the relevant regulatory authorities. This applies in particular in the audiovisual sector (the Audiovisual Council), in the banking sector (the Credit Institutions and Investment Firms Committee, the Banking Commission and the Financial Markets Authority), the insurance sector (the Insurance Companies Committee), the energy sector (the Energy Regulation Commission) and the telecommunications sector (the Regulatory Authority for Electronic Communications and Post).

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions

When dealing with concentrations, the FCA and competition authorities of other states (including EU Member States) may have concurrent jurisdiction. The Authority cooperates with competition authorities of other Member States through the European Competition Network. In parallel, the European Competition Authorities (ECA), which groups together the competition authorities in the European Economic Area,\(^\text{17}\) has been considering ways in which the processing of mergers subject to investigation in more than one country can be made easier both for the parties to the merger and the authorities, while ensuring that cooperation between members takes place as far as national legislation allows this. According to the arrangements agreed upon by the ECA, when an ECA authority is informed by the notifying parties that they have also notified or will be notifying the concentration to other authorities within the ECA, the relevant officials will contact their counterparts in the other ECA authorities informing them of the notification. The relevant officials of the notified ECA authorities will then exchange views on the case without exchanging confidential information (unless national legislation makes this possible), and keep each other informed of the development of the case as appropriate. It should also be noted that, on 9 November 2011, the ECA adopted a set of best practices to handle cross-border mergers that do not benefit from EU ‘one-stop shop’ review (i.e., mergers reviewed by two or several ECAs simultaneously that are not subject to notification before the Commission). This document envisages cooperation in multi-jurisdictional cases where the exchange of information between ECAs could be

\(^{17}\) EU Member States and the Commission, Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority.
valuable. The success of such cooperation depends to a great extent on the goodwill of the notifying parties, since ECAs will in most cases depend on them for permission to exchange confidential information.

Besides this, national competition authorities from the European Union published a report containing a complete overview of the state of play of information requirements for merger notification in the European Union (May 2016). This document intends to provide guidance to companies that must notify a transaction in several Member States.

However, the FCA and the Commission do not have concurrent jurisdiction. Concentrations with a Community dimension fall within the exclusive jurisdiction of the Commission, and reciprocally the Commission has no jurisdiction to deal with a concentration falling within the competence of the Member States.

In spite of this clear division of competence, some cases can, upon request and provided certain criteria are met, be re-attributed by the Commission to the FCA and vice versa (Articles 4, Sections 4 and 5, and 9 and 22 of the EUMR). Then, as a derogation from the general rules that determine jurisdiction based upon objectively determined turnover thresholds, various referral procedures may lead the FCA to review a concentration with an EU dimension.

Referrals from the Commission may give rise to a complicated Phase II investigation. Recently, the Commission referred the de facto merger between Auchan and System U. The Authority opened a Phase II, at the end of which, the parties withdrew their notification and abandoned the transaction in view of the risk of prohibition or onerous commitments.

ii Dealing with special situations

Ancillary restraints

Agreements entered into parties to a concentration may restrict the parties’ freedom of action in the market and thus contain restrictions of competition. Commonly encountered restrictions in this context include in particular non-compete clauses imposed on the vendor, restrictions in licence agreements and purchase and supply obligations.

Contrary to EU law, which has long provided that such restraints are covered by the decision clearing the concentration if they are directly related to and necessary to the implementation of the concentration (ancillary restraints), the French merger control regulation does not have specific provisions dealing with ancillary restraints.

The Authority has clearly stated that it will scrutinise such restrictions, and to that end will use the Commission Notice on restrictions directly related to and necessary for concentration as guidelines.

The Authority considers that even though there is no obligation for the parties to a concentration to advise the FCA of the existence of such restrictions, it is in their interest to do so when they have doubts as to their ancillary nature. In this review, it is obviously not bound by the parties’ assessment. The guidelines also specify that the FCA could initiate antitrust proceedings against such restrictions that would not be ancillary to the transaction and that the parties would implement.

In March 2016, the FCA cleared the creation of a full-function JV and examined in particular three ancillary restraints. It considered two of them to be ancillary restraints on the basis of the EU Commission’s notice (non-compete obligation for the parents in relation to
the JV for the JV’s lifetime and an exclusive distribution agreement for a period of five years). A commercial contract, the nature of which was kept confidential in the Authority’s public decision, was, however, declared not to be directly related and necessary to the transaction.\footnote{Case No. 16-DCC-34.}

**Distribution agreements**

The new thresholds specific to the retail sector have led to an increase in the number of notifications that involve distribution agreements (e.g., franchise contracts, contracts for car dealerships). In particular, several large distribution networks, whether large food or other specialised distribution networks, have opted for an organisation that contractually binds ‘network members’ (dealers, franchise holders, etc.) to a ‘network leader’ (which can be a licensor or a franchisor, for example). The application of merger control to relationships within such a distribution network involves examining various questions (nature of the control, calculation of turnover, evaluation of market power, etc.).

Distribution contracts are indeed likely, when considered together with other elements of law or of fact, to give the network leader a decisive influence on the business activities of the network members. The Authority will examine all clauses that allow the network leader to limit the members’ autonomy, both in implementing their sales policy (e.g., through contractual mechanisms that transfer all or part of the members’ commercial risk to the network leader) and in having the possibility to change network, and will determine whether they are sufficient to give the ‘network leader’ a decisive influence on its members’ business, namely, control, as defined by merger regulations.

In the same way, if the distribution network leader acquires a stake in the share capital of a member that enables it to exercise control alone or jointly over the member, the transaction will easily be qualified as a concentration.

The situation is less clear-cut if only a minority stake is acquired. Such an acquisition can have, as its main objective, the protection of minority shareholders’ financial interests as investors and is not sufficient a priori, as such, to grant a decisive influence on the franchise holder (the dealer or the cooperative member). In this case, the FCA will assess to what extent other elements could give the minority shareholder a decisive influence on the member. In a case, the FCA considered that a minority shareholder, together with the distribution agreement, granted the network leader a decisive influence since the articles of association could only be amended with the consent of the minority shareholder, provided that the member should carry on its business under a specific name.\footnote{Case No. 09-DCC-06.} The same applies when the articles of association provide for a very long period of time before the members can leave the network or de facto prevents members from leaving the network for a very long time. Such provisions in the articles can be in consideration for stakes equal to a blocking minority or even for holding one preference share. In another case\footnote{Case No. 09-DCC-064.} where the network leader owned only one preference share in a company operating a point of sale but where the articles of association granted the network leader, for a period of more than 10 years, the possibility of preventing any change of trade name, opposing any transfer of shares and obliging majority shareholders to sell the business if they operated a similar business with a competing trade name, the FCA considered that the network leader controlled the network member. In addition, the network leader had a right of first refusal in the event of sale of the business.

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18 Case No. 16-DCC-34.  
19 Case No. 09-DCC-06.  
20 Case No. 09-DCC-064.
Depending on other prerogatives that may have been granted to the minority shareholder pursuant to the articles of association as regards the management of the business and depending on the provisions of the trade name agreement, the control exercised by the network leader on the members can be joint, with both parties necessarily having to agree on the sales policy for the points of sale, or exclusive, with the network leader alone being able to determine this policy. When the network leader already exercises joint control on the members, the transaction by which the network leader acquires exclusive control of the member also constitutes a concentration.

**Financial distress and insolvency**

The fact that a concentration takes place within the context of an insolvency proceeding does not preclude the FCA from reviewing it.

Therefore, filing remains mandatory upon purchasers acquiring all or part of a company subject to insolvency proceedings. The purchasers can, however, request derogation from the suspensive effect. Application for such derogation is examined briefly and is generally viewed favourably by the FCA, but does not prejudice the outcome of the substantive review.

In the case of a concentration involving the acquisition of an undertaking that would soon disappear without the transaction, the FCA can clear the case if, in essence, the disappearance of that undertaking would yield more negative effects for competition than the transaction would (following EU case law on the ‘failing firm defence’).

The FCA may also strive to adopt a decision ahead of the phase I deadline, in order to ensure that its decision comes at a time that is fully compatible with the insolvency proceedings. For instance, on 23 May 2017 it authorised a concentration on the 17th day of Phase I.21

**Concentrations involving investment funds**

Merger control applies to concentrations involving investment funds. However, the FCA acknowledges that specific issues may arise in the case of acquisitions of control by investment funds. An annex to the guidelines is dedicated to the general features of merger control applied to such structures, including questions such as the notion of control, turnover calculation, etc.

The Authority recalls that investors participating in investment funds do not usually exercise control. Control is normally exercised by the investment company that has set up the fund.

Allocation of turnover may also raise specific issues in the case of concentrations involving investment funds. Turnover of all portfolio companies held by the different funds over which the investment company exercises control will have to be taken into account.

Substantive assessment of a concentration involving an investment company raises specific issues as to the extent to which the investment company can be considered autonomous from the investors. In the case of a sufficiently autonomous investment company, the competitive assessment will take into account all undertakings over which it exercises decisive influence through its funds. When it appears that the investment company does not control any undertaking active in the same market in which the target is active or in an

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upstream, downstream or connected market, the case will not require further analysis. On the contrary, when an overlap would result from the transaction, the effects of the concentration on the market must be assessed.

In cases where the investment company cannot be considered sufficiently autonomous in relation to investors of the funds, the assessment shall take into account all undertakings controlled by the said investors.

V OUTLOOK & CONCLUSIONS

Since the transfer of merger control from the Minister for the Economy to the FCA in 2009, the FCA has taken advantage of the new regulatory framework to create a robust and efficient merger control process. The FCA has the ability and the resources to tackle complex cases and it has clearly shown during its first years of enforcement that it will not hesitate to explore its own methods of reviewing mergers. The FCA has also shown that it does not shy away from strictly enforcing the rules on gun jumping and that it follows closely the implementation of the behavioural or structural commitments that it accepts in merger control proceedings.

It is also important to note that the FCA has launched on 20 October 2017 an initiative to modernise and simplify merger control law. Three topics have been proposed for consideration: (1) the simplification of merger proceedings (especially the current ‘simplified procedure’); (2) the need to define new jurisdictional criteria so that the FCA can review operations that could lead to competition problems and that are not currently covered by merger control procedures, in particular through the introduction of a market share threshold; (3) the role of trustees in merger control cases.

On 7 June 2018, the FCA announced several measures to modernise its merger control procedures. First of all, the FCA widened the scope of its simplified procedure and simplified that procedure. The FCA also by came to the conclusion that (1) the notification thresholds applicable to mergers were adequate, and that (2) taking into account the local competition issues that can arise, the existence of a specific threshold for the retail sector was still justified. Moreover the FCA considered that the establishment of a threshold based on the transaction value was not justified for the French economy. The FCA thus decided not to propose any reform of the general current legislative framework.

However the FCA considered that the introduction of a new ex post control is an option to be explored for cases falling below the thresholds but that might lead to significant competition issues. Therefore, the FCA launched a new four-month public consultation on this topic. It also announced a revision of its merger control guidelines.
Chapter 19

GERMANY

Alexander Rinne¹

I INTRODUCTION

While Germany is the largest economy in Europe, the turnover thresholds that trigger a merger filing requirement in Germany are some of the lowest across Europe. Following the ninth amendment to the German Act against Restraints of Competition (ARC), the scope of German merger control has become even wider due to the introduction of a transaction-value threshold by which transactions can be caught, even if the parties do not meet the relevant turnover thresholds.² In addition, the types of transactions that are caught by the Germany merger control regime go significantly beyond the usual ‘acquisition of control’, which is the applicable test in the vast majority of other European jurisdictions (along with the European Merger Control Regulation (ECMR) itself). As a result, unless subject to the ECMR, almost every significant European transaction that involves businesses with sales in or into Germany results in a German merger filing, with the German Federal Cartel Office (FCO) receiving more than 1,000 merger filings year-on-year.

Although the FCO is a very experienced authority that never shies away from taking a hard line if a transaction raises serious competition concerns, its approach is generally pragmatic and cooperative. The FCO’s divisions are each responsible for certain industries. Thus, parties can generally expect decision-makers with sector-specific knowledge and experience. Also, the formal requirements for submitting a complete notification in unproblematic cases are less burdensome than in many other jurisdictions.

In cases that raise serious competition concerns, the FCO’s approach tends to be more legalistic and focused on documentary and empirical evidence than in other major jurisdictions where economic theories increasingly appear to dominate merger reviews. Even if this is only a subtle difference – the FCO certainly employs economic theories and involves its chief economist team – it can make cases less data-intense. On the other hand, it can also lead to parties fearing that the authority does not sufficiently understand commercial realities.

All in all, the German merger control regime, although differing in many respects from regimes in other countries, strikes a well working balance between an unusually wide scope of applicability on the one hand and a flexible and practical review on the other.

Regarding its industry focus, the FCO continues to show an active interest in the numerous aspects of e-commerce and online markets, big data, platform markets, network

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² The amendment came into force on 9 June 2017.
effects, online marketing and others. Companies involved in transactions that require merger clearance in Germany are well advised to consider the implications of German merger control at an early stage of their contemplated transactions.

II YEAR IN REVIEW

2017 saw a relatively low degree of merger control enforcement in comparison to previous years. Only three decisions were issued in 2017 following an in-depth Phase II review. Two were cleared without conditions or undertakings. One was prohibited. Three others were withdrawn by the parties after the FCO has informed the parties about its competition concerns during the merger review. In addition, the FCO continues to be prepared to engage in detailed pre-filing consultations. Thorough pre-filing contacts allow the parties and the FCO to resolve issues that would otherwise result in an in-depth Phase II review. Pre-filing consultation remain entirely confidential upon the parties’ request. They are neither mandatory nor a general best practice requirement as with, for example, with the European Commission. Rather, it lies in the parties’ discretion whether they consider that a case warrants pre-filing consultations, either to avoid a Phase II review or, at least, to obtain initial guidance from the FCO on which areas it intends to focus its review. The following overview highlights some recent key cases and developments in German merger control.

i Online platforms and big data

E-commerce and online content, including online platforms, continued to play an important role in the FCO’s merger reviews. However, 2017 did not bring any significant cases or new developments with regard to actual cases. It was more for the FCO to apply the experience it has gained in previous years. All cases were cleared in Phase I.

Generally with a view to online and, in particular, platform cases, the FCO follows a more data-based approach when assessing mergers and market power, arguing that market shares based on turnover are not always a suitable means to evaluate the competitive significance of internet companies. As part of the ninth amendment of the ARC, a new transaction value threshold has been introduced, which aims to catch transactions of internet companies that may dominate their data-focused markets without generating significant turnover. The new threshold is triggered if the transaction value exceeds €400 million and the target has ‘significant’ business activities in Germany. However, based on publicly available information no case has yet been caught under the new thresholds.

A digital platform case involved the acquisition of the concert and festival organiser FKP Scorpio Konzertproduktionen (‘Hurricane’, ‘Southside’) by CTS Eventim. CTS Eventim operates the ticket online shop ‘Eventim.de’ and organises rock and pop tours and festivals. The transaction was cleared unconditionally in January 2017 after an in-depth Phase II investigation. The FCO found CTS Eventim to have a strong position, in the markets for the sale of tickets via digital platforms and online shops. Although CTS already held a stake in FKP Scorpio, the transaction required merger clearance due to the increase of CTS’s share in FKP Scorpio. However, the FCO concluded that its increased share in FKP Scorpio does not result in a relevant lessening of competition. However, parallel to the merger review, the FCO initiated proceeding against CTS Eventim on the suspicion that it has abused its market power by imposing exclusivity clauses on its business partners. In December 2017, the FCO
issued a decision by which it held that certain exclusivities in CTS Eventim’s agreements with tour organisers and ticket retailers were anticompetitive and invalid. Later in the year, the FCO prohibited CTS Eventim’s other proposed acquisition of its competitor Four Artists.

ii  Ongoing consolidation in the food retail sector

2017 was also another year of ongoing consolidation on the food retail sector, which is already highly concentrated. The four largest retailers Edeka, Rewe and Aldi and the Schwarz group (including Lidl) between them share over 85 per cent of the total market. 2017 did not see major mergers and acquisition in the traditional food retail sector. However, the FCO unconditionally cleared in Phase I a purchasing joint venture between EDEKA, Germany largest retailer, and Budnikowsky, a leading drug store chain. The FCO principally based its decision on the fact that the product portfolios of the joint venture partners, despite some overlaps, have a different focus. As a result, both parties are not close competitors. Each party faces significant competition from its direct competitors. In addition, the activities of the joint venture did not directly affect the downstream business.

iii  Other cases and developments

In three cases, the parties withdrew their merger notifications after the FCO had set out its competition concerns in its written statements of objections (cases Landgard/Raiffeisen Gartenbau, Schwenk/Poterra Zement, Potters Industries/Sovitec Mondieal).

In May 2017, the FCO published guidelines on remedies in merger control. The guidelines describe the most important types of remedies and set out the procedure by which remedies are accepted and implemented by the FCO.

III  THE MERGER CONTROL REGIME

i  Jurisdiction

The German merger control regime provides for a mandatory pre-merger filing requirement if:

a  the transaction constitutes a concentration pursuant to Section 37 of the German Act against Restraints of Competition (ARC);

b  the turnover and transaction value thresholds of Section 35(1) and (1a) ARC are met; and

c  none of the exemptions provided for in Section 35 (2) ARC apply.

Concentration

Unlike in many other jurisdictions, German merger control does not only cover the acquisition of control (solely or jointly), but also:

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4  The definition of control follows closely the definition contained in the European Merger Regulation (ECMR) and Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.
a. the mere acquisition of at least 25 per cent of either the capital or voting rights in another company, irrespective of whether or not the shareholding will confer control or a significant influence over the target (all existing shareholdings of all entities of the purchaser’s group have to be taken into account); and

b. the acquisition of shares or voting rights even below the threshold of 25 per cent if the transaction results in an acquisition of a ‘competitively significant influence’. Competitively significant influence is less than control but generally requires the acquisition of significant influence through additional rights (‘plus factors’) such as (1) information rights in respect of the operative business of the target; (2) the right to nominate members of the management board, the board of directors or the supervisory board; or (3) de facto blocking minority on annual shareholder meetings. Such influence is ‘competitively significant’ if the purchaser is or controls a competitor of the target, or if the purchaser or any of its group companies is party to a significant vertical supply relationship with the target.

**Turnover thresholds**

The turnover thresholds (referring to the last completed business year) are as follows:

a. the combined worldwide turnover of all participating enterprises exceeded €500 million;

b. one participating undertaking had a turnover exceeding €25 million within Germany; and

c. at least one further undertaking had a turnover in Germany exceeding €5 million.

**Transaction value threshold**

Before the ninth amendment, the German merger control thresholds followed a purely turnover-based approach. The new threshold is structured similarly to the size-of-transaction test under US merger control law and will be triggered if the transaction value exceeds €400 million and the target has ‘significant’ business activities in Germany (‘local nexus’). It is, however, combined with turnover thresholds, and will apply if:

a. the combined aggregate worldwide turnover of all undertakings concerned exceeds €500 million;

b. in Germany, in the last financial year preceding the transaction:
   - one of the undertakings concerned had a turnover of more than €25 million;
   - neither the target nor any other undertaking had turnover of more than €5 million respectively; and
   - the value of the consideration paid in return for the transaction is more than €400 million; and

c. the target has significant activities in Germany.

The first two requirements are identical to those of the traditional, turnover-based threshold that will continue to be the cause of most merger filing requirements. The new threshold will apply if the third requirement of the traditional turnover test is not met. The first limb of

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5 Special rules apply for the calculation of the turnover of financial services providers, insurance companies, companies active in the media sector (television broadcasting, radio, newspapers and periodicals) and certain trading activities. Companies operating in the field of publication, production and distribution of newspapers and magazines are subject to a turnover multiplier.
the new test, the ‘transaction value’ according to (b), needs to be determined based on the consideration for the target company (paid in any form), including assumed liabilities. This approach is different from the US size-of-transaction test which is focused on the acquisition price or ‘fair market value’.

The local nexus test according to (c) is fulfilled if the target carries out activities in Germany that might result in turnover in some time (i.e., a high number of German users in case of a service or substantial R&D in case of research companies and start-ups).

If the same parties enter into two or more transactions concerning the acquisition of parts of a company within a two-year period, these transactions will be treated as a single concentration. The thresholds will apply to the transactions as a whole, to ensure that parties cannot avoid a notification obligation by slicing a deal into staged transactions each falling below the relevant threshold.

If the transaction also exceeds the turnover thresholds of the ECMR (see the EU chapter), a notification has only to be made to the European Commission without the need to go through an additional procedure in Germany (the ‘one-stop shop’ principle). However, if a transaction meets the ECMR turnover thresholds but does not qualify for a concentration under the ECMR (e.g., in case of a non-controlling interest or a non-full-function joint venture), German merger control remains applicable.

**Exemptions**

The ARC provides for two exemptions. A filing will not be required if:

a. one of the participating companies is independent (i.e., not under the control of another company) and has achieved a worldwide turnover of less than €10 million in the last business year; or

b. the concentration has no ‘domestic effects’, in other words it impacts on the German market. Given that the German merger control regime requires at least two undertakings concerned generating turnover in Germany, this exemption only plays a role in joint venture cases where both joint venture partners but not the joint venture itself generates turnover in Germany.

Even though it is not an exemption from the formal filing requirement anymore, there is still an exemption when assessing mergers affecting de minimis markets, in other words, markets with total revenues of less than €15 million in Germany in the last calendar year and in existence for more than five years (Section 36(1) No. 2 ARC). Since the eighth amendment of the ARC, a prohibition decision cannot be based on competition concerns on de minimis markets. Thus, such mergers need to be notified if they meet the relevant turnover thresholds, but they cannot be blocked to the extent that de minimis markets are affected.

ii **Consequences for completion without merger clearance**

Concentrations that are subject to merger clearance in Germany must not be completed prior to having obtained clearance. The consequences for infringing the filing obligation are threefold:

6 In line with the EU’s merger control rules, the eighth amendment introduced an exception to the suspension obligation according to which public takeover bids or a series of transactions in securities may
a A transaction that is completed before having obtained clearance is deemed to be invalid as far as Germany is affected. In particular, the acquisition of shares in German companies and the acquisition of assets located in Germany are invalid until having obtained clearance. In addition, IP rights of the target are unenforceable in Germany. In order to remedy a legally defective acquisition and to obtain retroactive effect, the parties are required to submit a post-completion notice containing all the details that are normally required in a pre-merger notification. The FCO will then assess the competitive issues triggered by the proposed transaction directly as part of a ‘merger dissolution procedure’ without any statutory deadlines running.

b Secondly, the parties are subject to fines, which can theoretically range to up to 10 percent of the parties’ worldwide group turnover in the last business year. In practice, the fines have been well below this threshold but can still be significant depending on the circumstances.

c Finally, infringing the filing obligation can – if detected – seriously affect the parties’ relationship with the authority, which will make future filings much more difficult.

iii Procedure

There is no filing deadline. The filing can be made as soon as the parties to the concentration can show a good faith intention to complete the transaction.

There is also no official filing form that needs to be completed. Instead, German notifications are submitted in the form of a letter that has to include certain information required by law. The parties also have to submit a mandatory post-completion notice to the FCO, which needs to be filed without undue delay following completion of the transaction. This is, however, a mere formality.

The fact that a filing has been received (including the names of the parties and a brief description of the affected markets) will be published on the website of the FCO shortly after the submission of the filing.

The German merger control regime also provides for a ‘stop-the-clock’ possibility and an automatic extension of the deadlines upon submission of a remedy proposal as known from the EU merger control regime. Once notified, the vast majority of cases are cleared after a Phase I inquiry, lasting as a maximum one month. In straightforward cases, the FCO is generally prepared to clear the transaction even well before expiry of the one-month waiting period of Phase I. Though this is entirely within the discretion of the FCO and also depends on the workload of the case handler, it is not uncommon to receive early clearance after two or three weeks, or even earlier.

The maximum time frame for an in-depth review, encompassing Phase I and Phase II, is four months from the time of the complete notification. The four months period is extended by one month to five months if remedies are offered.

In cases that give rise to competition concerns, the FCO must inform the notifying parties within one month of receipt of the complete notification that it initiates an in-depth investigation of the proposed transaction. In the absence of such communication prior to the end of Phase I, the proposed merger is deemed to be cleared by time lapse (which is never the case in practice). Phase I clearances are communicated by standard clearance letters be implemented prior to clearance, provided that the transaction is notified to the FCO without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only on the basis of an exemption granted by the FCO.
merely informing the parties that the requirements for a prohibition are not met and not containing any substantive reasons or competitive assessment. A reasoned decision will only be issued following an in-depth Phase II investigation. Only reasoned Phase II decisions can be appealed before the Higher Regional Court of Düsseldorf.

In case of a prohibition decision, the parties also have the option to apply for an overruling approval by the Federal Minister for Economic Affairs and Energy if the negative effects of the merger on competition are outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The ministerial decision may include conditions imposed on the parties. Following the EDEKA/Kaiser's Tengelmann ministerial authorisation and the dispute about the lack of transparency, the ninth amendment of the ARC now provides for a faster and more transparent procedure.

Third parties such as competitors, suppliers and customers of the merging parties generally have the opportunity to comment on a proposed merger in the context of information requests issued by the FCO in the course of its investigation, or to submit unsolicited comments. Third parties may raise concerns without having to request formal admission to participate in the proceeding.

Third parties whose economic interests will be substantially affected by a decision of the FCO may, however, formally intervene in the proceedings upon application and admission by the authority. Once admitted, third party interveners have the right to be heard, to submit comments on the proceeding and to have access to the non-confidential part of the authority's file. They also have the right to appeal the FCO's decision.

The FCO is among the most active authorities in the EU’s referral system: Articles 4(4) and 4(5) of the EU Merger Regulation provide for the possibility of pre-notification referrals at the initiative of the notifying parties, while Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by the Member States – an option used by the FCO on a regular basis.

iv Substantive assessment

The FCO principally applies the same substantive test as the European Commission, that is, whether the proposed transaction would lead to a significant impediment to effective competition (SIEC), in particular by means of the ‘creation or strengthening of a dominant position’.

According to its Guidance on Substantive Merger Control of March 2012, the FCO first distinguishes between three broad categories of mergers: horizontal, vertical and conglomerate mergers. For each of these three categories, in line with the European Commission’s Horizontal and Non-Horizontal Guidelines, the German competition authority distinguishes again between single and collective dominance.

For a finding of single and collective dominance, the German merger control regime provides for the following – rebuttable – presumptions: a single undertaking has a share of at least 40 per cent of the market; three or fewer undertakings possess an aggregated share of at least 50 per cent of the market; or five or fewer companies hold a combined market share of at least two-thirds.

However, in the FCO’s decision practice, these presumptions play a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. In practice, the presumptions primarily provide an indication as to whether a deal requires closer scrutiny.
The cooperative aspects of joint ventures will, in addition, be examined under the rules relating to anticompetitive agreements (Section 1 of the Act against Restraints of Competition).

A merger that leads to a significant impediment of effective competition will not be prohibited if the requirements of the balancing clause are met (i.e., if the companies show pro-competitive effects on a different market that outweigh the negative effects on the affected market). For the pro-competitive effects presented by the parties to be taken into account, they must be of a structural nature.

When the FCO reaches the preliminary conclusion that a concentration raises competition concerns, the parties can offer commitments in Phase II to secure conditional approval. Conditions precedent (i.e., conditions that must be satisfied before the actual merger may be implemented, such as upfront buyer solutions) are generally preferred by the FCO.

While behavioural remedies are not generally impermissible, they are only accepted if they are equivalent to divestitures in their effects and provided that they do not require a constant monitoring by the FCO. However, the type of remedy that is most likely to be accepted by the FCO is a structural remedy, namely, a divestiture that removes the competition concerns. In cases where such structural remedy is not possible, the parties continue to face a difficult time to convince the authority to accept any other remedy solution. Not surprisingly, it continues to be difficult to convince the authority not to insist on structural remedies in the form of condition precedent.

It should also be noted that certain transactions may not only require clearance by the FCO but also other regulatory approvals based on special rules for – among others – foreign investments, telecommunications or media. These rules apply in addition to the general merger control regime and are administered by special agencies and authorities.

IV  OTHER STRATEGIC CONSIDERATIONS

The wide concept of reportable transactions under the German merger control regime, which also covers non-controlling minority interests below 50 per cent and in certain cases even below 25 per cent, regularly results in companies being required to notify transactions in Germany even though no other competition authorities are competent to review the transaction. Despite the far-reaching German merger control regime, there is still room for transaction structures that do not trigger a German merger filing requirement. For example, it may be a suitable strategy to first merge new businesses before they are acquired by an investor if it would only be the investor who triggers the relevant merger control thresholds.

While pre-filing contacts are neither mandatory nor generally expected by the FCO, they can be very helpful in order to address and overcome potential competition issues early on or to secure a Phase I clearance where otherwise the FCO would have to open Phase II simply to have enough time to assess the transaction. Such pre-filing contacts will be handled by the FCO on a strictly confidential basis.

The FCO has a close involvement with and a leading role in both the European Competition Network and the International Competition Network, whose chair is Andreas Mundt, the president of the FCO. The close communications between the authorities require consistent approaches in merger filings of transactions that require merger filings in multiple jurisdictions.
Empirical and documentary evidence plays an important role in German merger control. In cases that have the potential to give rise to competition concerns, a thorough preparation with operational business people and management is strongly recommended.

While the German merger control rules do not provide for a mandatory submission of internal documents prepared in connection with a transaction, such documents can be requested by way of an information request and reviewed by the FCO during the course of the merger review. Thus, utmost care is required when drafting internal documents in preparation for the transaction and presenting it to either boards or investors, in particular when it comes to the expected effects of the transaction.

The FCO acts independently and free from political influence. Attempts to lobby or even to exercise political influence almost always prove to be counterproductive.

Third-party interveners have a strong role with full rights of appeal and access to the file (including non-confidential copies of the merger filing and any additional correspondence of the parties with the FCO). Thus, it can be an attractive proposition to become an intervener in order to challenge (certain parts of) the transaction, resulting in remedies that may form attractive acquisition opportunities.

V OUTLOOK & CONCLUSIONS

As part of the ninth amendment of the ARC, the German legislator decided to revise the merger control rules. With a specific view to the internet economy, the new rules are driven by the importance of data when assessing mergers and market power, arguing that turnover is not always a suitable means to evaluate the competitive significance of internet companies. It remains to be seen how the FCO and courts will deal with uncertainties, in particular the determination of the transaction value, which often remains unknown until the very end of the transaction proceedings.

On a more general note, the FCO can be expected to remain at the forefront of the enforcement of assessment in the internet, online and big data sectors. Transactions involving online businesses should, thus, be prepared thoroughly with a particular view to the assessment of relevance customer data, network effects and innovations. Confidential pre-filing contacts may be recommendable in order to avoid surprises during the actual review process.

Also, the FCO will remain active in requesting referrals back from the European Commission to national level if the main effects of the transaction are to be expected in Germany.

As regards the substantive review, while the role of economists will continue to grow, it is also likely that it will remain less relevant than in other jurisdictions, with documentary and empirical evidence remaining important factors in the investigation.
I INTRODUCTION

Hong Kong’s merger control regime is voluntary in nature and – substantively speaking – only applies to transactions involving business groups with activities in the telecommunications industry. Mergers that fall outside of the merger control regime are wholly excluded from the application of competition law.

i The merger control regime under the Competition Ordinance

The entry into force of the Competition Ordinance in December 2015 has brought about significant institutional and procedural reforms to the Hong Kong competition regime, which now applies across all sectors of the economy. To a lesser extent, the legislation has also brought changes to the merger control regime. New merger rules (most of which are contained in Schedule 7 to the Ordinance) have replaced the previous regime established under the Telecommunications Ordinance. These new rules represent more of an evolution rather than any revolution when compared to those which they have replaced. As was the case under the previous regime, merger control remains predominantly relevant to those operators with activities in the telecommunications sector, and the authority responsible for merger review continues to be the Communications Authority. As such, the relevant Guideline on the merger rule has been jointly issued by the Hong Kong Competition Commission and the Communications Authority.

Under the Competition Ordinance, mergers that substantially lessen competition are prohibited (the ‘merger rule’). This prohibition, found in Section 3 of Schedule 7 to the Ordinance, has however a limited scope of application and only applies to mergers involving undertakings that hold telecommunications licences or that directly or indirectly control such licensees (see Section 4 of Schedule 7). Reliance on the broad notions of ‘undertaking’ and ‘direct or indirect control’ (specifically defined to include the ability to exercise a decisive influence) means in our view that any merger involving these undertakings will come within the scope of the prohibition, irrespective of whether the transaction has a particular nexus with the telecommunications industry. This was not intended by the legislator, and this is not discussed in the Guideline on the merger rule. The question remains to be decided by the courts, but in our view as soon as an undertaking directly or indirectly controls a telecommunications carrier licensee, the merger rule will apply to all mergers in which it is involved.

1 Marc Waha is a partner and Pearl Yeung and Sophie Chen are associates at Norton Rose Fulbright. The information in this chapter is accurate as of July 2017.
ii Types of transactions caught

In common with merger control regimes of other jurisdictions, only certain types of transactions constitute a 'merger' for purposes of the Competition Ordinance. According to Sections 3 and 4 of Schedule 7 to the Ordinance, these are:

a mergers between previously independent undertakings, where one or more of the undertakings participating in the merger holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(a) and 4(a));

b acquisitions of control over undertakings (through the acquisition of rights or assets), where the acquiring undertaking, the individual acquiring control, or the target, holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(b), 3(2)(c), 3(3), 4(b) and 4(c) of Schedule 7); and

c the establishment of full-function joint ventures, where any of the parent undertakings or the joint venture holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(b), 3(4) and 4(b) of Schedule 7).

The first type of transaction can be likened to the corporate concept of a merger, through which one unified undertaking would be created by the amalgamation of two existing undertakings, or by the absorption of one by another. While this generally means that the legal personality of one or more pre-merger undertakings would no longer exist post-transaction, de facto mergers also qualify under Section 3(2)(a), if the transaction results in the creation of a permanent, single economic management (such as through revenue or risk-sharing through the entities being part of the group).

The second type of transaction concerns the acquisition of control that translates into the ability to exercise a decisive influence by one or more undertakings, whether solely or jointly, over the activities of another undertaking. In this regard the Ordinance (at Section 5 of Schedule 7) makes clear that particular regard will be attributed to the ownership of or the right to use an undertaking’s assets; or rights or contracts that enable decisive influence to be exercised with regard to the composition, voting and governance of any governing body of an undertaking. The acquisition of control therefore would be derived by an undertaking becoming a holder of such rights or otherwise has the power to exercise such rights to be derived. Consistent with the position under EU law, the Communications Authority explains at Paragraph 2.7 of the Guideline on the merger rule that ‘decisive influence’ refers to the power to make strategic and management decisions (including the positive making or negative vetoing of a decision) related to an undertaking (such as in respect of budget, the business plan, major investments or the appointment of senior management). Accordingly, like under EU law, an acquisition of a minority stake could also qualify as a merger if it leads to the acquisition of control in the target. Note also that an acquisition of assets, whether whole or part, which results in the target undertaking being replaced (or substantially replaced) in its business or part of the business would also constitute a merger.

In the final type of transaction, the creation of a joint venture would constitute a merger under the Ordinance if the joint venture is to perform, on a lasting basis, all the functions of an autonomous economic entity. Consistent with EU law, the Communications Authority clarifies in the Guideline on the merger rule that, these are ventures that bring about lasting change in the structure of the undertakings concerned and the relevant market. In this regard,
a short-term, project-specific (such as a research and development or production) joint venture would not be seen as bringing about a lasting change. Additionally, the autonomous nature of the joint venture must go to prove that, subject to a reasonable transition period, it would ultimately have sufficient resources (in the form of management personnel, financial resources and other assets) to be able to act independently of its parents on the market. The activities of its parents upstream or downstream will be relevant for the analysis. Where substantial sales or purchases occur between the joint venture and its parents for a lengthy period and not on an arm’s length basis, the joint venture would not be seen as having autonomy on the market. See the Guideline on the merger rule at Paragraphs 2.8 to 2.12.

Note that, in line with the EU merger control regime, intra-group mergers are outside the purview of the Ordinance where the parties form part of a single undertaking.

Finally, in an attempt to bring legal certainty to M&A activities that are not caught by the merger rule, the Ordinance makes clear that mergers cannot be challenged under the Ordinance’s behavioural rules. In other words, the only relevant provisions in the Ordinance under which mergers should be assessed are the merger control regime; if a merger falls outside of the regime because none of the undertakings involved control telecommunications carrier licensees, then the merger is completely excluded from the scope of application of the Ordinance (see Section 4 of Schedule 1 to the Ordinance). Although the Communications Authority’s guidance on this point is not entirely clear, the Guideline on the merger rule suggests at Paragraphs 2.18 and 2.19 that ancillary restrictions (such as non-competes) that are directly related and necessary to the implementation of the merger should also benefit from this exclusion.

### iii Standard of review: substantial lessening of competition

As already mentioned, Section 3 of Schedule 7 to the Ordinance provides that mergers that substantially lessen competition are prohibited. The Ordinance provides further guidance on the matters that may be considered in determining whether competition is substantially lessened. Section 6 of the same Schedule lists the following matters:

- **a** the extent of competition from competitors outside Hong Kong;
- **b** whether the acquired undertaking, or part of the acquired undertaking, has failed or is likely to fail in the near future;
- **c** the extent to which substitutes are available or are likely to be available in the market;
- **d** the existence and height of any barriers to entry into the market;
- **e** whether the merger would result in the removal of an effective and vigorous competitor;
- **f** the degree of countervailing power in the market; and
- **g** the nature and extent of change and innovation in the market.

One interesting point to note is that none of the factors listed in Section 6 are specific to the telecommunications industry. Contrary to the predecessor regime under the Telecommunications Ordinance, the substantive competition analysis is not limited to telecommunications markets. The above factors are not exhaustive, and the Communications Authority has developed a more comprehensive methodology for its assessment, which it sets out at Paragraphs 3.21 to 3.85 of the Guideline on the merger rule. One of the most relevant aspects of this methodology is the reliance on market concentration levels as a proxy for the more complex economic analysis of whether competition is substantially lessened. The Guideline provides for indicative market concentration safe harbours below which a substantial lessening of competition is deemed unlikely.
The Guideline first indicates that in general, horizontal mergers leading to a combined market share of 40 per cent or more are likely to raise competition concerns. Below this market share threshold, there may still be concerns if safe harbour measures are not met. The safe harbours are expressed in the form of two alternative measures at Paragraphs 3.15 to 3.19 of the Guideline:

- if the post-merger combined market share of the four (or fewer) largest firms (‘CR4’) in the relevant market is less than 75 per cent, and the merged firm has a market share of less than 40 per cent, the Communications Authority takes the view that it is unlikely that there will be a need to carry out a detailed investigation or to intervene. Where the CR4 is 75 per cent or more, the Authority is unlikely to investigate the merger if the combined market share of the merged entity is less than 15 per cent of the relevant market.

- an alternative safe harbour threshold relies on the Herfindahl-Hirschman Index (HHI) measure of market concentration. The Communications Authority considers that no detailed investigation will be required for mergers fulfilling any of the following conditions:
  1. any merger leading to a post-merger HHI of less than 1,000 on the relevant markets;
  2. any merger leading to a post-merger HHI of between 1,000 and 1,800 and producing an increase in the HHI of less than 100;
  3. any merger leading to a post-merger HHI of more than 1,800 and producing an increase in the HHI of less than 50.

Notwithstanding the above, the Authority is careful to mention in the Guideline on the merger rule that the safe harbours are indicative in nature and that it does not completely rule out intervention even where transactions are below these thresholds.

The lead authority to enforce the merger rule is the Communications Authority, but the power of adjudication belongs to the Competition Tribunal.

Under Section 159 of the Competition Ordinance, the Competition Commission has concurrent jurisdiction with the Communications Authority in respect of the activities of undertakings licensed to operate in the telecommunications and broadcasting sectors. However, in recognition of the Communications Authority’s specific function of regulating the telecommunications sector, and in view of the limited application of the merger rule, both authorities have agreed that the Communications Authority will ordinarily take the lead on matters which fall within their concurrent jurisdiction, including mergers (see clause 1.2 of the memorandum of understanding between the Competition Commission and the Communications Authority of 14 December 2015).

In this regard, the powers of the Communications Authority under the Competition Ordinance in relation to mergers are limited to conducting investigations. While the Authority can seek to resolve issues informally or by way of commitments, most adjudicative powers belong to the newly established Competition Tribunal.

iv  Voluntary notification

There is no statutory obligation under the Competition Ordinance for parties to a merger that falls within the scope of the merger rule to seek clearance from the Communications Authority (or the Competition Commission). The merger control regime is entirely voluntary. However, in a departure from the previous regime under the Telecommunications Ordinance (and other voluntary regimes such as those of Australia, Singapore and the UK),
the availability of a formal decision from the competition authorities is severely curtailed. Under the Competition Ordinance, applications for a decision can only be made if parties intend to avail themselves of a cause for exclusion (i.e., exclusion as a result of economic efficiencies, as a result of the involvement of an excluded statutory body or person, or as a result of the involvement of a specified person or a person engaged in a specified activity as provided for in a decision of the Chief Executive in Council). An application may only be considered where it poses novel or unresolved questions of wider importance or public interest and where there is no clarification in existing case law on the matter (see Section 11 of Schedule 7 to the Ordinance), but even then, competition authorities have no obligation to issue a decision.

To remedy this very limited scope of application, the Communications Authority has introduced an informal notification regime under their joint Guideline on the merger rule. Under this informal procedure, parties are invited to approach the Authority to discuss their transaction and seek informal non-binding advice on the transaction on a confidential basis. See Paragraphs 5.4 to 5.8 of the Guideline on the merger rule.

II YEAR IN REVIEW

The merger control regime under the Competition Ordinance took effect on 14 December 2015 and enforcement is in its infancy. The most striking difference of the new regime as compared with its predecessor is the change to a judicial enforcement model, whereby adjudicative powers now solely rest with the Competition Tribunal. The Communications Authority no longer has the power to adopt formal decisions, except where causes for exclusion are invoked. Accordingly, most enforcement activities are taking place outside of the formal statutory framework.

The Communications Authority reviewed two transactions in 2016, one concerning the acquisition of New World Telecommunications by Hong Kong Broadband Network, and a second concerning the acquisition of Wharf T&T Limited by an indirectly owned subsidiary of two private investment firms (MBK Partners and TPG).

In relation to the first acquisition, the Authority announced its decision not to open an investigation under the Competition Ordinance on 31 March 2016. In its press release, the Authority explained that the acquirer was the holding company of Hong Kong Broadband Network Limited, a carrier licensee under the Telecommunications Ordinance, and that the transaction led to an indirect acquisition of New World Telecommunications Limited, another carrier licensee under the Telecommunications Ordinance. The transaction thus fell within the scope of the merger rule under the Competition Ordinance. While the activities of the acquirer and the target overlap in relation to the provision of fixed voice and broadband telecommunications services in Hong Kong, the Authority took the view that the transaction was unlikely to have the effect of substantially lessening competition in the relevant telecommunications service markets in Hong Kong. It accordingly decided not to commence an investigation under the Competition Ordinance.

On 10 November 2016, the Authority made a similar announcement of its decision not to open an investigation under the Competition Ordinance into the acquisition of Wharf T&T Limited by Green Energy Cayman Corp, an indirectly owned subsidiary of MBK Partners and TPG. Recognising Wharf T&T as a carrier licensee under the Telecommunications Ordinance, the Communications Authority concluded that the acquisition also fell within the scope of the merger rule under the Competition Ordinance. The Authority’s press release
confirms its decision not to commence an investigation having regard to its assessment that the transaction was unlikely to have the effect of substantially lessening competition in Hong Kong, and accordingly, that an investigation would not be initiated.

In each of these two transactions, the Authority’s press release does not explain whether the parties had notified their transaction voluntarily or whether the Authority reviewed the transaction on its own initiative.

III THE MERGER CONTROL REGIME

i No mandatory filing requirement

In the absence of a statutory obligation for parties to notify and obtain clearance from the Communications Authority in respect of a merger falling within the scope of the merger rule, parties are equally not subject to any corresponding obligation to suspend the implementation or consummation of their transaction. Instead, the competition authorities (in practice, the Communications Authority) are expected to be informed of any transactions that come within the purview of their jurisdiction and to bring objection by initiating investigations and (if necessary) proceedings before the Competition Tribunal to challenge a completed or anticipated merger. Appropriate remedies in the form of commitments may also be negotiated at any stage to allay any concerns that are identified, in consideration for the Communications Authority’s agreement to refrain from initiating investigations, bring proceedings or to terminate any investigations or proceedings that have been commenced.

The absence of any suspension obligation removes an important hurdle, giving parties considerable flexibility in the implementation of their transaction. More specifically, it means that transactions involving publicly listed entities, including hostile takeovers, which are otherwise often subject to merger control filing requirements around the world, can proceed unimpaired by protracted delays.

ii Challenges by the Communications Authority

Completed mergers

Notwithstanding its general power to conduct investigations in respect of a suspected contravention of the Ordinance (under Section 39), investigations of an already completed merger must be commenced within 30 days after the day on which the Communications Authority first became aware, or ought to have become aware, that a merger has taken place. Further, the Communications Authority may only mount a challenge before the Competition Tribunal within six months after completion of such merger or becoming aware of it (whichever is later). Accordingly, the commencement of an investigation within the prescribed time limit is essential to its ability to remedy the consequences of a contravention of the merger rule. Once objection in respect of a completed merger has been raised in legal proceedings, and the Competition Tribunal is satisfied that it leads to a substantial lessening of competition in Hong Kong, the Competition Tribunal can make an appropriate order against the merger.

Anticipated mergers

While the Communications Authority is subject to more onerous procedural constraints in respect of proceedings initiated against completed mergers, these do not apply to anticipated mergers. Accordingly, it may exercise its general power to conduct an investigation and apply
to the Competition Tribunal for an order to prevent (or alter the scope) of a merger that, if carried into effect, would result in the substantial lessening of competition in Hong Kong. In a similar vein, interim measures can be issued to prevent any ‘pre-emptive action’, that might prejudice the outcome of proceedings or a final order made by the Competition Tribunal following the hearing of such application.

**Competition Tribunal orders against mergers**
The consequences of completing a merger that is found to contravene the Competition Ordinance, or proceeding with a merger that will likely do so if carried into effect, are far-reaching; potentially giving rise to a Competition Tribunal order that either seeks to prevent a contravention or bring it to an end. This may include orders directing parties not to proceed with a merger or imposing structural or behavioural remedies, such as business, asset or share divestitures in respect of an overlapping business, the dissolution of the merger, or an undertaking by parties to conduct themselves in a particular manner. When challenges are brought in relation to anticipated mergers, the Competition Tribunal can also order interim measures for the purpose of preventing pre-emptive action pending review of the proposed transaction.

**Appeals**
Under Section 155 of the Competition Ordinance, parties (including the Communications Authority) that wish to challenge a judgment of the Competition Tribunal may bring an appeal in the Court of Appeal.

### iii Voluntary notification procedures
The risks that a merger might be blocked or unwound altogether or materially altered in scope, and the transaction costs associated with these risks are likely to encourage parties to exercise caution before consummating transactions that fall within the scope of the merger rule. This situation is further aggravated given that the market share safe harbours set out under the Guideline on the merger rule, aimed at facilitating the self-assessment of whether a transaction might raise competition concerns, do not sufficiently safeguard the interests of merging parties. Meeting one or both of these thresholds does not exclude the risk of ensuing investigations (see Paragraph 5.6 of the Guideline on the merger rule).

Several options are available to merging parties who wish to seek comfort that their transaction will not be challenged. The Ordinance provides for two formal procedures, whose scope of application is regrettably very limited. This has led the Communications Authority to establish informal procedures, one of which is documented in the Guideline on the merger rule. These are discussed below.

**Applications for a decision on the availability of an exclusion**
The only procedure that allows parties to seek a formal decision from the Communications Authority is found in Section 11 of Schedule 7 to the Ordinance. Under this procedure, merging parties can apply for a decision in reliance on a statutory cause for exclusion (i.e., an exception in the Ordinance pursuant to which the transaction escapes from the application of the merger rule). Of most relevance is the economic efficiency exclusion under Section 8
of Schedule 7 to the Ordinance. This efficiency exception is available by operation of statute and can be relied upon as soon as specific conditions are met – the parties need not obtain a decision from either the Communications Authority or the Competition Tribunal.

The Communications Authority is not under a statutory obligation to consider an application for a decision under Section 11 of Schedule 7 unless three specific conditions are met. In other words, it retains the discretion to decline to consider an application altogether unless:

a the application poses novel or unresolved questions of wider importance or public interest in relation to the application for an exclusion;
b the application raises a question for which there is no clarification in existing case law or decisions of the Communications Authority; and
c it is possible to make a decision on the basis of the information provided.

In addition to a lack of precedent showing (and certainty as to) how these conditions will be applied in practice, even where all three conditions are met, the Communications Authority’s statutory obligation would still be limited to considering the application of an exclusion – it need not consider the merits of the application, nor provide a definitive decision on whether the subject matter merger infringes the Ordinance. On being satisfied that the aforesaid conditions have been met, it is also subject to an obligation to publicise a notice of the relevant application and to allow 30 days for the submission of representations by interested third parties.

Having considered these representations, the Communications Authority may then make a decision as to whether the merger would be excluded from the application of the merger rule. The Ordinance does not provide for a timetable in this respect. In the Guideline on the merger rule, the Communications Authority states that it will endeavour to process applications in an efficient and timely manner with due regard being paid to the circumstances of the case (see Paragraph 5.21 of the Guideline). Although the Communications Authority’s statutory obligation is only limited to considering an application and it does not follow that it will also issue a formal decision, it would be expected to adopt a decision in all cases where it decides to proceed to launch a public consultation in respect of an application under consideration.

Under the Competition Ordinance, a favourable decision in respect of an application provides an applicant with confirmation that a specific merger fulfils the conditions to qualify for the efficiency exclusion, affording immunity from enforcement. However, the very narrow scope of application of the procedure suggests that formal decisions from the Communications Authority are likely to be few and far between.

Applications for exemptions on public policy grounds

The second formal procedure provided by the Ordinance does not involve the Communications Authority. Under Section 9 of Schedule 7 to the Ordinance, parties may seek an order from the Chief Executive in Council that their transaction should be exempted from the prohibition under the merger rule on the basis that there are exceptional and compelling reasons of public policy. Reliance on this exemption is not automatic; parties are required to persuade the Chief Executive in Council to make a favourable order removing their obligation to comply with the merger rule. At the time of writing, the government had yet to publish any guidance on how the procedure would operate and the circumstances which would justify an exemption on public policy grounds.
Applications for confidential guidance

While the Competition Ordinance emphasises a self-assessment approach and provides very few avenues to obtain formal comfort from the authorities that their merger will not be challenged, the Guideline on the merger rule gives clear indication that parties consummate their transactions at their own risks, and that they are advised to engage with the Communications Authority to discuss proposed mergers at an early stage to understand whether it has any concerns (see Paragraphs 5.2, 5.3 and 5.6 of the Guideline on the merger rule). However, the Authority’s commitment to engage with transaction parties in respect of a proposed merger only extends to the provision of non-binding, informal advice on a confidential basis; and there is no strict timetable applicable to this process.

The availability of non-binding, informal advice under this procedure may prove to have limited appeal for transaction parties. Notably, the absence of any strict time constraints within which the Communications Authority must complete its assessment exacerbates this uncertainty. Moreover, in seeking to preserve confidentiality in respect of a transaction for which informal advice is being sought, the Communications Authority’s analysis will be based primarily on the evidence of the relevant parties, when in the majority of cases, it is the conduct of market inquiries, including consulting competitors of the merging parties, suppliers, customers, industry associations and consumer groups, which lead to competition concerns being uncovered. This begs the question of whether an assessment in a self-contained manner (and on a confidential basis), being limited to only evidence produced by the transaction parties, would allow the Communications Authority to reach a satisfactory determination of whether a merger is or will likely result in a substantial lessening of competition.

Possible outcomes and other possible procedures

The Guideline on the merger rule contemplates the following outcomes in respect of applications for confidential guidance: (1) a positive confidential decision; (2) the opening of a formal investigation leading to a possible court challenge; (3) commitments discussions; or (4) a formal application for a decision that the merger benefits from a cause for exclusion. In practice, there may be room for the Communications Authority to develop other approaches and procedures that offer more legal comfort to merging parties. For example, the Authority may well take steps to gather information from third parties about the transaction, on the model of the initial assessment phase described in Paragraphs 3.1 to 3.8 of the Guideline on investigations, leading to the issuance of a public decision not to challenge the transaction without the need to formally open an investigation. Such a decision would be adopted on a more informed basis, thereby providing increased comfort to the merging parties. While there is no information available on whether the parties had voluntarily approached the Communications Authority in the two transactions reviewed to date, in each of these cases the Authority showed that it was prepared to publicly state that it would not seek to challenge a merger.2

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2 See the Communications Authority’s press releases of 31 March 2016 and 10 November 2016 regarding its decision not to open an investigation into HKBN’s acquisition of New World Telecommunications and MBK Partners and TPG’s acquisition of Wharf T&T, respectively.
V OUTLOOK & CONCLUSIONS

While the merger control regime is relatively new and some procedural uncertainty continues to linger, particularly for parties wishing to obtain formal legal comfort from the Communications Authority, it builds upon an established decisional practice developed under the previous regime. As a result, merging parties with activities in the telecommunications sector do not face a significantly different regulatory framework.

The legal framework established by the Competition Ordinance has clearly been designed to serve as a blueprint for a merger regime of wider application. Officials from the Competition Commission have also publicly expressed their wish for the regime to be expanded and made applicable to all sectors of the Hong Kong economy in due course.
Chapter 21

INDIA

Rahul Rai, Shashank Sharma and Shivam Jha

I INTRODUCTION

The Indian merger control regime came into effect on 1 June 2011 with the notification of Sections 5 and 6 of the Competition Act 2002 (the Competition Act). The regime is governed by the Competition Act, notifications issued by the Ministry of Corporate Affairs, Government of India (MCA) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, as amended up to 8 January 2016 (the Combination Regulations).

Under the Indian merger control regime, a ‘combination’ (i.e., an acquisition, merger or amalgamation) must be notified to and approved by the Indian competition authority, the Competition Commission of India (CCI), if it breaches the prescribed asset and turnover thresholds and does not qualify for any exemptions. The requirement to notify the CCI is mandatory and such combinations are subject to a standstill or suspensory obligation. Where a combination causes or is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India, the combination is void. By 31 March 2018, the CCI had cleared 515 combinations, with a vast majority within the 30-working-day Phase I period. To date, the CCI has cleared five combinations subject to remedies after a detailed Phase II investigation, but so far has never outright blocked a combination.

In this chapter we give a brief overview of the recent trends in Indian merger control, including key amendments to the Combination Regulations and then outline the circumstances under which parties to a transaction are required to notify the CCI, and the factors taken into account by the CCI when determining whether a combination is likely to cause an AAEC.

II YEAR IN REVIEW

The past year has seen the CCI increasingly assert itself in relation to both procedural and substantive matters relating to merger reviews. Up until 31 March 2018, the CCI cleared 515 combinations in various industries such as telecommunications, agro-chemicals, pharmaceuticals, aviation, manufacturing, information technology, financial services, banking and broadcasting.

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The landscape of the Indian merger control regime is shifting rapidly due to the frequent amendments to the Combination Regulations. On 27 March 2017, the MCA issued a notification (the March 2017 notification) that (1) extended the scope of the de minimis exemption to mergers as well; (2) limited the value of assets and turnover in the transfer of a portion of an enterprise (i.e., in an asset sale), to only the value of the assets and turnover of such a portion of the enterprise, division or business being transferred; and (3) maintained the increased value of the jurisdictional thresholds under the Competition Act. These changes are far-reaching and very welcome.

The March 2017 notification does away with the artificial distinction based on form, between transactions structured as ‘acquisitions’ and ‘mergers and amalgamations’ and instead, looks to the substance. In sum, the de minimis exemption will now be available to all types of combinations, irrespective of the manner in which they are structured. It clarified the basis for computing the value of assets and turnover attributable to assets in asset sales. It also extended the application of the de minimis exemption until 29 March 2022.

On 31 March 2017, the Finance Act 2017 (the Finance Act) was notified in the official gazette, and sought to dissolve the Competition Appellate Tribunal (COMPAT). The Finance Act has since become effective on 26 May 2017 and all the powers and duties of the COMPAT have been transferred to the National Company Law Appellate Tribunal (NCLAT). As a result, over 50 cases pending with the COMPAT as of 26 May 2017 have been transferred to the NCLAT. Such cases are being heard afresh by the NCLAT.

Subsequently, on 29 June 2017 the MCA issued another notification (the June 2017 notification) that does away with the requirement to necessarily notify a combination within 30 calendar days of the trigger event. The measure has been taken to alleviate the concerns of stakeholders who felt constrained by the deadline stipulated under the Competition Act. Importantly, the June 2017 notification puts an end to the possibility of penalties for delayed filing. Transacting parties will no longer be constrained to decide on the strategy, collect information and make the filing within the short window of 30 calendar days. Parties to global transactions requiring notification in multiple jurisdictions can now make the filing in India contemporaneous with other jurisdictions. The June 2017 notification will not only help the parties align their strategy, but also help the CCI align its review timelines with other jurisdictions.

Notably, the requirement to file a notice with the CCI is still mandatory and the suspensory regime (i.e., requirement to receive CCI approval prior to closing) still applies. Accordingly, any breach of these requirements will still lead to penalties under Section 43A of the Act. However, removal of a 30-day deadline makes it significantly easier for businesses to comply with the merger notification requirement in India and is in line with international best practices in merger control. On 4 April 2018, the Union Cabinet, chaired by the Prime Minister, approved a proposal to reduce the number of members in the CCI from one Chairperson and six members to one Chairperson and three members, by not filling in the current and expected vacancies. The Union Cabinet cited the reduction in the CCI’s case load resulting from the revision of the de minimis thresholds as the primary factor behind this decision.

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III  THE MERGER CONTROL REGIME

i  Applicable thresholds

A ‘combination’ is any acquisition, merger or amalgamation that meets certain asset or turnover thresholds, under Section 5 of the Competition Act. The asset and turnover thresholds applicable to combinations comprise two tests, which are applicable to the immediate parties to the transaction and separately to the group to which the target or merged entity (as the case may be) will belong, and have both Indian and worldwide dimensions.

The ‘parties test’ looks at the assets and turnover of the immediate parties to the transaction, that is, the acquirer and the target, or the merging parties, and a notification is triggered if the parties have any of the following:

a  combined assets in India of 20 billion rupees;

b  a combined turnover in India of 60 billion rupees;

c  combined global assets of US$1 billion including combined assets in India of 10 billion rupees; or

d  combined global turnover of US$3 billion including combined turnover in India of 30 billion rupees.4

Even if the parties’ test thresholds are not met, a notification may be triggered if the ‘group’ to which the parties would belong post-transaction has any of the following:

a  assets in India of 80 billion rupees;

b  turnover in India of 240 billion rupees;

c  global assets of US$4 billion including assets in India of 10 billion rupees; or

d  global turnover of US$12 billion including a turnover in India of 30 billion rupees.5

ii  Exemptions

Every combination must mandatorily be notified to the CCI, unless the parties are able to take advantage of any of the exemptions provided in the Competition Act, the Combination Regulations or the Notification6 issued by the MCA. These exemptions are as follows.

Statutory exemption

The requirement of mandatory notification prior to completion does not apply to any financing facility, acquisition or subscription of shares undertaken by foreign institutional investors, venture capital funds, public financial institutions and banks pursuant to a covenant of an investment agreement or a loan agreement. Such transactions need to be notified in the simpler and shorter Form III within seven days of the date of acquisition.

Categories of transactions usually exempt from mandatory notification – Schedule 1 of the Combination Regulations identifies certain categories of transactions that are ordinarily not likely to cause an AAEC in India, and need not normally be notified to the CCI. They are as follows:

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4  Sections 5(a)(i), Section 5(b)(i) and Section 5(c)(i) of the Competition Act, read with the notification SO 675(E) dated 4 March 2016 issued by the MCA.
5  Section 5(a)(ii), Section 5(b)(ii) and Section 5(c)(ii) of the Competition Act, read with the notification SO 675(E) dated 4 March 2016 issued by the MCA.

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The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment:

Provided that in relation to the said acquisition,

(A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and

(B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.
Target-based exemption (de minimis exemption)

Transactions where the target enterprise either holds assets of less than 3.5 billion rupees in India, or generates turnover of less than 10 billion rupees in India, are currently exempt from the mandatory pre-notification requirement. Pursuant to the March 2017 notification the exemption has been extended to mergers and amalgamations as well (it was previously applicable only to transactions structured as acquisitions).

Applicability of thresholds to asset acquisitions

Pursuant to the March 2017 notification, in the transfer of a portion of an enterprise, division or business (i.e., in an asset sale), the applicability of the thresholds under Section 5 of the Competition Act and the de minimis exemption is limited to only the value of the assets and turnover of such a portion of enterprise, division or business.8 The pre-amendment position required the value of the assets and turnover of the entire target enterprise to be taken into consideration for the de minimis exemption to apply. Further, the exemption is valid until 29 March 2022 unless it is further extended.

iii ‘Control’ as per the CCI

The acquisition of control or a shift from joint to sole control is an important determinant for whether exemptions relating to minority investments and intra-group reorganisations are applicable. Under the Competition Act, ‘control’ includes ‘controlling the affairs or management by (1) one or more enterprises, either jointly or singly, over another enterprise or group, (2) one or more groups, either jointly or singly, over another group or enterprise’. There is no ‘bright line’ shareholding percentage identified as conferring control.

The CCI has examined the issue of what constitutes ‘control’ in several cases. In SPE Mauritius/MSM Holdings,9 the CCI held that veto rights enjoyed by a minority shareholder over certain strategic commercial decisions might result in a situation of joint control over an enterprise. These rights include engaging in a new business or opening new locations or offices in other cities; appointment and termination of key managerial personnel (including material terms of their employment); and changing material terms of employee benefit plans. In Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited,10 the CCI observed that veto rights could create a situation of control over when they pertain to approval of the business plan, approval of the annual operating plan (including budget), discontinuing any existing line or commencing a new line of business, and the appointment of key managerial personnel and their compensation. In Caladium Investments/Bandhan Financial Services,11 the CCI expanded the scope of such affirmative rights to include veto rights over amendments to charter documents, changes in capital structure, changes to dividend policy and appointment of auditors in the list of rights that could be seen as leading to joint control.

Interestingly, in the Jet/Etihad case,12 the CCI came to the conclusion that the acquisition of 24 per cent of the equity share capital of Jet Airways (Jet) by Etihad Airways (Etihad) allowed Etihad to exercise joint control over the assets and operations of Jet.

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9 C-2012/06/63, dated 9 August 2012.
10 C-2012/09/78, dated 4 October 2012.
11 C-2015/01/243, dated 5 March 2015.
12 C-2013/05/122, dated 12 November 2013.
CCI determined that the terms of the agreements entered into between Jet and Etihad, along with a governance structure that allowed Etihad to appoint two out of six directors (including the vice-chair) on the board of directors of Jet, allowed Etihad to exercise ‘joint control’ over Jet. Notably, the Indian capital markets regulator, the Securities and Exchange Board of India (SEBI) differed on this issue, going on to say that under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Code), the definition of ‘control’ is narrower than that under the Competition Act and, therefore, that the acquisition does not grant ‘joint control’ of Jet to Etihad.

The CCI’s interpretation of ‘control’ resonates with the practice of its overseas counterparts like the European Commission (EC) and the US Federal Trade Commission (FTC) (particularly the former). Similar to the EC, the CCI has categorically taken the position that the ‘ability to exercise decisive control over the management and affairs’ of the target company amounts to control for the purposes of the Competition Act.13

Investors therefore need to keep in mind that even minority investments could be seen as an acquisition of control and trigger a notification if the thresholds in the Competition Act are met. This could extend to entirely innocuous financial investments.

iv Treatment of JVs

One of the common ways in which investors choose to do business in India is by way of joint ventures (JVs) with Indian counterparts. These joint ventures may be ‘greenfield’ (i.e., through the setting up of an entirely new enterprise) or ‘brownfield’ (i.e., via an investment in an existing enterprise).

The Competition Act does not specifically deal with JVs from a merger control perspective. However, as setting up a greenfield JV or the entry of a new partner in a brownfield JV involves the acquisition of shares, voting rights or assets, such acquisition may require notification to the CCI, if the jurisdictional thresholds are met and are not otherwise eligible for any exemption.

A greenfield JV would involve the setting-up of a new enterprise, which by itself will not have sufficient assets or turnover to trigger a notification. Prior to the March 2017 notification, where any of the parent companies to the JV transfer assets to the JV at the time of incorporation, a merger filing may have been triggered on account of the anti-circumvention rule in Regulation 5(9) of the Combination Regulations. The anti-circumvention rule requires that where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of Section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred. In such an event, despite the fact that the newly created joint venture may not itself have any assets or turnover, the acquisition of shares, voting rights or assets in the joint venture may require a notification to the CCI. However, the March 2017 notification clarifies that when only a portion of an enterprise, division or business is involved in a transfer (i.e., in an asset sale), then only the

value of the assets and turnover of such portion of enterprise, division or business should be considered and not the value of assets and turnover of the entire enterprise housing the relevant business, division or portion.

The March 2017 notification therefore has created uncertainty over the application of the anti-circumvention rule. As a general matter, the principles of statutory interpretation require a harmonious construction between the substantive provisions of an enabling statute and a rule or any other form of delegated legislation. As such, any delegated legislation has to be read and construed consistent with the enabling statute. Accordingly, the anti-circumvention rule (provided under the Combination Regulations which is delegated legislation by the CCI) should be construed in light of, and consistently with, the provisions of the March 2017 notification (enacted by the government of India).

Interestingly, the Combination Regulations also contains a ‘substance test’ whereby the CCI can look beyond a transaction structure and assess whether the substance of the transaction would trigger a notification requirement to the CCI.

iii The merger control regime – relevant considerations to reviewing a combination

The ‘appreciable adverse effect on competition’ test

The Competition Act prohibits the entering into of any combination, which has or is likely to have an AAEC in the relevant market in India, and treats all such combinations as void.14

Consistent with practices in other jurisdictions, the CCI first determines the relevant market or relevant markets, and in that context considers the competitive effects of the combination. It then considers a number of non-exhaustive factors set out in the Competition Act to determine whether the combination is likely to cause an AAEC.

A relevant market is defined as the market, which may be determined with reference to the relevant product market or the relevant geographic market or with reference to both the markets.15

In turn, a relevant product market is defined as a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.16 Notably, the CCI is only required to consider products or services that are interchangeable or substitutable by consumers. Therefore, the CCI is not required to consider supply-side substitutability in determining the relevant product market.

The relevant geographic market is a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.17

The CCI has used economic tools such as the Elzinga-Hogarty test and chains of substitution in certain cases to determine the scope of the relevant market, but this is more the exception than the rule.

14 Section 6(1) of the Competition Act.
15 Section 2(r) of the Competition Act.
16 Section 2(t) of the Competition Act.
17 Section 2(s) of the Competition Act.
18 Holcim/Lafarge, C-2014/07/190, dated 30 March 2015.
Upon determining the boundaries of the relevant market or markets, the CCI considers the competitive effects of the combination. The CCI is required to consider all or any of the following factors:

- **a** actual and potential level of competition through imports in the market;
- **b** extent of barriers to entry into the market;
- **c** level of combination in the market;
- **d** degree of countervailing power in the market;
- **e** likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- **f** extent of effective competition likely to sustain in a market;
- **g** extent to which substitutes are available or are likely to be available in the market;
- **h** market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- **i** likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- **j** nature and extent of vertical integration in the market;
- **k** possibility of a failing business;
- **l** nature and extent of innovation;
- **m** relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC; and
- **n** whether the benefits of the combination outweigh the adverse impact of the combination, if any.

In the 515 cases that the CCI has reviewed so far, it has typically considered factors such as the parties’ and competitors’ market shares, market concentration levels post-combination, the number of competitors remaining post-combination, barriers to entry, extent of growth in the market and countervailing buyer power to determine whether the combination being considered is likely to cause an AAEC. However, unlike more mature jurisdictions, so far the CCI has stopped short of expressly identifying an economic theory of harm to the parties or in its orders. An illustrative decision is the PVR/DT case. With respect to the acquisition by PVR Limited (PVR) of the film exhibition business of DLF Utilities Limited (DT), the CCI expressly considered that post-combination market shares and increments, the lack of efficiencies, the likelihood that the combination would result in the parties being able to significantly and sustainably increase prices or profit margins, and the lack of incentives to innovate further as sufficient grounds to determine there would be an absence of effective competitors and, therefore, the combination of PVR and DT would likely have an AAEC.19

The CCI’s analysis has focused on whether a combination is likely to cause an AAEC in India, even in cases where parties may have proposed global markets, or where markets are import-driven.

**Merger remedies**

An interesting development in the Indian merger control regime has been the perceptible shift in the CCI’s initial ‘soft attitude’ in clearing mergers. Initially the CCI did not use its powers to direct modifications to the terms of transactions or impose commitments to ensure

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compliance with the provisions of the Competition Act. Recently, the CCI has formally approved five different combinations subject to modifications in the form of structural and behavioural commitments, even though there are no formal guidelines on merger remedies as yet.

Voluntary commitments offered by parties during Phase I investigations

In several cases, modifications have been volunteered by the parties themselves in the Phase I stage, rather than being directed by the CCI. In Mumbai International Airport Private Limited/Oil PSUs, the parties offered various behavioural remedies voluntarily on the basis of which approval was granted by the CCI. In Elder Pharmaceuticals/Torrent Pharmaceuticals, the CCI approved the transaction after the parties agreed to modify the scope of a non-compete clause in the agreement and reduce its scope from five to four years. Similarly, in Agila Specialities/Mylan Inc, Tata Capital/TVS Logistics, Clariant Chemicals (India) Limited/Lanxess India Private Limited and Advent International Corporation/MacRitchie Investments Private Limited, the CCI approved the transaction only after the parties undertook to reduce the term of the non-compete clause. In Orchid Chemicals and Pharmaceuticals Ltd/Hospira, the CCI acknowledged that a non-compete clause is essential to acquire the full value of the asset, however, the clause must be reasonable in its application. The Guidance Note issued by the CCI on non-compete restrictions, will also certainly serve parties as an important tool in drafting non-compete restriction clauses. In most previous decisions, the CCI’s approach to modifications was primarily limited to non-compete obligations. However, more recently, in St. Jude Medical Inc/Abbott Laboratories, the parties offered voluntary structural remedies through divestment of assets. In China National Chemical Corp/Syngenta AG, the CCI granted an approval subject to a remedy proposal offered by the parties wherein they voluntarily agreed to treat two of their respective Indian subsidiaries as separate independent businesses for seven years, in addition to divestment of three formulated crop protection products sold by Syngenta in India. In Dish TV/Videocon, the CCI granted an approval in spite of the combined entity’s market share accumulating to 45 per cent in the market for DTH services in India. The CCI noted the possible customer apprehensions regarding the customer of each party having to bear the cost of technical realignment. However, the CCI was satisfied with the voluntary commitments offered by the parties that included (1) bearing the cost of such realigning and re-configuring the antennas installed by customers to make it compatible with the transponders; and (2) bearing the cost of the antenna and set top box that may be required to be changed as a result of the transaction. Additionally, the CCI

20 Regulation 19(3) of the Combination Regulations.
21 C-2014/04/164, dated 29 September 2014.
22 C-2014/01/148, dated 26 March 2014.
23 C-2013/04/116, dated 20 June 2013.
25 C-2016/02/373, dated 11 May 2016.
26 C-2015/05/270 dated 12 June 2015.
31 C-2016/12/463, dated 4 May 2017.
observed the ease of switching by consumers, constraints from other modes of distribution of TV content, presence of a sectoral regulator, expected entry of new players and accordingly granted the approval.

**Modifications directed by the CCI pursuant to Phase II investigations**

In *Sun/Ranbaxy*,32 *Holcim/Lafarge*33 and *PVR Cinemas/DT*,34 the CCI approved the transactions on the condition that certain assets of the parties involved in these transactions would be divested to third parties to prevent AAEC in the relevant markets identified. Interestingly, the CCI also issued a revised divestment order in *Holcim/Lafarge* after the original divestment process ran into regulatory hurdles.35 The CCI recently approved the *Dow/DuPont*36 transaction subject to divestment of assets, cancellation of certain trademarks and a commitment that the parties would not enter the market for Flusilasole, a fungicide (the underlying active ingredient and formulations) for a certain duration, and also sell off their ‘MAH grafted polyethylene’ business. In *Agrium/Potash*,37 the CCI directed divestment of PotashCorp’s shareholding in three companies (divestment assets) as well as a commitment to not acquire stake in the divested businesses for a period of 10 years.

**Merger filing time frames**

As stated above, the June 2017 notification38 does away with the requirement to necessarily notify a combination within 30 calendar days of the trigger event, which may be:

- the final approval of the merger or amalgamation by the board of directors of the enterprises concerned; or
- the execution of any agreement or other document for the acquisition of shares, voting rights, assets or control.

The term ‘other document’ has been defined as being any binding document, by whatever name, conveying an agreement or decision to acquire control, shares, voting rights or assets, and includes any document executed by the acquirer conveying the decision to acquire, in the case of hostile acquisitions. Interestingly, the CCI had introduced a third category of trigger event, which is the public announcement (PA) under the Takeover Code made by parties for the acquisition of shares, voting rights or control over a listed enterprise in *GE/Alstom*.39 After much debate, the PA has been specifically identified in the Combination Regulations as being a trigger document. The Combination Regulations previously considered any communication of the intention to acquire, by the acquiring enterprise, to the government or any statutory authority (such as SEBI, the Foreign Investment and Promotion Board or the Reserve Bank of India) to be a trigger event. Given the ambiguity of this provision, the CCI brought in more clarity by identifying PAs as a specific form of communication to SEBI, a statutory authority, as a trigger document by way of the Competition Commission of India.

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32 C-2014/05/170, dated 5 December 2014.
35 C-2014/07/190, order dated 7 April 2016.
36 C-2016/05/400, dated 8 June 2017.
37 C-2016/10/443, dated 27 October 2017.
38 Government of India Notification dated 29 June 2017, S.O. 2039(E).
(Procedure in regard to the transaction of business relating to combinations) Amendment Regulations 2016 notified on 8 January 2016. The Combination Regulations now state that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the ‘other document’.40

Further, the CCI has made it mandatory for parties to file a single notification for ‘interconnected’ transactions, one or more of which may be a combination. What constitutes ‘interconnected’ is somewhat vague, and is essentially determined by the CCI on a case-by-case basis. Interconnected transactions do not need to have any causal link or interdependence. Moreover, there is no time limit under the Competition Act or the Combination Regulations within which the CCI would consider transactions to be inter-connected (unlike in the EU), though the CCI does not consider transactions notifiable prior to 1 June 2011, the date on which the Indian merger control provisions came into force.

Parties have the option of notifying the CCI in either Form I, which is the default short-form notification, or in Form II, the more detailed long-form notification, where the parties have a horizontal overlap of over 15 per cent or a vertical overlap of over 25 per cent. In a recent round of amendments to the Combination Regulations, the CCI has overhauled the format of Form I, streamlining it and introducing accompanying guidance notes to assist parties in filing Form I.

Once notified, the CCI is bound to issue its prima facie opinion within 30 working days of filing, not accounting for ‘clock stops’, namely, when the CCI asks for additional information or directs parties to correct defects in their submissions. However, the CCI is also bound to issue its final order within 210 calendar days, even though the Combination Regulations provide that the CCI will ‘endeavour’ to pass relevant orders or directions within 180 days. In practice, the CCI has cleared the vast majority of all transactions within 30 working days (excluding ‘clock stops’), thus giving positive signals to the business community.

**Invalidation of notifications**

The CCI has enhanced powers to invalidate a notification within the 30-working-day review period in three circumstances:

- if it is not in accordance with the Combination Regulations;
- if there is any change in the information submitted in the notification, which affects the competitive assessment of the CCI; and
- if the transaction was notified in Form I, but the CCI is of the view that the transaction ought to have been notified in Form II (in this case, the CCI returns the Form I notification and directs parties to re-file in Form II).

While the CCI has the discretion to grant notifying parties a hearing before it determines to invalidate a notification, it is not mandatory for the CCI to do so. Further, the time taken by the CCI to arrive at such decision is excluded from the review clock.

The CCI appears to have used this power for invalidation in a technical fashion. In *BNP Paribas/Sharekhan*,41 the CCI invalidated a notification on the technical ground that the individual who signed the notification on behalf of the notifying party was not properly

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40 Regulation 5(8) of the Combination Regulations.
41 C-2015/12/354, dated 22 December 2015.
authorised to do so. In GE/Alstom, the CCI directed the parties to re-file the notification entirely in Form II (even for markets where there was insignificant overlap), as they had provided more detailed Form II level information only where overlaps were in excess of the market-share thresholds prescribed under the Combination Regulations.

**Penalties for delayed filings or failure to file**

The June 2017 notification puts an end to the possibility of penalties for delayed filing. Transacting parties will no longer be constrained to decide on the strategy, collect information and make the filing within the short window of 30 calendar days. However, failure to file before implementation of the transaction continues to allow the CCI to impose a penalty of up to 1 per cent of the assets or turnover of the combination, whichever is higher. The maximum penalty imposed to date is 50 million rupees each in Piramal Enterprises/Shriram and GE/Alstom – both penalties were much lower than the statutory upper limit.

**Confidentiality of submitted information**

Confidential information and documents contained in merger filings and subsequent submissions are not automatically granted confidential treatment by the CCI. The notifying parties are required to specifically identify such information and make a request for confidential treatment for an identified time period. The CCI usually grants confidential treatment only over commercially sensitive or price-sensitive information or business secrets, the disclosure of which would cause commercial harm to the notifying parties and typically for not more than three years. However, it should be noted that the CCI, being a statutory body, is subject to the (Indian) Right to Information Act 2005 (the RTI Act), through which citizens can secure access to information in control of public authorities. While, legally, the CCI is required to provide access to citizens, confidential information provided by parties falls within an exemption under the RTI Act and it is therefore likely that these in-built safeguards in the RTI Act, coupled with the CCI's own confidentiality regime, will be sufficient to assuage industry concerns in this regard.

**Judicial review of mergers and the appellate process**

On 26 May 2017, all the powers and duties of the COMPAT, were transferred to the NCLAT. As a result, decisions of the CCI may be challenged before the NCLAT, by any person aggrieved by that decision, including the central government, state government, a local authority or an enterprise. A further appeal from any order of the NCLAT lies to the Supreme Court of India.

In a decision that would have had wide-ranging implications, the COMPAT previously stayed the operation of the revised divestment order of the CCI in Holcim/Lafarge upon the application of a prospective bidder for the divested assets, however, this appeal was subsequently withdrawn by the appellant.

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Other COMPAT decisions in the context of merger reviews include the challenge in the case of the CCI’s order in *Jet/Etihad*, which allowed Etihad to acquire a certain percentage of the equity share capital of Jet. The complainant alleged that the CCI allowed the combination without correctly appreciating the facts of the case or carrying out a detailed assessment. The COMPAT, however, dismissed the matter, ruling that the complainant was not an ‘aggrieved party’ within the meaning of the Competition Act and hence had no *locus standi* to challenge the order of the CCI. Similarly, in *Piyush Joshi v. CCI*, the COMPAT dismissed the appeal against the approval of the merger of Royal Dutch Shell Plc and BG Group Plc, stating that the appeal was premature. However, this appeal now lies before the NCLAT and the final order is still pending.

Regarding gun-jumping and belated filing penalties, the COMPAT upheld the penalty imposed by the CCI on Piramal for failing to notify three interconnected transactions. In *CCI v. Thomas Cook*, the Supreme Court recently dismissed the order of the COMPAT that had overturned the penalty imposed by the CCI on Thomas Cook for alleged gun jumping. The Supreme Court held that there was no requirement of mens rea under Section 43A of the Competition Act or intentional breach as an essential element for levying penalties. The Supreme Court further emphasised that technical interpretation to isolate two different steps of transactions of a composite combination was against the spirit and provisions of the Competition Act. Notably, Eli Lilly & Company’s appeal to the COMPAT against the penalty imposed by the CCI for belated filing now lies before the NCLAT. The penalty was imposed on Eli Lilly on the basis that the relevant trigger document in the transaction was the global sale agreement, and not the local sale agreement that was signed after the global sale agreement. The final decision in this appeal is still pending.

**IV OTHER STRATEGIC CONSIDERATIONS**

Since the coming into force of the Indian merger control regime, the CCI has entered into cooperation agreements and memoranda of understanding with several of its overseas counterparts, including the FTC, the EC, the Australian Competition and Consumer Commission and the Russian Federal Anti-Monopoly Service. Through such agreements, the CCI has sought to strengthen international cooperation and share information related to fair trade practices. The CCI has demonstrated its intention to reach out to and coordinate with global regulators in the recent past, especially in multi-jurisdictional filings. Given the multi-jurisdictional nature of global transactions, the CCI has become an important regulator to factor in given its length of review and substantive assessment of the filings made before it. One of the key features of the CCI’s review in the past year is that it has considered transactions in the context of consolidation in the sector in which a transaction has taken place and this has generally entailed a more detailed review of all filings notified in the sector. As evident from the CCI’s decisional practice in the pharmaceutical, agro-chemical and industrial gas

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46 C-2013/05/122, dated 12 November 2013.
47 Appeal No. 44 of 2013, dated 27 March 2014.
49 TA (AT)(Competition) No. 32 of 2017 (Old Appeal No. 43/2016).
51 Civil Appeal No. 13578 of 2015, dated 17 April 2018.
52 Transfer Appeal (AT) (Competition) No. 3 Of 2017 (Old Appeal No. 44 Of 2016).
sectors,\textsuperscript{53} the CCI is increasingly examining transactions in sectors that are sensitive to the Indian political economy with greater scrutiny. Further, parties to competitively significant global transactions should factor in longer review timelines and the possibility of divestitures to attain the CCI’s approval. For example, the Linde/Praxair\textsuperscript{54} merger, which is still under review, was filed three times with the CCI (the parties’ notification was withdrawn once and invalidated the next time).

\section{OUTLOOK & CONCLUSIONS}

The CCI has been faced with complex transactions in the telecommunications and agrochemical sectors but has proved itself to be a proactive and important regulator despite being critically understaffed. The amendments to the Combination Regulations have been a significant and welcome development in the past year. These amendments will likely mean that the CCI will not review ‘no issues’ cases that were previously notifiable and will focus its attention on only those transactions that involve more in-depth competition law analysis. Also, transacting parties will be able to provide complete notifications to the CCI without the pressure of filing in 30 working days. With the introduction of the Insolvency and Bankruptcy Code 2016 (IBC), the new legislation aimed at streamlining insolvency procedures, the CCI has had to deal with transactions executed pursuant to the IBC process that must adhere to accelerated completion timelines. To its credit, even in the absence of any formal obligation to do so, the CCI appears to have prioritised the review of such transactions. The CCI has taken steps towards adapting its processes to best practices and applying lessons learned in more mature merger control jurisdictions. Although the Indian merger control regime remains relatively new, the CCI’s evolution over the past year shows a propensity for continuous development, in keeping with an overall objective to facilitate the concerns of notifying parties while asserting its role in developing competition law jurisprudence.

\textsuperscript{53} See ChinaChem/Syngenta, Dow/Dupont, Linde/Praxair (C-2018/01/545). The merger notification for the combination of Linde and Praxair has already been withdrawn by the parties once and invalidated once by the CCI. A new notification has been filed as of 2018.

\textsuperscript{54} C-2018/01/545.
Chapter 22

ITALY

Rino Caiazzo and Francesca Costantini

I INTRODUCTION

The Italian merger control regime was implemented with Law No. 287/1990 entitled ‘Provisions for the protection of competition and the market’ (Act). The Act was drafted on the basis of the ‘reciprocal exclusivity’ or ‘single barrier’ principles; thus, it applies only to concentrations that do not fall within the application of EU Merger Regulation No. 139/2004 (EU Merger Regulation), and that therefore do not have to be notified to the European Commission.

In July 1996, the Italian Competition and Market Authority (Authority) issued guidelines providing the general conditions of applicability of the merger control laws, as well as regulating certain procedural aspects (Guidelines).

Moreover, Decree of the President of the Republic No. 217/1998 (DPR 217/98) sets forth the procedural rules that must be complied with in carrying out investigations, which ensure the parties’ rights of due process, including the right to be heard and to have access to the documents of the proceedings.

The Authority is an independent body that deals with relevant concentrations. For certain industries, the provisions of the Act are enforced by the Authority with the cooperation of different government bodies. Section 20 of the Act provides that in reviewing concentrations involving insurance companies, the Authority must consult with IVASS, the sector regulator (which, according to Law Decree No. 95 of 6 July 2012, replaced ISVAP, the previous sector regulator) prior to rendering its decision. Section 20 of the Act (as amended by Law No. 303, 29 December 2006) also provides that, with regard to banks, merger control is under the responsibility of the Authority, while the Bank of Italy is requested to carry on its assessment of sound and prudent management and issue its own authorisation (with reference to the same transaction).

In the case of a concentration resulting from a stock exchange takeover bid, the Authority must receive notification at the same time as the securities regulator, the National Commission for Companies and the Stock Exchange (CONSOB), prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for a cumulative turnover thresholds criteria for pre-merger notification was introduced by Section 5 bis of Law Decree No. 1/2012 (converted into Law No. 27/2012). Previously, the Act provided for alternative turnover thresholds.

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The new regime prescribes that concentrations must be notified to the Authority when the aggregate gross turnover in Italy of the undertakings involved exceeds €495 million and the gross turnover in Italy of at least two of the participants exceeds €30 million.\(^2\)

Notification thresholds are subject to an annual adjustment to reflect inflation. Filing fees are not required.

The Act defines ‘concentrations’ to include mergers, share or asset purchases resulting in the acquisition of control over another undertaking, and the creation of concentrative, as opposed to cooperative, joint ventures.

The Authority considers that a preliminary agreement is not sufficient to create a concentration for the purposes of the Act.

Section 7 of the Act adopts the definition of control set forth by the Italian Civil Code (CC) for the purposes of Italian corporate law generally. Section 2359 CC recognises both *de jure* control (i.e., when a majority of the voting rights are held), as well as certain cases of *de facto* control (i.e., when, by reason of either voting rights or contractual links, one company exercises a dominant influence over the other).

Section 7 expands the definition of *de facto* control by providing that such control may exist in a variety of circumstances giving rise to the right to exercise decisive influence over the productive activity of an undertaking. Such rights may, *inter alia*, concern the ability to use all or a portion of the assets of the undertaking or involve special rights in terms of the composition of the administrative bodies of a company. The definition of control in Section 7 may also cover persons who are indirect holders of such rights. In various cases, the Authority has considered that control over a company is created by means of shareholders’ agreements, especially when a minority shareholder is given the right to appoint one or more members of the administration board, or when the by-laws require a certain voting quorum in the administration board that makes the participation and the vote of the director or directors appointed by the minority shareholder essential.

The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration.\(^3\) However, the Authority considers that no concentration takes place when the target company does not conduct (nor has conducted or has plans to conduct) any economic activity, even if it owns some assets. However, should the non-active target company be granted authorisations or licences that are necessary to enter a given market, its acquisition is considered to be a concentration.\(^4\)

With specific regard to joint ventures, the Authority distinguishes cooperative joint ventures from concentrative ones. Ventures with the principal object of coordinating the behaviour of otherwise independent undertakings are dealt with as ‘restrictive agreements’ rather than as ‘concentrations’ under the Act. Full functionality of the venture must be verified to establish that the venture is concentrative in nature. In this respect, to ascertain

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\(^2\) These figures apply for 2018.

\(^3\) The acquisition of intangible assets such as goodwill or trademarks could lead to a concentration. See the Authority’s Annual Report of 1994, pp. 135, 136; in particular for the insurance sector, see Decision No. 11775 of 6 March 2003, *Nuova Maa Assicurazioni*/*Mediolanum Assicurazioni* and Decision No. 1852 of 16 March 1994, *Ticino Assicurazioni*/*Sis*; in these cases, the contractual relationships of the companies were considered to be business divisions.

\(^4\) Decision No. 4516 of 19 December 1996, *Agip Petroli*/*Varie società* and Decision No. 9529 of 17 May 2001, *Benetton Group*/*Vari*. However, the licences must be released at the time of the transactions; see Decision No. 15464 of 10 May 2006, *Enel Tradel*/*Nuove Energie*.
whether a joint venture is a full-function venture, the Authority relies upon the criteria set forth in Communication 2008/C 95/01 of the European Commission (i.e., the carrying-on of a stable basis of all the functions of an autonomous economic entity).

Note that, pursuant to Law No. 153/1994, concentrations that result in the direct or indirect holding (even if in only one major Italian city) of more than 25 per cent of the turnover for cinematographic distribution and, contemporaneously, of the number of cinemas active in the relevant geographic area, must be notified to the Authority.

The Act prohibits concentrations whose effect is to create or strengthen a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner.

Unlike the EU Merger Regulation, the Act contains no general presumption that a concentration affecting less than a given market share (25 per cent, as established in Paragraph 32 to the preamble of the EU Merger Regulation in the current version) is compatible with the maintenance of competition on the relevant market. Nevertheless, the Authority has clarified through the Guidelines that for product and geographic markets that exceed certain thresholds, certain information must be given in addition to that required under the synthetic notification form.

The Authority considers six specific factors in determining whether a concentration would create or strengthen a dominant position in the market in such a way as to eliminate or reduce competition in a significant or lasting manner, as stated in Section 6 of the Act. These are:

a. the range of choice available to suppliers and consumers;
b. the market shares of the parties involved in the concentration and their access to sources of supply or market outlets;
c. the structure of the relevant markets;
d. the competitive situation of the national industry;
e. barriers to entry into the relevant market; and
f. the trends in supply and demand for the products or services in question.

To date, the Authority’s decisions show that it considers market shares, entry barriers and the degree of competitiveness in the relevant market to be the most relevant criteria in evaluating concentrations. The Authority also focuses on the opportunity for the parties to the concentration to preserve the market share that they would hold after the transaction as a factor to be taken into consideration in evaluating the competitive impact of a concentration. Such opportunity depends not only on the degree of competitiveness on the market and on the barriers to entry in the same, but also on other factors, such as the degree of evolution of the market or the retention of technological leadership, a vertical integration or important trademarks by the dominant operators. In cases where the market share in question is substantial, the Authority tends to look first at the competitive structure of the market, including the number of competitors and barriers to entry. In determining the scope of its examination, the Authority looks at the relevant product and geographic markets that it considers to represent, respectively, the smallest group of products and geographic area for which it is possible, having regard to the existing possibility for substitution, to create or strengthen a dominant position.

The Act also provides some exceptions to the general rule.

According to Section 5(2) of the Act, equity positions held by credit institutions, including insurance companies that participate in the underwriting of shares on the occasion...
of the incorporation of a company or the launching of a capital increase, are excluded from
the definition of concentration, provided that the shares in question are sold within two
years and the voting rights are not exercised during the period of ownership. This exemption
is more restrictive than that available under Community law. In fact, Section 3(5)(a) of the
EU Merger Regulation refers in general to a temporary purchase of securities with a view to
reselling them. The Act also requires that the bank or financial institution in question abstain
from exercising the voting rights attached to its shares, whereas the EU Merger Regulation
allows such rights to be exercised as long as they do not result in any influence over the
competitive behaviour of the target, in particular in certain circumstances, such as to prepare
the disposal of the shares. It must be noted that the Authority has refused an application
by analogy of Section 5(2) of the EU Merger Regulation in cases in which the temporary
acquisition is made by an entity other than banks or financial institutions.

Moreover, undertakings that operate a legal monopoly (e.g., before the 1999
liberalisation, ENEL for electric energy distribution and, before the 1998 liberalisation,
Telecom Italia for various telecommunications services) or under a special statutory mandate
(or concession) are exempted from the provisions of the Act. However, this is true solely in
respect of matters strictly connected to the performance of the tasks for which an undertaking
has been granted its concession. In particular, Section 8 of the Act now provides that those
undertakings shall operate through separate companies if they intend to trade on markets
other than those on which they trade under monopoly. In addition, the incorporation of
undertakings and the acquisition of controlling interests in undertakings trading on different
markets require prior notification to the Authority. To guarantee equal business opportunities,
when the undertakings supply their subsidiaries or controlled companies on different markets
with goods or services (including information services) over which they have exclusive rights
by virtue of the activities they perform, they shall make these same goods and services
available to their direct competitors on equivalent terms and conditions.5 Moreover, Section
25(1) allows the government to provide the Authority with guidelines in order to authorise
potentially restrictive concentrations that would be in the general interest of the national
economy within the framework of European integration (although this provision has never
been used).

II YEAR IN REVIEW

Among the most significant decisions during the past year were two proceedings concerning
mergers authorised subject to the adoption of corrective measures.

By decision No. 26431 of 1 March 2017,6 the Authority has authorised with conditions
the concentration concerning the acquisition by Gruppo Editoriale L’Espresso SpA of the
exclusive control of Italiana Editrice SpA, both companies operating in the editorial sector of
daily newspapers and advertising.

5 The Authority had interpreted this exemption narrowly. For example, in a decision involving an abuse of
dominant position, the monopoly granted to the then state-owned telecommunications concern, SIP (now
Telecom Italia), was interpreted by the Authority as not extending to non-reserved neighbouring markets
(payment of voice-telephone services by credit cards), exclusivity clauses in the franchise agreements
of SIP concerning the distribution of mobile terminals and the new pan-European digital mobile
telecommunications services.

6 Decision No. 26431 of 1 March 2017, Gruppo Editoriale L’Espresso/Italiana Editrice.
The Authority found that the transaction was likely to strengthen the dominant position already held by the purchaser in the market for local advertising in daily newspapers in the provinces of Turin and Genoa and to create a monopoly in the province of Genoa, and almost a monopoly in the province of Turin. Moreover, all other operators present in the affected provinces did not seem to be capable of exercising significant competitive pressure because, in addition to holding much lower market shares, they had a sales network that covers only part of their advertising requests.

According to the Authority, the concentration would likely have caused an increase in the price of advertising space, to the detriment of the advertisers and, as a result, would have affected the financing of new editorial enterprises (because advertising revenues are a necessary source of funds for the publication of a daily newspaper).

For these reasons, the Authority decided to authorise the transaction subject to the adoption (for the period of five years starting from the date of issue of the decision) of remedial measures. The purchaser undertook to entrust the advertising services for the local editions of the daily newspaper *La Repubblica* to two independent, unrelated parties, one for the province of Genoa and one for the province of Turin. Moreover, the purchaser submitted the draft contract with such advertising concession agent for the province of Genoa, which contract ensures the concession agent’s independence and does not contain any provision limiting the pricing policies, and undertook to use the same contractual format for the province of Turin.

In this respect, the Authority deemed that the granting to an independent third party of an exclusive concession agreement for advertising on the local edition of *La Repubblica* was a suitable measure to allow the entry of new operators in the reference markets, increasing the choice of the advertisers and reducing the barriers to entry.

By decision No. 26927 of 17 January 2018, the Authority authorised with conditions the transaction concerning the acquisition by Profumerie Douglas (controlled by CVC Group) of the exclusive control of La Gardenia and Limoni Group, both companies operating in the retail distribution market of perfumes and cosmetics.

During the investigation the Authority found that post-merger the activities of the merging parties would have overlapped in the following relevant product markets: (1) the market for the selective distribution for the retail of cosmetics and luxurious perfumes; (2) the market for procurement for cosmetics and luxurious perfumes; and (3) the market for the provision of aesthetics services.

The geographical dimension of the above relevant product markets was deemed to be local and was determined by the Authority by the method of isochrones. The relevant geographical markets were then identified by the Authority in the areas within a range of approximately 20 minutes travelling time by car from the stores of the merging parties. From a competition viewpoint La Gardenia and Limoni group is the first operator in the relevant product market for the selective distribution for the retail of cosmetics and luxurious perfumes, whereas Douglas is the second largest player in this market. The Authority identified 39 local areas where the merging parties would have had a combined market share of at least 45 per cent, that in some areas would have been much higher, even reaching a 85–90 per cent share. The entity resulting from the merger would have been the most important player in this market, and likely to restrict competition in many local areas.

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For this reason the Authority resolved to authorise the acquisition subject to the adoption of corrective measures, more in detail the sale to independent third parties of some stores of the local areas where the combined market share of the merging parties resulted higher.

III THE MERGER CONTROL REGIME

Notification of a concentration must be filed prior to the execution of the deed of merger, the acquisition or the joint venture’s creation. Within 30 days of receipt of notification (Phase I), the Authority shall either authorise the transaction or open a formal investigation. This 30-day period is reduced to 15 days in cases of a domestic takeover bid, except for public bids on a foreign stock exchange, in which case the normal period applies.

If a formal investigation is commenced (Phase II), Section 16(8) of the Act provides that the Authority must inform the parties of its final decision within a maximum of 45 days, which period may be extended for a maximum of 30 days in the event that the parties have failed to provide any information available to them that has been requested by the Authority. Otherwise, the Authority may order suspension of the proceedings. The final decision prohibiting the concentration, clearing the concentration in its entirety or clearing the concentration with the imposition of remedies must be adopted within the above statutory time limit, but it may be communicated to the parties thereafter.

The undertakings may accelerate the proceedings by contacting the Authority prior to the formal notification of the transaction and filing an informal document providing information on the same. That procedure anticipates the request for information at a preliminary phase, thereby avoiding delays during the formal proceedings.

The Authority may be made aware of a concentration by interested third parties, which may file a claim against a companies’ failure to notify. In such case, the opening of the investigation must also be communicated to the interested third parties (Sections 6(4) of DPR 217/98). In general, the Authority may also request hearings with third parties, which have the right to access the documents of the proceedings with the exception of those documents providing confidential data.

Third parties who feel aggrieved by a decision of the Authority to permit a merger have the right to initiate an appeal against that decision before the Lazio Court. In this respect, the administrative courts have recognised that competing companies have a qualified interest to oppose the decisions of the Authority, as such decisions may directly produce effects on their activity. Therefore, if the Authority authorises a merger that violates competitors’ rights, the competitors may appeal the decision before the administrative judge.8

The Authority may also impose conditions upon the authorisation of the proposed merger. These conditions can be directly imposed by the Authority or as a result of negotiations. The Act does not provide for the Authority to enter into any such negotiations with the parties, although in practice this may well happen.

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8 As indicated by the Italian Supreme Administrative Court in Decision No. 280 of 3 February 2005, parties that are not directly involved in an antitrust procedure can also legitimately appeal a decision of the Authority if they have a different and qualified interest in the procedure, and if they can prove that the same interest has been damaged by a decision. In this respect, see also Regional Administrative Court of Lazio, Decision No. 10757 of 20 October 2006 and Supreme Administrative Court, Judgment No. 1113 of 21 March 2005.
In general, should the Authority consider that a concentration is forbidden under the Act, an authorisation may be granted provided that the parties undertake to fulfil some specific undertakings that can be divided into structural and behavioural remedies. Considering the cases that have been dealt with by the Authority, the following remedies can be envisaged:

**a structural remedies:**
- divestiture of business or branches: this may be imposed to reduce the market share created by the concentration or more narrowly with regard to some geographical areas where the overlaps arising out of the concentration are deemed to be incompatible with the Act. In general, the Authority requires that divestiture be made to an undertaking with no structural, financial or personal links to the parties, and with financial resources and expertise in the involved market. The re-acquisition of the divested business may be forbidden indefinitely or for a limited time period. The Authority may also provide for a temporary moratorium on any further acquisition of third parties operating on the relevant market;
- undertaking to reduce production capacity: the Authority may ask the parties to divest production capacity and related assets and personnel necessary to operate in a given market. The same objective can also be attained by means of a ‘conduct’ remedy, consisting of an undertaking by the parties to reduce production capacity for a given period;
- reduction of the scale of the business acquisition;
- undertaking by the parties not to commercialise products under a certain trademark; and
- transfer of brands and other intellectual property rights; and

**b behavioural remedies:**
- grant competitors access to essential facilities and know-how; and
- create an internal committee responsible for the future compliance of the interested company with the competition law.

The Authority may expressly reserve the right to revoke its decision to clear the concentration and to impose fines for any failure to observe the prescribed undertakings.

Finally, as stated above, the Authority must prohibit a concentration that creates or strengthens a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner. If the Authority has not issued a suspension order and finds that a merger violates the provisions of the Act, it may issue an order to restore competition in the market. Such order may require divestiture of a company, business or assets that have been acquired.

Decisions of the Authority may be appealed within 60 days from their adoption before the Regional Administrative Court of Lazio, which also has exclusive appeal jurisdiction over administrative fines for infringements of the Act.

Appeals of the Authority’s decision may be made either by the parties to the merger in the case of an adverse decision or, as mentioned above, by third parties, including competitors, affected by a decision to permit a merger.

The Lazio Court may review the merits of the decision, but it may only uphold or overturn it; it may not amend or alter the Authority’s decision. In fact, the Lazio Court, like all other regional administrative tribunals of its kind in Italy, is able to undertake judicial review only with respect to the legitimacy of the administrative decision referred to it (i.e., determining whether the Authority has correctly applied the Act in each particular case).
Decisions of the Court must take the form of either an approval of the decision of first instance or an order quashing such decision. While it may not alter or amend the decision, Law No. 205/2000 has afforded the Regional Administrative Court of Lazio the power to impose on the Authority a duty of compensation for the damage suffered by the affected parties.

Appeals from the judgments of the Regional Administrative Court of Lazio may be filed with the State Council.

IV OTHER STRATEGIC CONSIDERATIONS

The Authority is required to inform the European Commission of a concentration that it believes to be subject to Community regulation (Section 1(2) of the Act). In cases where the European Commission has already commenced an investigation, the Authority must suspend its own proceedings, save in respect of aspects that are of ‘exclusive domestic relevance’ (Section 1(3) of the Act). In such way, it is ensured that the Act does not apply when the European Commission actually exercises its jurisdiction.

Moreover, the Act has been interpreted as having extraterritorial application. Insofar as concentrations involve companies without a permanent establishment in Italy, but that have sales in Italy exceeding the statutory thresholds either at the time of the transaction or during the previous three years, the concentration must be notified. The approach taken by the Authority is in line with the EU competition rules and the approach of both the European Commission and the European Court of Justice, which have adopted the ‘effects test’ regardless of where companies are based. Where the companies involved in the concentrations have subsidiaries in Italy, the Authority adopts the ‘business unit’ approach taken at the EU level, whereby the subsidiary’s behaviour is deemed to be decided by the parent company.

A more difficult question is that of the effective extraterritorial application of the various monetary sanctions set forth in the Act for failure to notify or for providing false or incomplete information. The Authority has fined foreign companies in some cases for failure to notify a concentration.

V OUTLOOK & CONCLUSIONS

On 10 February 2014, the Authority published a proposal to amend the merger control regime by reducing the notification threshold concerning targets from €48 million to €10 million. Such proposal aims to make those concentrations that are exempt from notification under the regime currently in force (e.g., those involving the acquisition of a company (with a turnover that is lower than the current threshold) operated by large corporate groups, which may impact on the level of competition on the market (especially where the relevant market is local)) subject to the analysis of the Authority. From its analysis of the Italian market, the Authority has observed that the market is highly fragmented and characterised by the presence of small to medium-sized companies in which only few enterprises would reach the current notification threshold. Moreover, such proposed amendment is in line with the European practice (e.g., the regimes in force in Germany and Poland).

A second proposal aims to solve some issues concerning the calculation of turnover of the target company in the case of a merger or joint venture. In this respect, following the amendment of the merger control regime in 2013 and the application of a cumulative threshold, the Authority published a notice detailing the criteria for the calculation of the
turnover of the target company in the case of a joint venture and merger. In the notice, the Authority provided that in the case of a joint venture, the transfer of a business and the related turnover by the incorporating companies to the joint venture should be kept out of the calculation of the turnover of the incorporating companies. In the case of a merger, the calculation of turnover should refer to both the undertakings concerned. Such criteria shall be overcome by the new proposal, which aims to simplify the procedure. In this respect, the amendment provides that concentrations shall be notified to the Authority when the turnover of at least two of the undertakings involved in the concentration exceeds €10 million, with the understanding that the aggregate turnover of all the undertakings involved is higher than €489 million. This proposal is also in line with the European practice (e.g., with the regimes in force in Germany, France, Spain, Portugal, Denmark and Greece).

In this respect, companies participating in the public consultation have underlined that a reduction of just the threshold concerning targets may result in a burdening of the filing procedures, and also proposed that the Authority should modify the threshold concerning the overall turnover of the companies involved in the acquisition. Such a proposal aims to submit to the procedure of authorisation also those mergers concerning small to medium-sized enterprises that could nevertheless produce restrictive effects in regional and local markets. The Authority, having taken into account such proposals, resolved to continue the monitoring of the current merger regime at least until the end of 2014. No final resolution has yet been adopted in such respect, but it should be noted that the second proposal (concerning the calculation of the turnover of the target company in the case of a merger or joint venture) has been already implemented by Law No. 124 of 4 August 2017, which changed the regulation in force by specifying that the second threshold for the notification of the concentration to the Authority should apply to each of at least two of the undertakings concerned, and no longer to the acquired undertaking alone.
I  INTRODUCTION

Merger control together with Japan’s first competition rules were introduced in Japan by the 1947 Japanese Antimonopoly Act (AMA). Merger control is enforced by the Japan Fair Trade Commission (JFTC), which was established as an independent administrative office with broad enforcement powers. The JFTC is composed of a chair and four commissioners and has primary jurisdiction over the enforcement of merger control under the AMA.

i  Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions, mergers, joint share transfers, business or asset transfers and corporate splits (or demergers) are subject to prior notification under the AMA if they exceed certain thresholds. Mergers and acquisitions (M&A) transactions whose schemes involve more than one of these transactions (e.g., reverse triangular mergers that involve a merger between a target and a subsidiary of an acquirer and an acquisition by the acquirer of shares in the target) are separately analysed at each step of the transaction and may require separate filings for each of the various transactional steps.

Joint ventures are also subject to the notification requirement if they satisfy the thresholds for the type of transactions used to form a joint venture, such as share acquisitions and asset acquisitions. Unlike the regime in the EU, Japanese law does not distinguish between full-function and non-full-function joint ventures. Notification may be also required when a partnership (including a limited liability partnership) formed under Japanese law or under foreign laws acquires shares in another company through partnership. The controlling company of such partnership should file a prior notification if the filing thresholds are otherwise satisfied.3

Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.4

1 Yusuke Nakano and Takeshi Suzuki are partners, and Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune.
2 The JFTC uses the term ‘merger’ in its English translation of the AMA to describe what is called an ‘amalgamation’ in many other jurisdictions.
3 Article 10, Paragraph 5 of the AMA.
4 A combined business group consists of all of the subsidiaries of the ultimate parent company. A company will generally be considered to be part of a combined business group not only when more than 50 per cent of the voting rights of a company are held by another company, but also, if its financial and business policies are ‘controlled’ by another company. The Merger Notification Rules specify detailed thresholds.
Domestic turnover

Domestic turnover, which is defined as the total amount of the price of goods and services supplied in Japan during the latest fiscal year, is used as a decisive factor in the calculation of thresholds. The same thresholds will apply to both domestic and foreign companies.

According to the Merger Notification Rules, the domestic turnover of a company includes the sales amount accrued through direct importing into Japan regardless of whether the company has a presence in Japan.

To be precise, domestic turnover is the total amount of the following three categories of sales:

\[
a \quad \text{sales amount derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business)};
\]

\[
b \quad \text{sales amount derived from the sale of goods (including services) supplied in Japan to business entities or individuals who are transacting business (business entities) (excluding sales of goods where it is known that such goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and}
\]

\[
c \quad \text{sales amount derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that such goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature or characteristics.}
\]

In the cases where the calculation of domestic turnover cannot be made in strict compliance with these rules, it is also permitted to use a different method to calculate the amount of the domestic turnover as long as it is in line with the purpose of the above-specified method and in accordance with generally accepted accounting principles.

Notification thresholds for each type of transaction

Under the AMA, different notification thresholds apply depending on the different types of transactions, namely, share acquisitions, mergers, joint share transfers, business or asset transfers and corporate splits.

For share acquisitions (including joint ventures), the thresholds are based both on domestic turnover and the level of shareholding in the target. First, the aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed ¥20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed ¥5 billion to meet the filing requirement. Second, such acquisition...
must result in the acquirer holding more than 20 or 50 per cent of the total voting rights of all of the shareholders of the target (i.e., an acquisition that increases a shareholding from 19 to 21 per cent is subject to a filing, while an acquisition that increases a shareholding from 21 to 49 per cent does not require one). A minority ownership of over 20 per cent will be caught regardless of whether the acquirer will take control of the target company.

For mergers and joint share transfers, the thresholds are based on domestic turnover. The aggregate domestic turnover of the combined business group of one of the merging companies, or of one of the companies intending to conduct the joint share transfer, must exceed ¥20 billion to meet the filing requirement. Furthermore, the aggregate domestic turnover of the combined business group of one other participating company must exceed ¥5 billion.

For business or asset transfers, the thresholds are based on domestic turnover. The aggregate domestic turnover of all companies within the combined business group of the acquiring company must exceed ¥20 billion to meet the filing requirement. For the transferring company, separate thresholds are applied depending on whether the target business or asset is the whole business or asset of the company or a substantial part of the business or asset thereof. In the former case, a threshold of ¥3 billion of domestic turnover applies to the transferring company; in the latter, the same shall apply to that attributable to the target business or asset.

For corporate splits, there are a number of relevant thresholds depending upon the structure of the transactions, but the ¥20 billion and ¥5 billion thresholds described above (or lower thresholds) similarly apply.

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions have to jointly file. By contrast, in the case of a share acquisition or business transfer, only the acquiring company is responsible for filing.

There are no filing fees under the AMA.

II Regulations and guidelines relating to merger control issued in the past year

During FY2017, there were no significant amendments made to regulations or guidelines relating to merger control.

II YEAR IN REVIEW

During the 2017 fiscal year (from 1 April 2017 to 31 March 2018, hereafter FY 2017), the JFTC opened a Phase II review only in one case: the joint share transfer by the Daishi Bank, Ltd (Daishi Bank) and the Hokuetsu Bank, Ltd (Hokuetsu Bank), which was cleared by

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10 Article 16, Paragraph 3 of the Implementation Rules of the AMA.
11 Under Japanese law, ‘joint share transfer’ refers to a specific structure stipulated by the Companies Act of Japan that involves two or more companies transferring their shares into a new holding company in exchange for shares of that holding company.
12 Article 15, Paragraph 2 and Article 15-3, Paragraph 2 of the AMA.
13 Article 16, Paragraph 2 of the AMA.
14 Article 15-2, Paragraphs 2 and 3 of the AMA.
15 Article 5, Paragraph 2; Article 5-2, Paragraph 3; and Article 5-3, Paragraph 2 of the Merger Notification Rules.
the JFTC in December 2017, without any condition. At the time of writing, *The Fukuoka Financial Group and the Eighteenth Bank* case, in which a Phase II review was initiated in July 2016, is still pending before the JFTC.

### The Daishi Bank and the Hokuetsu Bank case

The Daishi Bank and the Hokuetsu Bank are the top two regional banks based in Niigata prefecture. In April 2017, the two banks reached a basic agreement to integrate their businesses by establishing a joint holding company through a joint share transfer, aiming to address the worsening business environment.

Under the merger control regime in Japan, no special rule applies to the review of mergers that involve financial institutions. The Secretary General of the JFTC recently stated in a press conference that the JFTC would apply the same Merger Guidelines to review the impact of mergers involving financial institutions, particularly with respect to whether the consumers’ choices will be restricted as a result of the contemplated merger. This case is remarkable because the JFTC demonstrated how the 'restraints of trade' were assessed in a merger between regional banks in a manner that was significantly more detailed than ever before.

In defining the product market, the JFTC segmented the provision of loans into two markets: loans provided to enterprises for business purposes; and loans provided to individuals for non-business purposes (typically used for the purchase of residential properties and education). This segmentation reflects the absence of demand substitutability between those two markets since the purpose and consumers of those loans are distinctive. Likewise, there is no supply substitutability between the two markets since the business know-how and resources (such as branches and personnel) required for the two types of loans are different. Furthermore, in consideration of the differences in business scale, targeted ranges and characteristics of businesses the JFTC sub-segmented the market for loans for business purposes into three sub-markets: loans for large-sized and middle-tier enterprises; loans for small and medium-sized enterprises (SMEs); and loans for local public agencies. In these sub-markets, the JFTC conducted an in-depth review of the following two areas, loans for large-sized and middle-tier enterprises, and loans for SMEs.

In defining the geographic market, the JFTC conducted a survey using questionnaires to assess the geographical scope of the business activities of enterprises located in Niigata prefecture and the distance that these enterprises will search for lenders of loans.

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18 The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (31 May 2004 (as amended)).

19 JFTC press conference on 6 December 2017. A summary (Japanese only) of that press conference is available at www.jftc.go.jp/houdou/teirei/h29/oct_dec/kaikenkiroku171206.html. According to the Secretary General, there have been 14 merger notifications for the integration of regional banks in the past 10 years.

20 It is reported that the JFTC sent the questionnaires to over 7,000 enterprises located in Niigata prefecture and received responses from half of these respondents.
Consequently, the JFTC defined the geographic market for (1) loans to large-sized and middle-tier enterprises throughout the entire Niigata prefecture, and (2) loans to SMEs in each of the 10 business districts within Niigata prefecture.

The JFTC noted that as a result of the notified concentration, the combined firm would have a relatively high market share: approximately 55 per cent for loans to large-sized and middle-tier enterprises in Niigata prefecture, and approximately 40–60 per cent for loans to SMEs in the 10 business districts within Niigata prefecture. The combined firm, therefore, would become the largest player in all of these markets. In addition, there would be no competitive pressure from new entrants since no bank has established a new branch in Niigata prefecture in the past five years.

Nevertheless, with respect to unilateral conduct, the JFTC concluded that the integration would not result in restricting the consumers’ choices for loans for business purposes because of the following reasons:

- **a** competitors (banks) have sufficient excess supply capacity which would continue to function as competitive pressure;
- **b** for large-sized and middle-tier enterprises, there is also a certain degree of competitive pressure from adjacent markets (including neighbouring geographic areas and lenders other than banks, such as agricultural cooperative associations); and
- **c** the survey results show that the majority of enterprises would consider borrowing loans from banks other than the combined parties and that 60 per cent of the parties’ customers have actually borrowed from other banks simultaneously, it would be relatively easy for both large-sized and middle-tier enterprises and SMEs to switch their lenders if the parties raised their loan interest rate.

Similarly, the JFTC found that the likelihood of coordinated conduct among the combined parties and competitors in each of the relevant markets would be low, given the difficulty in predicting the competitive conduct owing to the differing loan conditions for each enterprise depending on the type of business and financial situation.

The JFTC, thus, concluded that the notified concentration would not substantially restrain competition in each of the relevant markets neither by unilateral conduct nor cooperative conduct.

### v Statistics of the JFTC’s activity

According to the JFTC, the total number of merger notifications filed in FY 2017 was 306.

There are a few cases that were brought into Phase II review every year, while there were no formal prohibition decisions made by the JFTC. According to the JFTC’s statistics, the number of filings and the cases cleared after a Phase II review is as follows:

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<td>3</td>
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III  THE MERGER CONTROL REGIME

i  Waiting periods and time frames
In terms of time frames, the standard 30-day waiting period will apply, which may be shortened in certain cases (see Section III.ii, below). If the JFTC intends to order necessary measures regarding the notified transaction, it will do so within the 30-day (or shortened) waiting period (which is extremely rare) or, if a Phase II review is opened, within the longer period of either 120 calendar days from the date of receipt of the initial notification or 90 calendar days from the date of the JFTC’s receipt of all of the additionally requested information. It should be noted that the JFTC does not have the power to ‘stop the clock’ in either the Phase I or Phase II review periods. It is, however, possible for the notifying party to ‘pull and re-file’ the notification during the Phase I period, thereby effectively restarting the clock.

ii  Parties’ ability to accelerate the review procedure
There is no provision in the law and there are no regulations regarding the ability to accelerate the review process. However, in practice, it may be possible to put pressure on the JFTC by submitting a written request to the JFTC in cases where a filing is made less than 30 calendar days before the planned closing date. The Merger Guidelines state that the JFTC may shorten the waiting period when it is evident that the notified merger may not substantially restrain competition in any relevant market (which means when the JFTC closes its review prior to the expiration of the 30-calendar-day review period).

iii  Third-party access to the file and rights to challenge mergers

Access to the file
Generally speaking, no third party has access to the merger notification files. Further, the JFTC does not even disclose the fact of the filing of a merger notification or clearance thereof, except for cases in which a Phase II review is commenced (in which case the JFTC discloses the identity of the companies involved in the notified transactions). This means that third parties cannot even confirm whether a merger has actually been notified, unless the case has moved on to Phase II. Apart from the above limited disclosure, although not timely, the JFTC usually discloses details of some major merger notification cases as part of its annual review. Such disclosure is generally subject to obtaining approval for publication from the notifying parties.

Rights to challenge mergers
Interventions by interested parties in JFTC proceedings have not historically been common. Nevertheless, there was one case in which Japanese steel manufacturers intervened in relation to the proposed hostile takeover attempt by BHP Billiton of Rio Tinto, first announced in 2007.

Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here. There are two ways for third parties to submit complaints

to the JFTC in the course of a merger review: one way is to notify the investigation bureau of the JFTC of a possible breach of the AMA;22 and the other is to submit complaints to the mergers and acquisitions division of the JFTC.

In addition, as stated in the Policies for Merger Review, in the event that a merger review moves on to Phase II, the JFTC will publicly invite opinions and comments from third parties. Public hearings can be held23 if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings, and market tests by way of questionnaires, with third parties, including competitors, distributors and customers, in the course of its review, as it did in the review of the Daishi Bank and Hokuetsu Bank case (see Section II, above).

iv Resolution of authorities’ competition concerns, appeals and judicial review

The JFTC can issue a cease-and-desist order when it believes that a proposed transaction has the effect of substantially restraining competition in a particular field of trade (i.e., a relevant market). Prior to issuing a cease-and-desist order, the JFTC will provide, in advance, information about, *inter alia*, the outline of the contemplated order as well as the underlying facts and the list of supporting evidence to the potential recipients of such order. The JFTC does so to give the potential recipients an opportunity to review and make copies of the evidence (to the extent possible) and to submit opinions as to the possible order.24

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court (instead of resorting to the JFTC administrative hearing procedure, as was the case in the past) for annulment of the JFTC order.

v Effect of regulatory review

The JFTC frequently holds consultations with sector-specific regulators concerning general issues as to the relationship between the JFTC’s competition policy and sector-specific public and industrial policies. In this regard, it is generally understood that the JFTC considers relevant public and industrial policy issues when ruling on a given transaction, without prejudice to the independence of its competition policy review and merger review. Among the various government ministries, the Ministry of Economy, Trade and Industry has been active in advocating competition policy, but depending on the specifics of each case, other ministries may also be involved.

vi Substantive review

The Merger Guidelines set out the various factors that may be taken into account by the JFTC when assessing the impact of notified transactions on the competitive situation. Specifically, the Merger Guidelines provide an analysis of the substantive test for each type of transaction (e.g., horizontal, vertical and conglomerate M&A transactions). One of the important parts of the substantive test analysis is the use of ‘safe harbours’ measured by the Herfindahl-Hirschman Index (HHI) for each of the above three categories (see Section III.vii, below). It is also suggested in the Merger Guidelines that, both before and after

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22 Article 45, Paragraph 1 of the AMA.
23 Article 42 of the AMA.
24 Article 9 of the Rules on the Procedures of Hearing of Opinions.
the transaction, the JFTC will closely analyse market conditions from various viewpoints, including whether the transaction may facilitate concentration between market players, to ultimately determine the notified transaction’s actual impact on competition.

The detailed method to define the ‘particular field of trade’ (i.e., relevant market) is also provided in the Merger Guidelines. Importantly, the Merger Guidelines were amended in 2007 to clarify that the geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business. Following the 2007 amendment, there have been several JFTC cases where the JFTC defined the relevant geographical market to extend beyond Japan.

vii Safe harbours

In the safe harbour analysis, if any of the following conditions is satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:\textsuperscript{25}

\begin{itemize}
\item[a] horizontal transactions:
  \begin{itemize}
  \item the HHI after the notified transaction is not more than 1,500;
  \item the HHI after the notified transaction exceeds 1,500, but is not more than 2,500, and the increased HHI (delta) is not more than 250; or
  \item the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150; and
  \end{itemize}
\item[b] vertical and conglomerate transactions:
  \begin{itemize}
  \item the merging parties’ market share after the notified transaction is not more than 10 per cent; or
  \item the merging parties’ market share after the notified transaction is not more than 25 per cent and the HHI after the notified transaction is not more than 2,500.
  \end{itemize}
\end{itemize}

In addition to the safe harbour above, the JFTC is highly unlikely to conclude that transactions falling within the following threshold would substantially restrain competition in any particular market: the HHI after the notified transaction is not more than 2,500, and the merging parties’ market share is not more than 35 per cent.

If the notified transaction does not satisfy the requirements for any of the above, the JFTC will likely conduct a more in-depth analysis of the unilateral and coordinated effects of the notified transactions.

viii Gun jumping

In the \textit{Canon and Toshiba Medical} case in 2016, the JFTC approved Canon’s acquisition of shares in Toshiba Medical, Toshiba Corporation’s (Toshiba) medical equipment unit. However, the JFTC also issued a statement warning that the structure of the deal could be deemed to circumvent the law, including the prior notification obligation under the AMA because the parties had provided that Toshiba could receive the payment of the transaction price of ¥665.5 billion prior to the JFTC’s clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In

\textsuperscript{25} Part IV, 1(3) and Part V, 1(3) of the Merger Guidelines. In practice, if a transaction satisfies the safe harbour conditions in (a) and (b), the JFTC does not conduct any further substantive review of the transaction.
return for that equity warrant, Canon paid to Toshiba an amount virtually equivalent to the
consideration for common shares. Further, shares with voting rights in Toshiba Medical were
acquired and held by an independent third-party owner up until the time Canon exercised
the equity warrant. The JFTC found that the transaction structure formed part of a scheme
that was aimed at Canon ultimately acquiring shares in Toshiba Medical.

The JFTC held that since there is no public precedent of its position as to such a
transaction structure, it would not impose any sanctions in this case, but warned that similar
transaction schemes will be considered to be in violation of the AMA in the future.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

Cooperation between the JFTC and foreign competition authorities

In principle, the JFTC is entitled to exchange information with competition authorities of
other jurisdictions based on the conditions set out in the AMA.26 In addition, the Japanese
government has entered into bilateral agreements concerning cooperation on competition
law with the United States, the European Union and Canada, and multinational economic
partnership agreements with competition-related provisions with 13 other countries.
Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda
with various competition authorities.27 It also has propounded the establishment of an
international cooperative framework for merger review at the 11th ICN Annual Conference
held in April 2012, which was approved at that Conference. Under these agreements and
frameworks, there have been various levels of information exchange and discussions carried
out between the participating authorities.

The JFTC has a good track record of closely working with other competition authorities.
It is reported that the JFTC exchanged information with various authorities, including its
counterparts in the United States and the European Union, for example, in the recent review
of the Zimmer and Biomet case in 2015 and the Lam Research and KLA-Tencor case in 2016.

Coordination among attorneys from various jurisdictions

As explained in Section IV.ii, below, because the JFTC abolished the voluntary consultation
procedure (prior consultation procedure) as of 1 July 2011, the substantive review of a
proposed transaction only begins at the formal notification stage. In addition, as explained in
Section III.i, above, each of the Phase I and Phase II review periods cannot be extended even
in cases where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock.
This might cause difficulties, especially in global merger notifications where the management
of the filing schedule is important to avoid conflicting remedies or prohibition decisions at
the end of the merger review procedure in various jurisdictions. Thus, coordination among
Japanese and foreign attorneys is of even greater importance following the abolition of the
prior consultation procedure.

26 Article 43-2 of the AMA.
27 A list of all international agreements and memoranda concerning competition law is available at: http://
ii  Pre-filing consultation with the JFTC

Upon the abolition of the prior consultation procedure in July 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

In practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials prior to formal filings. Interestingly, in almost all cases that the JFTC cleared recently after Phase II review, including the Daishi Bank and Hokuetsu Bank case, the JFTC made specific notes in its announcements that the parties had submitted supporting documents and opinions to the JFTC on a voluntary basis prior to officially filing the notifications. It is understood that parties to complicated mergers make use of that informal procedure to try and alleviate any potential concerns early. The JFTC seems to be receptive to such informal prior communications.

iii  Special situations

Failing company doctrine

The Merger Guidelines recognise the ‘failing company doctrine’. They state that the effect of a horizontal merger would not be substantial if a party to the merger has recorded continuous and significant ordinary losses, has excess debt or is unable to obtain financing for working capital, and it is obvious that the party would be highly likely to go bankrupt and exit the market in the near future without the merger, and so it is difficult to find any business operator that could rescue the party with a merger that would have less impact on competition than the business operator that is the other party to the merger.

Minority ownership interests

It should be noted that minority ownership of over 20 per cent of the voting rights in a company is a notifiable event regardless of whether the acquirer will take control of the target company (see Section I.ii, above). In addition, in the JFTC’s substantive review, any companies that are in a ‘close relationship’ with an acquirer or a target may be deemed to be in a ‘joint relationship’. Accordingly, these companies could be treated as an integrated group for the purpose of the substantive analysis. For example, the HHI would also be calculated based on the sales data of the integrated group as a whole. In the Idemitsu and Showa Shell case in 2016, the JFTC made clear that its review assumed that these parties would be completely integrated as one group after the acquisition, although Idemitsu only intended to have a minority shareholding in Showa Shell after the acquisition. The joint relationship will be determined by taking into account various factors even though, according to the Merger Guidelines, a minority holding of voting rights of over 20 per cent and the absence of holders of voting rights with the same or higher holding ratios of voting rights would suffice to find such relationship.

iv  Transactions below the notification thresholds

It is important to note that, under the AMA, the JFTC can theoretically review any M&A transactions under the substantive test, regardless of whether the filing thresholds described
above are met. The JFTC has actually investigated transactions that had not been notified, including foreign-to-foreign transactions such as an attempt by BHP Billiton to take over Rio Tinto through a hostile bid in 2010.28

V OUTLOOK & CONCLUSIONS

Seven years have passed since the amendments to the Merger Review Rules and the Policies for Merger Review were introduced in June 2011. These amendments primarily concern the procedural aspects of merger reviews by the JFTC, while some clarifications were also made to the substance of the JFTC’s review policies. Since these amendments, the scope of disclosure, which the JFTC has made in relation to its review of Phase II cases and as part of its annual review about recent major cases, seems to have expanded. For example, in the JXHD and TG case and the Idemitsu and Showa Shell case in 2016, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. Although these disclosures have been generally welcomed by practitioners, when compared to the practice of other leading competition authorities, there is still a relative lack of available information as to the JFTC’s decisional practice (e.g., few decisions are published), and there are some areas where further clarification or improvements seem necessary (e.g., as to market definition). It is hoped that the JFTC will take action, for example, through the publication of more decisions and of new or updated guidelines in the near future.

28 At the time, qualifying share acquisitions were subject to ex post facto reporting requirements.
I INTRODUCTION

The Monopoly Regulation and Fair Trade Act (MRFTA) is the primary antitrust statute and governs the merger control process in Korea. Under the MRFTA, the Korea Fair Trade Commission (KFTC) is the government agency that oversees the merger control process in Korea. Article 7(1) of the MRFTA sets forth the types of transactions (i.e., business combinations) for which a merger filing with the KFTC may be required. In addition, Article 12 of the MRFTA sets forth transactions that trigger a pre-merger filing requirement and those that trigger a post-merger filing requirement. In general, whether a merger filing is required under the MRFTA is examined under two jurisdictional tests: the size-of-transaction test and the size-of-party test. Whereas the size-of-transaction test applies only to certain types of transactions, the size-of-party test applies to all transactions. Under the MRFTA, there are five types of transactions:

a. interlocking directorate;
b. merger;
c. share acquisition;
d. business transfer (i.e., asset acquisition); and
e. formation of a new company (e.g., a joint venture).

Among these five types of transactions, interlocking directorates, mergers and the formation of a new company are not subject to the size-of-transaction test. The size-of-transaction test applies to share acquisitions and certain business transfers. With respect to a share acquisition, the size-of-transaction test is satisfied if:

a. the number of shares acquired pursuant to the proposed transaction is 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company; or
the acquirer becomes the largest shareholder of the target company, holding 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company, pursuant to the proposed transaction.

A business transfer involving the transfer of only a portion, and not all, of the business at issue is also subject to the size-of-transaction test, which is satisfied if the value of the business transfer is 5 billion won or more, or 10 per cent or more of the total assets of the transferor according to its financial statements at the end of the most recent fiscal year. On the other hand, a business transfer involving the transfer of all of the business at issue is not subject to the size-of-transaction test.

Even if a proposed transaction meets the size-of-transaction test, a merger filing with the KFTC is not required unless each of the relevant parties meets the size-of-party test. The size-of-party test is satisfied if either party to the transaction had consolidated worldwide assets or sales of 300 billion won or more during the most recently ended fiscal year; and the other party to the transaction had consolidated worldwide assets or sales of 30 billion won or more during the most recently ended fiscal year. These two thresholds (i.e., 300 billion and 30 billion won) have been established by the Enforcement Decree of the MRFTA.3

In addition, a local nexus test applies to a transaction where both parties to the transaction are foreign entities, or where the party with the filing obligation is a Korean entity and the counterparty is a foreign entity. Where both parties to a transaction are foreign entities (i.e., as in a foreign-to-foreign transaction), the local nexus test is satisfied if each party had Korean sales of 30 billion won or more during the most recently ended fiscal year. Where the counterparty to the party with the filing obligation is a foreign entity, the local nexus test is satisfied if the foreign counterparty had Korean sales of 30 billion won or more during the most recently ended fiscal year. When calculating a foreign entity’s Korean sales, inter-group sales between the foreign affiliate and its Korean affiliates are excluded to avoid double counting.

However, a transaction that satisfies the jurisdictional and local nexus tests need not be reported to the KFTC if it qualifies for an exemption under the MRFTA. The three most notable exemptions are for an interlocking directorate between affiliates, a share acquisition of which the parties are all specially related persons (i.e., affiliates), and a transaction where either the acquirer or the target is an investment company or a fund that satisfies certain conditions.

Where a transaction satisfies the jurisdictional and local nexus tests and does not qualify for an exemption, a pre-merger or post-merger filing with the KFTC is required. A pre-merger filing is required for a merger, business transfer, share acquisition or establishment of a new company where either the acquirer or the target has consolidated worldwide assets or sales of at least 2 trillion won. However, in a business transfer transaction, the assets or sales of affiliates are not included in calculating the assets or sales of the target. For all other transactions, a post-merger filing is required. For a tender offer transaction, only a post-merger filing is

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3 These two thresholds were recently amended in 2017. Under a 2017 amendment to the Enforcement Decree, the thresholds were raised to the current figures to ease regulatory burdens faced by companies undergoing business combinations.
required, even if the transaction satisfies the pre-merger filing requirement; specifically, the merger filing for a tender offer transaction must be made within 30 days after closing and does not trigger any waiting period.

A pre-merger filing may be made any time between the execution of the transaction agreement and prior to the closing date as long as the KFTC’s clearance is obtained prior to the closing date. If the parties to a transaction close the transaction prior to the KFTC’s clearance (gun-jumping), they may be subject to an administrative fine imposed by the KFTC. Furthermore, the KFTC may also review a transaction on its own initiative even where the transaction does not satisfy the jurisdictional and local nexus tests if it determines that the proposed transaction may have a significant impact on the Korean market.

If the parties to a transaction fail to file a merger notification in violation of the Korean merger regulations, they are subject to a maximum fine of 100 million won under Article 69-2(1) of the MRFTA. The specific amount of a fine imposed by the KFTC is determined in accordance with the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification.

With respect to merger filing and review, the applicable statutes, regulations and guidelines are as follows:

- the MRFTA and the Enforcement Decree of the MRFTA;
- the Guidelines on Methods of Business Combination Notification;
- the Guidelines on Standards of Business Combination Examination;
- the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification;
- the Guidelines on Standards of Imposition of a Corrective Order Regarding a Business Combination; and
- the Guidelines on Imposition of Fines for Non-Performance of a Corrective Order Regarding a Business Combination.

II  YEAR IN REVIEW

In 2017, the KFTC reviewed a total of 668 transactions, which represents a 3.4 per cent increase from 2016. (However, the total transaction value decreased by 14.2 per cent from 593.6 trillion won in 2016 to 509.4 trillion won in 2017.) Of these transactions, 514 (approximately 76.9 per cent) were Korean entities’ acquisitions of Korean or foreign entities, while the remaining 154 transactions involved foreign entities’ acquisitions of Korean or foreign entities. Of these 154 transactions, 41 were foreign companies’ acquisitions of Korean entities, while the remaining 113 were foreign-to-foreign transactions that affected the Korean market, thus requiring merger filing in Korea.4

In 2017, the KFTC reviewed and allowed Qualcomm’s acquisition of NXP Semiconductors. However, in order to address competitive concerns raised by the acquisition, the KFTC imposed both structural and behavioural remedies. Qualcomm Incorporated agreed on a deal to acquire NXP Semiconductors NV through Qualcomm River Holdings BV (Qualcomm) on 27 October 2016, and notified the proposed Qualcomm and NXP are global semiconductor manufacturers headquartered in the United States and the Netherlands.

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respectively. Qualcomm, a leader in mobile semiconductor sector, sought to expand into new sectors such as smart cars and IoT through the acquisition of NXP that has a strong foothold in the automotive and security semiconductor sectors. The KFTC was particularly concerned the merger would restrict competition by allowing Qualcomm to (1) unilaterally change NXP’s licensing policies on NFC patents and (2) technically or contractually link the sales of its baseband chipsets with NXP’s NFC and secure element chips. The KFTC noted that this bundling would lead to (1) Qualcomm’s increased market dominance in the baseband chipset market and (2) weakened innovation in the mobile device market because Qualcomm’s competitors may lose an incentive to invest. Accordingly, the KFTC imposed both structural and behavioural remedies to resolve potential competitive concerns. First, the KFTC’s structural remedy ordered Qualcomm to divest NXP’s standard essential NFC patents and a part of NXP’s non-standard essential NFC patents to a third party. In addition, the KFTC’s behavioural remedy was to prohibit Qualcomm from linking the sale of NFC chips to licensing terms for standard essential NFC patents.

On the merger between The Dow Chemical Company (Dow) and EI du Pont de Nemours and Company (DuPont), the KFTC ordered a divestiture of acid co-polymer assets. Dow and DuPont entered into a contract for consolidation on 11 December 2015, and reported the merger to the KFTC on 4 May 2016. Post-merger, the existing shareholders of Dow and DuPont were to each own 50 per cent of stocks issued by DowDupont, Inc, and Dow and DuPont became DowDupont’s subsidiaries. The KFTC concluded that the merger would restrain competition in the acid co-polymer sector, which is a type of petrochemical product. Specifically, the KFTC expressed a number of concerns because (1) after the merger, the combined market share of top three acid co-polymer producers would reach 77.7 per cent, and trigger the presumption of anticompetitiveness, (2) the merging parties are the first and third largest producers of acid co-polymer and the combined market share of the merging parties is over two times that of the second largest producer, ExxonMobil, and (3) the merger would effectively eliminate direct competition between Dow and DuPont.

As such, the KFTC imposed a structural remedy by which one of the merging parties has to sell its assets related to the development, production, and sales of acid co-polymer within six months of the completion of the merger. With regard to Maersk Line A/S’s (Maersk) proposed acquisition of shares of Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft ApS & Co KG (HSDG), the KFTC determined that the acquisition would stifle competition in the container shipping market. The KFTC was particularly concerned with decreased competition in the Far East Asia to Central America and the Caribbean Sea, and Far East Asia to the west coast of Latin America sea routes. Therefore, the KFTC imposed remedial measures, one of which was ordering HSDG to withdraw from the consortium regarding the sea routes. When reviewing this transaction, the KFTC examined competitive antitrust concerns based not only on each individual company’s business, but also on the consortium’s market share as a whole. In doing so, the KFTC considered the effects of the acquisition on both inter-consortium and intra-consortium competition. The KFTC concluded that the proposed merger may lead to a consortium-wide business combination beyond the two and then competition can be limited by, for example, an increase in freight rates. Consequently, the KFTC ordered HSDG to withdraw from the consortium regarding the sea routes between Far East Asia and also the Caribbean Sea and Central America, and blocked Maersk from joining any other consortium for five years.
The recent line of cases shows that the KFTC, in an attempt to address competitive concerns, is increasingly imposing even behavioural remedies in addition to more traditional structural remedies. Moreover, the KFTC is strengthening cooperation with foreign competition authorities, particularly in assessing global M&As and devising remedial measures so as to coordinate the structure, duration and timing of imposed measures.

In 2017, the KFTC imposed fines amounting to 577 million won with respect to 28 transactions that were not reported or that were reported late. The figures represent a 49.6 per cent increase in the number of such ‘failure to file’ cases as compared with 2016 when the KFTC imposed 385.6 million won in fines with respect to 19 transactions that were not reported or that were reported late.

Other noteworthy KFTC merger cases in 2017 include Samsung Electronics’s acquisition of Harman, AT&T/Time Warner (media and telecommunications) and Pangea/Toshiba Memory (semiconductor).

III THE MERGER CONTROL REGIME

The waiting period for the KFTC merger control review varies depending on the type of merger filing method employed. The Guidelines on Standards of Business Combination Examination provide a 15-day waiting period, in principle, for the following types of transactions that may qualify for the simplified review process:

a. transactions between affiliates;
b. transactions that do not form any controlling relationship (within the target);
c. conglomerate mergers by small or medium-sized companies (i.e., companies that do not belong to a business group whose consolidated total assets or turnover amount to 2 trillion won or more);
d. a conglomerate merger where no product or service substitutability exists between the parties due to the particular nature of the relevant market; or
e. participation in the establishment of a private equity fund or transaction involving an asset-backed securitisation company.

In addition, under the recently revised KFTC Guidelines, the 15-day waiting period rule also applies when the acquiring party files a formal merger notification after the KFTC’s review and provisional clearance of the parties’ provisional merger notification, provided that the facts and the market conditions have not materially changed since the KFTC’s provisional clearance.

The waiting period for the ordinary pre-merger filing is 30 days from the date of filing of notification, but the KFTC may, on its own initiative, extend the waiting period for an additional 90 days, if necessary. The KFTC’s current practice is that, if it views the case as having no effect of restraining competition, it usually clears the transaction within one month (or two months in certain cases) from the date of filing of the notification.

On 20 December 2017, in an effort to make its review process more efficient, the KFTC announced an amendment to its Guidelines. Following the amendment, the KFTC is now required to complete within 15 calendar days from the filing date its review of foreign JVs with no effects on the Korean market but that technically meet the jurisdictional

5 As described more fully below, the acquiring party may file a provisional merger notification form to obtain provisional clearance when there is not yet a binding merger agreement.
thresholds including the 30 billion Korean sales (or local Korean nexus sales) requirement. Except for in very obvious cases, however, it may not be as simple to qualify for the newly expanded fast track review because in some cases the threshold question (i.e., no effect on the Korean market) itself may require a substantial amount of substantive analysis and review. In addition, the KFTC does grant clearance sooner rather than later if a given transaction has no conceivable effect on the Korean market in any event regardless of the transaction types and whether it is nominally marked as a fast-track case or normal process case. Therefore, it remains to be seen whether the newly expanded fast-track review category for certain foreign JVs will shorten the average review time in a meaningful sense.

Meanwhile, the Guidelines on Methods of Business Combination Notification exempt companies that qualify for the simplified review process from submission of market status data. For a conglomerate merger, the KFTC simplified the reporting process by requiring the market status data for the top product only.

With respect to confidentiality issues, the materials submitted to the KFTC at the time of filing of the notification and thereafter are protected from disclosure to third parties. If a third party requests access to or a copy of such materials, the KFTC must obtain the prior consent of the submitting parties. The submitting parties are recommended to insert a statement in the notification to such effect.

The KFTC is permitted to impose several remedies if it determines that the transaction restrains competition. Under Article 16(1) of the MRFTA, the KFTC may:

- prohibit the relevant transaction altogether;
- order the total or partial disposal of assets, shares, or both;
- restrict the scope or method of operation of the relevant entity;
- order the resignation of relevant directors;
- order the transfer of business;
- order the relevant parties to disclose the fact that they have received the corrective order; and
- any other necessary measures.\(^6\)

If the parties fail to comply with the corrective measures, the KFTC may impose a penalty of not more than 0.03 per cent of the relevant amount of transaction day\(^7\) pursuant to Article 17-3 of the MRFTA. Further, under Article 67(6) of the MRFTA, failure to comply with corrective measures is punishable by a prison sentence of up to two years or a criminal fine not exceeding 150 million won.

In certain cases, the parties may apply for reconsideration of the KFTC’s decision to the KFTC or appeal the KFTC’s decision (or reconsidered decision if the parties had applied for reconsideration) to the Seoul High Court. Both options may be instituted simultaneously. The application for reconsideration must be made within 30 days from the issuance of the KFTC’s written decision. The KFTC is required to reconsider its decision within 60 days from the date of receipt of application pursuant to Article 53 of the MRFTA.

\(^6\) On 22 June 2011, the KFTC announced its standard for merger remedies, in which it highlighted its preference for structural remedies over behavioural remedies in merger cases.

\(^7\) For example, the value of the relevant business combination refers to the aggregate amount of value of acquired shares and debts in the case of a share acquisition, and the value of the relevant businesses in the case of a business transfer.
parties may also file an appeal before the Seoul High Court within 30 days from the issuance of the KFTC’s written decision or reconsidered decision. The Seoul High Court’s decision may be appealed to the Supreme Court.

Where the transaction falls under the ambit of responsibilities of other government agencies, such as the Korean Communications Commission or the Financial Services Commission, under the relevant statutes, such as the Electrical Communications Business Act or the Financial Industry Structure Improvement Act, Article 12(4) of the MRFTA provides that the merger filing requirements under Article 12(1) of the MRFTA are not applicable to the relevant transaction. These transactions do not, however, entirely avoid the review of the KFTC, because those other government agencies are still required, under Article 12(4), to discuss and consult with the KFTC regarding the potential competition-restraining effect of the relevant transaction during the review process.

Meanwhile, the recently enacted statute commonly referred to as the ‘One Shot Act,’ which allows for pre-emptive business reorganisation before insolvency, contains special provisions concerning mergers. For instance, Article 9(5) of the Act simplifies the filing burden on businesses undergoing reorganisation as it allows a business filing for reorganisation to file a reorganisation plan including, where applicable, a merger notification, which the government agency at issue must then forward to the KFTC. Furthermore, the KFTC under Article 10(7) of the Act must consider the views submitted by the government agency on any enhanced efficiencies resulting from the contemplated reorganisation or merger. However, the Act does not modify the substance of the merger control regime in any appreciable way.

IV OTHER STRATEGIC CONSIDERATIONS

When making worldwide merger filings in various countries, including Korea, parties need to consider the specific merger filing thresholds and waiting periods for each country. For example, as explained above, Korea imposes the merger filing obligation for the establishment of a joint venture company if it satisfies the jurisdictional and local nexus tests. As a result, where both parents of the joint venture are foreign entities, if they satisfy not only the size-of-transaction and size-of-party tests but also the local nexus test (or local sales test), which requires both foreign entities to achieve turnover or sales in or into Korea of 30 billion won or more, the transaction must be filed with the KFTC.

The KFTC in principle reviews the reportability of each transaction or step in a series of transactions that may constitute a ‘single transaction’ in other jurisdictions. As a result, an ancillary transaction (e.g., parties’ joint establishment of a paper company or an acquisition vehicle) preceding a main transaction may require a separate merger filing in Korea even though it may be exempt from merger filing obligations in other jurisdictions. Thus, parties to a series of transactions should check at the very outset whether any of the transactions requires a separate merger filing in Korea.

With respect to foreign-to-foreign transactions, in December 2011, the KFTC issued a manual on cooperation with foreign competition authorities in reviewing cross-border mergers subject to notification in multiple jurisdictions. It provides for a greater degree of cooperation with major competition authorities around the world, including the establishment

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8 Article 12(4) of the MRFTA reads as follows: ‘The provisions of Article 12(1) shall not apply if the head of the [other government] administrative agency concerned has consulted in advance with the KFTC regarding the business combination under the relevant statutes.’
of a cooperation system and the exchange of relevant information and opinions on market definition, analysis of anticompetitive effects and proposed corrective measures regarding the transaction at issue among the concerned jurisdictions.

The parties to the transaction are recommended to submit as much relevant information as possible regarding the proposed transaction and the relevant market at the time of filing in order to reduce the waiting period. If the parties wish to find out the KFTC’s position on the competitive effect of the proposed transaction earlier than the typical notification period, they may apply for the discretionary advanced or provisional filing procedure under Article 12(9) of the MRFTA. Under this procedure, the parties may be permitted to make a merger filing even prior to the execution of the relevant agreement as long as they submit sufficient information about the proposed transaction. Under the procedure, the relevant parties will be required to file a formal re-notification after the execution of the agreement. However, such re-notification only needs to be brief, and as explained above, the recently revised Guidelines on Standards of Business Combination Examination provide that a shorter 15-day waiting period applies to review of the formal re-notification. This procedure would be useful for parties wishing to close the proposed transaction shortly after the execution of the binding merger agreement.

Finally, the failing firm defence is available in Korea, and the parties may request an expedited review if the filing specifies that the relevant target entity is facing bankruptcy. However, the requirements to avail oneself of such defence are very strict.

V OUTLOOK & CONCLUSIONS

On 10 November 2017, the KFTC Task Force for Enhancing Law Enforcement System (KFTC TF) released an interim report that includes various recommendations for improving antitrust and consumer protection regulations in Korea. Then, on 23 February 2018, the KFTC TF released the final version of the report by finetuning the previously discussed agenda and adding seven new additional topics. While this comprehensive legislative reform initiative focuses mostly on non-merger issues, there are talks on improving the merger control regime as well.

Furthermore, the KFTC is strengthening inter-competition authority cooperation with foreign competition authorities, particularly in the assessment of global M&As. In particular, for the Dow/DuPont case, the KFTC made clear that it closely cooperated and discussed the review process with its foreign counterparts such as the US FTC and JFTC to impose structural remedies. The KFTC also recently cooperated with foreign competition authorities with respect to a number of major global transactions, including the AT&T/Time Warner transaction, the Pangea/Toshiba transaction and the Nokia/Alcatel-Lucent transaction.

Therefore, parties to global transactions triggering merger filings in multiple jurisdictions including Korea should expect the KFTC to be in even closer contact with other competition authorities that are also reviewing the same transaction.

I  INTRODUCTION

Merger control supervision is delegated by virtue of law to the Commission for Protection of Competition (the Commission). The Commission is an independent autonomous state authority with the capacity of a legal entity.\(^2\) It consists of a president, four members and an expert department.

The Commission:

\(a\)  determines rules and measures for the protection of competition and measures for the establishment of effective competition;

\(b\)  gives its opinion on draft laws and other acts that regulate issues related to economic activity, which may influence competition in the market;

\(c\)  either upon a request from Parliament, the government, other state authorities or undertakings, or \textit{ex officio}, the Commission shall provide expert opinions regarding issues in the areas of competition policy, protection of competition in the market and the awarding of state aid; and

\(d\)  cooperates with other state authorities regarding issues related to the protection of competition, and exchanges any necessary data and information for such purpose.

The Commission is also in charge of international cooperation related to the implementation of Macedonia’s international obligations, and participates in the implementation of projects in cooperation with both international authorities and the authorities of the European Union.

In cases of merger control, a system of pre-merger notification applies.

It should be noted that the Law on Protection of Competition (the Law) also applies to foreign-to-foreign transactions if any of the thresholds stated below are met.\(^3\)

Under the Law, a pre-merger notification must be submitted if any of the following thresholds are met:\(^4\)

\(a\)  the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, on the world market exceeds €10 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts

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\(^1\) Tatjana Popovski-Buloski is a partner at Polenak Law Firm.


\(^3\) Article 3 of the Law on Protection of Competition.

\(^4\) Article 14(1) of the Law on Protection of Competition.
and gained in the business year preceding the concentration, and where at least one participant is registered in Macedonia (i.e., has a legal presence in Macedonia either directly or through a subsidiary);
ob the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, in Macedonia exceeds €2.5 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts and gained in the business year preceding the concentration; or
c the market share of one of the participants in the concentration is more than 40 per cent, or the aggregate market share of the participants in the concentration is more than 60 per cent in the year preceding the concentration.

The aggregate turnover consists of the revenues from the sale of goods produced during the regular operation of an undertaking, as well as the revenues from services that the undertaking provides within its regular operations, after deducting sales rebates, value added tax and other public taxes directly related to the turnover. If one of the participants is an associated undertaking, then the aggregate turnover on the level of a group of undertakings will be taken into consideration, but revenues generated from the sale of goods or the provision of services, or both, among such undertakings shall not be taken into consideration.5

In the case of an asset deal, regardless of whether the parts are established as separate legal entities, only the revenue from the assets subject to acquisition shall be taken into consideration when calculating the turnover generated by the undertaking selling such assets. Two or more transactions carried out between the same entities or undertakings during a two-year period shall be deemed as one and the same concentration performed on the date of the last transaction.

The aggregate turnover of banks, saving houses and other financial institutions shall be determined according to the aggregate turnover generated from their day-to-day operations; in the case of insurance companies, the aggregate turnover shall be determined according to the value of the gross calculated premiums of the participants for the business year preceding the concentration.

The Law does not set a specific term for filing a notification, but provides that the participants in the concentration shall be obliged to submit a notification to the Commission prior to its implementation and following the conclusion of the merger agreement: that is, the announcement of a public bid for the purchase or acquisition of a majority participation in the basic capital of an undertaking.

The participants may notify the Commission regarding their serious intention to conclude an agreement (including, but not limited to, a letter of intent, term sheet or similar) or, in the case of a public bid, when they have publicly stated their intention to participate therein, provided that such agreement would result in the creation of a concentration in accordance with the law.

Creation of a joint venture that carries out the activities of an autonomous economic entity on a long-term basis shall also be deemed to be a concentration.

The Commission shall especially take into consideration the following with regard to a concentration:6

5 Article 16 of the Law on Protection of Competition.
6 Article 17 of the Law on Protection of Competition.
the need to maintain and develop effective competition on the market or a substantial part of the market, especially in terms of the structure of all markets concerned and the existence of competitors or potential future competitors having a head office both in and outside Macedonia; and

b the market position of the undertakings concerned and their economic and financial power, the market supply and the alternatives available to suppliers and users for the purpose of market supply, as well as their access to the supply (i.e., the markets, legal and other barriers to enter into and exit from the market, supply and demand trends for the relevant goods or services, the interests of consumers and any technological and economic developments), provided that the concentration is of benefit to consumers and does not represent an obstacle for the development of competition.

The Law excludes certain transactions from the definition of a concentration. Namely, a concentration of undertakings shall not be deemed to arise where:

a banks, saving houses and other financial institutions or insurance companies whose day-to-day activities include legal activities and trading with securities temporarily acquire securities with an intention to resell them within a period of one year as of the moment of their acquisition, and provided that the voting rights arising from those securities are not exercised with the intention of influencing the competitive behaviour of the undertaking on the market. On a special request, the Commission may extend this one-year period, provided that the acquirer proves that it could not sell the securities due to justified reasons. No appeal or lawsuit for the initiation of an administrative dispute shall be allowed against this conclusion;

b control is conducted by a representative of the company under a bankruptcy procedure or liquidation procedure at undertakings established outside Macedonia by persons performing a corresponding function in accordance with the legislation under which the undertaking has been established; or

c the investment funds acquire capital interest in undertakings, provided that they exercise the acquired rights only with the aim of maintaining the full value of their investment and provided that they do not influence the competitive behaviour of the undertaking on the market.

The Law provides for misdemeanour liability in cases of implementation of a concentration prior to a clearance decision being obtained or in cases of failure to notify. In such cases, the party that was required to submit the notification may be punished by the Commission with a monetary fine of up to 10 per cent of its worldwide turnover.

II YEAR IN REVIEW

In 2017, there were no changes to the relevant legal framework.

Pursuant to the Commission’s annual report on its activities for 2017, the increasing trend of submission of notifications regarding foreign-to-foreign transactions is continuing as a result of relatively low thresholds for notifying.
III THE MERGER CONTROL REGIME

The merger control regime is established on the principle of pre-merger notification. Therefore, no concentration that meets any of the thresholds set by the Law may be implemented before it is approved by the Commission, or before the relevant deadlines for the Commission to issue a decision have passed.

The Commission should decide upon a notification within 25 business days from the date of receipt of a complete notification (Phase I). Phase I may be extended for an additional 10 working days if the notified concentration is to be cleared subject to conditions and if the parties are willing to undertake commitments.

In the case of a disputable concentration, the Commission will open an in-depth assessment of a concentration (Phase II). This applies in cases where a concentration may significantly prevent, restrict or distort competition. The term for a Phase II investigation is 90 working days from the day of initiation of an in-depth assessment. The Commission is obliged to either clear a concentration conditionally or unconditionally, or prohibit the concentration. This investigation term can be extended to 105 working days.

Each of the above deadlines can be extended for up to an additional 20 working days by the Commission with the agreement of the participants in the concentration.

However, the statutory deadlines are not binding on the Commission when, as a result of circumstances for which one of the participants is responsible, the Commission has to request additional information or conduct inspections.

If the Commission does not make any decision within the set deadlines in any of the phases, the concentration is considered to be compliant with the law.

A concentration cannot be conducted prior to the submission of a notification to the Commission or, following the submission of a notification, until a decision is adopted that the concentration is in accordance with the Law or the participants have undertaken relevant commitments accepted by the Commission, or if the Commission fails to meet the deadline for clearance of a transaction within the statutory deadlines.

However, there will be no suspension of a public bid for the purchase of securities or a series of transactions of securities, including ones that are convertible into other securities intended for trading on the market in accordance with the law, if a notification is submitted without any delay to the Commission; and the acquirer of the securities does not exercise the voting rights on the basis of these securities, or does so only to the extent necessary for maintaining the full value of its investment, and on the basis of a decision for exemption from the obligations.

Namely, on the request of a party that has submitted a notification, the Commission may decide to allow an exemption from the suspension obligation. The request must be elaborated. When deciding upon such request for exemption, the Commission shall, inter alia, take into consideration the effects of the suspension of a concentration over one or more undertakings, participants or over a third party, as well the threat to competition caused by the concentration.

The exemption may be conditioned by requirements and obligations imposed for the purpose of ensuring effective competition. Such exemption may be required and allowed at any time, either prior to a notification or following a transaction by public bid for the purchase of securities or a series of transactions of securities.
Regarding examination of the case files, Article 56 of the Law provides that only the parties to the procedure before the Commission shall have the right to examine the case files and to make, at their own expense, transcriptions or copies of the whole case or certain documents. Therefore, the Law does not grant third parties the right to examine the files.

A request for examination should be in made in written form. The President of the Commission should approve such request through a separate administrative act (conclusion). In the conclusion, the President shall determine the date and hour of the examination, which should be performed within a period of 15 calendar days as of the date of receipt of the request for the examination of the files.

In accordance with the Law, the participants in the procedure shall not be entitled to perform an examination, transcription or copy of the draft decisions of the Commission, the minutes, or audio and audio-visual recordings of Commission sessions, any internal instructions and comments about the case, any correspondence between the Commission and the European Commission or the other institutions of the European Union, or other documents that constitute a business or official secret.

‘Business secrets’ shall in particular mean something that, by law or other regulations, is determined to be a business secret; and that constitutes a business secret when the Commission accepts such classification.

The Commission shall accept the classification of data as a business secret provided that the data have economic or market value, and their disclosure or use may lead to the economic advantage of the other undertakings.

The following criteria shall in particular apply to the evaluation of the data:

- the extent to which the data is known outside the undertaking;
- the extent to which measures for the protection of data secrecy have been taken in the undertaking; and
- the value of the data for the undertaking and its competitors.

The following, as a rule, shall not be deemed a business secret in terms of the provisions of the Law:

- publicly available data: that is, data that are publicly announced on the basis of another regulation or decision of the managing bodies of the undertaking;
- data older than five years, regardless of whether they have been considered a business secret in the past;
- the revenues contained in the undertaking’s annual financial and statistical reports that do not constitute a business secret because they have been publicly announced; and
- any data and documents being of decisive importance for the decisions of the Commission.

When submitting data classified as a business secret, the undertaking shall be obliged to justify such classification of the data as a business secret by giving objective reasons.

No legal remedy is allowed against a conclusion to reject the request for examination of the acts and files.

The Law allows for interested parties to provide their comments, opinions and remarks in relation to a concentration within the time period determined by the Commission, which is usually 10 calendar days from the day of announcement of the summary of a notification.
on the Commission’s website. However, it does not provide third parties with a right to challenge a Commission’s decision on a concentration; only the parties to the procedure may challenge the Commission’s decision on a merger.

The Commission’s decisions are final. Lawsuits to initiate an administrative dispute before an administrative court must be submitted within a period of 30 calendar days from the date of receipt of the decision, but such suit shall not postpone the enforcement of the decision.

Mergers are supervised only by the Commission; no other authority may conduct a concurrent review of a merger.

Decisions of the Commission may be subject to a review by the Administrative Court. However, such judicial review does not suspend the enforceability of the Commission’s decision.

IV OTHER STRATEGIC CONSIDERATIONS

Based on current experience, in cases of multijurisdictional merger transactions and notifications that may involve the Macedonian market, it is important to note that prior research of the fulfilment of the relevant thresholds should be undertaken. This is especially important due to the formality of the thresholds, the absence of the possibility of a self-assessment of the competitive influence of a certain transaction if the formal thresholds are met, the relatively low values of the turnovers set as thresholds and the market size.

V OUTLOOK & CONCLUSIONS

The Macedonian merger control regime may be considered to be complete and detailed. The law and related by-laws and guidelines follow the relevant rules of the European Union and European Commission. With regard to mergers, notwithstanding that Macedonian practice is still developing, the Commission has established relevant practices in almost all important areas, including in the imposition and practical implementation of behavioural remedies. Therefore, in our view, the coming year will bring further practical experience and improvements in the overall practical development of our merger regime environment, not only with regard to the Commission’s actions, but also with the expert contribution of notifying parties and their counsel.
Chapter 26

MALAYSIA

Shanthi Kandiah

I  INTRODUCTION

Malaysia has not introduced a cross-sectoral merger control law. The Competition Act 2010 (CA) sets out prohibitions on anticompetitive agreements and abuses of dominance, but not merger control. While mergers are not expressly excluded from the scope of the CA, there is acceptance that the competition regulator, the Malaysian Competition Commission (MyCC), has only review and enforcement powers in respect of behavioural conduct but no merger control mandate.

There are, however, sector-specific laws and guidelines that regulate the antitrust aspects of mergers. The sectors are aviation services, and communications and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC) respectively.

These sectoral regulators also enforce competition rules for their sector, which include prohibitions on anticompetitive agreements or conduct as well as abuses of dominance. The merger jurisdiction in each of these sectors will be discussed in turn in each section of this chapter.

i  Aviation services sector

The Malaysian Aviation Commission Act 2015 (MACA) gives MAVCOM full and sole authority for competition issues in the aviation services sector.² The provisions on competition and in particular merger control, are set out in Part VII Division 1 of the MACA. Section 54 prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market.

MAVCOM has also published the following guidelines on mergers:

a  the Guidelines on Substantive Assessment of Mergers (SAM Guidelines), 20 April 2018;

b  the Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger (NAP Guidelines), 20 April 2018; and


The term ‘aviation service’ is defined in Section 2 of the MACA as any of the following services:

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1  Shanthi Kandiah is the founding partner at SK Chambers. She was assisted by Sarah Samantha Huang and Carmen Koay (associates at SK Chambers) in writing this chapter.

2  The MACA has been expressly carved out of the application of the general competition legislation (i.e., the CA).
the carriage of passengers, mail or cargo for hire or reward by air or by the use of any aircraft between two or more places, of which at least one place is in Malaysia;

b the provision in Malaysia of any of the ground handling services as specified in the Second Schedule;

c the operation of an aerodrome in Malaysia for the take-off and landing of any aircraft engaged in the carriage of passengers, mail or cargo for hire or reward; or

d any other service determined by MAVCOM to be necessary or expedient for the carriage of passengers, mail or cargo referred to in Paragraph (a), whether or not such service is provided by a licensee, permit holder or otherwise.

As sector regulator, MAVCOM has wider responsibility for the regulation of economic and commercial matters within the civil aviation industry.

Its responsibilities include the issuance of air services licences (fixed schedule journeys) and air service permits for non-scheduled services. MAVCOM also issues out aerodrome operator licences for airport operators and ground handling licences to those who wish to carry out ground handling services in Malaysia.\(^3\)

Its responsibilities also cover the administration and allocation of air traffic rights to airlines based on the available capacity of each route and the approval of schedule filing. It monitors slot allocation for airlines and other aircraft operators.

It is worth noting that MAVCOM (as the sector regulator) has a wide range of \textit{ex ante} regulatory tools to achieve its outcomes for the sector. It is also likely that competition enforcement will take into account the broader range of regulatory objectives of the sector. For example, the goals of the MACA include:

a to encourage effective competition within the civil aviation industry by promoting an economic environment that allows Malaysian carriers to maintain their ability to compete effectively in the civil aviation market in a sustainably profitable, efficient and fair manner;

b to maximise the economic value of any financial support granted by the federal government to the civil aviation industry and to seek and promote ways to reduce any such financial support over time; and

c to promote an environment for consumers in relation to the civil aviation industry to have access in a transparent manner to choices of products and services of high quality and at fair prices.

The MACA therefore gives MAVCOM an important margin of discretion in prioritising these regulatory objectives as well as the means to achieve them.

\textbf{Definition of a merger}

Pursuant to Section 54(2) of the MACA, a merger is deemed to occur if:

a two or more undertakings, previously independent of one another, merge;

b one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;

\(^3\) See www.mavcom.my/en/industry.
as the result of the acquisition by one undertaking of the assets (including goodwill), or a substantial part of assets, of another undertaking is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate in the part concerned of the business in which the undertaking was engaged immediately before the acquisition; or

d a joint venture is created to perform, on a lasting basis, all the functions of an autonomous entity.

Section 48 read together with the Third Schedule lists excluded commercial activities, agreements and mergers.

**Applicability to joint ventures**

The MACA treats full-function joint ventures as mergers. The SAM Guidelines explain that such a joint venture ‘operates in an aviation service market and performs the functions normally carried out by enterprises in that market’.

A key factor in determining whether a joint venture falls within the scope of the MACA is, for example, whether the joint venture is intended to operate on a lasting basis. Factors to determine ‘intention’ include:

- commitment of resources by the parent enterprises for the carrying out of the joint venture’s functions as an autonomous economic entity;
- where an agreement forming the joint venture provides for a specific period, the period must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation of the joint venture beyond such specified period. However, provisions on the possibilities of dissolution of the joint venture by themselves do not prevent the joint venture from being considered as operating on a lasting basis;
- joint ventures established for a short definite period and to carry out a specific project may be considered as not having an operation on a lasting basis; and
- a joint venture under Section 54(2)(d) MACA would be jointly controlled by the enterprises that are parties to such joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

The treatment of full-function joint ventures as mergers in the aviation services sector is also an important development for the aviation sector in the wake of increasing collaborations between airlines via alliances and code sharing, and involving varying degrees of integration of operations. Merger regulations introduce another vehicle through which airlines may structure collaborations.

**Foreign-to-foreign mergers**

The prohibition under Section 54 of MACA may apply even where the merger takes place outside Malaysia or where the merger is located outside Malaysia, so long as the merger could have an effect on any aviation services market in Malaysia.

**Jurisdictional thresholds**

As of now, MAVCOM has laid down several *de minimis* thresholds on mergers. It is unlikely to investigate unless:
the combined turnover of the merger parties in Malaysia in the financial year preceding
the transaction is at least 50 million ringgit; or

b the combined worldwide turnover of the merger parties in the financial year preceding
the transaction of the merger parties is at least 500 million ringgit.

ii Communications and multimedia sector

The communications and multimedia sector in Malaysia is regulated by the MCMC under
the Communications and Multimedia Act 1998 (CMA). The CMA has been expressly carved
out of the application of the general competition legislation (i.e., CA).\(^4\)

The MCMC oversees the regulatory framework for the converging industries of
telecommunications, broadcasting and information and communications technology
industries. It is also the body through which the government implements and promotes
its national policy objectives for the communications and multimedia sector. The MCMC
licenses players in this sector and its jurisdiction as competition regulator extends over
licensees. The MCMC clearly contemplates that the objective of promoting competition
must be consistent with national policy objectives. As the sector regulator, it has \textit{ex ante}
powers – intervention before the fact, for example, price control and access conditions. It has
also \textit{ex post} enforcement powers. As with MAVCOM, the MCMC has a margin of discretion
to prioritise these national objectives as well as the means to achieve them.

The CMA’s merger control provisions are more oblique (when compared to the
MACA). MCMC has expressed its intention to monitor mergers and acquisitions that have
the potential to substantially lessen competition more closely using the existing regulatory
framework in the CMA – namely Sections 133, 139 and 140. In essence these set out the
three main prohibitions on that relate to anticompetitive conduct:

a Section 133 expressly forbids conduct that has the purpose of substantially lessening
competition;

b Section 139 gives the MCMC power to direct a licensee in a dominant position to
cease conduct that has the effect of substantially lessening competition; and

c Section 140(1): a licensee may apply to MCMC, prior to engaging in any conduct that
may be construed to have the purpose or effect of substantially lessening competition
in a communications market, for authorisation of the conduct.

The MCMC has published the following to clarify its approach in administering the
prohibitions under this chapter:

a Guideline on Substantial Lessening of Competition (SLC Guideline),
24 September 2014;

b Guideline on Dominant Position (DP Guideline), 24 September 2014; and

c Market Definition Analysis – Definition of Communications Market in Malaysia
24 September 2014.

More recently, MCMC has conducted an industry consultation on the following draft
guidelines, the final versions of which are expected to be released in 2018:

a Guideline on Mergers and Acquisitions (Draft M&A Guidelines), 17 November 2017;

\(^4\) Section 3 of the CA provides that the Act ‘shall not apply to any commercial activity regulated under the
legislation specified in the First Schedule’. The First Schedule specifies the CMA.
Interestingly, the draft guidelines introduce two routes that a licensee may take in relation to clearance of a merger:

- notification to obtain MCMC’s views in respect of the competitive effects of a merger or acquisition (where the applicant receives a no-objection or objection letter as the case may be); and
- authorisation of a merger where the merger will promote national interest.

**Definition of a merger**

On mergers, Paragraph 4.40 of MCMC’s SLC Guideline states that the MCMC regards mergers to be ‘conduct’ falling within the scope of Sections 133 and 139 of the CMA. The definition of a merger proposed under in the Draft M&A Guidelines is similar to that set out in the MACA.

Not all mergers or acquisitions will raise competition concerns. However, a merger or acquisition may raise competition concerns if it lessens competition by reducing or weakening the competitive constraints in a market or reducing the incentives for competitive rivalry. Accordingly, MCMC has said that they will closely monitor mergers or acquisitions where:

- the merger or acquisition results in a licensee obtaining a dominant position in a market; or
- where one of the parties to the merger or acquisition is already in a dominant position.

**Applicability to joint ventures**

The CMA does not define ‘joint venture’. However, the Draft M&A Guidelines explain that MCMC regards ‘mergers and acquisitions’ to constitute ‘conduct which has the purpose of substantially lessening competition in a communications market’. The guidelines further state that MCMC will deem a merger to have taken place when, *inter alia*, ‘a joint venture created to perform, on a lasting basis, all the functions of an autonomous economic entity’ occurs.

**Foreign-to-foreign mergers**

The CMA provides for extraterritorial jurisdiction. The CMA and its subsidiary legislation applies to any person beyond the geographical limits of Malaysia and its territorial waters if such person:

- is a licensee under the CMA; or
- provides relevant facilities or services under the CMA in a place within Malaysia. 5

It should be noted that the competition provisions under the CMA apply only to licensees. The four (major) individual licence categories under the CMA require licensees to be companies incorporated in Malaysia as a standard licence condition.

**Jurisdictional thresholds**

There have been no jurisdictional thresholds prescribed by MCMC. The MCMC has said that a high market share (as an indicator of dominance) would be a market share of more

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5 The CMA further provides that ‘a place’ means a point of any nature or description whether on land, in the atmosphere, in outer space, underground, underwater, at sea or anywhere else.
than 40 per cent. This is useful to the extent that MCMC has highlighted that it intends to monitor mergers involving dominant entities or that create dominant entities. The Draft M&A Guidelines do, however, provide guidance on thresholds for notification and assessment:

<table>
<thead>
<tr>
<th>Type of merger</th>
<th>Threshold for notification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposed horizontal merger</td>
<td>At least one of the parties to the merger is a licensee in a dominant position; or if the threshold above is not met, the merger would result in the proposed merged firm obtaining a dominant position. A post-merger market share of the proposed merged entity of 40 per cent or more would be indicative of this.</td>
</tr>
<tr>
<td>Completed horizontal merger</td>
<td>The merged entity is a licensee in a dominant position.</td>
</tr>
<tr>
<td>Proposed non-horizontal merger</td>
<td>At least one of the parties to the merger is a licensee in a dominant position.</td>
</tr>
<tr>
<td>Completed non-horizontal merger</td>
<td>The merged entity is a licensee in a dominant position.</td>
</tr>
</tbody>
</table>

Additionally, licensees can apply for authorisation of conduct where there are national interest justifications for the merger.

MCMC may also initiate investigations into a merger where there is allegation of anticompetitive conduct.

**II YEAR IN REVIEW**

**i Aviation services sector**

MAVCOM has developed several guidelines to clarify and illustrate the application of Part VII (Competition) of the MACA. These guidelines are SAM Guidelines, NAP Guidelines and Guidelines on Aviation Service Market Definition.

MAVCOM has also verbally confirmed that it will continue to publish further guidelines and aims to release them by the end of 2018. This is likely to include a standard form for filing merger notifications.

The gazetting of the Malaysian Aviation Commission (Amendment) Act 2018 on 10 January 2018 introduced the imposition of financial penalties for non-compliance with guidelines expedient or necessary for the better carrying out of the provisions on competition. This amendment is significant because it allows MCMC to impose high administrative penalties of up to 1 million ringgit (on individuals) and up to 5 per cent of a body corporate’s annual turnover from the preceding final year (on body corporates).

**ii Communications and multimedia sector**

MCMC has conducted an industry and public consultation on the Draft M&A Guidelines and the Draft AC Guidelines. The guidelines are expected to be issued in 2018.

**III THE MERGER CONTROL REGIME**

**i Aviation services sector**

**Voluntary regime**

MACA provides for a voluntary merger control regime, so parties can implement the transaction pending clearance. Alternatively, parties may apply for a decision from MAVCOM on whether a merger infringes the Section 54 prohibition.
A decision by MAVCOM is in the form of a finding of infringement under Section 59(1) or non-infringement under Section 58. Actions that MAVCOM can take where an infringement is found include the following:

\( a \) orders to cease infringement immediately;

\( b \) specify steps that are required to be taken by an infringing enterprise that are appropriate to bring an infringement to an end, for example, unwinding orders;

\( c \) financial penalties that shall not exceed 10 per cent of the worldwide turnover over the period during which an infringement occurred; or

\( d \) any other direction that MAVCOM deems appropriate.

The NAP Guidelines provide instances of directions that can be imposed by MAVCOM:

\( a \) prohibiting an anticipate merger from being carried into effect;

ordering a merger to be dissolved or modified;

\( b \) requiring parties to enter into agreements designed to lessen or prevent the anticompetitive effects arising from a merger or an anticipated merger;

\( c \) requiring a merger party to dispose its businesses, assets, shares or rights in a specified manner; or

\( d \) providing a performance bond, guarantee or other form of security on such terms and conditions as may be determined by MAVCOM.

Parties should therefore consider timing of implementation measures that are difficult or costly to unwind, if they choose to proceed with a merger that has yet to receive clearance from MAVCOM.

MAVCOM is required to prepare and publish reasons for each decision it makes.

**Regime where parties do not apply**

MAVCOM may launch an investigation at any point – pre- or post-closing of a transaction – whether or not the parties have made an application for clearance. An authorised officer has the power to conduct investigations on suspicion of infringement, attempts to commit infringement or conspiracy to commit infringement. In addition to MAVCOM’s power to make a finding of infringement or non-infringement pursuant to MACA when its investigation powers have been invoked, an authorised officer can issue a compliance order if satisfied of an infringement or likely infringement. The compliance order can require a person to refrain from conduct in contravention of MACA or to take actions required in order to comply with MACA.

**Interim measures**

Section 57 sets out MAVCOM’s power to issue interim measures. This power only arises upon commencement of an investigation which has not been completed. In other words, it is only available in context of an investigation. No specific provision to issue interim measures in connection with an application for clearance exists (in contrast, Singapore’s Competition Act provisions that set out two different interim measure provisions – one in the context of an application for clearance and the other in the context of an investigation).

Interim measures are directions to:

\( a \) suspend the effect of or desist from acting in accordance with any agreement;

\( b \) desist from any conduct which is suspected to infringe a prohibition; and

\( c \) to do or refrain from doing any act (but which shall not require the payment of money).
Timing for notification

Parties can apply any time before or during the merger (anticipated merger) or after (resulting merger).

For anticipated mergers, notification and application can be made to MAVCOM when:

1. merger parties have a *bona fide* intention to proceed with the anticipated merger;
2. details of the anticipated merger are available; and
3. the anticipated merger has or may been made public by any party or may be made public by MAVCOM through the publication of an application summary.

For completed mergers, notification and application can be made at any time, but merger parties are encouraged to do so as soon as possible after the merger is completed.

Time frame for assessment

The duration for the assessment of an application, based on the NAP Guidelines, will depend on complexity of issues, and timeliness and completeness of information provided by the enterprises.

Pre-notification discussion

The NAP Guidelines state that the CMA does not provide for a merger party to consult or seek guidance from MAVCOM on whether an anticipated merger or a merger would infringe Section 54 of MACA or should be notified to MAVCOM and applied for a decision.6

Non-suspensory regime

The regime is a non-suspensory regime. Parties may give effect to or proceed with mergers at their own commercial risk. MAVCOM has the power to unwind mergers that have been given effect to and even to impose financial penalties if it decides that the merger infringes the prohibition in Section 54 of the MACA.

Undertakings and remedies

MAVCOM may accept undertakings from an enterprise to do or refrain from doing anything that the MAVCOM considers to be appropriate. Where MAVCOM accepts an undertaking MAVCOM may close an investigation without a finding of infringement. These undertakings are enforceable if they form part of a decision of MAVCOM.

In terms of remedies, MAVCOM has the power to decide structural and behavioural remedies. Structural remedies may include sale of business or assets to introduce structural modifications to the market. Behavioural remedies would subject merger party to specific operating rules.

Appeals

A party affected by an infringement decision by MAVCOM may within 14 days from the date notice of the decision is given, apply to the Minister for an exemption from the prohibition on the ground of public interest considerations.

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6 For information on the notification of an anticipated merger or a merger, MAVCOM asks parties to email them at competition@mavcom.my.
Rights of appeal also exist to the High Court pursuant to Section 88(1) of the MACA, within three months beginning on the date on which the decision was communicated to the ‘person or body aggrieved by the decision’.

ii Communications and multimedia sector

In assessing whether a merger or acquisition has the purpose or effect of substantially lessening competition in a relevant market, MCMC will consider the following factors:

The degree of concentration in the market with or without the merger or acquisition taking place

A merger or acquisition that leads to a significant increase in market concentration is more likely to substantially lessen competition (although concentration is not in itself determinative). MCMC will consider the extent to which competitors remaining in the market post-merger will constrain the level of competition in the market.

The extent of barriers to entry into the market

The MCMC’s perspective on barriers to entry is discussed in the DP Guideline. Where a merger or acquisition brings about an increase in market concentration, low barriers to entry may nevertheless result in the merger or acquisition having no substantial effect on competition in the market, as new entrants can constrain the behaviour of the merged firm.

The effect of the merger or acquisition on the relevant firm’s ability to raise prices

A lowering of competitive constraints on the relevant firm after the merger or acquisition, conveyed through its ability to raise prices above the competitive level, may indicate that the merger or acquisition has the effect of substantially lessening competition in the market.

The level of dynamic competition in the market

A merger or acquisition that leads to an increase in market concentration may not necessarily have an anticompetitive effect in a dynamic market, where future competition may be fuelled by growth and innovation.

The degree of countervailing buyer power

Countervailing buyer power may function as a competitive constraint on a licence post-merger, even where the merger or acquisition brings about greater concentration in the market.

The existence and degree of any efficiencies brought about by the merger or acquisition

In its analysis, MCMC will consider the potential beneficial effects that a merger or acquisition may have on competition. For example, mergers and acquisitions may provide efficiencies through economies of scale and the pooling of research and development. In particular, the efficiencies resulting from the merger of two smaller players in the market may actually increase competition, by providing a more powerful constraint on larger or dominant players in the market.
The MCMC may require a range of quantitative and qualitative information from parties to a merger or acquisition when assessing whether a merger or acquisition is likely to raise competition concerns. Some examples of information that the MCMC may require include:

- recent sales figures (by volume and by value) of each competitor in the market, so as to allow the MCMC to calculate market shares;
- information relating to the size of investment required for a potential competitor to enter the market;
- economic data relating to price elasticity in the market, so as to determine the effect of a possible price increase on demand and therefore to assess the ability of the merged firm to raise prices above the competitive level;
- data relating to current pricing and profit margins of the parties, and projected prices and profit margins after the merger or acquisition;
- data relating to the market’s size, growth prospects; and
- level of innovation, to assess the level of dynamic competition in the market.

**Voluntary regime**

Section 140(1) provides that a licensee may apply to MCMC, for authorisation of the conduct where a merger will promote national interest. It is essentially a voluntary regime. Given MCMC’s regulatory leverage, licensees tend to err on the side of caution and consult MCMC, particularly since MCMC has expressed an interest in monitoring mergers in the sector.

Section 143 CMA provides for criminal penalties for contravention of any prohibition of Chapter 2 Part VI, which includes a fine not exceeding 500,000 ringgit or imprisonment for a term not exceeding five years or to both. A person may further be liable to a further fine of 1,000 ringgit for every day or part of a day during which the offence is continued after conviction.

Further administrative actions available to the MCMC include the following:

- Section 37 – right of the Minister, on the MCMC’s recommendation, to suspend or cancel a licence where the licensee fails to comply with a provision of the CMA.
- Section 33 – the Minister may modify, vary, revoke or impose further special or additional conditions to an existing licence.
- Section 139 – the MCMC may issue a direction to licensees to cease conduct that substantially lessens competition and implement appropriate remedies.7

There are no express provisions in the CMA on notification and assessment of mergers and acquisitions. The Draft M&A Guidelines, however, provides for a voluntary regime for notification and assessment, separate from an authorisation under Section 140 CMA.

**Interim measures**

MCMC or any person may seek an interim or interlocutory injunction against any prohibited conduct through the courts.

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7 The CMA does not offer insights on what these remedies might be. The MCMC has the power to determine what the appropriate remedy might be subject to the objects of CMA, national policy and any directions issued by the Minister.
**Timing for notification**

Section 140(1) provides that a licensee may apply to the MCMC, prior to engaging into any conduct which may be construed to have the purpose or effect of substantially lessening competition in a communications market.

In the case of public listed companies, the application for approval should ideally be submitted after announcement of a transaction to minimise the risk of leakage of price-sensitive information and disenfranchisement of minority shareholders. As completion of a transaction can be made subject to regulatory approval, it is likely that this would still qualify as prior approval.

For notification and assessment under the Draft M&A Guidelines, parties should submit their transactions prior to completion. It is recommended under the same guidelines that merger parties include as a condition precedent to the completion of their merger transactional documents the approval of MCMC in circumstances that would indicate that the merger has the potential to raise anticompetitive concerns. In recognition of the fact that mergers may have proceeded prior to the introduction of the voluntary assessment process via the guidelines, MCMC will also assess these types of completed mergers.

**Time frame for review**

The Draft M&A Guidelines provide for a two-phase review process with an indicative timeline of 30 days and 120 days for each phase respectively.

**Suspensory regime**

Where parties apply for authorisation, the regime can be described as suspensory as the application for authorisation is for prior approval of the conduct. There is, however, no requirement to seek authorisation.

In theory, the notification and assessment regime proposed under the Draft M&A Guidelines appears to be a non-suspensory regime. Parties can proceed with the merger without automatic sanctions.

**Undertakings**

Prior to authorising any conduct, the MCMC may require the licensee to submit an undertaking regarding the conduct in any matter relevant to the authorisation.

The Draft M&A Guidelines allow an undertaking under the notification route as long as it involves a licensee and an anticipated merger that has yet to take place.

**Appeals**

Section 120 of the CMA provides for rights of appeal to the Appeal Tribunal by a person who is aggrieved or whose interest is adversely affected by a decision or direction (but not a determination) of MCMC.

Section 121 of the CMA preserves the right to judicially review the decisions of MCMC provided that all remedies under the CMA are first exhausted.

**IV OTHER STRATEGIC CONSIDERATIONS**

What remains unclear is the application of the merger regimes to mergers between parties that are not licensees under the MACA and CMA.
MACA appears to apply to any merger that results or is expected to result in a substantial lessening of competition in any aviation service market. Its scope appears to be broader than just licensees. This is substantiated by the fact that MAVCOM has the power to determine any other service that is necessary or expedient to the carriage of passengers, etc. as an aviation service, whether or not the service is provided by a licensee.

With respect to the communications industry, the Draft Guidelines of the MCMC in defining a merger (Paragraph 3.9) does not reference the licensee. However as MCMC’s powers are limited by the scope of Sections 133 and 139 (which relate to the conduct of a licensee), the definition of a merger for the purposes of the Merger Guidelines may be similarly so limited.

V OUTLOOK & CONCLUSIONS

Malaysia remains a notable exception to the general trend within jurisdictions in East Asia to adopt a merger control regime as part of their competition law framework. The aviation services and communications and multimedia sectors are exceptions in this regard. MAVCOM has recently introduced the SAM Guidelines and NAP Guidelines, and intends to introduce further guidelines in future, and MCMC will issue its final merger and authorisation of conduct guidelines soon. This will provide much needed clarity on MCMC’s approach in regulating the mergers and acquisitions in these sectors. The merger control provisions in the MACA provide a useful template that could be broadened to other sectors and the broader economy via amendments to the CA, if and when cross-sectoral merger control provisions are introduced. It is hoped that the reform agenda of the newly elected government will see cross-sectoral merger control laws being introduced given that the CA is presently a ‘two-legged stool’ (providing only for prohibitions against anticompetitive agreements and abuse of dominance) in terms of the protection it offers to consumers.
Chapter 27

MEXICO

Rafael Valdés Abascal and Enrique de la Peña Fajardo

I INTRODUCTION

The Federal Law of Economic Competition became effective in Mexico in 1993. Congress approved important amendments to this statute in 2006 and 2011. In 2013, the Constitution was amended to improve the enforcement of competition law and policy and, as a result of this constitutional amendment, Congress enacted a new Federal Law of Economic Competition (the Competition Law) in 2014. The Federal Economic Competition Commission (CFCE) enforces the Competition Law in all areas of the economy, except the telecommunications and broadcasting sectors, where the Competition Law is enforced by the Federal Telecommunications Institute (IFT).

Under the Competition Law, pre-merger notification is mandatory when certain monetary thresholds are met. Since 2014, a notified transaction must be approved by the CFCE or IFT before consummation. Under the Competition Law, reportable transactions will not produce legal effects without such approval.

The Competition Law provides both a size of transaction test and a size of person test for determining whether a filing is required. For 2018, pre-merger notification is required when:

\[ a \] the transaction’s value exceeds 1,450.8 million pesos in Mexico;\(^2\)
\[ b \] an economic agent acquires 35 per cent or more of the assets or capital stock of an economic agent with assets or annual sales of at least 1,450.8 million pesos; or
\[ c \] the acquired assets or capital stock amount to more 677.04 million pesos,\(^3\) and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 3,868.8 million pesos.\(^4\)

The assets and sales located or originating in Mexico are included.

Failure to file can result in a fine of between 403,000 pesos\(^5\) and 5 per cent of the parties’ annual sales.

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1 Rafael Valdés Abascal is the founding partner and Enrique de la Peña Fajardo is senior associate at Valdés Abascal Abogados SC.
2 18 million times the unit of measure and update (UMA), currently: 80.60 pesos. The value of the UMA is updated each year.
3 8.4 million UMAs.
4 48 million UMAs.
5 5,000 UMAs.
The Competition Law provides certain exemptions to the pre-merger notification requirement. Some general examples of these are:

- intra-corporate transactions;
- acquisitions of capital stock by an acquirer who holds control of the company since its incorporation or when such control has already been approved by the CFCE or IFT;
- transfers of assets or capital stock to administration or warranty trusts;
- international transactions not implying acquisition of control of Mexican companies or accumulation of assets in Mexican territory; and
- certain acquisitions solely for investment purposes.

Approved transactions may not be subject to further investigation unless the approval has been based on false information, or the approval has been subject to conditions and the parties do not comply with such conditions.

Transactions not surpassing the thresholds or falling under the exemptions may not be investigated after a year following their consummation. Transactions not subject to mandatory pre-merger notification may be voluntarily reported in order to seek approval and eliminate the possibility of further investigation.

Note that the ninth transitory provision of the new Federal Law of Telecommunications and Broadcasting states that as long as preponderant economic agents exist in the telecommunications and broadcasting sectors, mergers between concessionaries (i.e., telecommunications and broadcasting operators) will not require previous authorisation from the IFT whenever:

- the preponderant economic agent is not involved in the transaction;
- the Dominance Index shows a negative variation in the sector, as long as the Herfindahl-Hirschman Index does not show an increase that exceeds 200 points;
- as a result of the transaction, the economic agent has a share of less than 20 per cent in the corresponding sector; and
- the merger does not produce harmful effects to competition in the sector.

This type of transactions will require a post-closing notice instead of the pre-merger notification filing.

In addition to the Competition Law, the following regulations and guidelines are related to merger control:

- Regulations of the Competition Law, issued and amended by the CFCE on 30 October 2014, 21 January 2016 and 25 January 2018. These regulations complement the merger control provisions established in the Competition Law;

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6 It is important to bear in mind that some specific requirements need to be met to fall into each of the exemptions.

7 Effective as of 13 August 2014.

8 Preponderant economic agents are agents that have a national share of more than 50 per cent in the corresponding sector. As of 6 March 2014, the IFT determined the existence of two preponderant economic agents, one for each of the telecommunications and broadcasting sectors.

9 This notice must be filed before the IFT within 10 days following the closing. The IFT will have 90 days to investigate the merger and, if substantial market power in the relevant market exists, such authority will be entitled to impose measures in order to protect competition.
Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued by the IFT on 7 January 2015. These regulations complement the merger control provisions established in the Competition Law;

Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the relevant market, issued by the CFCE on 23 April 2015. This Technical Criteria maintains the application of the Herfindahl-Hirschman Index and determines the elimination of the Dominance Index;

Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the markets related to telecommunications and broadcasting sectors, issued by the IFT on 17 March 2016. This Technical Criteria also maintains the application of the Herfindahl-Hirschman Index and determines the elimination of the Dominance Index (except for procedures under the ninth transitory provision of the Federal Law of Telecommunications and Broadcasting);

Guidelines for the Notification of Concentrations, issued by the CFCE on 9 October 2015 and amended on 20 April 2017. These guidelines provide further details regarding application of thresholds, information and documents required for the filing of non-compete clauses, among other issues;

Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers, issued by the CFCE on 22 June 2015. These guidelines explain in detail the investigation procedure of illegal mergers, among other issues;

Guidelines for Exchange of Information between Economic Agents, issued by the CFCE on 10 December 2015. These guidelines provide the rules regarding information exchange during the due diligence, among other issues;

Regulations of the use of Electronic Systems of the CFCE, issued by such authority on 2 November 2017. These regulations establish the rules for the operation of the Electronic System of Filings of the CFCE; and

Rules for the Notification of Concentrations via electronic systems, issued by the CFCE on 8 December 2017. These rules establish the requirements and the procedure, in case the parties opt to submit a concentration filing via the newly created electronic system.

II YEAR IN REVIEW

In 2017, the CFCE concluded reviews of 143 pre-merger notifications with the following outcomes: 130 transactions were authorised, eight transactions were conditioned to comply with undertakings and five did not finish their review. Also, in the first quarter of 2018, the CFCE reviewed 35 pre-merger notifications with the following outcomes: 33 transactions were authorised, one transaction was objected to and one did not finish the process.

Also, even though the second quarter merger data have not been published, it is worth mentioning that CFCE determined, in the Bayer/Monsanto transaction, to condition the approval to the compliance with certain undertakings. In analysing the transaction, the CFCE found that Bayer would become the sole provider of genetically modified cotton seeds in Mexico and high aggregated market share would result from certain crops (onions, cucumbers, tomatoes, watermelons, cantaloupe and lettuce) and non-selective herbicides. Also, the CFCE determined that these markets are characterised by high-entry barriers such as the time and difficulty in research and development of new products, high investment,
and the need to strictly comply with regulations. The undertakings consist of selling the businesses of seeds for crops, genetically modified cotton seeds and non-selective herbicides to BASF.

CFCE also objected to the Rheem/Grupo Industrial Saltillo (GIS) transaction in the first quarter. The transaction involved the acquisition of certain assets of GIS, such as facilities, trademarks and licences related to the wholesale of gas or electric water heaters for both residences and businesses. The CFCE considered that the acquisition would strengthen Rheem’s position, which would allow it to increase prices and harm competition. Also, the CFCE determined that the competitors in such market lacked competitive portfolio products, had low market shares and non-recognisable trademarks. These conditions would not allow them to counteract the foreseeable price increases. Although Rheem and GIS filed undertakings seeking a conditioned approval, they were not accepted by the CFCE.

III THE MERGER CONTROL REGIME

The notification must be filed by all parties involved in the transaction (e.g., buyer and seller), while a common representative appointed to act on behalf of the parties before the CFCE or IFT. As of 1 January 2018, the mandatory filing fee is 176,238.

The initial filing must provide, in general, some corporate and financial information and documents (articles of incorporation, by-laws, capital structure, corporate charts and financial statements); the agreements governing the transaction; the scope of the non-compete obligations; an explanation of the transaction purposes; and a brief description of the products and market shares of the parties. Such information and documents are described in Article 89 of the Competition Law and are commonly known as ‘basic information’.

Within any initial 10-business-day period, the CFCE or IFT may request basic information that was not provided with the initial filing, and such information must be submitted in a 10-business-day period, extendable under duly justified causes.

By reviewing the basic information, the CFCE or IFT should be able to determine whether the transaction produces relevant effects in the market, in which case they would issue an additional information request in order to proceed with a deeper analysis of concentration effects.

The additional information request may be issued and notified to the parties within a 15-business-day term after the compliance of the basic information request, or after the initial filing if such request was not issued. This additional information request may include such economic information that the authority deems necessary to analyse the effects of the transaction (description of products and substitutes, production processes, costs, investment amounts, distribution options, suppliers, clients, prices, market shares, etc.), and in many cases it has to be provided at a high level of detail. This information must be submitted within a 15-business-day term, extendable under duly justified causes.

If the notifying parties fail to comply with the information requests, it is legally tantamount to the notification not being filed. However, the transaction may be notified again and the procedure would start from the beginning.10

The CFCE or IFT will issue its decision within a 60-business-day period after the compliance of the additional information request; the compliance of the basic information request (if an additional information request was not issued); or the initial filing (if no

10 The payment of a new filing fee would be required.
basic or additional information requests were issued). In exceptionally complex cases, this 60-business-day term may be extended for up to 40 additional business days. The CFCE or IFT decision may approve, with or without conditions, or disapprove the transaction. If a decision is not issued within the established time frames, the notified transaction is deemed approved. The approval of the transaction will be valid for a six-month period, which may be extended for another six months when justified causes are credited to the parties. The transaction may not be closed after the expiration of such periods, unless a new notification is filed. The parties shall provide the CFCE or IFT with documents evidencing the transaction formalisation within 30 business days after closing.

If, during the notification process, the concentration raises competition concerns, the CFCE or IFT will inform the parties about the concerns at least 10 days before the case is included for decision in the board of commissioners’ agenda. No later than one day before the case is included for decision in the board of commissioners’ agenda, the parties may offer undertakings to prevent the risks found by the authority. The 60 or 40-day terms mentioned above will start to count again from the day the proposed undertakings are filed. Also, parties can offer undertakings from the beginning of the process (with the initial filing), in which case these terms will not be interrupted, although this is rarely recommended.

The CFCE or IFT is empowered to, and frequently does, request information to third parties who may be related to the market where the concentration will take place or have effects, being also empowered to request information of other authorities. Such information must be provided in a 10-business-day period, extendable for another 10 days when justified.

The Competition Law does not acknowledge the legal standing of affected third parties to challenge approval decisions issued by the CFCE or IFT in a pre-merger notification process. However, third parties may submit their concerns and provide information and documents, which shall be taken into account by the CFCE when issuing its decision.

During the notification process, non-access to the file is restricted to the notifying parties. Once the process concludes, the CFCE publishes its decision, excluding the information classified as confidential, and any person may have access to the rest of the non-confidential information contained in the file, through a specific petition filed under the transparency law.

Regarding concurrent review of mergers, Article 5 of the Competition Law provides that if one of the two agencies determines that a case that is being reviewed by the other should actually be reviewed by it, it will inform the agency that is reviewing the case of its views. If this agency declines jurisdiction, the case is sent to the requestor agency within five business days. However, if after such notice the agency does not decline jurisdiction, then the procedure will be suspended and the case will be sent to the economic competition, telecommunications and broadcasting circuit courts in order to determine which agency holds jurisdiction over the case. Also, whenever one of the agencies receives a case and deems that it should be reviewed by the other, the case should be sent within five business days to this agency. However, if the receiving agency declines jurisdiction the other agency should be informed within five business days, and the case should be sent to the circuit court to determine which agency holds jurisdiction.
IV OTHER STRATEGIC CONSIDERATIONS

Even if the parties believe that the merger is not expected to produce competition risks, it is recommended to provide economic information with the filling. Even though the parties are not obligated to provide such information at that time, providing it may avoid a request of additional information (such situation will speed up the process).

It is also recommended to approach the CFCE or the IFT at the early stages of the process and hold meetings with the officers in charge of the case. The purpose of such meetings will be to answer any questions and to explain every aspect of the merger. By having these meetings, the scope of the basic information request and the additional information request may be reduced.

CFCE or IFT decisions may be challenged before federal courts via *amparo*, which is a trial aimed to revoke unconstitutional or illegal decisions of authorities’ CFCE and IFT decisions, these trials are before competition, telecommunications and broadcasting specialised federal district judges and circuit courts that were created after the 2013 constitutional amendments. *Amparo* trials have no specific time frame and sometimes may last more than a year. Thus, in certain cases it is recommended to file a new notification offering suitable undertakings instead of challenging the CFCE decision before federal courts.

V OUTLOOK & CONCLUSIONS

On 29 June 2012, as the current administration was about to begin, the elected president Enrique Peña reached a political agreement with the three largest parties in order to perform several structural reforms. One of them consisted of enhancing the enforcement of competition law and policy. Another one consisted of improving the telecommunications and broadcasting law, and enhancing its enforcement. As a consequence, some amendments to the Constitution were approved by the legislative bodies in 2013. Some of the most important changes are as follows:

- the Federal Competition Commission and Federal Telecommunications Commission (both agencies within the executive branch) were replaced by the new autonomous constitutional entities CFCE and IFT, respectively;
- the five former commissioners were replaced by seven new commissioners for each entity;
- the power to enforce the Competition Law in the telecommunications and broadcasting industries was transferred to the IFT;
- the CFCE and IFT were empowered to issue Competition Law regulations (before the constitutional reform, the Competition Law regulations were issued by the president);
- new federal courts specialised in competition, telecommunications and broadcasting were created; and
- the reconsideration appeal was eliminated, so the CFCE and IFT decisions may only be challenged through *amparo* trial before the specialised federal courts.

In order to implement the constitutional reform, in 2014, a new Federal Law of Economic Competition and a new Federal Law of Telecommunications and Broadcasting were enacted.

Besides the above, the main changes to the competition legal framework that had an impact on the merger control regime are the following:
concentrations surpassing the monetary thresholds require approval from the CFCE or IFT prior to its consummation. No agreement or legal act executed to formalise the transaction will be valid without said authorisation;

b a new stage of the notification procedure was created, where the parties may offer conditions or remedies in order for the concentration to be approved;

c the time frame to request basic information was extended from five to 10 business days and the time frame to issue a decision was extended from 35 to 60 business days. As a consequence, a notification procedure may last seven months, plus the time consumed by the parties in gathering and submitting requested information. In the cases that the parties propose conditions or remedies, the procedure may last about one year;

d generation of competition barriers as a consequence of the proposed transaction was included as a cause for objection. Acquiring or increasing substantial market power, as well as acquiring the ability to displace other economic agents or to perform monopolistic practices, remained as causes to object the transaction; and

e the Herfindahl-Hirschman Index is still applicable for the analysis of market concentration levels and the proposed transaction effects. However, the Dominance Index, which acknowledged positive effects on competition derived from mergers between small players, was eliminated.

Also, as mentioned in Section I, above, the CFCE issued the Guidelines for Notification of Concentrations. One very important aspect of these guidelines is that they provide that collaboration agreements (a figure that is not regulated in the Competition Law) may be reviewed under the merger control procedure whenever such transactions meet the characteristics of a concentration; therefore, the parties will have certainty regarding the legality of a collaboration agreement if they submit it to scrutiny by the CFCE, before its closing. This implies that the agreement would be studied on a rule-of-reason basis, which will give the parties the possibility to submit economic arguments such as efficiency gains, absence of substantial market power, among others, for the authorisation of the agreement. Also, regarding this issue, it is expected for the CFCE to issue guidelines for collaboration agreements in the near future.
Chapter 28

MOROCCO

Corinne Khayat and Maïja Brossard

I INTRODUCTION

Since 2000, Moroccan merger control has existed through Law No. 06-99 of 5 June 2000 on free pricing and competition, and its Enforcement Decree No. 2-00-854 (the former legal framework), under which the mergers are notified to the Chief of Government. The Competition Council, which was reactivated in 2008, has a consultative role when the notified concentration is likely to infringe competition.

A reform of the Moroccan merger control rules was launched in 2014 with the adoption of Law No. 104-12 of 30 June 2014 on free pricing and competition, and its Enforcement Decree No. 2-14-652 of 1 December 2014 and Law No. 20-13, relating to the Competition Council of 30 June 2014 and its Enforcement Decree No. 2-15-109 of 4 June 2015 (the new legal framework), which transferred the merger control function to the Moroccan Competition Council. Under this new legal framework, only residual powers will be retained by the Chief of Government (in particular, an evocation power on the decisions of the Competition Council for matters of public interest).

However, the provisions of the new legal framework are still not applicable as the new members of the Competition Council have not been appointed. In the meantime, according to the Directorate of Competition and Pricing of the Ministry of General Affairs and Governance (which received an express delegation of powers from the Chief of Government in matters of merger control), mergers are still notified to the Chief of Government on the basis of the former legal framework.

Under the Moroccan merger control regime, a merger must be notified when a concentration meets the notification thresholds.

Under the new legal framework, a concentration occurs where:

a two or more previously independent undertakings merge;

b one or more persons, already controlling at least one undertaking, acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one or more undertakings; and

c one or more undertakings acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one other or more other undertakings.

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2 Dahir No. 01-00-225.
3 Dahir No. 1-14-116.
4 Dahir No. 1-14-117.
The creation of a joint venture performing all the functions of an economic entity on a lasting basis shall also constitute a concentration within the meaning of the new legal framework.

The notion of ‘control’ is defined as resulting from rights, contracts or any other means that confer, either separately or in combination, having regard to the considerations of fact or law involved, the possibility to exercise a decisive influence on the activity of an undertaking and, notably:

a. ownership rights or rights of use over all or parts of the assets of an undertaking; or

b. rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

As regards the notification thresholds, the former legal framework provides that a concentration must be notified when the undertakings that are parties to the concentration, or which are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

Additional turnover thresholds have been introduced in the new legal framework and, according to Law No. 104-12 of 30 June 2014 and its Enforcement Decree, such that the notification of a concentration should take place when one of the following conditions is fulfilled:

a. the combined aggregate worldwide pre-tax turnover of all of the undertakings or groups of natural or legal persons parties to the concentration is equal to or more than 750 million dirhams;

b. the aggregate Moroccan-wide pre-tax turnover of at least two of the undertakings or groups of natural or legal persons concerned by the concentration is equal to or more than 250 million dirhams; or

c. the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

Aside from these standard thresholds, specific turnover thresholds may be fixed by decree for certain sectors or geographic areas.

These thresholds raise some uncertainties:

a. about the application of the merger control rules to a merger where the parties’ aggregate worldwide turnover exceeds the 750 million dirhams threshold but where the Moroccan turnover threshold and the market share threshold are not met; the Competition Council shall confirm the alternative nature of these criteria when it will be operational; and
as to the necessity to notify a transaction when only one of the merger parties has a market share exceeding 40 per cent in Morocco, and when the contemplated transaction will not result in additional market shares. However, the notification of such a merger is strongly recommended insofar as the Competition Council has already examined concentrations where the acquirer was not present in the same sector than the target company in Morocco (Opinion No. 36/13 relating to the acquisition of 6 per cent of the capital of CMA CGM by the Strategic Investment Fund) and where only the target company was active in Morocco (Opinion of November 2011 relating to the acquisition by CCPL of Ono Packaging Maghreb and Opinion No. 37/13 relating to the acquisition of 49 per cent of the shares and voting rights of Terminal Link by China Merchants).

II YEAR IN REVIEW

Between 2009 and 2013, the Competition Council annually published several consultative opinions relating to merger cases.

However, as previously mentioned, the Competition Council has been paralysed since 2013. As a result, no opinion, decision or annual report has been published by the Competition Council over the past years.

While waiting for the appointment of the Competition Council’s members and the entry into effect of the new legal framework, the transactions are still notified to the Chief of Government.

To the best of our knowledge, the last significant merger case examined by the Moroccan Chief of Government was the merger between Lafarge and Holcim, which obtained conditional clearance in 2014, with implementation starting in 2016 in Morocco.

III THE MERGER CONTROL REGIME

i Deadline for filing

A merger must be notified before its completion and as soon as the parties concerned are able to present a ‘sufficiently concrete’ file to allow the investigation of the case, in particular when the project is formalised by an agreement in principle or a signed letter of intent, or when it follows the announcement of a public offer.

ii Suspensive effect

Under the former legal framework, the filing has a suspensive effect and the parties are therefore not entitled to implement the planned transaction before the authorisation of the Chief of Government. No derogation to this rule is provided.

Under the new legal framework, the suspensive effect of the filing obliges the parties to wait for the authorisation of the Competition Council (or the administration) to implement the contemplated merger. However, the Competition Council may grant the parties an exemption to this suspensive effect and allow them to complete all or part of the transaction without waiting for an authorisation decision in case of duly motivated need.
iii Sanctions upon failure to notify and closing before clearance

Under the former legal framework, upon failure to notify, the Chief of Government may bring the case in front of the King’s Prosecutor at the relevant first instance court for prosecution. A fine amounting to 2–5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, for legal entities, and of 200,000–2 million dirhams, for natural persons, may be imposed. Conservatory measures ordering the undertakings involved to revert to the situation that existed prior to the transaction may also be adopted by the Chief of Government.

Under the new legal framework, the sanctions for not filing and closing before clearance are the following:

a for legal entities responsible for filing: a fine amounting to a maximum of 5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, increased, when applicable, by the turnover made in Morocco during the same period by the acquired company; and

b for natural persons responsible for filing: a fine of a maximum amount of 5 million dirhams.

The Competition Council may also compel the parties that failed to notify, subject to a daily penalty payment, to notify the operation, unless they revert to the previous state of affairs.

iv Waiting periods and time frames:

Under the former legal framework

The Chief of Government has a maximum period of six months upon receipt of full notification to deliver its decision authorising (with or without conditions) or prohibiting the merger. There are two main phases in this regulatory process.

During the first phase of a maximum period of two months, the Chief of Government may either:

a authorise the transaction without remedies or with the sole remedies offered by the notifying parties, if any; or

b request the opinion of the Competition Council when the merger is likely to infringe competition rules, particularly by creating or strengthening a dominant position (which leads to the second phase).

Should the Chief of Government remain silent for two months after having received the full notification, the tacit approval of the transaction and of the remedies offered by the parties, if any, shall be deemed granted.

During the second phase of four months, the Competition Council, whose opinion has been requested by the Chief of Government, assesses whether the transaction provides a sufficient contribution to the economic progress to outweigh its restrictions on competition. The Competition Council takes into account the competitiveness of the involved undertakings in the context of international competition.

After the Competition Council has issued its consultative opinion, the Chief of Government may either:

a authorise the merger;

b order the parties not to implement the planned transaction and, if needs be, to revert to the situation that existed prior to the transaction; or
order the parties to modify or complete the transaction or take any measures that will ensure or establish sufficient competition.

The implementation of the planned transaction may also be subject to compliance with instructions aimed at providing a sufficient contribution to economic and social progress to outweigh the restrictions to competition.

No possibility is provided to suspend or accelerate this time frame.

**Under the new legal framework**

During the first phase, the Competition Council must rule on the transaction within a 60-day period after the receipt of the complete notification file. In case commitments are offered by the parties, this 60-day period is extended by 20 days. In case of particular necessity, such as the finalisation of the commitments, the parties may ask the Competition Council to suspend the deadline for a maximum of 20 days.

The Competition Council may, at the end of the first phase, either:

- decide that the notified transaction does not fall under the scope of the merger control;
- authorise the operation subject, where applicable, to the effective implementation of the remedies proposed by the notifying parties;
- open an in-depth analysis of the transaction (which leads to the opening of the second phase) if it finds that serious doubts remain as to the risk of infringing competition; or
- refrain from adopting any of the above decisions.

The governmental authority in charge of competition may ask the Council to open a second-phase investigation within a 20-day period after having received a copy of the decision, or having been informed of it by the Competition Council. At the end of the 20 days, the authorisation is deemed granted.

During the second phase, the Competition Council must assess within 90 days whether the transaction is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency, and whether the contemplated transaction brings a sufficient contribution to economic progress to offset the competition infringements. In case commitments are offered by the notifying parties to remedy the anticompetitive effects of the transaction less than 30 days before the end of the 90-day period, the deadline will then expire 30 days after the reception of the commitments. The 90-day period may be suspended for up to 30 days at the parties' request in case of particular necessity, in particular to finalise their commitments. The Competition Council can also suspend the 90-day period in particular when the notifying parties have failed to provide it with the requested information, or to inform it of the occurrence of a new material event. The time limit resumes when the cause of the suspension has been addressed.

At the end of the second phase, the Competition Council may either:

- authorise the operation subject to, where applicable, the effective implementation of commitments offered by the notifying parties;
- authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements; or
c prohibit the concentration and require the parties, when applicable, to take all appropriate measures to re-establish sufficient competition.

Within 30 days upon receiving a copy of the decision or being informed of it by the Competition Council, the Chief of Government or the delegated governmental authority may exert their power and issue a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation).

At the end of these 30 days, the authorisation is deemed to be granted.

No accelerated procedure is provided.

v Third-party involvement and access to files
Under the former legal framework, no involvement of the third parties to the merger control process is organised.

However, the competition authorities can hear or request information from any third parties who may enable them to assess the impact of the transaction, such as competitors, suppliers or customers.

Moreover, the decisions of the Chief of Government are, in principle, published in the Official Bulletin together with the opinion of the Competition Council (in this regard, it should be noted that the president of the Competition Council is prohibited from communicating any document involving business secrets, unless the communication or the consultation of those is necessary to the proceeding or the exercise of rights of defence of the involved parties).

Under the new legal framework, upon receipt of a notification file, a press release will be published by the Competition Council, which indicates the name of the concerned parties, the nature of the transaction, the concerned economic sectors, a non-confidential summary of the transaction provided by the parties and the time frame in which interested third parties are invited to make observations.

A third party that would be in a position to contribute to its information may also be heard by the Competition Council.

The merger decisions of the Competition Council and of the governmental authority in charge of competition will be published in the Official Bulletin and available on their websites (however, business secrets are in principle reserved to the Competition Council and the government commissioner).

vi Appeals and judicial review
Under the former legal framework, an appeal may be lodged before the administrative court having jurisdiction, in principle within 60 days from the date of the publication or of the notification of the decision.

Under the new legal framework, appeals against merger decisions could be lodged by the concerned parties or the government commissioner before the administrative chamber of the Moroccan Supreme Court within 30 days from the receipt of the merger decision notification.
IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

The Moroccan competition authorities have entered into several cooperation agreements with other national authorities:

a An association between Morocco and the Member States of the European Communities was created in 2000 by the Euro-Mediterranean Agreement and Decision No. 1/2004 of the EU-Morocco Association Council of 19 April 2004. Adopting the necessary rules for the implementation of the competition rules, it has set up a mechanism of cooperation between European and Moroccan competition authorities. In particular, a twinning cooperation has been established between the Moroccan Competition Council and the German competition authority, mainly taking the form of trainings and technical assistance.

b The Moroccan Competition Council is also a founding member and the co-president (with the Austrian Federal Competition Authority) of the coordinating committee of the Euro-Mediterranean Competition Forum, an informal regional network set up in 2012.

c A bilateral cooperation has been developed with the Tunisian competition authority.

d A cooperation agreement has been concluded in 2017 with the competition authority of People’s Republic of China.

Therefore, the Competition Council, once operational, is very likely to cooperate with these other jurisdictions in reviewing multi-jurisdictional merger cases.

Moreover, certain specific economic sectors are regulated in Morocco by sectoral authorities: telecommunications (National Telecommunications Regulatory Authority (ANRT)), the audiovisual market (High Authority for Audiovisual Communication), banks (Bank Al Maghrib), the capital market (Financial Market Authority), insurance (Insurance and Social Security Directorate) and ports (National Ports Agency).

According to Law No. 104-12, the Competition Council will (as from a date to be defined by future regulation) exercise its jurisdiction over all economic sectors, unless the relationship between the Competition Council and the sectoral regulators is addressed in the constitutive texts of these institutions. These regulators must nevertheless be consulted by the Competition Council when the notified transaction concerns their specific sectors.

The allocation of jurisdictions between the Competition Council and these Moroccan sectoral regulators should therefore be clarified in the future and such clarification is especially important for the ANRT, who is authorised by constitutive texts to enforce merger control provisions in the telecommunications sector.

ii Specific situations

A minority ownership interest might fall under the scope of the Moroccan merger control provided that it enables a person or an undertaking to acquire control of the whole or parts of an undertaking (the ‘control’ being defined as resulting from rights, contracts or any other means that confer, either separately or in combination, having regard to the considerations of fact or law involved, the possibility to exercise a decisive influence on the activity of an undertaking, and notably ownership rights or rights of use over all or parts of the assets of an undertaking or rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking).
Moreover, no specific procedure is provided by the Moroccan merger control regarding financial distress and insolvency of the target company. However, we surmise that, in such a situation, the Competition Council may grant the parties an exemption to the suspensive effect of the merger control procedure, therefore allowing them to complete all or part of the transaction without waiting for an authorisation decision.

Finally, concerning public takeover bids, it seems that the Competition Council applies to these transactions the general rules of the Moroccan merger control legislation (as it appears from its Opinion No. 9/10 relating to the public takeover bid launched by Kraft Foods Inc over Cadbury Plc).

V OUTLOOK & CONCLUSIONS

The nominations of the Moroccan Competition Council’s members will trigger the entry into effect of Law No. 104-12 and Law No. 20-13, which grant the Competition Council decision-making power over merger control cases.

The issues raised by the new legal framework, such as the alternative or cumulative nature of the notification thresholds provided by Law No. 104-12 and its Enforcement Decree or the allocation of jurisdictions between the Competition Council and the Moroccan sectoral authorities (in particular the ANRT), shall hopefully be clarified by the Competition Council once it will be operational.
Chapter 29

NETHERLANDS

Gerrit Oosterhuis and Weyer VerLoren van Themaat

I  INTRODUCTION

Dutch merger control is similar to European merger control, certainly as regards the substantive rules. Thus, the Dutch concept of a concentration is similar to the definition of a concentration as laid down in the EU Merger Regulation (EUMR). It includes the acquisition of control and the possibility to influence strategic decisions of the target. Furthermore, the concept of undertakings concerned and the methodology of allocating turnover to the undertakings concerned are identical. Moreover, the European Commission’s decision practice and the Commission’s Consolidated Jurisdictional Notice are closely followed by the Dutch Authority for Consumers and Markets (ACM) when it comes to, for example, the full functionality of a joint venture or the geographical allocation of turnover.

Mergers meeting the jurisdictional thresholds as laid down in the Dutch Competition Act (DCA) must be notified to the ACM. In general, a concentration must be notified to the ACM if the combined worldwide turnover of all undertakings concerned is more than €150 million in the calendar year preceding the concentration, and at least two of the undertakings concerned each achieved at least a €30 million turnover in the Netherlands. Various sector-specific thresholds are discussed in Section III, infra.

Concentrations meeting the thresholds must be notified prior to completion and may not be implemented during the review period. Failure to notify may result in large fines.

II  YEAR IN REVIEW

i  Workload

The ACM received 102 notifications and reached 103 decisions in 2017 – which is similar to the ACM’s workload in 2016 (105 notifications and 100 decisions). The majority of notifications resulted in one-page short decisions. Only 14 Phase I decisions were

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2 The ACM is the result of the merger between the Dutch Competition Authority (NMa), the Dutch Consumer Authority and the telecoms authority OPTA. The merger was effectuated as per 1 April 2013. Some of the case names – prior to 1 April 2013 – still refer to the NMa.
3 Decision NMa 7 September 2010 (Transdev/Veolia) Case 6957.
4 Decision NMa 3 May 2010 (Amlin/Dutch State) Case 6843. For a discussion of the EUMR, the Consolidated Jurisdictional Notice and the decision practice of the European Commission, please refer to the European Union chapter.
substantiated (with reasons, up from nine in 2016 and nine in 2015). The majority of these decisions concerned the healthcare sector, with three hospital mergers,6 one merger of mental-healthcare institutions,7 and five mergers in the field of home care, elderly care and rehabilitation care.8

Of the five remaining cases, two concerned the medical sector9 and the others wholesale trade,10 medical microbiological laboratory diagnostics11 and the collection and processing of waste.12

The continuing policy of the ACM to issue only a limited number of reasoned decisions results in a lack of guidance on market definitions, jurisdictional issues, economic analyses and theories of harm. This can render the notification process unpredictable. The ACM only partially makes up for the ‘guidance deficit’ by publishing informal guidance letters addressed to parties seeking guidance on the interpretation of the merger rules. It did not issue any informal opinions in 2017.

The ACM concluded that a Phase II investigation was necessary in one case.13 Subsequently, the involved parties decided to refrain from applying for a licence and terminated their merger plans.14 The ACM reached a decision in two Phase II investigations where the procedure had started already in 2016.15 One was allowed without remedies16 and the other with remedies.17

An exemption from the mandatory waiting period has been granted once, which concerned youth and childcare providers.18

The ACM did not impose any fines for a failure to notify a concentration in 2017.

ii Infringements of formal obligations and legal proceedings

Two merger decisions were appealed in 2017. In both cases, the Rotterdam District Court (the Court) ruled in favour of the ACM.

6 Decision ACM 17 November 2017 (Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep) Case 17.0090.17, Decision ACM 21 April 2017 (Enasmus MC/Admiraal De Ruyter Ziekenhuis) Case 16.1297.22, Decision ACM 26 June 2017 (St. Antonius Ziekenhuis/Maartenkliniek Woerden) Case 17.0459.22
9 Decision ACM 10 July 2017 (Italpa/Sanoma) Case 17.0453, Decision ACM 1 May 2017 (Mediahuis/ TMG) Case 17.0337.22.
10 Decision ACM 12 September 2017 (Slogro/Heineken) Case 17.0611.22.
11 Decision ACM 8 June 2017 (Stichting Certe Medische Diagnostiek en Advies/Stichting Izeke) Case 17.0107.22.
12 Decision ACM 14 February 2017 (Shanks/Van Gansewinkel) Case 16.1044.22.
13 Decision ACM 17 November 2017 (Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep) Case 17.0090.17.
16 Decision ACM 4 September 2017 (AMC/VUmc) Case 17.0166.24.
17 Decision ACM 12 June 2017 (Parnassia/Antes) Case 15.1259.24.
18 Decision ACM 29 December 2017 (Parnassia Groep/Virenze) Case 17.0248.98.
In 2015, the ACM granted a licence for the merger between two providers of games of chance: Stichting Exploitatie Nederlandse Staatsloterij (SENS) and Stichting Nationale Sporttotalisator (SNS). The ACM stated that the parties hardly competed with each other, as games of chance are strictly regulated. Lotto and Stichting Speel Verantwoord (SSV) appealed the ACM’s approval of the merger. The ACM had stated that the relevant market would most likely be the market for lotteries and lotto games, and therefore had investigated the effects of the concentration on that possible market, but it had not definitely defined the market. The Court ruled that the ACM had sufficiently justified its decision to leave the definition of the market open: it held that defining this market is not a goal in itself but merely a tool to assess market power. Moreover, a narrower definition of the market would lead to the conclusion that the concentration would not significantly impede competition, as the parties would then be active on different markets. According to the Court, the ACM was also correct to conclude that Dutch regulations on lotteries and lotto games reduce the opportunity for competition. Based on these regulations, only one licence can be granted per category of game. The Court held that the ACM had carefully analysed its collected data in a scientifically sound manner, and was right to conclude that the reporting parties only competed with each other to a limited degree. Furthermore, the ACM was correct to conclude that it would be unlikely that the merged entity could transfer its market power to a new online market segment (i.e., because of the presence of several strong potential foreign competitors). SSV submitted an appeal with the Trade and Industry Appeals Tribunal (CBB).

In 2016, the ACM granted a licence under conditions for the acquisition of MediQ by its competitor Brocacef. Both parties operate a chain of pharmacies in the Netherlands, and are active in the field of retail trade and in the pharmaceutical sector, as well as the import of medicines under the licence, Brocacef was obliged to sell 89 local pharmacies. Mosadex CV and two groups of health insurers appealed the ACM’s decision, arguing that the remedy did not go far enough (i.e., as it did nothing to address many local monopolies). The Court held the remedies eliminated overlap where necessary: under the merger control regime the ACM could only remedy new problematic overlap but could not address pre-existing local monopolies. Accordingly, the Court upheld the decision of the ACM. Mosadex also lodged an appeal with the CBB.

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22 Decision ACM 13 June 2016 (Brocacef/MediQ), Case 15.0849.24 and see Chapter 30 ‘The Netherlands’.
23 Rotterdam District Court 7 September 2017 (Mosadex e.a./ACM) ECLI:NL:RBROT:2017:6833). Brocacef also requested the Rotterdam District Court to suspend the conditions that ACM had imposed, but the Court refused a request for a provisional ruling. See Rotterdam District Court 15 September 2016 (Brocacef/ACM), ECLI:NL:RBROT:2016:7082 and Chapter 30 ‘The Netherlands’. © 2018 Law Business Research Ltd
iii Phase I decisions

In 2017, two mergers of hospitals were allowed without remedies. The proposed merger between the Catharina Hospital and the St. Anna Hospital was referred to Phase II. The ACM concluded that the merger would weaken the bargaining power of health insurers in the greater Eindhoven area, as St. Anna Hospital would cease to serve as a cheaper alternative to St. Catharina Hospital and other hospitals. The ACM also established that the competitive pressure of surrounding hospitals would be insufficient to discipline the hospitals after the proposed merger. As such, the merger could result in higher healthcare costs for patients.

The ACM allowed several other mergers in the field of (mental) healthcare: one merger of mental healthcare institutions, and five mergers in the field of home care, elderly care and rehabilitation care.

The merger between Stichting Certe Medische Diagnostiek en Advies and Stichting Izore, both active in the field of medical microbiological laboratory diagnostics, was allowed without remedies.

Talpa was allowed to buy Sanoma without remedies. Both parties are active on the markets for television advertising and online advertising. Regarding the vertical relationship between Sanoma as an operator of television channels and Talpa as a producer of content for television programmes, the ACM considered it unlikely that the merger would have anticompetitive effects due to the limited market share and size of Sanoma's television channels. The ACM concluded that Talpa would also not be able to foreclose competitors by bundling the provision of television and radio advertising, among other things because Talpa could not transfer its strong position on the radio-advertising market to the television-advertising market: the limited market share of Sanoma's television channels would prevent the merged entity from reaching a sufficiently large target group for a successful exclusion strategy.

The acquisition of Telegraaf Media Group NV (TMG) by Mediahuis NV (Mediahuis), both newspaper companies, was allowed without remedies. The ACM acknowledged, among other things, that online news media and online advertising increasingly exercise competitive pressure on the parties in the relevant reader market for paid regional and

25 Decision ACM 17 November 2017 (Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep) Case 17.0090.17.
28 Decision ACM 8 June 2017 (Stichting Certe Medische Diagnostiek en Advies/Stichting Izore) Case 17.0107.22.
29 The vertical relationship between the parties was assessed in a former decision: Decision NMa 22 July 2011, (Sanoma/SBS) Case 7185 – Sanoma/SBS. In this decision, the ACM considered that both parties has relatively limited market shares and that multiple alternatives would remain available. The ACM followed this approach.
30 Decision ACM 1 May 2017 (Mediahuis/TMG) Case 17.0337.22. The ACM considered that the merger would not have effects on (1) the national and regional market for newspapers, (2) the provision of advertising space in regional and national newspapers, (3) the provision of online advertising space and (4) the provision of online space for job advertisements.
national newspapers, as well as the market for national advertising in regional and national newspapers. Nevertheless, the ACM left it open whether these online media would fall within the scope of the relevant markets.

Waste company Shanks was allowed to acquire its competitor Van Gansewinkel, leading to the merger of two of the three largest waste companies in the Netherlands. Based on an extensive investigation, the ACM concluded that a sufficient range of options would remain available for the collection of different types of waste and waste-treatment services. It appeared that the parties were often not close competitors and that smaller competitors exercise significant competitive pressure. Regarding the certain types of dangerous waste, Shanks was the only processor and Van Gansewinkel supplier. The ACM nevertheless held that there was no risk of foreclosure as Shanks would need to continue to process waste of competitors to fill the capacity of its facilities.

The ACM also cleared the acquisition of a part of Heineken’s wholesale activities by whole food supplier Sligro. The ACM concluded that the acquisition would not give rise to competition problems, as a sufficient number of wholesalers for food products and related non-food products would continue to exist. The distribution agreement between Heineken and Sligro did not change this. This decision was appealed by competitors of Sligro.

iv Phase II cases

The ACM held that the concentration between the mental-healthcare institutions Parnassia Group and Stichting Antes would result in a near-monopoly position in the greater Rotterdam area. The concentration was allowed under the strict condition that both Parnassia and Santes would transfer several clinics, treatment centres and patients to the competitor GGZ Delfland. The parties also had to commit to comply fully with the obligations as laid down in the administrative agreement for mental healthcare. Accordingly, the parties must reduce their combined number of beds by 31 December 2019. This would mean that the buyer under the remedy, GGZ Delfland, would not have to reduce its capacity.

The merger between Academic Medical Center (AMC) and the VU University Medical Center (VUmc), the two university hospitals in Amsterdam, was cleared without remedies in Phase II. The ACM concluded that patients and health insurers would have access to sufficient options in the fields of basic care and complex hospital care in the greater Amsterdam area. In the market for unique care there is little to no competition. However, this was no consequence of the merger, as the relevant care is usually only provided by one university hospital. The parties could use their dominant position in the unique care sector to strengthen their negotiation position with health insurers regarding basic care and complex hospital care.

v Exemptions from the standstill period

The ACM granted an exemption of the mandatory standstill period before closing of a concentration on one occasion.

The case concerned the bankruptcy of the child and youth care provider Virenze. Although the ACM was concerned that the continuity of care was at risk, it did not rule

31 Decision ACM 14 February 2017 (Shanks/Van Gansewinkel) Case 16.1044.22.
32 Decision ACM 12 September 2017 (Sligro/Heineken) Case 17.0611.22.
33 Decision ACM 12 June 2017 (Parnassia/Antes) Case 15.1259.24.
34 Decision ACM 29 December 2017 (Parnassia Groep/Virenze) Case 17.0248.98.
out the possibility that a licence would be required. Therefore, the exemption was granted under the condition that the buyer Parnassia would not take steps regarding organisational and operational integration of Virenze until the ACM assessed the concentration. However, Parnassia withdrew its notification in 2018, as the proposed transaction did not, after all, fall within the scope of the merger control of the ACM.35

vi Impact assessment reports
The ACM published a report in which it investigated the price and volume effects of 12 hospital mergers between 2007 and 2014.36 This report argues that hospital mergers lead to price increases but not to better care. However, these conclusions are, by its own admission, often based on figures that are statistically not significant, and leave out many relevant parameters. It must be hoped that the ACM will not let its actual merger decisions be influenced by the highly politicised debate about healthcare mergers.

III THE MERGER CONTROL REGIME

i Merger control thresholds
Article 29 DCA provides that a concentration must be notified if:

a the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration; and

b of this turnover, at least two concerned undertakings each achieved at least €30 million in the Netherlands.

Alternative jurisdictional thresholds exist for the following undertakings.37

Healthcare undertakings
All concentrations involving at least one healthcare undertaking must be notified to the Dutch Healthcare Authority (NZa). For the purpose of the healthcare specific test carried out by the NZa, a healthcare undertaking is defined as an undertaking employing or contracting more than 50 healthcare providers (persons).38 The NZa evaluates, inter alia, the accessibility and quality of services and their integration plans. If the NZa advises positively, the transaction must be notified to the ACM if it meets the thresholds explained below.

For the purpose of the control by the ACM, a healthcare undertaking is an undertaking that achieves at least €5.5 million turnover through healthcare services. A concentration between two or more healthcare undertakings must be notified to the ACM if:

a the combined turnover of all undertakings concerned exceeds €55 million in the calendar year preceding the concentration; and

37 Since the Act for the streamlining of market surveillance by the ACM of 24 June 2014 entered into force on 1 August 2014, concentrations between insurance companies are subject to the regular thresholds. Previously, a complicated lower threshold applied.
38 The relevant amendment to the Healthcare (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014.
of this turnover, at least two of the undertakings concerned each achieved at least €10 million in the Netherlands.39

**Credit and financial institutions**

For credit and financial institutions within the meaning of the Act on Financial Supervision, Article 31(1) of the DCA states that instead of turnover, income items must be used (analogous to those defined in Article 5(3)(a) of the EUMR).

**Pension funds**

Any type of pension fund will be regarded as an undertaking for competition law purposes. New thresholds apply from 1 July 2016: concentrations involving pension funds are subject to prior notification if the joint worldwide premiums written by the parties concerned in the preceding calendar year amounted to €500 million and at least two parties achieved €100 million premiums written by Dutch citizens.40

**ii Investigation phases**

**Notification phase**

The Dutch procedure consists of two phases. In Phase I, the ACM will investigate upon notification whether there are reasons to assume that the concentration may impede effective competition in certain markets (notification phase). If there are no such reasons, the authority will clear the concentration, after which the concentration may be completed. Once the decision on the notification is issued, a filing fee of €17,450 is imposed, regardless of the outcome of the decision.

**Licence phase**

If the ACM has reason to assume that competition may be impeded, it decides that the concentration requires a licence, which will be granted only after a further investigation in Phase II (licence phase).

In contrast with the European procedure, in the Netherlands, Phase II only starts if and when the parties involved request a licence. Such request requires a new notification in which more detailed information is provided to the authority about the parties and the relevant markets. Upon this request, the authority will conduct an additional investigation and either clear or prohibit the relevant concentration. Before prohibiting a concentration, the authority will provide the parties (and sometimes third parties) with an overview of the relevant competition concerns (points of consideration) and will provide the parties (and sometimes third parties) with the opportunity to give their reactions on these points. Once the decision on the licence request is issued, a filing fee of €34,900 is payable, regardless of the outcome of the decision.

39 These thresholds will continue to apply until at least 1 January 2018. Decision of 19 October 2012, amending the decision of 6 December 2007 regarding the temporary lowering of the thresholds for healthcare mergers, Government Gazette 2012, 515.
40 Law of 23 December 2015 changed a number of laws in the Ministry of Economic Affairs domain, including raising the maximum fines applicable to the ACM (proposal 34,190).
Both the notification for Phase I and the request for a licence must be submitted in Dutch. Annexes, such as letters of intent or share purchase agreements, or annual reports, may be submitted in English.

**Clearance by the Minister of Economic Affairs, Agriculture and Innovation**

If a concentration is prohibited, there is a (theoretical) possibility – which has never been undertaken to date – of requesting the Minister of Economic Affairs, Agriculture and Innovation to grant a licence due to serious reasons of general interest.

iii  **Duration procedure and waiting period (standstill obligation)**

Phase I is a 28-day review period, whereas Phase II has a maximum duration of 13 weeks. However, these periods may be suspended if the authority asks formal questions requiring additional information on the concentration. Due to this possibility of suspension, the review period can be very lengthy. As an extreme example, the 28-day period (Phase I) was suspended for 261 days in the case of *Cooperatie Vlietland/Vlietland Ziekenhuis.* 41 There are no requirements for pre-notification.

**Exemption waiting period**

As previously indicated, the concentration may not be completed during the review period. Some exceptions apply, which are similar to those under the EU Mergers Regulation. In the event of a public bid, the prohibition does not apply, provided that the bid is immediately notified to the ACM and the acquirer does not exercise the voting rights attached to the relevant share capital (the latter condition may be waived).

The ACM can also grant an exemption from the standstill obligation if quick clearance by the authority is not possible and suspension of completion of the concentration would seriously jeopardise the concentration. Such exemption can be granted within several working days. Once the exemption is granted, the concentration may be completed before the authority clears it.

In both cases, the concentration must be unwound if it is subsequently prohibited by the authority.

iv  **Other procedural aspects**

**Third parties**

The notification of a transaction is always published in the Government Gazette. In this communication, third parties are invited to comment on the contemplated concentration. Although third parties are requested to respond within seven days, information provided later may also be used in the procedure. The authority also actively gathers information by sending out questionnaires or by interviewing third parties.

Information received from third parties will generally be communicated to the parties concerned to provide them with the opportunity to respond. Generally, the authority will reveal the third party’s identity. 42

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41  Decision NMa 18 February 2010 (*Coöperatie Vlietland/Vlietland Ziekenhuis*), Case No. 6669.

42  The ACM has published ‘rules of the game for merger control procedures’ providing detailed information on its approach in merger control cases, available at www.acm.nl/nl/download/publicatie/?id=11348 (in Dutch).
Remedies

Under the Dutch merger control rules, parties can propose remedies in both the notification phase and the licence phase. The conditions and type of remedies are in principle similar in both instances and are laid down in guidelines. The general preconditions are that the parties to the concentration must take the initiative and the remedies proposed must be suitable and effective for eliminating the relevant competition concerns. The authority generally prefers structural remedies, but behavioural or quasi-structural remedies (not structural but nevertheless on a permanent basis, such as an exclusive licence agreement) are also possible. The authority does not have a specific form, but does require, inter alia:

a the proposal to be in writing;

b a detailed description of the nature and size of the remedy;

c a note on how all indicated competition concerns will be eliminated;

d if applicable, the steps required to divest a part of the undertaking and the timeline for such;

e a non-confidential version of the proposal; and

f a timely filing of the proposal.

Nevertheless, there are some differences between the procedures in the two phases. First, in the notification phase the remedy proposal should be handed in a week prior to the deadline of the ACM decision, whereas this is three weeks in the licence phase. In addition, whereas a concentration cleared under conditions in the notification phase may not be completed until the remedy is effectuated – effectively creating a ‘fix it first’ obligation – this limitation does not apply to remedies accepted in the licence phase. In both cases, however, effectuation of the remedies must be within the time frame stipulated in the proposal. If the parties fail to meet this deadline, the concentration will require a licence (remedies in the notification phase) or the concentration will be deemed to have been completed without a licence (remedies in the licence phase). In general, any failure to comply with remedies once the concentration has been completed is punishable by heavy fines.

Fines for late notification

As previously indicated, failure to notify a concentration (in a timely manner) will usually lead to a fine upon discovery by the authority. Fines for late notification may run up to 10 per cent of the worldwide turnover in the year preceding the year of the fine, but this ceiling can be doubled in a case of recidivism. On the basis of Articles 2.5 and 2.6 of the 2014 ACM Fining Policy Rule, the ACM sets the fine at €400,000 to €700,000 or 5 per cent of the total Dutch turnover in the preceding financial year for the buyer, whichever is higher; however, the ACM has substantial leeway to increase the resulting amount of the fine if it deems it to be too low.

43 Remedies guidelines 2007. This section is based on these guidelines.
44 In its guidelines, the authority does refer to model texts from the European Commission.
45 For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.
46 Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (www.acm.nl/en/download/attachment/?id=12098).
v Appeals and judicial review

**Merger control decisions**

Each phase ends with a decision, which can be appealed before the District Court of Rotterdam by any party directly affected by the decision, including the parties involved in the concentration, and usually also competitors, customers and possibly suppliers. Further appeal against a judgment of the Rotterdam District Court can be lodged with the Regulatory Industrial Organisation Appeals Court (CBb).

Third parties directly affected by the decision do not have access to the authority’s file, but they can request information from the authority on the basis of the Government Information (Public Access) Act when the merger control procedure has been completed. Information that is generally not provided to third parties under this Act includes confidential business information and internal memos of the authority.

**Sanction decisions**

Before imposing a fine, the ACM draws up a statement of objections on which parties may comment (in writing or orally). After this, the ACM will take a decision against which a notice of objection can be filed with the ACM. An appeal can be lodged against the ACM’s decision (on administrative appeal) to the District Court of Rotterdam. An appeal can be lodged with the CBb against the District Court’s decision.

### IV OTHER STRATEGIC CONSIDERATIONS

As previously indicated, the ACM is stringent in its interpretation of its jurisdiction, gun-jumping issues, late notifications and failure to comply with remedies, and has a track record of imposing heavy fines in cases of non-compliance. If it is unclear whether a concentration must be notified, the parties can seek informal guidance from the authority. The authority is required to react to such queries, and does so within two weeks (often within days).

The ACM imposed remedies in only a limited number of cases. However, in the case *Borgesius/Bakkertland* no formal remedies were imposed, but the case was only allowed after the buyer changed the concentration through a modified notification. In the case *Sonova/AudioNova* the remedies were very limited, but it is understood that the seller may have selected the buyer – through a controlled auction – in part because of the limited overlap to avoid a lengthy procedure at the ACM. Such cases are not uncommon. Hence, the impact of the control exercised by the ACM is bigger than it seems at first sight.

### V OUTLOOK & CONCLUSIONS

The merger of the NMa with the telecom regulator OPTA and the Consumer Authority was effectuated per 1 April 2013. Some changes to the powers of the authority, such as the increase in merger thresholds and the possibility to exchange information with other government agencies, entered into force on 1 August 2014.47

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47 See footnote 33.
Since the merger, the ACM is clearly placing more priority on consumer protection than on the competitive structure of the market. This is, so far, of small consequence in the field of merger control, where the ACM generally remains quite realistic in its analyses.

The main challenge for private parties remains how to deal with the tendency of the ACM to refuse to conduct more substantial investigations during Phase I, obliging parties to offer radical remedies to prevent a time-consuming Phase II investigation.

Another major challenge is the healthcare specific merger test of the NZa. The Minister had proposed to transfer this test to the ACM as per 1 January 2017, which may bring some procedural efficiency. The transfer would not affect the essence of the test and hence will continue to pose a heavy administrative burden on the parties involved. At the time of finalising this chapter in 2017 the legislative proposal had not been adopted by any of the two houses of the Dutch parliament.

The Minister has submitted a legislative proposal that would enable the Dutch cabinet to block or reverse acquisitions in the telecommunications sector. The proposal aims to prevent any ‘undesirable’ mergers by foreign companies that can be linked to criminal activities, are financially vulnerable or have a non-transparent corporate structure. The Minister is also considering additional legal mechanisms to protect companies from hostile takeovers, such as the introduction of a mandatory period of reflection for the board. These legislative debates had, at the time of writing, only been conducted in an informal manner. Therefore, it is still unclear whether and which mechanisms may be introduced.

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.

The fining ceilings of the ACM rose considerably from 1 July 2016. The absolute maximum would be raised from €450,000 to €900,000. The relative maximum amount for cartel infringements would become 10 per cent of the turnover of the infringing group, multiplied by the number of years that the cartel lasted up to a maximum of four years. All maximum fines would double in cases of recidivism. Notably, the last change would affect fines for late filing.
I INTRODUCTION

New Zealand’s competition law is contained in the Commerce Act 1986 (the Act). The merger control provision prohibits acquisitions of business assets or shares that have the effect or likely effect of substantially lessening competition in a New Zealand market.

The New Zealand Commerce Commission (NZCC) is an independent Crown entity responsible for administering the Act and determining applications for clearance or authorisation of proposed mergers.

The NZCC may grant clearance for a proposed acquisition if it is satisfied the acquisition will not be likely to have the effect of substantially lessening competition in a market. The NZCC may grant authorisation for a proposed acquisition if the applicant is able to demonstrate that the public benefit of the merger (efficiency or other gains) outweighs the detriment resulting from the lessening of competition.

The merger clearance and authorisation regime is voluntary. There are no compulsory notification thresholds.

i Relevant law

The purpose of the Act ‘is to promote competition in markets for the long-term benefit of consumers within New Zealand’. The Act promotes competition by prohibiting restrictive trade practices and business acquisitions that reduce the level of competition between businesses.

Section 47(1) of the Act is the merger control provision. It provides that ‘a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.’

The NZCC has statutory powers enabling it to:

a) grant, or decline to grant, applications for clearance or authorisation; and
b) investigate and bring court proceedings for breaches of the merger control provision.

The NZCC cannot in its own right either determine whether the Act has been breached or impose penalties. Where the NZCC considers that an alleged breach of Section 47 warrants prosecution, it must bring civil proceedings before the courts and seek pecuniary penalties or other appropriate remedies.

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1 Ross Patterson and Oliver Meech are partners and Kristel McMeekin is a senior associate at MinterEllisonRuddWatts.
ii Qualifying transactions

The Act does not provide any turnover or other thresholds over which a transaction is required to be notified. Instead, New Zealand’s merger clearance regime provides a voluntary regime under which parties may (but do not have to) seek clearance or authorisation for a proposed acquisition (discussed in further detail in Section III, below). Clearance or authorisation is only available for proposed transactions and cannot be granted retrospectively.

The NZCC has specified ‘concentration indicators’ in its Mergers and Acquisitions Guidelines (July 2013) (see Section III.iii, below).

iii Application to overseas entities

Recent amendments to the Act repealed the former Section 4(3) (which extended the prohibition of certain acquisitions that lessen competition to acquisitions made outside New Zealand). Overseas acquisitions that lessen competition in New Zealand markets are now instead dealt with by the new section 47A, under which the NZCC may apply to the High Court for a declaration in respect of an acquisition by an overseas person. The High Court may make a declaration if it satisfied that:

a the overseas person has acquired a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares; and

b the acquisition has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

Applications must be made within 12 months of the date of the acquisition. A declaration may not be made in respect of acquisitions that have been granted clearance or authorisation by the NZCC.

The Court has discretion, in granting a declaration, to make further orders requiring any New Zealand body corporate in which the overseas person has a controlling interest to, for example, cease carrying on business in a relevant New Zealand market, dispose of shares or other assets, or take any other action the Court considers is consistent with the purpose of the Act (see Section II.iv).

iv Overseas Investment Act 2005

The Overseas Investment Act 2005 (OIA) applies to acquisitions by ‘overseas persons’ of a 25 per cent or more direct or indirect ownership or controlling interest in significant business assets, ‘sensitive’ land or fishing quota. Under the OIA, consent must be obtained from the Overseas Investment Office for qualifying transactions.

For the purposes of the OIA, an overseas person includes:

a an individual who is not a New Zealand citizen and who is not ordinarily resident in New Zealand;

b a partnership, body corporate or trust where an overseas person or persons have 25 per cent or more ownership or control (based on composition of a governing body or beneficial ownership); and

c a company incorporated outside New Zealand, or in which an overseas person or persons hold 25 per cent or more of: any class of share; the power to control the company’s governing body; or voting rights.
An acquisition of ‘significant business assets’ occurs when the total expenditure involved, or price paid, or gross value of the assets (including shares) of the company or property being acquired, exceeds NZ$100 million.²

v Joint ventures
The merger control regime extends to joint ventures that acquire shares or assets. Other purely contractual transactions engaged in by joint ventures (for example, long-term and exclusive contracts) are governed by the restrictive trade practices provisions of the Act.

vi Industry-specific merger control
The same merger control provision applies to all industries.

II YEAR IN REVIEW

i Applications from mid-2017 to mid-2018
Over the past financial year, nine applications for clearance were made to the NZCC.³ Of those applications, and as of the time of writing, the NZCC had cleared four applications (including one cleared subject to a divestment undertaking), declined one, and was still processing three. One application had been withdrawn by the parties.

At the time of writing, the NZCC had not received any applications for authorisation.

ii Average time frames for clearance applications
Over the past financial year, the average time frame between registration of a clearance application and the NZCC’s final decision was 73 working days. The average number of working days to reach a decision has been steadily increasing, climbing from 60 working days in the 2015–2016 financial year to 82 in 2016–2017, reflecting the increasing complexity of the clearance applications filed, and several high-profile declined clearances.

iii Merger clearance decisions of interest
Merger clearance decisions of interest, published in the past 12 months, are described below.

Heinz/Cerebos⁴
The NZCC in March 2018 granted clearance for HJ Heinz Company (New Zealand) Limited (Heinz) to acquire Cerebos Pacific Limited’s (Cerebos) New Zealand food and instant coffee business subject to a divestment undertaking. The transaction (under which Heinz would acquire 100 per cent of the shares in Cerebos’ subsidiary Cerebos Gregg’s Limited) was part of an international transaction through which Heinz’s parent, the Kraft Heinz Food Company, would acquire Cerebos’ New Zealand, Australia, and Singapore food and instant coffee business through its local subsidiary companies.

Heinz offered an undertaking to divest the Gregg’s red, barbecue and steak sauce businesses as well as the F Whitlock & Sons Worcestershire sauce business. In making

² This may be amended to include an alternative monetary threshold in accordance with regulations if and when the Trans-Pacific Partnership Agreement comes into force in New Zealand.
³ The NZCC’s financial year runs from 1 July to the following 30 June.
its decision, the NZCC primarily focused on the national markets for the manufacture, importation, and wholesale supply of a number of table sauces to supermarkets and the food service industry.

NZCC Chair, Dr Mark Berry, said that the NZCC believed that the merger of the number one and two wholesale suppliers to supermarkets of red sauce, barbecue sauce, steak sauce, and Worcestershire sauce would be likely to result in a substantial lessening of competition in each of those markets. However, the divestment offered by Heinz was sufficient to remedy the competitive harm the merger would cause.

**Trade Me/Limelight Software**

The NZCC in March 2018 declined to give clearance for Trade Me Limited (Trade Me) to acquire 100 per cent of the shares in Limelight Software Limited (Limelight), trading as Motorcentral.

Trade Me is an online marketplace and classified advertising platform. Limelight is a Christchurch-based supplier of motor vehicle dealer management (DMS) software. DMS software is used by motor vehicle dealers to manage their businesses and includes functionality such as keeping track of inventory, customer relationship management, and uploading vehicle listings to online advertisers.

The NZCC was not satisfied that the acquisition would not have (or not be likely to have) the effect of substantially lessening competition in markets for the supply of (1) online motor vehicle classified advertising to motor vehicle dealers (the advertising market), and (2) DMS software to independent motor vehicle dealers (the DMS market).

Dr Mark Berry noted that:

> Trade Me is an important advertising platform for car dealers and we were concerned the merger could result in Trade Me creating barriers for dealers who do not use Motorcentral’s DMS. Likewise, we were concerned Motorcentral could create barriers for dealers who want to list on rival advertising websites or any new potential entrants.

**Recent legislative changes**

The Commerce (Cartels and Other Matters) Amendment Act 2017 (the Amendment Act) was passed in August 2017 and made a number of significant changes to the Act.

The Amendment Act provides for greater alignment with Australia by enabling the NZCC to apply to the High Court for a declaration that a wholly overseas merger has the effect of substantially lessening competition in a market in New Zealand where:

- The overseas person has acquired a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares; and
- The acquisition has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

The Court has the discretion, in granting a declaration, to make further orders requiring any New Zealand body corporate in which the overseas person has a controlling interest to:

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New Zealand

a cease carrying on business in New Zealand, in the market to which the declaration relates, no later than six months after the date of the declaration (or any longer period specified by the court); or

b dispose of shares or other assets specified by the court; or

c take any other action (including disposing of shares or other assets) that the court considers, in all the circumstances, is consistent with the purpose of the Act.

Breach of such orders could expose parties to penalties of NZ$500,000 for individuals and, in any other case, NZ$5 million. The purpose of these provisions is to encourage applications to the NZCC, and to extend the use of its merger remedies to overseas mergers that could impact competition in a New Zealand market.

Other amendments to the Act included:

a amendment of the statutory time frame for a clearance decision from 10 to 40 working days;

b a new cartel provision, replacing the former price fixing prohibition. The new prohibition arguably captures a broader range of conduct (including price fixing, output restriction, and market allocation);

c new exceptions to the cartel prohibition for collaborative activities (replacing the joint venture exemption), vertical supply contracts, and joint buying and promotion agreements;

d a new clearance regime for collaborative activities that will allow businesses to test proposed collaborations with the NZCC to obtain greater legal certainty before entering into the arrangements; and

e an increase in fines for failing to assist the NZCC in its investigations from NZ$10,000 to NZ$100,000 for an individual, and from NZ$30,000 to NZ$300,000 in all other cases.

III THE MERGER CONTROL REGIME

i Overview
The NZCC can either:

a grant clearance for a merger or acquisition if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market; or

b grant authorisation if it is satisfied that the merger or acquisition will result, or is likely to result, in such benefit to the public that it should be permitted.

ii Competition assessment
The NZCC assesses applications for merger clearance by applying a ‘with and without test’ – comparing the likely state of competition with the merger (the factual) with the likely state of competition without the merger (the counterfactual).

The NZCC considers the possible range of scenarios with and without the merger, discards those it concludes are unlikely, and compares the most competitive likely ‘without the merger’ scenario with the likely ‘with the merger’ scenario. It describes this as a ‘worst case’ scenario, on the basis that if the scenario that gives rise to the greatest competition concerns does not result in a substantial lessening of competition, none of the other likely scenarios will.

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The test the NZCC ultimately applies is ‘if we are not satisfied that competition would not be substantially lessened, compared to any of the scenarios likely to arise without the merger, we must decline clearance’.

The NZCC considers:

a the constraint on the merged entity (and market generally) from existing and potential competitors (including imports);
b conditions of market entry and expansion;
c the countervailing power of buyers;
d any enhancement in the ability of the remaining competitors to collude (either expressly or tacitly); and
e whether the transaction removes a particularly aggressive or destabilising competitor.

### iii Filing requirements and thresholds

The Mergers and Acquisitions Guidelines specify the following concentration indicators. An acquisition is unlikely to raise competition concerns if, post-merger:

a the merged entity would have less than a 40 per cent market share and the three largest firms (i.e., the merged entity and the two nearest players) together would have less than 70 per cent of the relevant market; or

b the merged entity would have less than a 20 per cent share in a market where the three largest firms together would have more than 70 per cent of the relevant market.

The concentration indicators are merely an administrative screening tool; while the NZCC recommends seeking clearance if the indicators are exceeded, the majority of mergers that are granted clearance exceed the concentration indicators.

### iv Process for seeking clearance

Applications for clearance must be made in the prescribed form and be filed with the NZCC with the statutory filing fee of NZ$3,680.

The NZCC encourages parties to provide advance notice of clearance applications to the NZCC and to engage in confidential pre-notification discussions with the NZCC.

The NZCC generally publishes a statement of preliminary issues on its website at an early stage of its investigation when considering an application for clearance. It also seeks information from competitors, suppliers, customers and any other interested parties and interviews the applicant and vendor.

Following this public consultation process, the NZCC may send a letter of issues to the applicant seeking further information and highlighting initial competition concerns, giving the applicant and vendor an opportunity to address these concerns.

In complex cases where issues remain unresolved, a subsequent letter of unresolved issues may be sent at the 40-working-day stage. This may be the final opportunity for the applicant to provide evidence to allay the NZCC’s concerns.

The statutory time frame for a clearance decision was recently amended from 10 to 40 working days. This reflected the fact that the 10-working-day statutory period was unrealistic. The actual time frame varies depending on the level of complexity of the acquisition and the analysis required. The time frame could be as short as three weeks for a straightforward merger and more than six months for a very complex merger. In the current financial year, the shortest time to complete an application was 32 working days, and the longest was 116 working days.
To address potential structural competition concerns, applicants may include divestment undertakings of specified assets or shares as part of an application (for example, if the merged entity’s potential market power poses concerns in a particular product market or geographical area).

Such undertakings are deemed to form part of the clearance or authorisation, and approval is void if the undertaking is contravened. Accordingly, if the terms of the undertaking are breached, the NZCC may take enforcement action through the courts.

**Process for seeking authorisation**

A party can apply for authorisation where there is a real risk that a proposed acquisition is likely to result in a substantial lessening of competition. If the NZCC is satisfied that the public benefits will outweigh the lessening of competition associated with the proposed acquisition, then it will grant authorisation.

The NZCC compares the benefits of the acquisition against likely counterfactuals. Section 3A of the Act provides that, when assessing public benefits, the NZCC is required to have regard to any efficiencies that will result or will be likely to result. In the past, the NZCC has stated that public benefits can be derived from:

- economies of scale;
- economies of scope;
- better utilisation of existing capacity; and
- cost reductions, including those due to reduced labour costs, greater specialisation of production, lower working capital and reduced transaction costs.

The ‘public’ is the public of New Zealand. Benefits to foreigners are counted, but only to the extent that they also benefit New Zealanders.

Overall, public benefits are net gains in economic terms. The NZCC applies a total welfare test, and transfers of wealth between groups of New Zealanders are generally ignored. The authorisation application process requires the public benefits to be quantified, usually through detailed economic evidence.

The NZCC follows the below process for investigating and considering an authorisation application:

- the NZCC engages with the applicant in pre-notification discussions;
- the authorisation application is registered and a public version is published on the NZCC’s website;
- submissions from interested parties are received and considered by the NZCC, and public versions are published on the NZCC’s website;
- the NZCC publishes a draft determination on which further submissions may be lodged and considered;
- the NZCC may hold a ‘conference’ to discuss issues raised by the application, if it thinks this would be useful; and
- a final decision is made by the NZCC to grant or decline to grant authorisation, based on all the evidence received or gathered, and a public version of the decision is published.

The authorisation process is both more time consuming (with a 60-statutory-working-day period, subject to extensions), and more expensive than the clearance process (the application fee is NZ$36,800.
As a result of these factors, in 2009 the NZCC introduced a new streamlined authorisation process for proposed acquisitions that have clear public benefits and a limited impact on competition. The streamlined process has a statutory time period of 40 working days. To date, the streamlined process has not been used for authorisation of a merger.

**vi Remedies**

A wide range of remedies are available to the NZCC in the event it considers that a merger is likely to substantially lessen competition. These include prosecution and the ability to seek significant penalties of up to NZ$5 million for companies and NZ$500,000 for individuals.

The NZCC may also apply to the High Court for a divestment order in relation to any of the shares or assets specified in the order. The NZCC’s principal counsel (Competition) has described divestment, which is required in 10 per cent of cases, as a blunt remedy.6

The NZCC has the power to seek ‘cease and desist’ orders from an independent cease and desist commissioner appointed under the Act, although this power has only once been utilised and looks likely to be repealed. In addition, any person (but most likely a competitor of the acquiring company) may:

a apply to the High Court for an injunction preventing an acquisition or attempted acquisition;

b bring an action for damages suffered as a consequence of an acquisition in breach of the Act; and

c apply to the High Court for a declaration that a proposed acquisition would breach the Act.

**vii Appeals**

A decision of the NZCC to grant, or decline to grant, clearance or authorisation can be appealed or can be subject to judicial review proceedings in the High Court. Judicial review is the only option available to third parties affected by, but not involved in, a transaction that has been cleared or authorised by the NZCC.

Under Section 92 of the Act, the following persons may appeal against a clearance decision by the NZCC:

a the person who applied for the clearance; and

b any person whose assets or shares are proposed to be acquired.

In respect of an authorisation decision by the NZCC, the applicant and any other person who has a direct and significant interest in the application; and participated in the Commission’s processes leading up to the determination, may appeal.

**NZME/Fairfax**7

In May 2017, the NZCC declined NZME and Fairfax’s application for clearance and, alternatively, authorisation to merge their media operations in New Zealand. The merger would have combined New Zealand’s two largest newspaper networks and news websites, with about 90 per cent of daily newspaper circulation, and the largest reach for online New

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Zealand news by a significant margin. The NZCC concluded that NZME and Fairfax were each other’s closest competitors in both advertising and New Zealand news content production. The NZCC was of the view that the merger would remove the close rivalry seen in both those markets and result in readers and advertisers facing price increases along with a reduction in news quality.

The applicants had sought an authorisation for the merger in the alternative, on the basis that if a lessening of competition was final, the merger would result in such a benefit to the public that it should be permitted. Balancing the benefits and detriments of the merger, the NZCC thought that the quantifiable benefits (reduced operational costs) were far outweighed by the detriment flowing from a loss of media plurality (even though this could not be quantified).

The applicants appealed the decision not to grant clearance, arguing that the NZCC’s approach to market definition was flawed. The applicants also appealed the decision not to grant authorisation, arguing that the NZCC did not have jurisdiction to consider detriments beyond economic or financial detriments and that, even if it were able to consider such detriments, the view on loss of media plurality was speculative.

The High Court dismissed the appeals. On the clearance issue, the Court concluded that the NZCC’s approach was sound and that the merger would affect the news and advertising markets identified by the NZCC. On the authorisation issue, the Court endorsed the NZCC’s approach and agreed with the NZCC that ‘a substantial loss of media plurality would be virtually irreplaceable.’

viii Limitation period
Proceedings for penalties and damages in relation to the merger provisions can be commenced within three years after the matter giving rise to the contravention arose. Proceedings seeking a divestiture can be commenced within two years from the date on which the contravention occurred.

An appeal must be filed within 20 working days from the release by the NZCC of its written reasons for granting or declining to grant clearance.

ix Use of expert economists
Parties engage expert economists to prepare an expert economic report to submit to the NZCC where the application for clearance is particularly complex. In authorisation applications, such economic analysis is usually required to quantify the public benefits and detriments. Lay members (often economists) are appointed to assist judges of the High Court in certain competition law cases.

IV OTHER STRATEGIC CONSIDERATIONS
New Zealand’s merger control regime is voluntary. This means the parties to a proposed acquisition must decide whether or not to make an application to the NZCC.

In some cases, the decision will be clear: where no competition concerns arise, a clearance will not be required, just as when a transaction gives rise to material aggregation, applying for clearance will be advisable to mitigate the risk of challenge.
Typically, key considerations include:

\(a\) whether the acquisition forms part of a global transaction that is being notified in overseas jurisdictions; and

\(b\) the profile of the industry and merging parties involved, and the likelihood of the transaction raising concerns for the NZCC.

Ultimately, the parties’ appetite for risk will determine whether they decide to apply to the NZCC to obtain protection for their acquisition, or whether they prefer to proceed without that protection.

V OUTLOOK & CONCLUSIONS

i Proposed legislative changes

Two bills proposing amendments to the Act have been introduced in 2018.

The Commerce (Criminalisation of Cartels) Amendment Bill was introduced into Parliament in February 2018 and proposes a new criminal cartel offence. The new offence largely replicates the drafting of a 2011 bill that originally proposed criminalisation for cartel conduct. The offence was removed in 2015 due to concerns about the potential ‘chilling effect on pro-competitive behaviour’ while the other amendments (without the criminal offence) came into force in August 2017 (see Section II.iv).

In April 2018, a bill was introduced to Parliament that would amend the Act and introduce a new competition studies regime. If passed, the amendments would allow the NZCC to initiate competition studies either where directed to by the Minister or of its own accord. In either case, the Minister or the Commission must be satisfied that it is in the public interest to carry out a competition study. The bill also proposes to update the regulatory regime for airports to improve its effectiveness and introduce an enforceable undertakings regime into the Act.

ii Pending applications

As at the time of writing, the NZCC is considering one application for clearance, which was registered in April 2018.

**Ingenico/Paymark**

The NZCC registered an application for Ingenico Group SA (Ingenico) to acquire 100 per cent of the shares in Paymark Limited (Paymark).

Ingenico is a global payment services company offering point of sale (POS) payment terminals, electronic payment software, and transaction services. Ingenico is a wholesale supplier of its POS terminals to resellers and operates a digital payments gateway business called Bambora. Paymark is an operator of a ‘payment switch’ and is owned by four of New Zealand’s five major trading banks. Paymark’s ‘payment switch’ receives electronic requests for transfer of funds from merchants at the point of sale and routes them to the appropriate bank for transfer of those funds. Paymark also provides a range of services complementary to ‘payment switching’ as well as some eCommerce offerings.
The NZCC has noted that the proposed merger raises vertical effects in that it would combine two firms that provide services at different levels of the supply chain. The NZCC plans to look at whether the merger would, among other things, make it harder to gain access to Paymark’s ‘payment switch’ or related services in order to foreclose firms that either supply terminals in competition with Ingenico or provide digital gateway services in competition with Paymark and Bambora.
Chapter 31

POLAND

Małgorzata Szwaj and Wojciech Podlasin

I INTRODUCTION

Polish merger control, in terms of substance and procedure, is becoming increasingly aligned to that of the EU, and the Polish competition authority, the President Office for Competition and Consumer Protection (OCCP), often draws benefits from the decisional practice of the European Commission and the EU courts. However, in spite of the above tendency, in some important aspects where Polish merger control rules continue to differ from those provided by EU law. Capturing those differences is particularly important considering the relatively low notification thresholds triggering the merger filing obligation in Poland.

In 2015 the amendments to the Polish Act on Competition and Consumer Protection (ACCP)\(^2\) came into force and introduced several important modification to the Polish merger control system, both in terms of procedure and substance. We have observed how the key amendments materialised in practice, including rationalisation of the notification obligations aimed at excluding concentrations without an actual impact on competition within Poland, the introduction of two-phase proceedings or a statement of objections. As explained in detail below, merger control in Poland experienced the OCCP issuing several statements of objections followed by the parties’ withdrawal of the notification, most likely in anticipation of a prohibition decision. In addition, the introduction of the 2015 amendments shortened the review period in simple cases. At the same time, although the OCCP cleared the vast majority of the cases in Phase I, an increasing number of complex merger cases are decided in Phase II. It was also interesting to note the impact of views presented by customers, competitors and suppliers, which were requested by the OCCP in relation to notified concentrations, on the final outcome of its decisions.

i Jurisdiction

An analysis as to whether a prior merger clearance of the OCCP for a given transaction is necessary requires a short assessment and answers to the following questions:

a whether a transaction amounts to a concentration, i.e., whether it constitutes:

• a merger of two or more independent undertakings;

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2 The text of the ACCP as well as the secondary legislation and merger control guidelines issued by the OCCP are available in Polish on the authority’s website (see https://uokik.gov.pl/prawo.php).
• the acquisition by one or more undertakings, whether by purchase or subscription of shares or securities or through any other means, of direct or indirect control over one or more other undertakings;
• the creation of a joint venture;
• the acquisition of part of a business of another undertaking (i.e., an asset sale of part of a business); ³

b whether turnover thresholds are exceeded:
• the combined worldwide turnover of the undertakings involved in the concentration and their entire groups exceeds €1 billion for the year prior to notification; or
• the combined Polish turnover of the undertakings involved in the concentration and their entire groups exceeds €50 million for the year prior to notification;

c whether notification exemption applies:
• de minimis exemption – no filing is triggered if the Polish turnover of the following does not exceed €10 million in any of the two financial years preceding the concentration:
  • the target – in the case of the acquisition of control; or
  • none of the undertakings participating in the concentration (their capital groups) – in the case of a merger or the creation of a joint venture; or
  • the part of the business to be acquired.

In the case of an acquisition of control or an acquisition of part of the business between the same parties in a series of transactions executed over two years, the total turnover of the undertakings to be acquired and the acquired business is taken into account. The purpose of this provision is to prevent avoiding merger notification by slicing the transaction into parts each falling within the notification exemption.

In addition, specific types of transactions fall outside merger control review:
• an acquisition or holding of securities by a financial institution with a view to reselling them, provided that the resale takes place within one year and the financial institution does not exercise the shareholder’s rights;
• an acquisition or holding of securities on a temporary basis, with a view to securing claims, provided that the undertaking does not exercise the shareholder’s rights;
• a concentration during bankruptcy proceedings, unless control is taken over or part of the business acquired by a competitor; or
• intra-group concentrations.

ii Joint ventures

In Poland, in contrast to the EU Merger Regulation, a joint venture does not have to provide on a lasting basis all the functions of an autonomous economic entity for its creation to be caught by the merger notification obligation. Thus, if the relevant notification thresholds are met, all joint ventures are notifiable to the OCCP, irrespective of whether they are ‘fully functional’ or not.

Furthermore, the ACCP does not require JV parents to exercise joint control over a joint venture being created. As a result, a joint venture is deemed to arise even if only one

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³ Differently from the EU Merger Regulation, under the ACCP an acquisition of part of a business constitutes a form of concentration separate from the acquisition of control over an undertaking.
undertaking will exercise (sole) control while the remaining undertakings establishing the joint venture will have non-controlling stakes. Given that a joint venture can also be created on the basis of an existing company, this may lead to practical problems distinguishing between an acquisition of a minority shareholding in an existing company (which is not notifiable to the OCCP) and the acquisition of joint control, and the creation of a joint venture.\(^4\) This issue was noticed by the OCCP, which in its guidelines on the criteria and procedure for notifying the intention of concentration as updated in 2015 (the OCCP Procedural Guidelines)\(^5\) stated that a creation of a joint venture on the basis of an existing company takes place when the company, although existing, was not operational, or it is intended that post-acquisition an already operational company will substantially change or expand its business profile. Otherwise, the transaction should be viewed as an acquisition of joint control (which may be notifiable to the OCCP) or as an acquisition of a minority shareholding that does not constitute a concentration.

A notification obligation may also arise if an existing joint venture, which could have been previously cleared by the OCCP, is to substantially change or expand its scope of operations.

### iii Domestic effect

Foreign-to-foreign transactions meeting the Polish jurisdictional thresholds are subject to notification to the OCCP unless they have no (even potential) effect in Poland. According to the OCCP Procedural Guidelines, a concentration has an effect in Poland if at least one of the capital groups taking part in the concentration achieves turnover on the territory of Poland.

### II YEAR IN REVIEW

#### i Fines

In 2017, fines were imposed by the OCCP for breach of the standstill obligation in three cases (i.e., Bać-Pol,\(^6\) Fermy Drobiu Woźniak and MO).\(^7\) Moreover, the OCCP instigated an explanatory proceedings pertaining to the alleged implementation of the concentration without required clearance by Gazprom and five other companies. The cases show that the OCCP’s increased attention on cases pertaining to concentrations closing before required clearance.

In Bać-Pol, the OCCP concluded that Bać-Pol had infringed Polish competition law by acquiring control over Klementynka without the required OCCP clearance. The proceedings were instigated as a result of a complaint submitted by the previous co-owner of Klementynka. The evidence gathered indicated that Bać-Pol had acquired the main business assets of Klementynka, such as key employees, contracts with key suppliers and customers, and goods designated for immediate shipment. Although the proceedings did not reveal any

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4 A distinction between an acquisition of joint control and an establishment of a joint venture may be relevant given different undertakings whose Polish turnover is taken into account for the purposes of an assessment of the *de minimis* exemption.
5 Polish version available at the OCCP’s website (see: https://uokik.gov.pl/wyjasnienia_i_wytyczne.php).
6 Decision of the OCCP No. DKK - 86/2017 of 5 June 2017.
8 Decision of the OCCP No. DKK – 2010/2017 of 29 December 2017 (MO is an individual).
written contract confirming the concentration, the OCCP found that the acquisition of those assets constituted a concentration based on other evidence such as mail correspondence and statements of witnesses. The OCCP fined Bać-Pol 527,000 złoty, which is the highest fine imposed for breach of the standstill obligation in Poland so far. While determining the amount of the fine, the OCCP took into consideration both aggravating circumstances such as lack of cooperation in the course of the proceedings as well as mitigating factors such as no significant impediment of competition on the relevant market (i.e., non-specialised food wholesale) resulting from the completion of the transaction.

Fermy Drobiu Woźniak was also fined 339,000 złoty for a similar infringement of the competition law. The OCCP concluded that Fermy Drobiu Woźniak acquired assets of Fermy Drobiu Borkowski without notifying the OCCP of its intention to concentrate, and thus violated merger control provisions laid down in the Act. Acting upon a complaint from Fermy Drobiu Woźniak’s competitors, the OCCP collected evidence supporting the fact that Fermy Drobiu Woźniak acquired a part of Fermy Drobiu Borkowski’s assets on the basis of a lease agreement of six poultry farms of Fermy Drobiu Borkowski. The OCCP was of the view that Fermy Drobiu Woźniak, as a professional market participant, should have been aware of the existence of the Act and have had a general knowledge of its provisions regarding merger control. The OCCP concluded that the gravity of the infringement was significant. This follows from the fact that the whole merger control system is based on the duty to notify an intention to concentrate, and Fermy Drobiu Woźniak failed to fulfil this obligation. The gravity of the infringement was also affected by the fact that both Fermy Drobiu Woźniak and Fermy Drobiu Borkowski were major players on the Polish market for egg production. As a mitigating factor the OCCP considered the lack of the negative impact of the merger on the relevant market. In the case, the OCCP confirmed that entering into the lease agreement should have been classified as a form of notifiable concentration.

In MO, an undisclosed individual was fined 22,120 złoty for the acquisition of joint control over Empik Media & Fashion. The OCCP concluded that MO intentionally breached the obligation to notify the intent to concentrate and acquired control at the moment of signing the shareholders’ agreement, under which two major shareholders of Empik Media & Fashion agreed, among others, to act in concert as to the exercise of their voting rights at the company’s shareholders’ meeting. When setting the amount of the fine, the OCCP took into account that gravity of the infringement was not significant, since the MO did not achieve any turnover from activity of his companies in Poland in the financial year before the concentration and that markets on which these companies operate did not overlap with any of the markets on which Empik Media & Fashion is active, so the conducted concentration did not significantly restrict the competition on any market. As a mitigating factor the OCCP also considered the fact that MO provided information on concentration to OCCP and cooperated with it during proceedings.

No fines were imposed by the OCCP in 2018, but one ongoing proceeding is worth mentioning due to the possibility of imposing a fine and precedent character. The OCCP alleges that Gazprom and five other companies breached Polish competition law by financing the creation of Nord Stream 2 gas pipeline without obtaining prior merger clearance. In December 2015, the companies notified the OCCP of their intention to create a joint venture in the form of a company: Nord Stream 2 AG, responsible for designing, financing and constructing Nordstream. Having conducted a detailed analysis and market study, the OCCP raised objections against the notified transaction in July 2016. The OCCP was of the view that the notified transaction might lead to a significant impediment to competition. This is
because at that time, Gazprom already had a dominant position in gas supplies to Poland and the proposed joint venture would significantly strengthen Gazprom’s transmission capacity in Europe, and thus also its market and negotiating position in relation to Polish customers. Following the OCCP’s objections, the companies withdrew the merger notification in August 2016 and the proceedings were discontinued. In April 2017, the OCCP instigated preliminary proceedings to re-examine the case. The OCCP learned from public sources that the companies signed the contract to finance the construction of Nordstream. This, in the OCCP’s opinion, could constitute an attempt to circumvent the obligation to obtain consent to create a joint venture. This is because, both the creation of a joint venture and the conclusion of a financing agreement had the same purpose: financing the construction of Nordstream. Should the OCCP conclude that the companies breached the obligation to obtain a merger clearance, it may impose on each of them a fine of 10 per cent of the annual turnover in the financial year preceding the year in which the fine is imposed.

ii Phase II cases
In 2017 the OCCP opened 12 Phase II proceedings. In the majority of cases, the reason for this was a need to conduct a market survey to define the relevant market. In cases reviewed in Phase II in one case in 2017 the OCCP issued a conditional decision, five concentrations were cleared unconditionally and in one case the notifying party withdrew its notification. In 2017 the OCCP issued four statements of objections but no concentration was blocked.

The above statistics confirm the relatively high number of complex cases dealt with by the OCCP in 2017.

In 2018, the OCCP opened 7 Phase II proceedings and similarly to 2017, in the majority of cases the reason for this was the need to conduct a market survey to define relevant market. In three cases the notifying parties withdrew their notifications. In one case the OCCP issued statement of objections. So far, the OCCP has not blocked any concentration and has not issued any conditional decision.

iii Conditional decisions
The OCCP issued one conditional decision in 2017, which concerned PGE’s acquisition of EDF assets in Poland consisting of a power plant in Rybnik and eight heating plants. The OCCP’s assessment was that PGE may have a share in excess of 40 per cent of the Polish market for the generation and wholesale of electricity in Poland post-transaction, and pointed out that it could gain a dominant position in the electrical power generation market. The OCCP therefore issued an SO, and PGE submitted its remedy proposals.

PGE committed itself to selling additional power through the Polish Power Exchange in an amount effectively equal to the volume of power generated in EDF’s power plant in Rybnik. Interestingly, in 2011, the OCCP rejected the same kind of a remedy in a case concerning another concentration contemplated at the time by PGE, and concerning Energa as a target. In 2017, the OCCP concluded that the proposed behavioural remedy removes the threat of a significant restriction of competition because it limits the possibility of PGE

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9 As at 31 May 2018.
10 Decision of the OCCP No. DKK 156/2017 of 4 October 2017.
abusing its market power post-transaction and also reduces other risks resulting from the vertical relations between PGE and EDF in Poland. The commitment will be in force until the end of 2021 or until the acquired power plant in Rybnik ceases to belong to PGE.

So far in 2018, the OCCP has not issued any conditional decisions.

III THE MERGER CONTROL REGIME

i Responsibility for filing

Once the jurisdictional test is met, the notification to the OCCP and subsequent obtaining the OCCP's clearance for the transaction is mandatory and the latter must be obtained prior to closing. A notification can be filed as early as the actual intention of the parties to concentrate can be shown. Filing can be made based on a conditional agreement, but also based on a memorandum of understanding, letter of intent, heads of terms or a similar document sufficiently expressing the intention of the parties to the transaction. In turn, press releases or a statement of one party are not sufficient. Pre-notification consultations with the OCCP are possible in problematic cases, albeit rare.

Which party (parties) is responsible for filing depends on the type of concentration: in the case of a merger or the creation of a joint venture, all parties to the transaction must notify; and if the concentration constitutes an acquisition of control or an acquisition of part of a business, the acquiring undertaking is responsible for filing.

In the event of the acquisition of joint control, all undertakings acquiring such control must notify (but not the undertaking already exercising joint control or changing its control from sole to joint control). The notification can be made jointly or separately by each of the undertakings acquiring joint control.

ii Review period

In line with the EU merger control rules, the amendment to the ACCP introduced two-phase proceedings. The Phase I review period is one calendar month. Phase II lasts an additional four calendar months. The OCCP may decide on Phase II by way of a procedural, non-appealable decision that requires justification. Such decision may be issued in the event of:

a particularly complex matters;

b matters where there is a reasonable likelihood that the concentration will result in a significant impediment to competition; or

c matters requiring a market survey.

In light the above, unlike at the EU level, the OCCP may instigate the Phase II even without specifying any competition concerns potentially raised by a concentration.

12 Because the OCCP mandatorily publishes in a Public Information Bulletin information that a filing was made, information about the transaction becomes publicly available. In certain situations (e.g., public tenders), this may have an impact on the decision of when to file.

13 If the concentration is conducted by a parent undertaking through at least two of its subsidiaries, the parent undertaking is responsible for filing the notification. Similarly, the parent undertaking may file if the concentration is conducted by a ‘corporate vehicle’.

14 Prior to the amendment to the ACCP the statutory review period was two calendar months.
Any additional questions from the authority stop the clock until answers are given by the notifying parties. Thus, the actual review period (both in Phase I and Phase II) may last longer than the statutory periods. In fact, in particularly problematic cases the proceeding may last six to nine months.

iii Suspension obligation

The parties are prohibited from closing a notifiable transaction without the OCCP’s clearance. A breach of this suspension obligation or a failure to notify at all may result in fines imposed on undertakings obliged to notify a transaction amounting to up to 10 per cent of their worldwide turnover. In practice, the fines imposed by the OCCP are lower than the maximum amount permitted by law, and to date have typically ranged from €2,000 to €20,000. However, recent fines in cases such as Bać-Pol and Fermy Drobiu Woźniak where fines reached significantly higher amounts (€125,000 and €80,000 respectively) show that the gun jumping is one of the OCCP’s growing concerns. There is no sanction of invalidity; however, if an implemented concentration results in a significant restriction of competition, the OCCP may, in addition to fines, impose remedial measures (e.g., divestment).

There is an exemption from the suspension obligation that relates to a public offer for the acquisition or exchange of shares notified to the OCCP, provided that the acquirer does not exercise the voting rights attached to those shares, or exercises those rights only with a view to maintaining the full value of its capital investment or to avoid serious harm to the undertakings involved in the concentration.

iv Third-party rights

Third parties (e.g., competitors, customers and suppliers of the parties to the concentration) do not have a right to formally intervene or participate in the merger control proceedings (e.g., they do not have access to a case file or the right to lodge an appeal from the clearance decision). However, they may submit unsolicited comments in relation to an intended concentration or have the opportunity to present their observations on the occasion of a market survey conducted by the OCCP in the course of the merger proceeding.

v Substantive assessment

The substantive test applied by the OCCP is whether the intended concentration would lead to a significant impediment to competition, in particular by creating or strengthening a dominant position on the market. There is a rebuttable presumption that an undertaking enjoys a dominant position if it has a share exceeding 40 per cent of the market. In principle, in relation to horizontal mergers, the OCCP does not identify a significant impediment to competition below a 40 per cent market share threshold. There was one exception where the OCCP prohibited a horizontal merger even though the combined market share of the undertakings concerned was below the 40 per cent threshold (Decision DKK-12/11, Empik/Merlin).

15 The OCCP is permitted to make additional information requests even if the notification is formally complete, and it often benefits from this right.
16 In 2016, the average review period in Phase I was 38 days (i.e., the level comparable to 2015), while almost half the length it was in 2014 (i.e., before the 2015 amendments to the ACCP).
17 Fines are not imposed on vendors.
18 The equivalent of the ‘significant impediment to effective competition’ test applied at the EU level.
19 There was one exception where the OCCP prohibited a horizontal merger even though the combined market share of the undertakings concerned was below the 40 per cent threshold (Decision DKK-12/11, Empik/Merlin).
notified concentrations,²⁰ the OCCP distinguishes between horizontal, vertical and conglomerate effects and, in relation to all three categories of effects, the OCCP may take into account both unilateral and coordinated effects.

vi  Resolution of competition concerns

In matters where there is a reasonable likelihood that the concentration will result in a significant impediment to competition, the OCCP presents a statement of objections together with its justification. The OCCP may also propose conditions upon which it will clear the concentration. The conditions may also be proposed by the notifying party or parties. The OCCP gives preference to structural remedies, while behavioural ones play a secondary role.

During the subsequent 14 calendar days an undertaking may submit its position in relation to the statement of objections or conditions proposed by the OCCP. Upon an application of the notifying party or parties, the 14-day period may be extended by the OCCP by no more than an additional 14 days.

A statement of objections allows an undertaking to become acquainted with the OCCP’s view of the case in question, and therefore make it possible to propose modifications to the planned concentration so as to ensure its compatibility with competition law. When proposed solutions are not satisfactory to the OCCP, a notifying party can withdraw the notification. In recent practice, statements of objections resulted in such withdrawals to avoid the issuance of a prohibitive decision.

A lack of response from the notifying party or parties to the conditions proposed by the OCCP or the refusal of their acceptance, as well as the OCCP’s refusal to accept the conditions proposed by the undertaking, results in the issuance of a prohibitive decision.

vii  Appeals and judicial review

A decision of the OCCP is appealable to the court of competition and consumer protection (via the OCCP) within one month from the date of that decision having been served. The appeal may be filed by the party or parties to the concentration, the public prosecutor or the Ombudsman.

Where the OCCP considers an appeal justified, it may revoke or change the decision in its entirety or in any part without sending the case files to the court, and it will immediately notify the party concerned by sending a new decision that may be appealed by that party.

The court of competition and consumer protection issues a new ruling concerning the concentration and is not bound by the OCCP’s findings made during the administrative proceedings. Judgments of the court of competition and consumer protection are appealable to the Appeal Court, which verdicts are final.

Final rulings of the Appeal Court may be subject of cassation appeal to the Supreme Court.

²¹  Regional court in Warsaw.
IV OTHER STRATEGIC CONSIDERATIONS

i Joint ventures
As explained, the approach to joint ventures in the Polish merger control regime happens to create an obligation to notify a transaction that is actually not capable of impacting competition in Poland in a way that would justify intervention from the competition authority. As an example, the creation of a joint venture established and active in another part of the world by large capital groups may technically require notification to the OCCP. This is due to the broad notion of ‘joint venture’ (which includes both full function and non-full function joint ventures), the wide scope of the ‘domestic effect’ test in Poland and the relatively low turnover thresholds. The 2015 amendments to ACCP, particularly the introduction of the de minimis exemption for concentrations in the form of a joint venture, did not provide much support in this respect.

This issue is particularly important given that the definition of a joint venture is not related to the notion of joint control. For this reason, sometimes even the acquisition of a minority stake might lead to a notifiable concentration. Unfortunately, the OCCP is not willing to change its approach and interprets the ACCP provisions in this respect in a strict manner.

ii Process
The 2015 amendments to the ACCP in relation to introducing two-phase merger control proceedings were designed specifically to allow the OCCP to better allocate its resources and focus on cases with competition concerns. The OCCP’s practice between 2016 and 2018 confirmed that the review period for simple, non-problematic concentrations reviewed in Phase I remains relatively short, lasting approximately five weeks on average. At the same time, proceedings in cases with competition concerns in which the OCCP issues statements of objections remain long, lasting seven to 10 months. This is partially due to the absence of pre-notification in Poland.

In the merger control processes, the OCCP continues to heavily rely on third parties’ views on a transaction under review. In complex Phase II cases, competitors, customers and suppliers are approached by the OCCP and their views, including justified criticism, if expressed, affect the OCCP’s perception of the market definition and the notified transaction’s impact on competition.

iii Substantive assessment
Although the greater involvement of the OCCP’s internal economists in merger control cases is observed, this does not result in an effects-based analysis of complex cases. Definition of the relevant market is the necessary and most important step in the analysis, and the market shares remain decisive in the assessment of the concentrations’ impact on competition.

iv Remedies
In the conditional decision issued in December 2016 in Eurocash/Eko Holding case, the OCCP ordered a simple divestiture remedy instead of a carve-out one for the first time since

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22 Namely the exclusion from the notification obligation of transactions where none of the capital groups involved in the creation of the joint venture held more than €10 million in Poland in any of the two financial years preceding the concentration.
2014. Moreover, the OCCP accepted a behavioural remedy in the PGE/EDF case. However, it is not expected that the OCCP will significantly modify its general preference towards the structural remedies.

V OUTLOOK & CONCLUSIONS

The 2015 amendments to the ACCP continue to prove its positive effects in a form of shorter merger control review for simple cases. Nevertheless, the proceedings concerning more complex transactions still remain lengthy and prone to the opinions shared in the market surveys conducted by the OCCP. The improved regime has not resulted in changes to the substantive assessment of concentrations, which still focuses on market-share analysis instead of effects-based analysis. At the same time, the OCCP’s practice with regard to merger remedies continues to be notably conservative.

Recent case law of the OCCP show its increased attention to gun-jumping cases, which is expected to continue in the coming years.
I INTRODUCTION

Law 19/2012 of 8 May (the Competition Act) is the main statute applicable to Portuguese merger control. It is enforced by the Portuguese Competition Authority (AdC), which was created in 2003 by Decree Law 10/2003 of 18 January.

According to the Competition Act, a concentration is deemed to exist when a change of control regarding the whole or parts of one or more undertakings occurs on a lasting basis as a result of:

a. the merger of two or more previously independent undertakings or parts of undertakings;

b. the acquisition, by direct or indirect means, of control of all or parts of the share capital or parts of the assets of one or various undertakings, by one or more persons or undertakings already controlling at least one undertaking; or

c. the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (a full-function joint venture).

Control is defined as any act, irrespective of the form it takes, implying the possibility of exercising a decisive influence over the activity of an undertaking on a lasting basis, whether solely or jointly. It results, inter alia, from the acquisition of all or part of the share capital, the acquisition of ownership rights or rights to use all or part of an undertaking’s assets, or the acquisition of rights or the signing of contracts that confer a decisive influence on the composition of the corporate bodies, voting rights or decisions of the undertaking’s corporate bodies.

Concentrations must be notified to the AdC if they meet one of the three alternative jurisdictional thresholds set out in the Competition Act:

a. the parties’ aggregate Portuguese turnover exceeds €100 million and the individual Portuguese turnover of each of at least two parties exceeds €5 million;

b. there is the acquisition, creation or reinforcement of a national market share exceeding 50 per cent; or

c. there is the acquisition, creation or reinforcement of a national market share exceeding 30 per cent but lower than 50 per cent and the Portuguese individual turnover of at least two parties exceeds €5 million.

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1 Rita Leandro Vasconcelos is a counsel and Inês Ferrari Careto is a trainee lawyer at Cuatrecasas.
The calculation of the turnover under the Competition Act closely follows the European Merger Regulation EC 139/2004 (EUMR), including the replacement of the turnover by the sum of a set of items in the case of banking and insurance undertakings.

Since two of the notification thresholds are based on the market share, some uncertainty may arise. Special attention is necessary in these cases, as the AdC has proved to be extensive in its interpretation of the parties' market share threshold. In particular, this can be met by the target company alone (even in the absence of overlap between the parties).

Two or more concentrations between the same natural or legal persons within a period of two years, even when individually considered as not being subject to prior notification, are considered a single concentration subject to prior notification when the concentrations together reach the turnover thresholds.

Although not a concentration, the creation of a joint undertaking not performing all the functions of an autonomous economic entity may still be subject to the Act, and assessed as a restrictive practice, if it has as its object or effect the coordination of the competitive behaviour of independent undertakings, beyond the aim of creating the joint undertaking.

In 2014, the new statutes of the AdC were adopted (Decree Law 125/2014, of 18 August). They maintain one important merger control rule already present in the previous statutes: the possibility of appealing a prohibition decision to the Minister of Economy (as described below). Other important merger control (procedural) rules have been adopted by the AdC in the past few years in several regulations and guidelines, and these are discussed throughout the chapter.

On a subsidiary basis, the Administrative Procedure Code (Decree Law 4/2015, of 7 January) is applicable to the merger control procedures conducted by the AdC, rules of the Administrative Courts Procedure Code (Law 15/2002, of 22 February, as amended) apply to the judicial review of the AdC's decisions in administrative proceedings concerning merger control, and the misdemeanours regime (under Decree Law 433/82, 27 October, as amended) applies on a subsidiary basis to administrative offence proceedings regarding merger control (e.g., gun jumping).

The merger control regime in Portugal closely follows the European Union merger control regime. Mergers meeting the thresholds of the EUMR, although having effects in Portugal, are subject to the exclusive jurisdiction of the European Commission (Commission).

The Competition Act also sets forth the possibility to file notification before executing the relevant agreements, provided the parties show a serious intention of implementing the concentration. Pre-notification contacts can be held on an informal and confidential basis, as a way to determine, for example, if the transaction is subject to notification (you may find a more detailed analysis of this procedure below).

II YEAR IN REVIEW

In 2017, there is record of 50 concentrations notified2 to the AdC (against 64 concentrations notified in 2016). From the 50 concentrations notified, 46 were decided in 2017 and two in 2018, all approved in Phase I without commitments.

However, there are two concentrations that have not yet been decided, as the AdC opened in-depth investigations (RUBIS/Ativos Repsol and Altice/Media Capital).

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2 There were 54 final decisions.
Up until 7 June 2018, 24 concentrations had been notified to the AdC in 2018, 19 were authorised in Phase I without commitments and five (considering the two concentrations currently under Phase II filed in 2017) are still pending.

Of all the concentrations notified to the AdC, only two were withdrawn by the notifying parties, both of them concerning the financial sector.

There are some cases worth mentioning.

i SIBS/UNICRE

The only concentration subject to a Phase II in 2016 involved the acquisition of exclusive control by SIBS, SGPS, SA, (SIBS) of a group of assets of Unicre – Instituição Financeira de crédito, SA (UNICRE) related to its merchant acquiring activity. The concentration was notified to the Authority on 8 September 2016.

SIBS is the holding company of the SIBS Group, specialist in complex interbank payment environments. SIBS supports several central banks, interbank processors and individual public and private bank initiatives in launching and reforming payment systems, comprising all card-related, terminal network driving and other payment-related solutions.

Unicre is a financial and credit institution and the assets object of the merger refer to its merchant acquiring business area, under the Redunicre brand, which designs and commercialises solutions for accepting payments in shops, both physical and virtual, with payment cards from the main national and international payment systems, including, among others, MB, Visa and MasterCard.

In December 2016, the Authority adopted a decision to open an in-depth investigation into the concentration on the grounds that, given the information gathered during Phase I of the proceedings, including the comments of interested third parties, there were indications that the concentration may result in significant impediment to competition (SIEC) in the market for merchant acquiring services through physical POS. The interested parties admitted in the proceedings, which have submitted observations on the operation, include the Portuguese Association of Retailers, Portuguese financial institutions with acquiring business in Portugal and Visa Europe Services, Inc.

In July 2017, the AdC issued a draft prohibition decision, as it considered that such transaction would strengthen the barriers to entry and competition in the market, which could ultimately lead to a monopoly in the Portuguese payment system. Following such decision, SIBS withdrew the notification.

ii Vallis’ fine for gun jumping

In December 2017, the AdC imposed a fine of €38,500 on two undertakings of Vallis Group, Vallis Sustainable Investments I, Holding S.à.r.l. and Vallis Capital Partners, SGPS, SA, for failure to notify the acquisition of sole control of 32 Senses, a network of dental-care clinics.

In setting the fines, the AdC took into consideration the turnover of both companies in 2016 as well as the settlement submissions of the parties. In fact, the parties confessed the facts of the case and accepted full responsibility for the facts, thus benefitting from the settlement procedure. The AdC took into consideration the acknowledgment of the facts by the parties, the notification subsequently filed by the companies, the absence of competition concerns resulting from the merger and the full cooperation with the investigation.

This was the second fining decision of the PCA for failure to notify a concentration meeting the notification thresholds under the Competition Act.
iii  RUBIS/Ativos Repsol

The RUBIS/Ativos Repsol concentration was notified to the AdC in September 2017 and it involves the distribution of LPG through pipeline, in bulk and in bottles. Rubis intends to acquire part of Repsol’s LPG distribution business in the islands of Madeira and the Azores, as well as the networks in mainland Portugal. Currently, three players (GALP, REPSOL and RUBIS) control the supply and distribution of LPG in Azores and Madeira. This concentration will therefore necessarily reduce to two the number of players in this market.

Based on the evidence gathered, the AdC considered that this concentration may significantly restrain competition and can have a negative impact on the supply conditions of LPG to final consumers in the islands of Madeira and the Azores. Therefore, in January 2018, it decided to proceed to an in-depth investigation to ascertain whether this further merger is likely to result in competition concerns.

vii  Altice/Media Capital

The Altice/Media Capital concentration consists of the purchase by Serviços de Telecomunicações e Multimédia (MEO), of the entire share capital of Vertix, SGPS, which owns 94.69 per cent of the share capital of Media Capital, and of the remaining share capital in the securities’ markets. The particularity of this concentration lies in the fact that MEO is the primary player for electronic communications in Portugal, while Media Capital owns TVI, the main Portuguese free-to-air broadcaster.

In light of the elements gathered, and taking into account the opinions received from the competent regulatory authorities – National Communications Authority (ANACOM) and the Portuguese Regulatory Authority for the Media (ERC) – the AdC notified all the parties involved in February 2018 – of its decision to open an in-depth investigation phase. The AdC justified its decision with the serious doubts arising from the compatibility of this concentration with effective competition in the Portuguese market, notably in what concerns to the possible foreclosure of the retail markets for pay-TV and multiple play.

In order to obtain the approval from the AdC, Altice has proposed some remedies that included the separation of its channel distribution, content, advertising and digital-terrestrial television and the creation of an independent figure to monitor the compliance with said commitments. However, the AdC has recently rejected Altice’s remedies, arguing that they were not specific enough and failed adequately to address the question of potential non-compliance and distortion of the market. Consequently, Altice retrieved the notification and the AdC terminated the proceedings on 19 June 2018.

III  THE MERGER CONTROL REGIME

i  Filing

Prior notification is mandatory, with no exceptions, for concentrations meeting the notification thresholds.

A concentration subject to mandatory notification must not be implemented prior to being notified and authorised (or before a specified lapse of time) by the AdC.

There are two exceptions to the obligation of non-implementation of the merger:

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3 Case 39/2017 – RUBIS/Ativos Repsol.
4 Case 35/2017 – Altice/Media Capital.

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a public offer of acquisition or exchange notified to the AdC may be implemented before a decision by the AdC provided the acquiring party does not exercise the voting rights inherent in the shareholding, or exercises them merely with a view to protecting the full value of its investment on the basis of a derogation previously granted; and

b before or after the notification filing, the notifying parties may submit a reasoned request to the AdC for a derogation from the obligation of no prior implementation. The AdC will analyse the consequences of suspending the operation (or of suspending the exercise of voting rights by the undertakings concerned) and the negative effects of the derogation on competition and may, if necessary, add to the derogation conditions or obligations destined to ensure effective competition. A complaint can be lodged against the decision to accept or reject the request for a derogation, but no appeal is admissible. To date, there have been very few derogation decisions, as the AdC is very restrictive in the granting of such waivers (derogations were recently granted for reasons of imminent bankruptcy).

The notification must be filed by the undertaking or undertakings or person or persons acquiring control. The parties involved in a full merger or in the creation of a joint venture are responsible for jointly notifying the merger. In submitting the notification, the notifying parties are required to use the notification forms of Regulation 60/2013, of 14 February, which sets the procedural rules for merger notifications. Since 2009, merger notifications can be submitted electronically.

Notifications only become effective with the payment of the filing fee (as defined in Regulation 1/E/2003 on merger control procedure fees, of 25 July, and which vary between €7,500 to €25,000 according to the turnover of the undertakings concerned). An additional filing fee, corresponding to 50 per cent of the base fee, must be paid upon the opening of a Phase II investigation.

ii Local effects test
Concentrations that take place or may produce effects in the Portuguese territory must be notified if one of the three thresholds mentioned in Section I, above, is met. It is sufficient that at least one of the parties has direct or indirect sales in Portugal (even through an agent or distributor), even if any of the parties are established or have assets in Portugal. Foreign-to-foreign transactions must be notified if the jurisdictional thresholds are met.

iii Substantive assessment
The substantive assessment applied by the AdC is the significant impediment to SIEC, as set out in the EUMR. Concentrations likely to give rise to a SIEC in the national market or in a substantial part of it will be prohibited.

To determine the effects of the concentration on the structure of competition, the AdC will take into consideration the structure of the relevant markets, the position of the undertakings and their competitors in the relevant markets, the purchaser’s market power, potential competition and the existence of barriers to entry.

The AdC’s assessment can also include the consideration of any technical and economic progress that does not constitute an impediment to competition, provided there are efficiency

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gains that benefit consumers resulting directly from the concentration (efficiency defence), as well as the control of essential facilities by the parties and the possibility of access to these facilities provided for competing undertakings.


A decision authorising a concentration is considered to cover the restrictions directly related to the implementation of the concentration and necessary for it. Some of the ancillary restraints included in authorised concentrations include non-compete obligations between the seller and the acquirer in order to preserve the value of the acquired business, non-solicitation of customers and workers, and non-compete obligations between a joint venture and parent companies.

iv Consequences for not filing

There are serious consequences for not filing a concentration subject to mandatory notification. The most important consequence is the lack of production of legal effects for transactions implemented before notification and clearance. Transactions implemented in breach of a prohibition decision are null and void. The AdC may also revoke a concentration that has been implemented in disregard of a decision of non-opposition imposing conditions or obligations.

The AdC may impose on the notifying parties fines of up to 10 per cent of the turnover of the year immediately preceding the final decision issued by the AdC for each of the undertakings concerned. Persons holding positions in the managing bodies or responsible for the supervision of the relevant department may also be held responsible, with fines of up to 10 per cent of their annual income applying.

In cases of failure to notify, a periodic penalty payment of up to a maximum of 5 per cent of the average daily turnover in the year immediately before the decision can be imposed for each day of delay.

If the AdC becomes aware of a concentration subject to mandatory filing being implemented within the prior five years that was not previously notified, it can initiate ex officio proceedings, in which case the filing fees double.

The AdC can order the separation of the undertakings or of any aggregated assets, including the unwinding of the transaction or cessation of control, or take all the measures deemed necessary to restore the situation that existed prior to the concentration.

In situations in which a notified concentration was implemented before clearance, the AdC can order that the parties who acquired control immediately suspend their voting rights, that the board of directors not undertake any act that is not an act occurring in the ordinary course of managing the business, and can prohibit the disposal of shareholdings or parts of the assets of the acquired undertaking. Penalties for implementing an operation before express or tacit clearance by the AdC are similar to the ones levied for failure to notify.

In December 2012, the AdC issued its first decision for breach of the prior notification obligation during the modernised competition rules, in the ex officio Farminveste/Pararede case, which concerned the acquisition, in June 2008, of sole control of Glintt – Global Intelligent Technologies, SGPS, SA by Farminveste – Gestão de Participações, SGPS, Lda. Three undertakings were fined €150,000 for implementing a concentration before receiving

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6 Fines are calculated according to the AdC’s Guidelines on setting fines, of 20 December 2012.
7 Case 47/2009 – Farminveste/Pararede.
Portugal

clearance. This decision was later quashed by the Competition, Regulation and Supervision Court (the Competition Court) on grounds of infringement of the defendants’ defence rights. In a subsequent procedure regarding the same case, the AdC settled with the undertakings concerned for €118,837. This shows that the settlement procedure may used in these kind of cases.

In December 2017, and on the same basis, the AdC imposed a fine of €38,500 on two undertakings of Group Vallis, Vallis Sustainable Investments I, Holding S.à.r.l. and Vallis Capital Partners, SGPS, SA, for failure to notify the acquisition of sole control of 32 Senses, a network of dental-care clinics.

Procedure

There is no fixed deadline for the notification filing; however, concentrations meeting the notification thresholds must not be implemented prior to being notified and authorised, or before a tacit decision is made by the AdC (standstill obligation).

The merger may be notified after the execution of the relevant agreement or, in the case of public offers of acquisition or exchange, following the date of the preliminary announcement of the public offer, or of the announcement of the acquisition of a controlling shareholding in an undertaking with shares listed on a regulated stock market. Concentrations resulting from a public procurement procedure may be notified after the awarding decision and before the public contract is executed.

Concentrations may be also notified before the execution of the relevant agreement (voluntary notification) when the parties to the concentration offer a serious intention to conclude an agreement (e.g., by signing a letter of intent or a memorandum of understanding) or, in the case of a public offer of acquisition or exchange, where they have publicly announced their intention to make such an offer.

The notifying parties may, on a confidential and informal basis, enter into pre-notification contacts with the AdC up to 15 days before the expected notification date, according to the procedure set down in the Guidelines on pre-notification procedure (of 27 December 2012). Such contacts are designed to help determine whether the transaction is subject to notification, to identify relevant markets and which information needs to be provided and to explore possible competition concerns. As this pre-notification phase is not mandatory, there is not much information available on the estimated length of these pre-notification contacts, but in practice they take at least 15 days to one month.

The assessment of a concentration may involve two phases (Phases I and II).

In Phase I the AdC will assess whether the concentration will result in SIEC in the relevant markets. Within 30 working days (extendable if information requests are made to the notifying parties), the AdC must conclude Phase I and take one of the following decisions: that the case does not amount to a concentration; clear the concentration (with or without commitments); or open an in-depth investigation (Phase II) if it has serious doubts that the concentration will result in SIEC. The majority of concentrations in Portugal are decided in Phase I.

Phase II investigations must be concluded within a maximum time limit of 90 days from the date when the notification becomes effective. In practice, a period of 30 (or more) working days for Phase I, and a period of 60 working days for Phase II, respectively, are common. Upon request by the notifying party or with its agreement, the global time limit can be extended by the AdC for a period of up to a maximum of 20 additional working
days. Within 75 working days from notification, the AdC hears the notifying parties and interested parties (unless the AdC intends to adopt a non-opposition decision without imposing conditions).

At the end of Phase II, the AdC may adopt either a clearance decision (with or without commitments) or a prohibition decision. Prohibition decisions can only be adopted in Phase II, with the exception of the merger in the Ongoing/Prisa/Media Capital case, which was prohibited in Phase I following the binding negative opinion of the media regulator (see below).

Both the 30 and the 90-working-day deadlines may be suspended if requests for additional information are made by the AdC to the notifying parties, if parties offer commitments (suspension for 20 working days), and in the case of a prior hearing of the notifying parties or of interested third parties having submitted observations.

If no decision is adopted within the time limits (including suspensions), a non-opposition decision is deemed to have been made (tacit decision). To date, there have only been three tacit decisions, all in 2003 (the year of the AdC’s creation). In 2013, the notifying parties to the acquisition of Sport TV appealed to the Competition Court claiming that a tacit approval had occurred (due to the issuance of a legal opinion by the media regulator after the expiration of the deadline established), which the AdC rejected. The Competition Court agreed with the AdC.

The notifying party can at any time withdraw the notification as well as renounce its rights or legally protected interests, except in those cases stipulated in law.

vi Accelerating the procedure
Since 2012, a simplified procedure has been available for concentrations that, on a preliminary assessment, do not pose significant impediments to competition. The simplified notification form requires a lower level of information to be provided to the AdC. Under Regulation 60/2013, the simplified notification form may be used to notify concentrations where there are no horizontal overlaps, where the combined market share does not exceed 15 per cent (or 25 per cent if the share increase is not higher than 2 per cent) in horizontal mergers, or where the combined market share does not exceed 25 per cent in vertical or conglomerate mergers.

In July 2007, the AdC adopted its Simplified Procedure Guidelines, setting out a simplified (and faster) decision procedure available for concentrations that are not likely to raise competition concerns, such as concentrations that do not entail a significant change to the competitive structure of the market (no overlap), concentrations that have no significant horizontal or vertical effects (or negligible effects), or concentrations that do not amount to a concentration subject to mandatory pre-notification.

Pre-notification contacts with the AdC can substantially reduce the need for information requests, which stop the clock. Additionally, a voluntary notification is possible whenever the parties to the concentration offer a serious intention to conclude an agreement, which can also anticipate a decision by the AdC.

8 To date, there have been only five prohibition decisions in Portugal: Arriva/Barraqueiro (Case 37/2004, 25 November 2005); Petrogal/Esso (Case 45/2004, 14 December 2005); Bristal/AEO/AEE (Case 22/2005, 7 April 2006); TAP/SPDH (Case 12/2009, 19 November 2009); and Controlinveste/ZON Optimus/PT (Case 4/2013, 31 July 2014).

9 Case 41/2009 – Ongoing/Prisa/Media Capital.
The notifying parties may offer commitments in Phase I when necessary to gain the approval of the AdC. In the *EDP Renewables/Sociedades Ventinveste* case, the acquisition by EDP Renewables, the Portuguese leading renewable energy operator, of several companies that managed wind farms, was decided in Phase I, with the offering of commitments by the notifying party.

However, in the *Altice/Media Capital*, even though Altice proposed (during Phase I), some remedies concerning competition and media pluralism, the AdC did not consider them to be sufficient or adequate and decided to open an in-depth investigation. This case was filed in 2017 and is still ongoing.

**vii  Third-party rights**

Within a time limit of five working days counting from the day when the notification becomes effective, the AdC will, at the expense of the notifying party, publish the key elements of the concentration in two daily national papers and set a time limit of no less than 10 working days for interested third parties to submit observations. Interested third parties that submit concerns regarding the concentration are considered opposing parties and are entitled to intervene in the prior hearing.

Prior to the adoption of any decisions (non-opposition or prohibition decisions), third parties that have already intervened in the procedure shall be heard. The prior hearing suspends the time periods for the adoption of the decision for at least 10 working days. Third parties opposing the transaction may also access a non-confidential version of the AdC’s file in both Phases I and II information regarding the internal affairs of the parties may be considered by the AdC to be confidential if disclosure of such information to interested parties or third parties could cause serious damage.

Third parties can appeal AdC decisions adopted in the context of merger control.

**viii  Remedies**

The notifying parties may, at any time in Phase I or II, on their own initiative or after an informal invitation from the AdC, submit commitments with a view to ensuring that effective competition is maintained. Remedies can only be submitted by the parties, which must negotiate them with the AdC.

The AdC recommends that, in Phase I, parties submit commitments within 20 working days from notification and in Phase II, within 40 working days following the decision to open an in-depth investigation.

The submission of commitments suspends the time limit for the adoption of a decision for a period of 20 working days counting from the first working day following the submission of commitments and expiring on the day that the notifying party is informed of the AdC’s decision to accept or refuse such commitments.

The AdC will refuse commitments whenever it considers that the submission is a delaying tactic, or that the commitments are insufficient to remedy the competition concerns. A complaint may be lodged against the refusal decision, but no autonomous appeal is allowed.

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10 Case 55/2015 – *EDP Renewables/Sociedades Ventinveste*.
11 See footnote 3.
12 Case 4/2013 – *Controlinveste*ZON*PT/Sport TV*PPTV*Sportinveste.
The authorisation of a concentration with remedies may be subject to conditions or obligations that are designed to maintain effective competition.

The Guidelines on Remedies (of 28 July 2011) set out detailed procedural rules on the proposal, negotiation and implementation of remedies, in line with the Commission’s practice. Commitments may include structural (such as divestments) or behavioural commitments. Both were already accepted by the AdC. Behavioural remedies are normally permitted by the AdC (even in decisions where divestitures have been imposed), although in its Remedies Guidelines it declares that divestitures are preferable to behavioural commitments.

Non-compliance with the remedies is subject to consequences that include:

a the opening of an investigation of the breach;

b fines of up to 10 per cent of the company’s turnover;

c possible revocation of the clearance decision; and

d the agreements related to the merger being considered null and void.

ix Appeals

Merger control decisions are appealable to the Competition Court13 as special administrative judicial cases. Appeals must be lodged within three months of a merger’s notification (although when the decision is null and void, there is no time limit for the appeal). The appeal does not have a suspensive effect unless such provision is established in the interim measures duly handed down.

Rulings handed down by the Competition Court in administrative cases are appealed to the Lisbon Appeals Court within 30 days of the appealed ruling. Appeals focusing on issues of law must be lodged directly to the Supreme Court of Justice.

Appeals against rulings by the Lisbon Appellate Court are lodged at the Supreme Court of Justice and must be limited to issues of law. These appeals do not have suspensive effect.

According to publicly available information, to date, only the prohibition decision in the Arriva/Barraqueiro case14 (the Competition Court upheld the decision and an appeal before the Lisbon Appeals Court is now pending), the clearance decision in the Arena Atlântida/Pavilhão Atlântico case15 (appeal lodged by a third-party competitor to the Competition Court, meanwhile dismissed) and the clearance decision in the case SUMA/EGF16 (an appeal to the Competition Court, which was lodged by third parties opposing the concentration, is currently pending) have been appealed.

In an appeal lodged before the Competition Court in 2014, the notifying parties requested the annulment of the AdC’s decision to initiate an in-depth investigation based on the argument that the approval of the Controlinveste*ZON*PT/Sport TV*PPTV*Sportinveste merger had occurred by tacit consent. The appeal was denied by the Competition Court.

Under the Statutes of the AdC, prohibited merger decisions may also be appealed by the notifying parties to the Minister for the Economy within 30 days from the notification of the prohibition decision. The Council of Ministers may overturn a prohibition based on fundamental national economy interests that override the competition concerns of the

13 Created by Law 46/2011, of 24 June.
14 Case 37/2004 – Arriva/Barraqueiro.
15 Case 38/2012 – Arena Atlântida/Pavilhão Atlântico.
16 Case 37/2014 – SUMA/EGF.
concentration. This appeal has only been used once, in the Brisa/AEA case, a decision that had originally been prohibited as it would create a market share of more than 75 per cent in some point-to-point routes.

x Regulatory review

The AdC has exclusive competence to decide on concentrations subject to mandatory prior notification. However, concentrations in markets subject to sectoral regulation (such as telecommunications, energy, transport, postal services, financial services, capital markets, insurance, health and media) are also subject to sector-specific legislation, which may involve additional assessment by the relevant regulatory AdC.

The AdC, prior to making a final decision, must request the opinion of the sectoral regulatory AdC, setting a reasonable time limit for its response. In general, with the exception of Entidade Reguladora para a Comunicação Social, the media regulator, such opinions are not binding. When the opinion is binding, the time limit for the AdC to adopt a final decision is suspended. The absence of such binding opinion does not, however, prevent the AdC from adopting a final decision.

In the Ongoing/Prisa/Media Capital case, a concentration that involved the acquisition of joint control of Media Capital, which is active in the television and radio sectors, the AdC prohibited the merger (in Phase I) even though it raised no competition concerns, following the negative binding opinion of the media regulator, which considered the concentration to be likely to restrict media plurality and freedom of speech.

In the Altice/Media Capital case, the concentration was also subject to regulatory review as it concerned both the electronic communications and the media sectors. Therefore, the AdC requested both ANACOM and ERC to issue an opinion on the impact of said concentration in each sector. ANACOM issued a negative opinion, considering that the transaction as it was envisaged could create significant impediments to effective competition in several electronic communications market and ERC stated that the envisaged transaction raised several risks to media pluralism, such as the increase of contents’ uniformity in Portugal, preventing the growth or entry in the market of rival content production companies. ERC's decision in this case was not considered to be binding, as the board did not issue a unanimous negative resolution.

Mergers in particular sectors (such as insurance, banking and media) must also be approved by the relevant regulatory authorities.

IV OTHER STRATEGIC CONSIDERATIONS

Under Article 9 of the EUMR, the AdC has in several cases referred concentrations with a Community dimension to the Commission. The latest request, filed on 5 March 2015, concerned the acquisition by Altice, a multinational cable and telecommunications company, of the Portuguese and Hungarian assets of PT Portugal SGPS, which the Commission rejected.

17 Case 22/2005 – Brisa/AEA.
18 See footnote 6.
19 See footnote 3.
20 Case COMP/M.7499 – Altice/PT Portugal.
Several concentrations meeting the notification thresholds of the Act have been referred to the Commission under Articles 4(5) and 22(4) of the EUMR.

Under the EUMR, the AdC has a regular and intensive cooperation agreement in place with the Commission and the national competition authorities of the other EU Member States (in particular, the AdC and the Spanish Competition AdC hold monthly meetings). It also takes part of the European Competition Network, the International Competition Network and the European Competition Authorities Association.

Moreover, both the regular and simplified forms require the notifying parties to indicate if and in which other national competition authorities the notified concentration has also been filed.

The acquisition of a minority shareholding is only deemed a concentration if it confers control, either sole or joint, on the acquirer, and will only be notifiable if it meets the notification thresholds.

A concentration does not exist where:

a the acquisition of shareholdings or assets is performed by the insolvency administrator within the context of an insolvency procedure;

b the acquisition of shareholdings as mere collateral; and

c the acquisition by credit institutions, financial institutions or insurance companies of shareholdings in undertakings held on a temporary basis and acquired with a view to reselling the shareholdings, provided they are not to be held on a lasting basis and no voting rights are exercised in respect of such shareholdings.

The acquisition by the state of a controlling shareholding in a credit institution, or the transfer of its business to a transition bank as ordered by the Bank of Portugal, is also not considered to be a concentration (Article 20(1) of Law 63-A/2008, of 24 November, as amended).

V OUTLOOK & CONCLUSIONS

Although the AdC has been paying close attention to cartels – having conducted several dawn raids last year – there was also a considerable activity in what regards merger control review. In fact, since the end of 2017, the PCA has imposed a fine on undertakings for failure to comply with the prior notification obligation and opened two in-depth investigations into mergers notified by the involved parties. We can expect this attitude to continue in 2018.

In its priorities for 2018, the AdC undertook to be more effective in the merger control procedures, in order to avoid unnecessary burdens on the companies. It also promised to pay special attention to non-notified mergers implemented in the past five years without its prior approval.

We also highlight that the key economic sectors under the PCA’s scrutiny this year will include banking, financial markets and insurance, telecommunications and media, energy and fuel, health and pharmaceuticals, education, distribution and food, the environment and waste management, liberal professions, transport and infrastructure, and construction.
Among other observations and recommendations, the PCA indicates significant growth in what concerns the fintech industry\textsuperscript{21} that will raise several challenges for the financial sector, particularly in the banking market.

As for ongoing cases, the AdC is expected to decide on the \textit{RUBIS/Ativos Repsol} and \textit{Altice/Media Capital} mergers. A decision regarding the appeal from the Competition Court’s decision that confirmed AdC’s decision to prohibit the \textit{Barraqueiro/Arriva Investimentos} merger is expected in 2018.

\footnote{The PCA recently published a paper for public consultation on Technological Innovation and Competition in the Financial Sector in Portugal, which reviews the potential competition consequences of the entry of new fintech companies in the financial sector.}
I INTRODUCTION

Federal Law No. 135-FZ dated 26 July 2006 on Protection of Competition (the Competition Law), which has undergone a series of amendments, is the main statute in the area of merger control. The Russian competition authority, the Federal Anti-monopoly Service (FAS), and its regional offices remain the authority responsible for the enforcement of the merger control rules.

Decrees of the Russian government and regulations of the FAS are adopted in furtherance of the statutory provisions and deal with the technical aspects of the filing, including the contents of merger clearance notifications and other procedural issues. In addition, the competition authority has issued clarifications and guidelines, for instance, on the assessment of joint venture agreements, which shed some light on the analysis of non-compete clauses.

Apart from the Competition Law requirements (i.e., the merger control regime), transactions involving a foreign party may be caught by Federal Law No. 160-FZ dated 9 July 1999 on Foreign Investments in the Russian Federation (the Foreign Investments Law) and Federal Law No. 57-FZ dated 29 April 2008 on Procedures for Foreign Investment in Companies of Strategic Importance for National Defence and Security of the Russian Federation (the Strategic Investments Law) that have been recently amended. The Strategic Investments Law applies to transactions associated with the participation of foreign investors in companies active in strategic sectors (e.g., nuclear power, military technology, space industry, aircraft, cryptography and the manufacturing of explosives). A specifically appointed government commission is responsible for the approval of such transactions.

II YEAR IN REVIEW

i Key legislative developments

While 2017 was not marked by significant changes to the Competition Law, both market players and the FAS were adapting to the new rules brought by the Fourth Anti-monopoly Package: the relevant practice is still evolving.

First, the scope of transactions subject to merger clearance was broadened: competitors are required to obtain the prior approval of the FAS for joint venture arrangements in the Russian Federation if the turnover or asset-based thresholds are exceeded. Last year the FAS reviewed such notifications across different industries, including several high-profile deals. Thus, if the following thresholds are met, the joint activity requires mandatory clearance:

1 Maxim Boulba is a partner and Maria Ermolaeva is an associate at CMS Russia.
the aggregate worldwide value of assets of the groups involved exceeds 7 billion roubles;
or
the aggregate worldwide revenue of such groups for the past year exceeds 10 billion roubles.

Clearly, the term ‘establishment of a joint venture’ is correct. The term ‘agreement on joint activities’, however, is broad (as suggested by the FAS’s clarifications published in 2013, well before the entry into force of the Fourth Anti-monopoly Package) so, in principle, it may also catch other commercial arrangements aimed at establishing cooperation. As a consequence, regardless of whether a separate legal entity is created, the merger clearance requirements of the Competition Law may potentially catch cooperation agreements even though they are not an M&A transaction.

Still, taking into account the broad definition of ‘agreement on joint activities’ and somewhat limited experience of the competition authority in the matter, competitors should treat all contemplated cooperation agreements with caution and assess whether the merger clearance provisions of the Competition Law are going to be triggered. If the above thresholds are not exceeded by the parties involved, formally there is no need to clear an ‘agreement on joint activities’. In order to avoid the risks specified above and gain certainty, the parties may still consider submitting the agreement voluntarily to the FAS, as provided for in the Competition Law.

Further, in line with the liberalisation trend, the register of economic entities with a market share exceeding 35 per cent is no longer maintained by the FAS: a specific ground for obtaining prior approval in relation to the transactions involving such companies has been abolished. By virtue of this amendment, the number of transactions previously subject to the FAS’s clearance on this largely administrative ground (if the financial thresholds were not met) was reduced.

The amendments of the Fourth Anti-monopoly Package led to a number of procedural changes in the field of merger control. The FAS is required to publish the basic information on the submitted merger control filings (including those relating to the joint venture agreements discussed above) on its website so that all interested parties are able to provide their opinion on the impact of transaction on competition.

Furthermore, the parties may submit the information on the contemplated transaction before filing a formal notification, provide supporting documents and economic analysis, and propose remedies. The FAS is supposed to take this information into account when reviewing the notification for clearance. According to the FAS officials, this procedure is advisable in the situations where a transaction may give rise to competition concerns. Also, it is possible to submit the merger clearance notification electronically, in the format prescribed by the FAS.

Further amendments resulting in the increase of the asset-based threshold applicable to the target and its group, which is now equal to 400 million roubles, can be considered as a positive development.

Both the Foreign Investments Law and the Strategic Investments Law were amended in 2017. Notably, in accordance with the Foreign Investments Law the chairman of the government commission (the Russian prime minister) is now entitled to rule that essentially any transaction by a foreign investor in respect of any Russian company may require approval should this be necessary in order to ensure national defence and security. The FAS is supposed to notify a foreign investor of the requirement to seek approval within three days. A transaction implemented without such an approval is null and void. The amendments specifically mention
that for the purpose of applying the above provisions the term ‘foreign investor’ shall cover Russian citizens that also have a different citizenship, as well as organisations controlled (i.e., directly or indirectly owned at more than 50 per cent) by foreign investors, including Russian entities. The ultimate effect of these controversial amendments, which, according to the FAS, were loosely inspired by the US regime, will naturally depend on the relevant practice. Still, it is clear that they hardly bring any comfort to foreign investors by creating ambiguity and additional exposure to regulatory risks in Russia.

Furthermore, certain important changes were introduced to the Strategic Investments Law, for instance, failure of a foreign investor to submit a post-transaction notification on the acquisition of five or more per cent of shares in a strategic company may now lead to the FAS initiating court proceedings to deprive a foreign investor of the voting rights at the general meeting of shareholders until this investor files the notification (previously, liability was limited to administrative fines). If the transaction is subject to an obligation of a foreign investor to comply with certain terms formalised in an agreement, the government commission is authorised to establish any obligations, rather than only those prescribed in the Strategic Investments Law (i.e., the list is not exhaustive). In addition, the amendments reflected the existing practice of the competition authority as to defining the involvement of a company in strategic activities, slightly updated and extended the list of activities deemed strategic and limited the application of the exemption provided for entities controlled by Russian citizens. Finally, the rules of the Strategic Investments Law for foreign investors incorporated in offshore jurisdictions or controlled by offshore companies have been tightened, which often requires careful review in terms of deal structuring.

ii Recent practice of the competition authority

As in the past, the FAS seeks to move from a formalistic approach and concentrate on major deals that may give rise to competition concerns. The FAS focus includes the following markets: pharmaceuticals and healthcare, the chemical industry, energy and natural resources, agriculture, infrastructure, transportation, financial services, and telecommunications. Currently, the FAS is starting to look into the impact of digital economy and IT businesses.

Several global M&A deals (primarily involving the acquisition of control rights over a Russian company by virtue of acquiring a foreign target (group) with a subsidiary in Russia) were reviewed by the competition authority in 2017. Examples of the significant cases include conditional clearance of the Uber/Yandex. Taxi joint venture (the FAS communicated with the competition authorities of Kazakhstan and Belarus based on the waivers from the undertakings involved and issued an order for both taxi aggregators and their joint venture to (1) ensure that passengers are provided with the detailed information on their orders and can access the history of orders, and (2) not to impose prohibitions on drivers and passengers as to the use of applications of other taxi aggregators) and the notorious Bayer-Monsanto deal (eventually the FAS, among other things, prescribed Bayer to transfer certain technologies (molecular selection of specific crops) to Russian recipients and provide non-discriminatory access to digital farming platform following the commercial launch of products in Russia).

According to the FAS’s officials, 1,103 pre-transaction notifications (lower than in 2016, due to the reduced M&A activity) and 128 post-transaction notifications were reviewed in 2017. Overall, the pattern established in the past remains in place. In total, clearance was granted in respect of 1,209 notifications. As to conditional clearance, binding orders were issued in 30 cases, while clearance of one transaction was associated with the satisfaction of certain pre-closing conditions (see below for more details of the procedure). Behavioural
remedies dominate and structural remedies such as divestment remain uncommon. Administrative barriers (practical application) constitute one of the main impediments for the development of structural remedies.

The FAS refused to clear 22 transactions (21 in 2016). Most of the few cases involving rejection of transactions in 2017 related to the market for energy resources and other highly concentrated markets where the notified deals involved undertakings with significant market shares and the transaction could limit competition, including creating or strengthening a dominant position (e.g., transportation, construction). Other grounds for rejection were more technical, for instance, failure to provide the documents or accurate information requested by the FAS, such as information on the group structure or ultimate beneficial owners (in the absence of which the competition authority could not reach a conclusion on the transaction’s impact on competition).

As suggested by the FAS’s annual report, even in the existing economic and political environment, foreign companies are still interested in potential investment opportunities in Russia. For example, 13 transactions were cleared by the government commission in 2017.

III  THE MERGER CONTROL REGIME

i  Transactions and thresholds

Generally, the notification is to be undertaken as a pre-transaction clearance. Post-transaction filing is possible only in relation to certain intra-group transactions (instead of pre-transaction filing) where the information on the group is provided to the competition authority before the transaction is implemented.

If an intra-group transaction is implemented between legal entities or individuals that are part of the same ‘group of persons’ under Article 9(1)(1) of the Competition Law (a company and an individual or legal entity directly or indirectly holding more than 50 per cent of shares in that company), it is expressly exempt from the merger control requirements. If the parent company holds more than 50 per cent of the subsidiaries’ shares, the transactions between the parent company and its (direct or indirect) subsidiaries, as well as between the subsidiaries controlled by the same parent company, would benefit from this exemption.

To this end, the pre-transaction filing may still be necessary for certain intra-group transfers. Alternatively, Article 31 of the Competition Law provides for a specific clearance procedure for intra-group transactions that would otherwise be subject to prior approval. It is possible to make a prior disclosure of the group structure to the FAS, which is made publicly available by the competition authority, and then further notify the FAS of the transaction once completed.

The Competition Law provides the following jurisdictional thresholds for pre-transaction clearance (see Section II, supra, for the thresholds applicable to joint venture agreements):

a  the aggregate worldwide value of assets of the acquirer’s group and the target’s group of companies exceeds 7 billion roubles and the aggregate worldwide value of assets of the target’s group of companies exceeds 400 million roubles; or

b  the aggregate worldwide turnover of the acquirer’s group and the target’s group of companies from the sale of goods, works and services during the last calendar year exceeds 10 billion roubles and the aggregate worldwide value of assets of the target’s group of companies exceeds 400 million roubles.
The above thresholds apply to undertakings active in the commodity markets. Different thresholds apply to financial organisations, as established by the government together with the Central Bank of Russia.

The worldwide information is relevant for calculation purposes; the thresholds are based on the book value as reflected on the balance sheet as of the latest reporting date preceding the notification date. The value of assets (turnover) of the acquirer's group and the target's group are taken into account. The assets of the seller and its group are not relevant if the deal results in the seller and its group losing the right to determine the business activities of the target. Still, if the seller disposes of a minority stake or otherwise retains control over the target, the assets of the ‘whole’ group are used for the calculation.

Under the Competition Law, the following transactions require pre-transaction approval from the FAS if the thresholds are met:

a the acquisition of more than 25 per cent, 50 per cent or 75 per cent of the voting shares in a Russian joint-stock company, or more than one-third, one-half or two-thirds of the participatory interests in a Russian limited liability company;
b the acquisition of direct or indirect rights to determine the business activities of a Russian company (including those based on voting arrangements or agreements such as the shareholders’ agreements providing for additional voting rights) or to act as its executive body;
c the acquisition of the fixed assets (except for land plots and non-industrial buildings or premises, such as warehouses) or intangible assets of a company if the book value of the acquired assets located in Russia exceeds 20 per cent of the total book value of the fixed and intangible assets of the transferor (for companies operating in commodity markets);
d the incorporation of a company if:
  • its charter capital is paid up by the shares, participatory interests or fixed or intangible assets of another company; and
  • a new company, as a result, acquires: more than 25 per cent of the voting shares in a Russian joint-stock company; more than one-third of the participatory interests in a Russian limited liability company; or fixed or intangible assets that are located in Russia and amount to more than 20 per cent of the total book value of the fixed and intangible assets of the transferor;
e the reorganisation (in the form of a merger or consolidation); and
f the execution of a joint venture agreement between competitors.

Pure foreign-to-foreign transactions need to be cleared before the Russian competition authority if they are related to the acquisition of more than 50 per cent of the voting shares in a foreign company that generated turnover on the Russian market in an amount that exceeds 1 billion roubles in the preceding year, or the acquisition of direct or indirect rights to determine the business activities or to act as the executive body of such company. A local presence is not required.

Furthermore, the acquisition of shares in a non-Russian holding company that owns shares in a Russian subsidiary may be caught by the Russian merger control rules as the acquisition of indirect control rights over the Russian subsidiary. This is one of the most common grounds for clearance, partially due to the fact that the concept of ‘control rights’
is rather broad and leaves much room for interpretation. As long as the target does not have any direct sales, or own shares in Russian companies or assets located in Russia, the filing is not necessary.

ii Time frames

The notification must be submitted before the closing to allow sufficient time for the FAS to review the notification. The clearance is valid for one year from the date of the decision. If the transaction is not completed within one year, a new filing procedure must be initiated.

The initial review period is 30 days from the date of submission of the notification with all the documents to the competition authority. Transactions that do not restrict competition are normally cleared within this statutory term, provided that the required information has been submitted in full to the FAS.

The second stage review may evolve differently. In 2017, for example, this in-depth review was initiated with regard to 144 notifications (100 in 2016). Thus, the FAS is entitled to extend this time frame by an additional two months if there are concerns that the transaction may restrict competition (in-depth analysis is necessary or further information is requested). The FAS publishes the information concerning the transaction on its website so that the interested parties can share their views on its effects with the authority.

iii Review procedure

The concept of ‘restriction of competition’ constitutes the main part of the substantive analysis. Generally, transactions that do not result in the restriction of competition are cleared. The percentage of rejections is rather small: in most transactions that are prohibited, their adverse impact on competition is obvious and cannot be remedied.

The FAS has a right to prescribe binding pre-closing conditions (e.g., granting access to the infrastructure or certain IP rights, or divesting) that must be complied with by the parties before the clearance will be granted. The relevant term for implementing the conditions is determined by the competition authority and will not exceed nine months. Once the required conditions are complied with, the supporting documents are submitted to the FAS, which reviews the documents within 30 days and issues a final decision either granting clearance or prohibiting the transaction. Practically speaking, extensions of this kind are very rare, since the FAS clearly prefers to issue binding orders providing for post-closing conditions.

If the transaction is subject to ‘strategic’ clearance under the Strategic Investments Law, the antitrust clearance can only be granted if there is an affirmative decision by the government commission. From a technical perspective, this filing is administered by the FAS that deals with the initial review and assessment. The competition authority looks at the formal aspects, communicates with other authorities (e.g., the Federal Security Service and the Ministry of Defence), and, thereafter, provides the government commission with its recommendations and assessment. The final decision rests with the commission. The review period is extended until the government commission issues a decision on the transaction. If the government commission does not grant its approval, then the antitrust clearance notification is rejected.

The review of the notification results in one of the following decisions: clearance of the transaction (conditional or unconditional) or rejection of the notification. According to the statistics, rejections are not common: except for politically impacted cases, a transaction can be prohibited only if it restricts or may restrict competition. The refusal to grant clearance can also be based on formal grounds: if the data included in the notification turns out to be false, or if the applicant fails to provide the documents crucial for the FAS to complete its review.
In practice, the FAS typically issues its decisions in line with the deadlines specified in the Competition Law. Transactions that do not restrict competition are on average cleared within 40–45 days (including the time for obtaining the hard copy of the clearance decision). This timing usually serves as guidance for the parties in planning the closing date.

There are no official acceleration procedures or other options to expedite the review of a merger clearance notification. The most obvious recommendation is to submit the full set of documents specified in the Competition Law and the FAS regulations to avoid delays or a situation where an incomplete notification is considered as ‘not presented’. In the latter case, the applicant has a right to request the authority to return the notification, proceed with the collection of the outstanding documents and file all the documents anew (the review period will begin again). The collection of the necessary documents (e.g., information on the parties, their groups, assets and turnover, business activities, transaction structure) can take some time to complete as in many instances the Russian merger control filing remains a rather technical exercise. Although this is not formally necessary, to streamline the review the parties may choose to provide economic data (evidence), such as their assessment of the market shares and main competitors.

Requests for information from the FAS are very common. Normally, after the filing is submitted the applicant’s representatives communicate with the FAS case handler in order to pre-empt any official requests. In contrast to the official written requests that are likely to lead to the extension of the review period, the ‘informal’ requests can be addressed swiftly, which results in a more straightforward review of the notification.

### Third-party access

The role of third parties in the FAS’s review is rather limited. Their basic right is to provide their outlook on the envisaged transaction to the authority. Interested parties may provide their opinions as to effect of the transaction on competition. In many instances, the FAS on its own initiative decides to send requests to other market players and collect their feedback. Under the Competition Law, the FAS may challenge mergers and initiate the associated proceedings. Any third parties that wish to challenge a merger would need to contact the FAS.

More importantly, no third parties can have access to the merger control files to examine the data submitted by the parties or obtained by the competition authority. Where necessary, the sensitive commercial data shall be provided to the FAS as part of the notification. The officials are specifically required to keep such information confidential and cannot disclose it to third parties. Failure to comply with these rules can result in liabilities. The review of the notifications containing such information is confidential, and from a practical perspective, the benefits of this procedure are not obvious (for example, it is not always possible to directly contact the case handler in the course of the review).

### Competition concerns, appeals and judicial review

If the FAS has competition concerns, it may decide to grant conditional clearance. In this case the FAS issues a binding order where the necessary remedies are specified. Generally, structural remedies are uncommon, and behavioural remedies are preferred by the FAS. By way of illustration, the requirement to create a commercial policy and make it publicly available (so that existing and potential distributors can have access to the document) is one of the most common remedies, particularly in the pharmaceuticals industry.
The reasoning behind the remedies can be based on political considerations in ‘sensitive’ transactions; nonetheless, the remedies are usually envisaged to deal with competition concerns. There is no official procedure for negotiating remedies. With the probable exception of high-profile deals, the FAS is generally free to prescribe the remedies it deems appropriate without consulting with the parties. However, the parties may try to propose certain alternatives in order to address the competition concerns. According to the FAS’ officials, the introduction of these negotiations into the FAS practice is possible in the future.

The decisions and binding orders of the FAS establishing the remedies (e.g., if the parties involved find the remedies excessive) can be challenged in full or in part in the Russian commercial courts. The binding order is to be suspended until the court decides on the matter. The number of appeals in the area of merger clearance is fairly insignificant. The applicants mainly appeal the FAS decisions on rejection of the notification on formal grounds. The court practice is controversial but there are examples of successful appeals.

**vi Effect of regulatory review**

If the transaction requires prior approval of the competition authority, it must be suspended until clearance and can be implemented after approval has been granted. There are no exceptions to the suspensory effect; no waivers or derogations are available. In this regard, there are no provisions in the Competition Law that would allow the rollout of the global transaction without obtaining a clearance in Russia. The carve-out scenario may be acceptable in certain situations. However, its implementation would be subject to a number of conditions to be complied with in order to avoid any contravention with the Competition Law requirements.

Gun-jumping practices are prohibited and may result in the same sanctions as failure to submit the notification: administrative fines of up to 500,000 roubles imposed on an acquirer (or the founders of a new company) required to notify the authority (fines of up to 20,000 roubles may also be imposed on the company officials), and in the most extreme cases invalidation by the court upon the FAS claim. The main risk is the potential rejection of the notification by the FAS. The transaction may be scrutinised by the competition authority as, most likely, it will be reluctant to grant clearance based on various grounds (e.g., purely technical and formalistic).

The FAS is the authority that controls compliance with the merger control rules. As discussed above, the government commission is in charge of the approval of transactions caught by the Strategic Investments Law: only the Commission can grant ‘strategic’ clearance. By way of background, other laws may contain industry-specific merger approval requirements (for instance, in banking and insurance where the Central Bank of Russia is the regulator), which are separate from the Competition Law provisions, and restrictions or prohibitions as to foreign participation (media, air transportation).

**IV OTHER STRATEGIC CONSIDERATIONS**

The key issues associated with coordinating the clearance of a global transaction with a Russia-related component are the strict suspensory regime of the Competition Law with a limited number of carve-out options and the arbitrary approach often exercised by the FAS in relation to more complex transactions, which makes it difficult to predict the exact scenario of the review. In this regard, the basic recommendation would be to start preparation of the filing in advance and structure the relevant undertaking with due consideration of the
Russian filing and its time frame. Particular attention should be paid to proposed transactions with ‘strategic’ companies: the importance of initial analysis, planning and compliance with the formal requirements cannot be overestimated.

Considering that not all matters in the area of merger control are expressly dealt with in the Competition Law, the FAS’s practice is evolving, as is the Competition Law. Still, a lot of concepts and rules existing in other jurisdictions or used in the course of global deals are provided for in the Competition Law and may not be applicable or are highly problematic in Russia. Thus, one of the most obvious examples is the clearance and assessment of ancillary restraints in the context of M&A transactions.

There are no special rules applicable to situations where the Russian target is in financial distress or undergoing insolvency. Thus, if the financial thresholds are met by the companies and groups involved, transactions with the companies under insolvency proceedings (most notably, the asset deals) are subject to the same treatment as those with ‘active’ companies. Essentially the same requirements for obtaining the clearance will apply.

V OUTLOOK & CONCLUSIONS

The FAS considers the best global practices (e.g., clearance of joint venture agreements) and tries to be consistent, with the objective of reducing the administrative burden for businesses and liberalising the rules in the area of merger control. In the past, some of its initiatives were widely discussed by the practitioners but eventually were not included in the Fourth Anti-monopoly Package. The FAS has recently prepared a draft law (also known as the Fifth Anti-monopoly Package) introducing amendments to the Competition Law with a view to streamlining the application of antitrust rules to digital economy and IT companies. The document is now being discussed with the industry experts.

As suggested by various comments made by the FAS officials and the available draft law, the additional amendments to the Competition Law relating to merger control can be reasonably expected and should introduce an additional ground subjecting a transaction to merger clearance (transaction value), as well as more detailed rules on the review of merger clearance notifications and extension of the review term.
Chapter 34

SERBIA

Rastko Petaković and Bojana Miljanović

I  INTRODUCTION

The Serbian Competition Commission is well known locally for its track record of imposing fines for antitrust infringements. In late 2009, a new law came into effect authorising the Competition Commission to impose fines directly; however, no one expected that by 2014 the total amount of fines it had imposed would reach approximately €40 million. While the significant amount of these fines in the end was not actually collected since the Commission’s decisions imposing them were overturned by courts, this nevertheless shows the competition authority’s willingness and readiness to use the full scope of its statutory powers when going against what it sees as infringements of competition. Although its fining policy in relation to merger control is falling behind antitrust, the merger control has set another stellar record in the number of cases reviewed and cleared over the years.

Outside Serbia, the Competition Commission is best known for being one of the jurisdictions consistently considered in multi-jurisdictional filings. Despite its relatively small population (around 7 million), Serbia has had a disproportionate number of merger control cases – around 100 a year on average since the enactment of the first EU-modelled competition law in 2005. Because of its low notification thresholds and no local effects required, European and global transactions involving at least one party with a material business interest in Serbia need to be pre-notified to the Competition Commission in Serbia. The merger control in Serbia is that of ex ante control of concentrations.

This experience in dealing with merger control cases has helped the authority develop its capacity and gain a better understanding of how markets work. It is now well equipped to handle the most complex cases and deal with them within a relatively short time frame. Additionally, it has consistently shortened the review period in more straightforward cases.

The Competition Law of 2009 moved the Serbian antitrust regime closer to EU law. The Law was amended in November 2013 to overcome the procedural deficiencies that had been realised in practice since 2009 (for instance, the longer periods of the statute of limitations for imposing fines were introduced). The 2013 amendments changed the deadline for the issuance of merger clearances in inquiry proceedings (Phase II). The Competition Commission is now required to issue its decision in an inquiry proceeding within four months from commencing the Phase II procedure (instead of three months, as was the case

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The substantive regime is to a large extent identical to the regime introduced by the first EU-modelled competition law, the Competition Law of 2005. Thus, the current regime mostly meets the standard of review that exists in the EU.

Since 2008, the Serbian competition rules have been formally exposed to the influence and case law of the EU. Under the Stabilisation and Association Agreement (SAA) with the EU, which entered into force on 1 September 2013, Serbia formalised its commitment to harmonise its legislative framework with that of the EU.

The Central European Free Trade Agreement (CEFTA), similar to the SAA, envisions the application of EU competition law principles and rules to all matters in which trade among the member countries may be affected. Therefore, while Serbian competition law normally would not apply to sales outside Serbia, the CEFTA rules will, together with the laws of Serbia and the interpretative criteria and principles of the EU, which the national authorities are obliged to follow. While the Commission considered the CEFTA area as a free-trade zone in its merger review practice, there has been no case law so far regarding competition infringements in cross-border trade between member countries.

The Competition Commission, which is seated in Belgrade, is composed of two decision-making bodies, the President and the Council, which are appointed by Parliament. The Council consists of the President and four other members. The Commission is an independent regulatory body that is authorised to implement the law, and is responsible exclusively to Parliament.

Parties may challenge the Competition Commission's decisions before the Administrative Court, which may, either set aside the Commission's decisions and return it to the Commission to repeat the procedure, or take full jurisdiction over the matter and replace the Commission's decision with its own. In practice, when it wants to strike down a Commission decision, the Administrative Court is reluctant to take full jurisdiction over competition law matters and prefers to set aside the Commission decision and return it to the authority for reconsideration.

The Administrative Court is normally required to test the Competition Commission's findings and hear evidence on the issue, although it rarely takes any such action. The Administrative Court's judgments are final, but the parties may appeal them to the Supreme Court of Cassation, which can only decide on points of law.

Since 2006, the Competition Commission has blocked two transactions and has imposed remedies in close to 20 other cases. With regard to remedies, it has imposed remedies even in foreign-to-foreign transactions. Previously, such remedies had been more complex structural remedies, but recently it tends to impose both structural and behavioural remedies equally.

Certain specific rules and regulations, including the occasional deviation from the general competition law regime, are contained in the appropriate sector legislation; for example, banking and insurance regulations (specific merger thresholds that concurrently have to be approved by the National Bank), telecom rules (ex ante regulation and special rules regarding significant market power operators), public health norms (maximisation of drug prices), media laws ('disruption of media pluralism') or even local ordinances in certain cases (fixing of local taxi and public transport fares).
II YEAR IN REVIEW

Number-wise, merger control still represents the most significant part of the Commission’s practice, accounting for the vast majority of its decisions (138 merger decisions were issued in 2017, compared to less than 10 in the sphere of antitrust).

137 of the concentrations the Commission examined during 2017 did not raise serious competition concerns, and all of them were unconditionally cleared in Phase I. Only one concentration went into in-depth, Phase II proceedings where it was cleared with commitments. This should not be interpreted as the authority’s reluctance to afford adequate scrutiny to mergers it sees as potentially problematic; rather, such statistics would appear to simply evidence that during the previous year there were not too many problematic mergers on the Commission’s table.

The Competition Commission has developed its capacities, both quantitatively and qualitatively. The number of case handlers has increased as well as the number of professional trainings and educational efforts aimed at increasing specialisations of the case handlers. Therefore an even further increase in the overall activities of the Competition Commission can be expected. It fulfilled its promise of increasing its investigative activities by performing dawn raids and several sector inquiries.

i The successful implementation of the Merger Control Regulation

At the beginning of 2016 a new Merger Control Regulation was adopted and it has since been successfully applied in practice. The Regulation introduced short-form merger filings. Today, a vast majority of notifications has so far been submitted as a short-form, implying that this became a prevailing manner of submitting merger notifications, especially in foreign-to-foreign transactions. The Regulation was received well and is being applied in practice by both undertakings and the Commission. When filing transactions that are unlikely to raise any competition concern, the applicants are therefore relieved of the burden of collecting and delivering to the Competition Commission certain items that were mandatory under the old regime.

The submission of a short-form notification is possible if the parties are neither competing in the same market nor present on vertically related markets, and their market shares do not exceed the thresholds prescribed in the regulation. The submission of a short-form notification is also possible if the applicant acquires sole control of an undertaking over which it already exercises joint control.

ii Serbia Broadband/I.KOM merger

In March 2017, following an in-depth (Phase II) merger assessment, the Competition Commission cleared the takeover of I.KOM by Serbia Broadband (SBB), a leading Serbian cable operator. The Commission identified three relevant product markets: (1) retail market for provision of fixed telephony service; (2) retail market for provision of fixed telephony service; and (3) retail market for provision of fixed telephony service. The Commission determined the territory of city of Belgrade as the relevant geographic market, as I.KOM, the target, was only present on the territory of Belgrade.

From a substantive viewpoint, the most interesting part of the clearance decision are the commitments that Commission imposed on SBB, one of them being a structural measure (i.e., divestment of secondary network infrastructure in overlapping buildings), and the other two behavioural (i.e., reporting on prices and mandatory offer for existing users of I.KOM).
When analysing the effects the merger would have on the relevant markets, the Commission had some initial competition concerns arising out of the merger. Therefore, it imposed certain commitments on the acquirer.

### Prointer IT Solutions/Alti
In July 2017, the Competition Commission imposed a fine on Prointer IT Solutions for implementing a concentration without prior clearance from the Commission.

In particular, the underlying concentration concerned the change from joint to sole control by Prointer IT Solutions and Services, a local IT company, over Alti, a local computer distributor, on the relevant market of technical goods. After the acquisition of 50 per cent of the shares in the target was cleared by the Commission, the acquirer failed to submit another merger notification for the acquisition of the remaining 50 per cent shares in the target. The Commission established that, even if the acquirer acquired 1 per cent of the remaining shares, it would acquire sole control over the target, meaning that such acquisition is notifiable under Serbian competition law.

Upon assessment of the amount of fine, the Commission took into consideration the behaviour of the acquirer and the fact that the subject concentration did not affect the competition on the relevant market of retail sale of audio-visual products and consumer electronics. The fine was imposed on the acquirer alone and it amounted to 0.25 per cent of the company’s turnover generated in Serbia in 2016 (i.e., 6.7 million dinar) and this is the first fine ever imposed by the Competition Commission for implementing a concentration without prior clearance.

### III THE MERGER CONTROL REGIME

#### i Definition of concentration

The Serbian Competition Law defines concentrations in the same way as the EUMR. Essentially, all forms of ‘amalgamations’ of previously independent undertakings qualify as concentrations. In formal terms, a concentration can result from:

- **a** mergers and other status changes;
- **b** acquisition of direct or indirect control by one or more undertakings over another undertaking or part of an undertaking; or
- **c** full functional joint ventures, where full functionality is interpreted similarly to the EUMR’s interpretation (e.g., creation of a new undertaking by two or more independent undertakings that will exercise joint control over the new undertaking, but that will be independent from its shareholders and have full access to the market).

The notion of control is practically identical to that used in the EUMR.

The following are not concentrations:

- **a** temporary acquisitions of shares by banks and other financial institutions in the course of regular business activities, assuming they intend to dispose of the shares and assuming there is no change of control on a lasting basis;
- **b** acquisitions of shares by investment funds, assuming the shares are used only for maintaining the value of the business;
- **c** cooperative joint ventures; and
- **d** acquisition of control by a bankruptcy administrator.
ii  Merger control thresholds
Merger filings are mandatory in Serbia if either of the following two thresholds are met:
a  the combined annual turnover of all the parties to the concentration realised on the world market in the previous accounting year exceeds €100 million, where at least one of the parties to the concentration had an annual turnover exceeding €10 million in the Serbian market; or
b  the combined annual turnover of at least two parties to the concentration on the Serbian market exceeded €20 million in the previous accounting year, where at least two of the parties to the concentration each had an annual turnover exceeding €1 million in the Serbian market.

The Competition Law also applies to foreign-to-foreign mergers, in which case the same jurisdictional thresholds apply. Therefore, there is no local effects doctrine prescribed under the Competition Law. The Competition Commission has in many cases examined and issued clearances in foreign-to-foreign transactions. It has taken a very strict and formalistic approach in this respect, and it requires mandatory filing whenever either of the two thresholds is met. Normally, foreign-to-foreign mergers without any competition concerns in the local Serbian market will be processed through a simplified Phase I proceeding.

Additional rules may apply for certain sectors (i.e., banking, insurance, telecommunications and media).

iii  Procedure

Filing deadlines
The merger notification must be filed with the Competition Commission within 15 calendar days of the date of entering into the binding agreement, the announcement of the public offer or the acquisition of controlling shares, whichever takes place first. If the parties do not file in a timely manner, the Competition Commission may impose fines ranging from €500 to €5,000 for each day of late filing. The filing can be made based on a non-binding letter of intent, memorandum of understanding or any similar document showing both parties’ serious intent to enter into the transaction in which case the 15-day deadline does not apply. The Commission has so far been reluctant to accept unilateral declarations or commitments as valid proof of this.

Pre-notification discussions
The Competition Law does not provide for pre-notification discussions with the Competition Commission. However, informal discussions with the authority are possible, in particular concerning mergers that are expected to raise competition concerns and go through Phase II review. In relation to Phase I merger filings, pre-notification discussions are not common and given the effectiveness of Phase I reviews, they are not needed. The duration of informal discussions would depend on the complexity of the case in question. Any representations made orally by the Commission are not legally binding on them.

Length of review
The length of review depends on whether the Commission decides on implementing fast-track (Phase I) or inquiry proceedings (Phase II). For Phase I, the statutory deadline is one calendar month after filing a complete merger notification. Requests for information may restart the
clock, however, in practice the deadline is usually calculated from the initial filing. Phase II can only be initiated after the Phase I proceeding has expired; the Commission then has a time frame of four calendar months to issue a decision in this case. If the Commission does not issue a decision either clearing (conditionally or unconditionally) or forbidding the merger within the above-cited deadlines, the merger is considered to be cleared.

**Standstill obligation**

The law prescribes a standstill obligation – the parties must suspend the implementation of the transaction until the clearance is issued, or until the statutory deadlines have expired.

Mandatory stay of the concentration does not prevent the implementation of a takeover notified to the relevant authority pursuant to the law regulating the takeover of joint stock companies, or the law regulating privatisations, under the condition that the notification of concentration is made in a timely manner, that the acquirer of control does not execute its managing rights based on the acquired rights, or that it does so only for the purpose of maintaining the full value of investments and based on a special approval obtained from the Commission. So far, in practice the Competition Commission has been reluctant to issue such an approval.

**Confidential information**

Parties may classify as confidential sensitive information and documents they are submitting as part of the merger control proceedings. Provided that the party shows that it will suffer substantial damage due to publication of such sensitive information or documents, such items will not be published or otherwise made accessible to the public. The decisions of the Commission, apart from information classified as confidential, are regularly published on its website.

**Merger clearances with commitments**

The first ‘conditional’ clearances in Serbia were issued almost a decade ago. In their form, the Competition Commission’s conditional decisions were very similar to its regular (unconditional) clearances. All of the conditional clearances were issued by way of simplified procedures, even though one would expect that an in-depth procedure be initiated once the competition authority reached the conclusion that conditions and obligations must be imposed. In those cases, the Competition Commission would simply conclude, at a certain stage of the review process, that the merger filing could neither be cleared nor prohibited, but rather that certain conditions had to be imposed on the applicant. Such conditions were those that the competition authority found to be most appropriate in the case in question, and unfortunately usually imposed without any consultations with the applicant itself.

These shortcomings have been overcome over time. In the Stampa Sistem/Futura Plus case, decided in 2012, the Competition Commission followed the basic EU merger control rules that apply to clearances with conditions and obligations. This was the first case that included negotiations between the competition authority and the applicant, and the applicant’s proposal of both structural and behavioural measures led to the issuance of a merger clearance acceptable to the competition authority.

The Competition Commission is now well versed in dealing with commitments in the merger context – not only in assessing them during the merger control procedure, but also in monitoring their implementation post-merger. The latest Commission’s merger clearance
with strings attached came in March of 2017, in the Serbia Broadband/I.KOM case, when the authority was prepared to clear the merger only subject to the implementation of both structural and behavioural measures —.

**In-depth merger control procedure (Phase II)**

The Competition Commission may initiate an in-depth merger control procedure in two situations: (1) if the combined market share of the parties on the relevant market in Serbia amounts to at least 40 per cent or the Commission otherwise reasonably assumes that the concentration raises serious competition concerns (e.g., if the concentration leads to a significant prevention, limitation or distortion of competition on the relevant market); or (2) if a notifiable concentration was implemented without being approved by the Commission.

During the in-depth (Phase II) procedure, it is common for the authority to contact the parties’ main competitors, their largest suppliers and buyers in order to assess what their expectations of the concentration in question are. For instance, the authority may want to establish whether the competitors, suppliers and buyers estimate that their position will be degraded or perhaps improved by the implementation of the concentration.

If it finds that the concentration does not satisfy the conditions for being cleared, it will issue to the applicant a statement of objections and invite the applicant to respond within the deadline given by the Commission. In its response, the applicant may offer conditions it is willing to accept in order to obtain the Commission’s clearance. When it finds the offered conditions satisfactory, the Commission will clear the concentration conditionally. Also, it is possible and common to discuss and negotiate the proposed conditions with the Competition Commission before the final proposal of the conditions is submitted.

The maximum duration of the Phase II procedure is four months. If, during that time frame, the Commission does not decide the case, the concentration is deemed cleared by virtue of the law. As far as we are aware, there have not been any such cases thus far.

**Fees and penalties**

The applicant must pay a fee for the issuance of the clearance in summary proceedings amounting to 0.03 per cent of the total worldwide annual income realised by the merging parties (capped at €25,000). The fee for the issuance of a merger clearance in the inquiry proceedings is set at 0.07 per cent of the total annual income realised by the merging parties (capped at €50,000). If the Commission rejects the notification on procedural grounds, the fee is €500; should the Commission prohibit a transaction, the fee for issuance of such a decision is €1,200.

Implementing a concentration that was not notified or not cleared can result in a fine of up to 10 per cent of the infringing undertaking’s total annual turnover realised on the Serbian market in the year prior to the start of the proceedings. Late filings may be sanctioned with a procedural penalty amounting to between €500 and €5,000 for each day of failing to file the notification within the prescribed 15-day deadline. The procedural penalty is also capped at 10 per cent of the infringing undertaking’s total annual turnover.

To date, one fine, in July 2017, was imposed in Serbia for implementing a concentration without clearance.

The trend of investigating non-notified merger took a swing in February 2016, when an *ex officio* proceeding was initiated against a banking group for allegedly implementing
a concentration (that concerned an asset deal) without a clearance. This proceeding was, however, suspended on merits as in the end it was found that the subject transaction did not amount to a concentration.

The Commission may de-merge an already implemented concentration (de-concentration), which can be effected by way of a split-off, sale of shares, cancellation of the agreement or performance of any other action that would lead to the restitution of the status prior to implementation of the concentration. The Commission has not implemented any de-concentrations to date.

The Commission may also impose both behavioural and structural measures on merging entities to alleviate antitrust concerns. In practice, the Commission has used both behavioural and structural measures. Furthermore, special sanctions, such as additional fines or non-registration, might be applicable in certain particular sectors (i.e., banking or telecommunications).

The Serbian Criminal Code contains a wide provision targeting the conclusion of restrictive agreements (and not abuses of a dominant position) related to price-fixing, limitation of production or sales or market-sharing – meaning that a range of behaviour concerning dominance abuse has been decriminalised as of March 2018.

Judicial review

Resolutions of the Competition Commission are final in administrative proceedings. A party to the proceedings or a third party with a legal interest may challenge the decision before the Administrative Court of Serbia by initiating an administrative dispute through filing a claim within 30 days of receipt of the decision, or within 60 days if the appellant did not receive the decision. The appeal does not preclude the enforcement of the decision. However, the Competition Commission can in certain cases postpone enforcement until the Court ruling upon the reasoned request of the appellant.

The Administrative Court may confirm the decision, annul the decision and return it to the Competition Commission for reconsideration, or decide the case itself. According to the letter of the law, the Administrative Court must decide the administrative dispute within two months of receiving the claim. However, in practice the administrative dispute before the Administrative Court takes much longer than this, and can last even a couple of years.

The Supreme Court of Cassation decides on extraordinary legal remedies against the rulings of the Administrative Court. Such request may only be filed if the Administrative Court has violated the law or procedural rules where this could have affected the outcome of the proceedings.

iv Substantive assessment

When deliberating on the permissibility of a concentration, the Competition Commission particularly considers the following:

a the structure of the relevant market;
b actual and potential competitors;
c the market position of the parties and their economic and financial power;
d the possibility to choose suppliers and customers;
e legal and other barriers to entry in the relevant market;
f the level of competitiveness of parties;
g supply and demand trends for relevant goods or services;
technical and economic development trends; and
the interests of consumers.

The Competition Commission applies the SIEC test in combination with the dominance test, based on wording that has been transposed from the EUMR. Most often, the authority will analyse the level of concentration of the market by relying on the Herfindahl-Hirschman Index, and assess the parties’ market power based on the market share information.

Despite the SIEC test being an integral part of the assessment toolkit, the Competition Commission in practice initiates Phase II proceedings, discusses remedies and blocks transactions almost exclusively by relying on the dominance test.

IV OTHER STRATEGIC CONSIDERATIONS

i Voluntary notification

Exceptionally, the Competition Commission has the authority to institute an ex officio merger control procedure if an unnotified concentration results in the merged undertakings having a market share above 40 per cent. The 40 per cent market share threshold is not a mandatory jurisdictional threshold (i.e., the parties are not obliged to file a notification with the Competition Commission if their combined market share in any relevant market exceeds 40 per cent).

However, to avoid a situation of an ex post analysis, it may be advisable to notify the Competition Commission of the intended merger if the parties’ market shares do exceed this threshold (in Serbia). To our knowledge, the Competition Commission has not initiated any ex officio merger control procedure where a concentration that has not been notified might have resulted in the parties’ market share exceeding 40 per cent.

ii Acquisition of minority shareholdings

Similarly to the EU regime, an acquisition of a minority shareholding may trigger the filing requirement provided that the minority shareholder would be able to exercise certain controlling rights that fall outside the scope of ordinary rights attributed to a minority shareholder. However, while the European Commission would normally rely on its own guidelines (the Consolidated Jurisdictional Notice), the Serbian Competition Commission has enacted no such guidelines, but looks at the European Commission’s Consolidated Jurisdictional Notice as persuasive authority. Parties normally refer to the Consolidated Jurisdictional Notice, although in certain cases the Competition Commission may use a wider interpretation of control than that found in the European Commission’s Notice.

iii Takeovers by a public takeover bid

Regardless of whether the turnover thresholds have been met, all concentrations occurring as a result of a public takeover bid within the meaning of Serbian legislation governing the takeover of joint stock companies must be notified to the Competition Commission.
V  OUTLOOK & CONCLUSIONS

The merger control regime in Serbia functions relatively well and is relatively straightforward. The Competition Commission has increased its capacity and handles cases in an efficient and fairly consistent manner. Some of its activities have to a certain extent been motivated by public pressure and consumer expectations, but its standard of review is transparent and to a large extent predictable.

Serbian merger rules are largely aligned with the EU merger regime, which was continuously confirmed by annual EU Commission’s Progress Reports concerning Serbia. The possibility of short-form merger filings has significantly cut the red tape surrounding the merger filings in Serbia, making the merger control procedure more efficient and less burdensome for the parties. The Competition Commission has increasingly become more lenient towards requiring formalities such as apostilisation or notarisation of documents, especially in foreign-to-foreign filings and tends to adopt a more practical approach.

In the coming period, the Commission is expected to continue with its high level of activities in the field of mergers. In particular, since it has repeatedly publicly emphasised its statutory power to impose fines for late filing or implementing a merger without clearance, the first fine for implementation of a concentration without clearance ever imposed in July 2017 did not come as a surprise in this regard. We are also expecting some developments in terms of adoption of the new Competition Law in the mid-term (i.e., during the course of 2018) and there have been public considerations of upcoming amendments; however, there have not been any specific changes as of yet. As far as we are aware, the new law is still being discussed by the relevant working groups, with the possibility of the new competition law being adopted in late 2018.
I INTRODUCTION
Mergers that take place in Singapore, or which may affect markets in Singapore, are subject to the merger control regime established by the Competition Act, Chapter 50B of Singapore (the Act), unless excluded or exempt under the Act. The Act is administered and enforced by the Competition and Consumer Commission of Singapore (CCCS) (established on 1 January 2005 as the Competition Commission of Singapore, as a statutory body under the Ministry of Trade and Industry). Section 54 of the Act prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods and services.

i Definition of a merger
Pursuant to Section 54(2) of the Act, a merger is deemed to occur if:

a two or more undertakings, previously independent of one another, merge;
b one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
c the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

The following are excluded from the prohibition under Section 54 of the Act:

a mergers that are:
• approved by any minister or regulatory authority (other than the CCCS) pursuant to any requirement imposed by written law;
• approved by the Monetary Authority of Singapore pursuant to any requirement imposed under any written law; or
• under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition;
b mergers involving any undertaking relating to any specified activity as defined in Paragraph 6(2) of the Third Schedule to the Act; and
Mergers that are under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition may be subject to pre-merger notification or approvals as set out under such written law or code of practice.

**ii  Applicability to joint ventures**

A joint venture may be subject to the prohibition under Section 54 of the Act if it is considered a merger. In order to be considered a merger, a joint venture must fulfil the following criteria:

- **a** joint control must exist, where two or more parties have the possibility of exercising decisive influence (including negative control) over that undertaking;
- **b** the joint venture must perform all the functions of an autonomous economic entity, where the joint venture operates on a market and performs the functions normally carried out by undertakings operating on that market, including having a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible); and
- **c** the joint venture must be intended to operate on a lasting basis.

A joint venture that merely takes over a specific function (e.g., research and development or production) of its parent companies’ business activities without having access to the market is not considered a merger.

No special substantive test is applied for a joint venture that is considered a merger under the Act. Whether a joint venture is prohibited under Section 54 of the Act will depend on whether it results, or may be expected to result, in a substantial lessening of competition within any market affecting Singapore, and whether any exemptions or exclusions apply.

**iii  Foreign-to-foreign mergers**

The prohibition under Section 54 of the Act may apply even where the merger takes place outside Singapore or where any merger party is located outside Singapore, so long as the merger could have effect on any market affecting Singapore (whether as part of a global, regional or local market).

**iv  Jurisdictional thresholds**

There are no jurisdictional safe harbours where mergers which do not trigger specified quantitative thresholds are exempt or excluded from the prohibition under Section 54 of the Act.

Generally, the CCCS is likely to give further consideration to the merger if it meets the following quantitative thresholds:

- **a** the merged entity has a market share of 40 per cent or more; or
- **b** the merged entity has a market share of between 20 and 40 per cent and the post-merger market share of the three largest firms (i.e., the concentration ratio of the three largest firms) is 70 per cent or more.

The quantitative thresholds are based on the relevant markets defined in accordance with the rules set out in the gazetted CCCS Guidelines on Market Definition.
The CCCS also considers mergers that satisfy the following *de minimis* thresholds to be of more concern:

- **a** the turnover in Singapore (i.e., turnover booked in Singapore as well as turnover from customers in Singapore) in the financial year preceding the transaction of at least one of the parties exceeded S$5 million; or
- **b** the combined worldwide turnover in the financial year preceding the transaction of all of the parties exceeded S$50 million.

The CCCS has stressed that it may also investigate transactions that fall below the indicative market share thresholds and the *de minimis* thresholds. Parties must conduct a self-assessment to establish whether their merger could give rise to a substantial lessening of competition within any market affecting Singapore and whether a merger notification should be made to the CCCS.

**II  YEAR IN REVIEW**

The merger regime under the Act came into force in 2007. As at 31 May 2018, the CCCS has received 66 merger control notifications, of which, the CCCS proposed to move to a Phase II review for 15 transactions, and commitments were considered for no less than six transactions.

The CCCS has also exercised its powers to issue provisional decisions to prohibit mergers, arising from horizontal and non-horizontal (i.e., vertical and conglomerate) effects. The most recent being 25 May 2018 when the CCCS issued a provisional decision to block Wilhelmsen Maritime Services AS’s proposed acquisition of Drew Marine Group Coöperatief UA and Drew Marine Partners LP’s technical solutions, fire, safety and rescue businesses in the marine chemicals sector in Singapore. The CCCS has also, in the past 18 months, cleared a merger conditional on Singapore-specific behavioural and divestiture commitments, and conducted extended Phase I reviews for three transactions.

| Statistics on merger filings with the CCCS: 1 July 2007 to 31 May 2017 |
|-----------------------------|-----------------------------|-----------------------------|-----------------------------|-----------------------------|
| Merger filings lodged with the CCCS | Merger filings that the CCCS had proposed to move to Phase II | Merger filings where commitments were considered | Merger filings where CCCS took a decision to block | Merger investigations by the CCCS* |
| 66                          | 15                          | No less than 6              | 3                           | Undisclosed                 |

* Where the CCCS probes or challenges a merger which has not been notified, such a process is confidential.

In addition to the review of notified mergers, the CCCS has also been actively investigating transactions that have not been notified. Such investigations may be triggered by the CCCS through its market intelligence function or by third-party complaints. On 13 April 2018, the CCCS issued its first-ever notice of interim measures directions in relation to the acquisition of Uber Technologies, Inc’s (Uber’s) South-East Asian business by Grab Inc (Grab) and Uber’s acquisition of a 27.5 per cent stake in Grab. Interim directions imposed on Grab include, among others, the maintenance of pre-transaction pricing, product options and commission rates, holding separate of certain operational data, the removal of exclusivity obligations for new drivers and the appointment of a monitoring trustee. It is noteworthy that the CCCS commenced its investigation and issuance of interim measures notwithstanding the parties’ announced intention to voluntarily lodge a post-completion merger notification to the CCCS.
i Revised CCCS guidelines

On 1 December 2016, the CCCS Guidelines on the Substantive Assessment of Mergers 2016 came into effect. The key additions with practical impact on the assessment of the antitrust risk for mergers in Singapore, and the need for merger notifications to be made, include clarifications on:

a minority shareholdings giving rise to control, in particular, in view of attendance and voting patterns at shareholders’ meetings, and the wide dispersion of shares;

b a substantial lessening of competition being deemed to arise even if it is not felt across the entire market or all dimensions of competition, which supports a market segmentation approach in the assessment of mergers;

c additional evidence required in supporting a failing firm defence;

d additional evidence required in supporting a defence on countervailing buyer power of customers; and

e additional types of net economic efficiencies to be considered by the CCCS, and the supporting documentary and quantitative evidence required.

ii Merger clearances

The CCCS had received total of six merger filings between 1 June 2017 and 31 May 2018, among which transactions notified in other jurisdictions include Wilhelmsen Maritime Services/Drew Marine, Essilor/Luxottica, CAE/SIA. Within the same period, the CCCS had issued a total of seven clearance decisions.

III THE MERGER CONTROL REGIME

i Voluntary regime

Under the Singapore merger control regime, a merger notification to the CCCS is voluntary, but advisable and expected if the merger may potentially result in a substantial lessening of competition in any relevant market or a market segment (defined in accordance with the rules set out in the gazetted CCCS Guidelines on Market Definition).

In the absence of a filing, the merger parties bear the antitrust risk as there is no limitation period on the time frame after which the CCCS may cease to have the power to investigate a transaction. There is accordingly an evergreen risk of an investigation and subsequent divestments or other remedies to the transaction, even where the transaction has been implemented for some time. The CCCS has stated that it will generally not consider the costs of divestment that the merger parties would have to incur, as it would have been open to the merger parties to notify the merger to the CCCS for a decision. The only way to close off the antitrust risk is to undertake a merger notification and obtain a clearance decision from the CCCS.

Risks of not filing: investigation risk

As part of its statutory remit in the context of merger control, the CCCS keeps markets under review to ascertain which mergers and acquisitions are taking place.

Where the CCCS identifies transactions that it considers may potentially raise concerns, the CCCS will approach the merger parties and third parties to gather further information about the transaction and the effect on competition. A formal investigation may be triggered under Section 62 of the Act if there are reasonable grounds for suspecting that a merger has
infringed, or that an anticipated merger, if carried into effect, will infringe, the prohibition under Section 54 of the Act. Where the CCCS investigates a transaction, the CCCS may publish the fact of its investigation on its website.

The CCCS may be prompted to investigate:

a. following consistent complaints, or one or two substantiated complaints, from third parties;
b. where there are preliminary indications that the CCCS’s indicative market share thresholds are likely to be crossed;
c. where customers in Singapore appear, post-merger, to have limited choice; or
d. for vertical mergers, where there is a possibility of competitors being foreclosed.

The CCCS has previously raised serious doubts as to the compatibility of transactions with Section 54 of the Act even where:

a. mergers by the same parties, or involving the same industry, had received clearances in other jurisdictions;
b. there are no significant issues identified within the wider defined relevant markets, but the CCCS has reviewed whether there may be competition issues within narrower market segments, on a global or Singapore-specific basis; and
c. the CCCS’s indicative market share thresholds are not crossed.

Risks of not filing: closing risk

A CCCS investigation may be triggered at any point pre or post-closing of the transaction. There is no administrative timetable for an investigation, and the investigation can take several months. This may adversely affect the timeline for closing of the transaction or for implementation of the transaction post-closing.

Risks of not filing: burden of proof risk

Where the CCCS investigates, the CCCS is likely to have formed its theories of harm, and the practical burden of proof will be on the merger parties. From our experience, this burden of proof is significantly harder to discharge.

The temperament of the merger review process is also materially harsher in cases of investigations. The extent and volume of documents requested for also tends to be much wider.

Mandatory self-assessment

While merger notifications to the CCCS are voluntary, the CCCS requires all parties to mergers to conduct a self-assessment on whether a merger filing is necessary, in accordance with the methodologies in the guidelines published by the CCCS, read with its decided cases. Where the CCCS investigates a merger that was not notified, the CCCS would expect the parties to explain why the merger was not brought to their attention and why a merger filing was not made.

In the event of a CCCS finding that the transaction gives rise to an infringement of the prohibition under Section 54 of the Act, it will consider whether the infringement was intentionally or negligently committed in determining whether financial penalties should be levied on the parties, apart from other directions and remedies. The CCCS may impose financial penalties of up to 10 per cent of the turnover of the undertaking in Singapore for each year of infringement, up to a maximum of three years, and remedies on parties to the
transaction, such as a direction for the merger to be unwound or for divestments to be carried out. A contemporaneous self-assessment documented at the time of the transaction would be considered as a first line of defence to the CCCS that the infringement was not entered into intentionally or negligently.

In the context of cross-border transactions, the prohibition under Section 54 of the Act may apply even where the merger takes place outside of Singapore, or where any party is located outside Singapore, so long as the merger has effect on any market affecting Singapore (whether as part of a global, regional or local market). In its assessment of the potential impact of global mergers, the CCCS will also consider Singapore-specific factors. Accordingly, it is necessary to include an assessment of any Singapore-specific effects in the self-assessment as to whether the merger may give rise to a substantial lessening of competition within any market affecting Singapore.

ii Timing for notification
The Act specifies no deadline for notification. If the parties wish to notify their merger, they may do so at any time before, during or after the merger.

To apply to the CCCS for a decision on a merger or anticipated merger, the Form M1 (the first notification form) must be completed and submitted to the CCCS together with the prescribed fee. Once the CCCS receives the complete Form M1 and the requisite filing fees, it will commence its Phase I review of the merger.

For anticipated mergers, an application can be made only once the parties have a good-faith intention to proceed with the transaction and the merger has been made public (or if the parties have no objection to the CCCS publicising the merger).

In the case of completed mergers, an application may be made at any time – although parties are encouraged to notify as soon as possible after completion.

iii Time frame for review
There are no statutory deadlines for the CCCS’s review process. That said, the CCCS Merger Procedure Guidelines 2012 prescribe an indicative time frame of 30 working days within which the CCCS should complete its Phase I review, starting from the date on which a complete Form M1 is submitted and the requisite filing fee is paid.

The indicative time frame for a Phase II review is 120 working days, commencing from the date on which the CCCS receives a complete Form M2 (the second notification form) and a satisfactory response to its Phase II information request. Although the indicative time frame for a Phase II review is 120 working days, the CCCS has been cited stating that it may consider reasonable requests by merging parties for shorter timelines for assessment on a case-by-case basis.

In both the Phase I and Phase II review, the CCCS may require the applicant to provide additional information. If the applicant is unable to provide the requested information by the deadline stipulated by the CCCS, an extension may be requested. If the CCCS extends the deadline, it may stop the clock until the requested information is provided, thereby extending the 30-working-day (Phase I) or 120-working-day (Phase II) indicative review period.

At any time during the Phase I or Phase II review process, the parties (which may not be limited to the applicant if a sole filing is made) may offer commitments to the CCCS to remedy competition concerns on the adverse effects of the transaction. In order to accommodate the commitments procedure in a Phase I review – including for public
consultation on the proposed commitments – the CCCS is likely to extend the indicative timeline by 20 working days or more, at its discretion. An extension may also be required in a Phase II review.

There are no formal avenues for parties to accelerate the review procedure, similar to, for example, the simplified procedure available for the European Commission. There is, however, a confidential advice process and the availability of pre-notification discussions (elaborated below), which are avenues that could be explored to engage the CCCS earlier, and to potentially expedite the overall review timeframe in certain cases.

Confidential advice
The CCCS provides for a confidential process for businesses to approach it for advice, typically issued within 14 working days of the application. The confidential advice includes an indication of whether a merger is likely to raise competition concerns in Singapore and whether a notification to the CCCS is advisable, on the basis that such advice is provided without having taken into account third-party views.

This process is available only for transactions:

a. that raise a genuine issue relating to the competitive assessment in Singapore;
b. where there is a good-faith intention to proceed with the transaction; and
c. that are not in the public domain.

Confidential advice is not binding on the CCCS and the CCCS reserves the right to investigate the merger situation where the statutory test for doing so (i.e., reasonable grounds to suspect that the prohibition under Section 54 of the Act may be infringed) is met.

This option is generally most useful for foreign-to-foreign mergers with a tangential effect on markets in Singapore. It may also be helpful in cases where parties may not agree on the findings of the self-assessment, and therefore wish to obtain a non-binding guidance from the CCCS, on whether a merger notification would be necessary.

iv Pre-notification discussion
Where parties have decided to file, they are also encouraged to approach the CCCS before filing for a pre-notification discussion to discuss the content and timing of their notifications. This is to identify further information that the CCCS may require in assessing the filing. Where possible, the CCCS will also indicate gaps in the information provided in the draft notification form. Such discussions can help the CCCS to plan its work and facilitate an expeditious merger review process.

In the context of such discussions, the CCCS does not give views on whether a merger would likely require a Phase II assessment or would result in a substantial lessening of competition.

v Non-suspensory regime
There is no requirement to suspend implementation of a merger or anticipated merger before clearance by the CCCS. However, parties that give effect to or proceed with mergers before CCCS clearance should note that they do so at their own commercial risk, as the CCCS has the power to unwind a merger that has already been effected and – in the case of intentional or negligent infringements – to impose financial penalties if it decides that the merger infringes the prohibition under Section 54 of the Act.
vi Commitments and remedies

At any time during the Phase I or Phase II review process, the parties (which may not be limited to the applicant if a sole filing is made) may offer commitments to the CCCS to remedy competition concerns on the adverse effects of the transaction.

Where the CCCS proposes to make an infringement decision at the end of the Phase II review, it will issue a notice to the applicant setting out its provisional statement of decision. The applicant’s written response to the provisional statement of decision will be its last opportunity to propose commitments or give its views on the remedies proposed by the CCCS. However, even where the parties propose commitments, the CCCS may consider and impose alternative remedies.

In relation to commitments and remedies, the CCCS’s starting point is to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. There are broadly two types of remedial action that the CCCS may consider – structural and behavioural.

The CCCS prefers structural remedies to behavioural remedies, as they tend to address the competition concerns more directly and require less monitoring.

The CCCS has formed a Commitments and Remedies Unit to independently assess the suitability of proposed commitments and remedies.

Structural remedies

Typically, structural remedies require the divestment of overlapping assets or businesses that have led to the competition concern. The sale should be completed within a specified period and the CCCS must approve the proposed buyer before the sale of any business in order to ensure that it has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace.

Where appropriate, the CCCS may also consider other structural or quasi-structural remedies – for example, divestment of the buyer’s existing business (or part of it) or an amendment to IP licences.

Behavioural remedies

The CCCS will consider behavioural remedies in situations where divestments are considered to be impractical or disproportionate to the nature of the concerns identified. Where appropriate, the CCCS may also implement behavioural remedies to support structural divestment.

In CCCS Case No. 400/004/14 – the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business – the CCCS took the view that the significant market power possessed by the merged entity could give rise to non-coordinated effects post-merger. The CCCS accepted the following behavioural commitments, in addition to structural commitments, to address the CCCS’s competition concerns:

<table>
<thead>
<tr>
<th>CCCS’s competition concerns</th>
<th>Commitments accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merged entity has the ability and incentive to provide loyalty rebates, exclusive contracts or bundling and tying of its products across its two brands that would prevent – or would be likely to prevent – customers from switching away.</td>
<td>Not to enter into exclusive agreements with employer and recruiter customers for a period of three years.</td>
</tr>
<tr>
<td>Merged entity has the ability and incentive to impose price increases.</td>
<td>To maintain the current pricing of services capped at present-day rate cards or current-day negotiated prices, subject to Consumer Price Index changes for a period of three years.</td>
</tr>
</tbody>
</table>
In CCCS Case No. 400/003/15 – the proposed acquisition by ADB BVBA of Safegate International AB – the CCCS took the view that the proposed acquisition may significantly reduce the level of competition in the affected markets, and may lead to price increases and deterioration in quality or technical support. Following public consultation, the CCCS accepted the following behavioural commitments to address the CCCS’s competition concerns.

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Significant post-merger price increase due to substantial reduction of competition in the short to medium term.</td>
<td>Certain products and spare parts of the merged entity sold directly or indirectly to any airport operator for use in Singapore will be, for specified periods, subject to pre-merger prices and adjusted for inflation.</td>
</tr>
<tr>
<td>Reduced supply of spare parts and technical support to customers.</td>
<td>The merged entity commit to supply all required spare parts for specific products sold to any airport operator for use in Singapore for a period of 10 years from the completion of the proposed acquisition. The merged entity will also supply any technical support required for these products to the airport operators.</td>
</tr>
<tr>
<td>Possible ‘lock in’ of third-party contractors and suppliers in Singapore using exclusive agreements.</td>
<td>To facilitate entry by competing airfield lighting system suppliers into the Singapore market, for the period of four years commencing from the completion of the proposed acquisition, the merged entity commits not to enter into any agreements with any third-party contractor or supplier in Singapore that expressly prevent or have the effect of preventing third-party contractors or suppliers from carrying, promoting or offering alternative competing products and services.</td>
</tr>
<tr>
<td>Possible retroactive termination of, or jeopardising of, agreements concluded before the completion of the proposed acquisition.</td>
<td>The merged entity will ensure that any contracts or agreements relating to the sale of specific products entered into between the parties or a third party and an airport operator in Singapore on or before the completion date of the proposed acquisition shall continue in full force and effect post-transaction.</td>
</tr>
<tr>
<td>Ensuring compliance with the proposed commitments.</td>
<td>The merged entity will regularly provide the CCCS with an independent audit report.</td>
</tr>
</tbody>
</table>

In CCCS Case No. 400/001/17 – the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd – the CCCS took the view that the proposed acquisition may lead to the merged entity having greater ability and incentive to discriminate or restrict supply of certain publishers’ titles to other retailers. Following public consultation, the CCCS accepted the following behavioural commitments to address the CCCS’s competition concerns.

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>The merged entity may refuse to supply or restrict supply to third party retailers.</td>
<td>The merged entity will ensure that the full range of books will be supplied to third party retailers.</td>
</tr>
<tr>
<td>The merged entity may discriminate by increasing price or offering unfavourable supply terms to third party retailers.</td>
<td>The merged entity will ensure that the terms of supply of books to third-party retailers and the pricing of books will be fair, reasonable, and non-discriminatory.</td>
</tr>
<tr>
<td>The merged entity may raise prices at the distribution level for all retailers to foreclose competition at the retail level.</td>
<td>The merged entity will ensure that prices at the distribution level will be fair and reasonable.</td>
</tr>
</tbody>
</table>

vii Third-party access to file and rights to challenge mergers

Third-party access to file

There is no third-party access to file. For notified transactions under Section 57 or 58 of the Act, only the applicant and those persons whom the applicant identified in the application as being the other parties to the anticipated merger or the other parties involved in the merger, as the case may be, will be given an opportunity to inspect the documents in the CCCS’s file. The CCCS may withhold any document to the extent that it contains confidential information, or which is an internal document.
It should also be noted that access to the CCCS’s file is also only granted where an unfavourable decision is made (i.e., where the CCCS proposes to make a decision that an anticipated merger, if carried into effect, will infringe Section 54 of the Act, or a decision that a merger has infringed Section 54 of the Act).

**Third-party rights to challenge notified mergers**

During the CCCS’s public consultation process at the start of its merger review (see Section IV.ii, below), third parties are invited to provide comments to the CCCS on the merger, via an invitation to comment on the CCCS website, and would be able to challenge a notified merger through this process.

Once the CCCS has issued a favourable decision, it will not take further action unless it has reasonable grounds for suspecting that:

a. information on which CCCS has based its decision (which may include information on the basis of which a commitment was accepted) was materially incomplete, false or misleading;

b. a party who provided a commitment failed to adhere to one or more terms of the commitment; or

c. where a favourable decision was given for an anticipated merger to proceed, the merger so effected is materially different from the anticipated merger.

The CCCS would generally publish detailed decisions on the notified merger, the CCCS’s grounds for issuing a favourable decision, as well as details of any commitments entered into. Accordingly, third parties may be able to challenge a merger after a favourable decision is issued, if they are able to support any of the grounds above for the CCCS to take further action in relation to the cleared merger.

Third parties have no right to appeal to the CCCS or the Competition Appeal Board (CAB) against any decision by the CCCS in respect of a merger situation or any direction imposed by the CCCS. Please see below for further information on appeals generally.

**Third-party rights to challenge un-notified mergers**

For un-notified mergers, third parties are able to make a complaint to the CCCS at any time pre- or post-closing of the merger. There is no limitation period on the time frame after which the CCCS may cease to have the power to investigate a transaction and to impose directions (e.g., for the transaction to be unwound or divestments to be made, or financial penalties). Each complaint will be assessed by the CCCS on its merits taking into account, among others, the strength of any supporting evidence. As discussed above, the CCCS has stated that it may be prompted to investigate following consistent complaints, or one or two substantiated complaints, from third parties.

**Appeals**

Where the CCCS proposes to make an infringement decision, it will issue a notice setting out its provisional statement of decision. The applicant may then apply to the Minister for Trade and Industry for the merger to be exempted on the grounds of any public interest consideration (i.e., national or public security, defence and such other considerations as the Minister for Trade and Industry may gazette). Should the application to the Minister for Trade and Industry be unsuccessful, the CCCS will make a final decision on the merger, after having taken into account any oral and written representations made by the applicant.
There is a right of appeal to the CAB against any decision of the CCCS in respect of a merger situation or any direction (including interim measures) imposed by the CCCS. Any party to the notified merger may appeal the CCCS’s decision in respect of a merger situation, while an appeal of a direction may be made by the party to which the CCCS issued the direction. The notice of appeal must be lodged within four weeks of either the date on which the appellant was notified of the contested decision or the date of publication of the decision (whichever is earlier). On the application of the appellant, the CAB may, in its discretion, extend the time frame for lodging the notice of appeal.

There is no right to appeal the CCCS’s refusal to accept any commitments offered, but the parties may appeal against its refusal to vary, substitute or release existing commitments.

The parties to the CAB proceedings may further appeal the decision of the CAB to the High Court and thereafter to the Court of Appeal, but only on points of law and the quantum of the financial penalty.

As of 24 July 2017, the CAB had received 13 appeals and issued eight decisions. The CAB had not received an appeal in respect of a merger situation as of 24 July 2017; the 13 appeals received by the CAB related to either Section 34 (against anticompetitive agreements) or Section 47 (against abuse of dominance) of the Act. In the nine CAB decisions issued, the CAB generally upheld the findings and decisions of the CCCS. Of these, the CAB reduced the financial penalty that was initially imposed by the CCCS in six decisions.2

ix Sectoral regulators

Industry sectors, such as telecommunications, media, post, airport, gas, electricity and financial sub-sectors have sector-specific laws or code of practice on competition, which include merger control laws or rules. These industry sectors are carved out from the merger control regime under Act in the Third and Fourth Schedules to the Act, and the sectoral regulators enforce their respective industry-specific competition rules. For example, the telecommunications sector is regulated by the Code of Practice for Competition in the Provision of Telecommunication Services and the media sector is regulated by the Code of Practice for Market Conduct in the Provision of Mass Media Services. Both these industries are regulated by subsidiary legislation which is industry-specific and includes prohibitions on unfair methods of competition, predatory pricing and general misuse of market power.

On cross-sectoral matters, the CCCS has stated in the CCCS Guidelines on the Major Provisions that the CCCS will work with the relevant sectoral regulator to determine which regulator is best placed to handle the case in accordance with the legal powers given to each. The lead will be taken by the agency best positioned, in terms of ability and scope, to investigate the alleged anticompetitive conduct and impose any necessary remedies. To prevent double jeopardy and to minimise the regulatory burden, the CCCS and the sector-specific regulators will cooperate and coordinate closely in dealing with the case.

2 Of the remaining three decisions, the CCCS dismissed the appeal against the quantum of financial penalty in two cases, and set aside the appeal in the other case on the basis that the applicant had no right of appeal against the decision of the CCCS.
IV OTHER STRATEGIC CONSIDERATIONS

i Navigating multi-jurisdictional reviews

As the Act has an extra-territorial application, merger parties should factor in the self-assessment for Singapore when conducting the multi-jurisdictional analysis on where merger control filings should made, at an early stage of the transaction being contemplated. In particular, and as highlighted in Section II above, un-notified mergers continue to be a key area of focus for the CCCS in its merger enforcement efforts.

While the regime in Singapore is non-suspensory, to avoid deal and timing uncertainty (see Section III, supra), merger parties may wish to budget the Singapore clearance time frame into the overall global regulatory approval time frame.

Other substantive and procedural issues to be considered in coordinating multi-jurisdictional review and filings are set out below.

**Concept of ‘control’**

In determining whether the transaction may constitute a reviewable merger in Singapore, the structure of the transaction should be considered, bearing in mind that the concept of ‘control’ may differ across jurisdictions.

The ‘control’ test under the Act applies a similar concept of ‘decisive influence’ as that adopted under the European Union merger control regime.

Section 54(3) of the Act states that ‘control’ over an undertaking is regarded as existing if decisive influence is capable of being exercised with regard to the activities of an undertaking. The CCCS Guidelines on the Substantive Assessment of Mergers further illustrates that ‘control’ can be legal or de facto. Legal control arises where there is decisive influence and the CCCS considers that decisive influence is deemed to exist if there is ownership of more than 50 per cent of the voting rights. Where ownership is between 30 and 50 per cent of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists.

However, the aforementioned thresholds are only indicative and it is necessary to consider all the relevant circumstances on a case-by-case basis. Control may potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. De facto control may arise, for example, via financial arrangements, rights to veto strategic and commercial decisions of an undertaking, or other agreements such as long-term supply agreements.

**Minority interests**

In relation to minority shareholders, it is possible that decisive influence may be capable of being exercised by an undertaking which acquires a minority interest. For example, control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, the appointment of senior management or market-specific rights.

Within the CCCS Guidelines on the Substantive Assessment of Mergers 2016, the CCCS has clarified that the acquisition of minority shareholdings may lead to decisive influence, for example, depending on the patterns of attendance and voting at shareholders’ meetings, resulting in a reviewable merger.

It is noteworthy that the CCCS initiated an investigation of Uber’s acquisition of a 27.5 per cent stake in Grab, and had imposed interim measures on 13 April 2018.
**Consistency in merger assessment**

Procedurally, the Form M1 requests for a waiver allowing the CCCS to exchange confidential information with competition agencies in other jurisdictions in respect of the notified merger, and the CCCS would generally expect such waivers to be granted. It is therefore critical to ensure that the key defences and competitive assessment of the relevant markets are consistent across jurisdictions in which the transaction is notified.

From a practical perspective, a centralised assessment on competitive effects, market definition, the parties’ business and activities, and the transaction, which is used as a starting point to take into account jurisdiction-specific characteristics, would also minimise duplication and time required for the relevant business personnel to provide the information required.

**Carve-out agreements**

As explained above, there is no requirement to suspend the implementation of a merger or anticipated merger before clearance by the CCCS. Parties that give effect to or proceed with mergers before CCCS clearance by the CCCS do so at their own commercial risk, as the CCCS has the power to unwind a merger that has already been effected and – in the case of intentional or negligent infringements – to impose financial penalties where it decides that the merger infringes the prohibition under Section 54 of the Act.

There is no express prohibition against, and it is therefore possible for merger parties to have, agreements to carve out Singapore while the transaction closes in other jurisdictions, as a means of managing the risk of financial penalties, directions or remedies imposed by the CCCS if the CCCS has concerns regarding the transaction specific to Singapore.

**Publicity and confidentiality**

Merger parties should be aware of the following considerations on publicity and confidentiality in making merger notifications to the CCCS. Such considerations may have particular implications for transactions involving listed entities, in terms of the disclosure and timing of the parties’ own announcements.

**Publicity**

Upon acceptance of a complete Form M1, together with the necessary supporting documents and prescribed fees, the CCCS will publish a summary of the merger on the public register on its website. The summary is provided by the applicant as part of the Form M1. The recent practice of the CCCS has been to issue a media release together with acceptance of the notification published on the public register.

Third parties are invited to provide comments to the CCCS on the merger, and any commitments contemplated, via an invitation to comment on the CCCS website.

The CCCS will update the status of its review on the public register – for example, when it is considering commitments, when it is proceeding to a Phase II review and when it makes a decision on the notified merger.
**Confidentiality**

In submitting the Form M1, Form M2 and any other submissions to the CCCS, applicants are required to provide both confidential and non-confidential versions, as well as of the supporting documents. The CCCS is obliged under Section 89 of the Act to preserve the secrecy of confidential information that it receives.

The confidentiality claims of the applicants are subject to acceptance by the CCCS. The CCCS must also consider the extent to which disclosure is necessary for the purposes for which it proposes to make the disclosure.

If the confidentiality claims are accepted, the CCCS will not generally disclose any confidential information received to any other parties. Instead, the CCCS may use the non-confidential version of the submissions and supporting documents both to facilitate its discussion with third parties and to enable the CCCS to publish a non-confidential version of its decision without delay.

In the event that any confidentiality claims are not accepted by the CCCS, the CCCS will generally liaise with the applicant before any disclosure to consider how any detriment to the applicant could be minimised.

The CCCS will also generally provide applicants with the opportunity to review its decision to ensure that confidentiality claims and the accuracy of factual statements have been maintained before publishing a merger decision.

### iii Special circumstances

#### Failing firm situations

The CCCS will consider, and has accepted, the failing firm defence in its assessment of mergers. On 28 November 2014, the CCCS announced the clearance of the proposed acquisition of Tiger Airways Holdings Limited by Singapore Airlines Limited. The CCCS agreed that the transaction would be less detrimental to competition in Singapore as compared to the scenario where Tiger Airways Holdings Limited would have exited its operations in the absence of the transaction, which would have also caused disruptions to passengers and to the connectivity of the Singapore air hub. This marked the first merger notification for which the CCCS granted clearance on the basis of the alternative exit argument.

To qualify for the failing firm defence, the CCCS has stated that the following conditions are required to be met:

- **a** first, the firm must be in such a dire situation that without the merger, the firm and its assets would exit the market in the near future. Firms on the verge of judicial management may not meet these criteria, whereas firms in liquidation will usually do so. Decisions by profitable parent companies to close down loss-making subsidiaries are unlikely to meet these criteria;
- **b** second, the firm must be unable to meet its financial obligations in the near future and there must be no serious prospect of reorganising the business, for example, a liquidator has been appointed pursuant to a creditor’s winding-up petition; and
- **c** third, there should be no less anticompetitive alternative to the merger. Even if a sale is inevitable, there may be other realistic buyers whose acquisition of the firm and its assets would produce a more competitive outcome. Any offer to purchase the assets of the failing firm at a commercially reasonable price, even if the price is lower than that which the acquiring party is prepared to pay, will be regarded as a reasonable alternative.
offer. It may also be better for competition that the firm fails and the remaining players compete for its customers and assets than for them to be transferred wholesale to a single purchaser.

The party claiming the failing firm defence is therefore required to provide supporting evidence that:

a. the undertaking is indeed about to fail imminently under current ownership (including evidence that trading conditions are unlikely to improve);

b. all re-financing options have been explored and exhausted; and

c. there are no other credible bidders in the market (by demonstrating that the firm has made good faith and verifiable efforts to elicit reasonable alternative offers of acquisition).

A non-exhaustive list of evidence that the CCCS may consider when assessing a failing firm scenario could include:

a. timelines of critical events and decisions of the failing firm;

b. internal documents, such as briefing and board papers for the board or senior management;

c. audited financial statements, including notes and qualifications in the auditor’s report;

d. projected cash flows, projected operating income or losses, projected net worth;

e. credit status;

f. reduction in the firm’s relative position in the market; and

g. changes in the firm’s share price or publicly traded debt of the firm.

As the evidentiary threshold for claiming the failing firm defence is high, it is advisable for parties wishing to claim the failing firm defence to consider the available supporting facts and evidence early in the notification process.

**Hostile takeover situations**

The CCCS’s regime allows for sole notifications to be made by a potential acquirer. In hostile takeovers, it may be difficult for the potential acquirer to obtain and provide certain information on the target undertaking in making a sole merger notification to the CCCS. In such situations, the CCCS has powers to issue formal information requests to the target for the CCCS’s assessment of the merger.

**V OUTLOOK & CONCLUSIONS**

With the CCCS Guidelines on the Substantive Assessment of Mergers 2016 in effect since December 2016, the inclusion of additional forms of supporting evidence required by the CCCS points towards a materially stricter enforcement stance by the CCCS towards mergers, consistent with the recent trends in remedies and commitments, and increased complex reviews and blocked mergers observed.
Chapter 36

SOUTH AFRICA

Candice Upfold

1

I INTRODUCTION

i Competition authorities

The South African Competition Act 1998 (Competition Act) establishes three specialised bodies each tasked with distinct functions, namely the Competition Commission (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court (CAC).

The Commission is the body tasked with investigating intermediate and large mergers (and small mergers if these are notified). The Commission must, after considering an intermediate merger, approve the merger, with or without conditions, or prohibit the merger. The Commission is not authorised to make a determination in relation to large mergers and must, after investigation, refer the large merger together with a written recommendation to the Tribunal and the Minister of Economic Development.

The Tribunal is an adjudicative body and may hear appeals from, or review any decision of the Commission that may, in terms of the Competition Act, be referred to it. When the Tribunal receives a referral of a large merger and recommendation from the Commission, the Tribunal must consider the merger and the recommendation, and approve the merger, with or without conditions, or prohibit the merger. The Tribunal can also reconsider a decision of the Commission in relation to a small or intermediate merger if a party to the merger requests it to do so.

The CAC has a similar status to a High Court, and may review any decision of the Tribunal, or consider an appeal arising from the Tribunal in respect of any of its final decisions other than a consent order made in terms of Section 58(1)(b); or any of its interim or interlocutory decisions that may, in terms of the Competition Act be taken on appeal.
A decision of the CAC can be appealed to the Constitutional Court in South Africa if constitutional issues or issues impacting on the public interest arise.

**ii Pre-merger notification**

A transaction is automatically notifiable as a merger to the competition authorities in South Africa if it falls within the definition of a merger in terms of the Competition Act and if it meets the monetary thresholds for compulsory notification.

Section 13A of the Competition Act provides that parties to an intermediate or large merger may not implement that merger, until it has been approved, with or without conditions. If a notifiable merger is implemented without prior approval, an administrative penalty may be imposed on the transacting parties of up to 10 per cent of their annual turnover in, and exports from, South Africa in the preceding financial year.\(^\text{13}\)

In February 2016, the Tribunal imposed the largest administrative penalty to date (10 million rand) on Life Healthcare and Joint Medical Holdings (JMH) for the implementation of a notifiable merger without approval.\(^\text{14}\) The Tribunal has, in previous cases, indicated that it takes the failure to notify a notifiable merger very seriously and intends imposing higher penalties. As is evident from the hospital groups case, the Tribunal is increasing the penalties imposed, since the previous administrative penalties imposed for this type of contravention did not exceed 1 million rand.

The Tribunal can also, in terms of Section 60 of the Competition Act: order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or declare void any provision of an agreement to which the merger was subject. In the hospital groups case referred to above, the parties agreed, in anticipation of the consent agreement, to Life Healthcare divesting from JMH, and JMH acquiring nearly all of the shares in Life Healthcare by way of a share buy-back arrangement.

More recently, however, on 21 February 2018, the Tribunal confirmed a consent order in terms of which Macsteel and Unique Ventilation agreed to pay an administrative penalty of 1 million rand for failure to notify a merger.\(^\text{15}\)

**iii Guidelines**

*Failure to notify*

On 17 February 2017, the Commission published draft guidelines for the determination of administrative penalties for failure to notify a merger and implementation of mergers contrary to the Competition Act (the Draft Guidelines for Failure to Notify a Merger).\(^\text{16}\)

The Draft Guidelines for Failure to Notify a Merger are aimed at presenting a general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent or settlement agreements and seeking administrative penalties in prior implementation referrals.

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\(^{13}\) Section 59(2) of the Competition Act.


\(^{15}\) *The Competition Commission and Macsteel Service Centres SA (Pty) Ltd and Unique Ventilation & Support Systems (Pty) Ltd* Case No. FTN154Nov16.

\(^{16}\) Published under Government Gazette Notice Number 40628 on 17 February 2017.
The Commission has indicated (in Paragraph 6 of the Draft Guidelines for Failure to Notify a Merger) that as a general approach it will apply the following methodology when determining the administrative penalty that a firm will be liable to pay:

a. Step 1: determination of the nature or type of contravention;
b. Step 2: determining the range of the administrative penalty;
c. Step 3: considering factors that might mitigate or aggravate the amount reached in step 2; and
d. Step 4: rounding off this amount if it exceeds the cap provided for in Section 59(2) of the Competition Act (i.e., 10 per cent of annual turnover).

The Commission has recorded in the Draft Guidelines for Failure to Notify a Merger that the minimum penalty for prior implementation of an intermediate merger will be double the applicable filing fee for an intermediate merger and the maximum penalty will be 5 million rand. The filing fees are currently 150,000 rand for an intermediate merger and 500,000 rand for a large merger. The Commission does, however, specifically note that the Draft Guidelines for Failure to Notify a Merger will not fetter the discretion of the Commission to impose the maximum penalty permitted in the Competition Act, which is 10 per cent of total annual turnover.

Given the inconsistency in penalties that have been imposed over the years, the Draft Guidelines for Failure to Notify a Merger provide some welcome clarity on the approach that will be taken by the Commission in cases of this nature; however, it is not clear when the Commission will publish the final guidelines.

Public interest

The competition authorities are obliged in terms of Section 12A of the Competition Act to consider whether a merger is likely to substantially prevent or lessen competition, and whether a merger can be justified on public interest grounds. Public interest considerations in merger transactions have taken prominence in recent years, due to the high unemployment rates in South Africa and the state of the economy.

On 2 June 2016, the Commission published its final guidelines on the assessment of public interest provisions in merger regulation (the Public Interest Guidelines).

The Public Interest Guidelines have been implemented to provide merging parties with guidance on the approach the Commission is likely to follow, and the types of information the Commission may require when evaluating public interest grounds in terms of Section 12A(3) of the Competition Act.

The Public Interest Guidelines provide insight into the approach adopted by the Commission in relation to:

a. the effect on a particular industrial sector or region;
b. the effect on employment;

17 See clause 6.9 of the Draft Guidelines for Failure to Notify a Merger.
18 See clause 6.10 of the Draft Guidelines for Failure to Notify a Merger.
19 Paragraph 3.3 of the Public Interest Guidelines.
21 Paragraph 1.2 of the Public Interest Guidelines.
the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

d the ability of national industries to compete in international markets.

II YEAR IN REVIEW

During the Commission’s 2016/2017 financial year (the most recent reported information), it received 418 merger notifications, and finalised its investigation in relation to 385 of the notified transactions. This demonstrates a moderate increase from the 391 merger notifications received in the previous financial year. Of the 418 notified mergers, 93 were large, 319 were intermediate and six were small mergers. During this period, 349 mergers were approved without conditions while 31 were approved subject to conditions. This is a slight decrease from the 37 mergers approved subject to conditions in the 2015/2016 financial year and a moderate decrease from the 43 mergers approved subject to conditions in the 2014/2015 financial year.22

The Commission prohibited five merger transactions in the 2016/2017 financial year which is a slight decrease from the seven merger transactions prohibited in the 2015/2016 financial year but equal to the five mergers prohibited in 2014/2015.

i Public interest conditions

The focus on public interest considerations has markedly increased over time. Only four public interest conditions were imposed in the 2010/2011 year, which increased to 22 and 28 in 2011/2012 and 2012/2013 respectively. There was a decrease in 2013/2014, with only 10 transactions being approved subject to public interest conditions but this number increased substantially to 39 during the 2014/2015 year. In the 2016/2017 financial year there was a significant decrease with only 15 transactions approved subject to public interest conditions. The conditions imposed were, however, onerous and demonstrates the creative remedies that can be imposed in order to protect the public interest in South Africa.

As with previous years, the majority of public interest conditions were imposed in order to protect employment, for example, it is reported in the Commission’s annual report that its interventions in merger transactions resulted in a net saving of 48,403 jobs.23 This was, however, mostly as a result of a merger between Parentco (Pty) Ltd and Edcon Limited in which 41,151 people stood to lose their jobs. Ultimately this merger was not implemented.

In addition to public interest conditions aimed at protecting employment, other public interest conditions imposed include an obligation to subcontract at least 40 per cent of orders to previously disadvantaged black economic empowerment individuals and small, medium and micro-sized enterprises (one merger), an obligation not to relocate manufacturing facilities for a fixed period (two mergers), obligations to source locally (two mergers) and the creation of a fund to benefit small business and society (one merger).

23 See page 27 of the Competition Commission’s annual report for the 2016/2017 financial year.
**Dimension Data and Hatch Investments**

On 5 October 2017, the Tribunal approved the proposed transaction between Dimension Data Protocol BV (Dimension Data) and Hatch Investments (Mauritius) Limited (Hatch) subject to certain public interest conditions.

Notwithstanding that there was a horizontal overlap in the activities of Dimension Data (through Britehouse) and Hatch (through Nihilent), the combined market share was minimal and as such, the Commission concluded that the transaction was unlikely to substantially prevent or lessen competition in the relevant markets.

The Commission did, however, find that the transaction gave rise to public interest concerns. In particular, 69 of the 83 Nihilent employees in South Africa would fall within the category of jobs that are duplicated by the proposed transaction. In order to protect the employees of Nihilent and to ensure that no job losses occur as a result of the merger, the Commission imposed an employment condition that prohibits Dimension Data from retrenching any employees as a result of the merger for a period of two years.

In addition to the employment concern, the Commission was also concerned that the merger would impact the transfer of skills in the IT sector. In particular, pre-merger, Nihilent offered an internship programme in IT and software testing in South Africa. The Commission was therefore concerned that if Dimension Data, through Nihilent does not continue to provide the internship programme, the merger will negatively impact the skills levels and transfer of skills in the IT sector. Accordingly, the Commission imposed a condition that requires that Nihilent continues providing internship programmes in South Africa post-merger.

Lastly, the Commission raised a concern that the merger would have a negative impact on Black Economic Empowerment (BEE) as the merger would result in a loss of approximately 28 percent of BEE shareholders in Hatch post-merger. After considering certain factors, which have not been disclosed, the Commission concluded that notwithstanding the impact on the BEE, there was significant countervailing public interest justification for approving the merger and accordingly, no condition was imposed to address this concern.

**SOIHL Hong Kong and Chevron South Africa**

On 8 March 2018, the Tribunal approved, subject to extensive conditions, the large merger between SOIHL Hong Kong Holding Limited (SOIHL) and Chevron South Africa (Pty) Ltd (CSA) in terms of which SOIHL (owned by China Petroleum & Chemical Corporation (Sinopec)) sought to acquire 75 per cent of the shares and related interests in CSA.

Whilst the Commission found that the transaction was unlikely to substantially prevent or lessen competition in any of the identified markets, the Commission was concerned with possible loss of employment. In addition, the Department of Economic Development raised certain public interest issues. To alleviate the public interest concerns, a number of conditions, including the following were imposed by the Tribunal:

- **Investment in a head office:** Sinopec undertakes that it will establish its head office in South Africa, to coordinate and oversee its midstream and downstream operations in South Africa. Sinopec will also use the platform provide by CSA to oversee its midstream and downstream operations in the rest of Africa.

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24 *Dimension Data Protocol BV and Hatch Investments (Mauritius) Limited Case Number: LM173Sep17.*

25 *SOIHL Hong Kong Holding Limited and Chevron South Africa (Pty) Ltd Case No. LM050May17.*
b Investment in the Cape Town refinery: Sinopec undertakes to procure that CSA invests a total of six billion rand over and above any current investment plans, within a period of five years from the implementation date so as to increase the refinery’s capacity, improve the refinery’s safety and performance, upgrade the IT and automation systems and increase production of environmentally cleaner fuels.

c CSA’s wholesale and retail chains: Sinopec undertakes to maintain CSA’s current baseline number of independently owned petrol stations (currently 615 stations). Further, where independently owned petrol stations are to be established, CSA will give preference to small businesses, especially black-owned businesses. Sinopec also undertakes that in establishing new retailer-owned petrol stations, CSA will favour small businesses.

d Promote exports: Sinopec undertakes that it shall use reasonable endeavours to promote the export and sale of South African manufactured products for sale in China and in particular through the service station network operated by Sinopec in China.

e B-BBEE: Sinopec undertakes to procure that:
   • CSA shall use all reasonable levels to increase its current broad-based black empowerment (B-BBEE) scorecard rating by two levels, from level 4 to level 2 within two years of the implementation date;
   • CSA shall increase the number of service stations operated by black-owned businesses in the large metropolitan areas by at least 20 within five years from the implementation date; and
   • over a period of five years, Sinopec undertakes to increase the B-BBEE shareholding in CSA from 25 to 29 per cent and retain it at no less than 29 per cent.

f Funding: Within two years of the implementation date, CSA shall establish a development fund in order to support small businesses and black owned businesses that are involved in the CSA’s value chain. Sinopec undertakes that it will providing funding to the development fund of $15 million over a period of five years.

g Local procurement: Sinopec will maintain or increase CSA’s current level (as a proportion) of expenditure on local procurement of goods and service. Sinopec will also ensure that CSA will not substitute current, local, South African owned suppliers with offshore suppliers of goods or services.

h Employment: CSA shall not retrench any employees as a result of the merger. In addition, CSA commits that, for a period of five years from the implementation date, it will maintain at least the same number of employees as are employed in aggregate by CSA as at the implementation date.

AB InBev and SABMiller

The merger transaction between Anheuser-Busch InBev (AB InBev) and SABMiller, was notified to the competition authorities on 14 December 2015 and approved subject to extensive conditions on 30 June 2016. The merger contemplated AB InBev acquiring the entire issued and to-be-issued share capital of SABMiller. During its investigation of the proposed merger, the Commission identified several competition and public interest concerns that it proposed to address with the implementation of conditions.

26 Anheuser-Busch InBev SAINV and SABMiller plc Case No. 2015 Dec0690/LM211Jan16 (023283).
27 Conditions to the approval of the merger (Public Version).
The public interest conditions are extensive and include ensuring that there is cooler and refrigerator space for small local competitors in retail outlets and taverns that are solely supplied by the merged entity; 28 continued supply to small beer producers of crucial inputs to endure in perpetuity, maintaining the current ratio of local procurement; not entering into new exclusive supply arrangements or renew existing supply arrangements with raw material suppliers, which prohibits those suppliers from dealing with small beer producers; 29 the investment of a 1 billion rand fund; 30 no retrenchments as a result of the merger, to the extent that any employees of DGB (who distribute AB InBev’s alcoholic beverages in South Africa) are retrenched if the distribution agreement is terminated – the merged entity will employ those employees; 31 any apple juice concentrate in excess of 1 million litres per annum must be procured from imports or local sources brought about by investment by the merged entity; 32 and an outline of the merged entity’s BEE plans setting out how it intends to maintain black participation in the company, including equity, with the outline to be submitted to both the government and the Commission no later than two years from the closing date. 33

A number of other conditions unrelated to the public interest concerns were also imposed. To prevent the exchange of commercially sensitive information between competitors, SABMiller will divest of its shareholding in Distell, 34 and employees involved in bottling operations for Coca-Cola would not also be involved in the Pepsi bottling arrangements. 35 To prevent foreclosure as a result of the merged entities’ dominance in the supply of tin-metal crowns in South Africa through its subsidiary Coleus, the merged entity will continue to supply third parties with tin-metal crowns on a reasonable, non-discriminatory and market-related basis and not enter into any exclusive agreements with Coleus. 36

The conditions relating to the public interest were largely driven through interactions with the Minister of Economic Development, the Minister of Agriculture, Forestry and Fisheries of South Africa and the Minister of the Department of Trade and Industry. A separate agreement that has been confirmed by the Tribunal has been entered into between the merging parties and those government departments. There was also trade union participation in relation to employment concerns.

GEPF and Distell 37

On 29 March 2017, the Tribunal conditionally approved the merger between the government Employees Pension Fund, represented by the Public Investment Corporation SOC Limited (GEPF) and Distell Group Limited (Distell). The transaction involved the acquisition by GEPF of SABMiller’s non-controlling 26.5 per cent interest in Distell.

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28 Conditions to the approval of the merger (Public Version) Paragraph 7.3.
29 Conditions to the approval of the merger (Public Version) Paragraphs 9 and 10.
30 Conditions to the approval of the merger (Public Version) Paragraph 15.
31 Conditions to the approval of the merger (Public Version) Paragraph 8.
32 Conditions to the approval of the merger (Public Version) Paragraph 11.
33 Conditions to the approval of the merger (Public Version) Paragraph 13.
34 Conditions to the approval of the merger (Public Version) Paragraph 4.
35 Conditions to the approval of the merger (Public Version) Paragraph 5.
36 Conditions to the approval of the merger (Public Version) Paragraph 6.
37 Government Employees Pension Fund Represented by the Public Investment Corporation SOC Limited and Distell Group Limited Case No. LM215Feb17.
While the transaction was not strictly speaking notifiable, since there was no change of control the notification of this transaction was made a condition to the approval of the ABInBev merger mentioned above.

As there were no overlaps in the activities of the merging parties, the transaction did not result in a substantial prevention or lessening of competition. In addition, even though the Public Investment Corporation also has a shareholding in ABInBev, the shareholding is nominal at less than 0.1 per cent and as such, the cross-shareholding did not give rise to any competition concerns.

However, in terms of the conditional approval of the ABInBev merger, preference for the disposal of the Distell shareholding was to be given to BEE bidders. No BEE bidders, however, submitted bids for the acquisition of the Distell shareholding. The Commission, therefore, recommended that this merger be approved subject to the condition that the GEPF on-sell a percentage of the Distell shareholding to a BEE investment entity within a reasonable time subsequent to the merger approval. The GEPF was amenable to this condition.

**Clicks and Netcare**

On 10 November 2016, the Tribunal conditionally approved the merger between Clicks Retailers (Pty) Ltd (Clicks) and two target firms. The first of which is the retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd within Medicross Clinics (Medicross Pharmacies) and second, being the front shops of the in-house retail pharmacies operated by Netcare Pharmacies (Pty) Ltd within Netcare Hospitals (Front-shops).

The transaction raised both competition and public interest concerns, which were addressed through conditions. To address public interest concerns, the merging parties engaged with the Minister of Economic Development and ultimately agreed to the following conditions:

- not to retrench any employees as a result of the transaction for a period of five years after implementation;,
- to use reasonable endeavours to maintain local procurement levels; and
- to provide 100 learnership opportunities and 80 to 100 bursaries in pharmacy over the course of five years.

**ii Prohibited mergers**

As mentioned above, the Commission prohibited five mergers in its most recent financial year and seven in the previous financial year. Some examples of mergers in which the Commission prohibited or recommended prohibition of a transaction are set out below.

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38 Clicks Retailers (Pty) Ltd and The retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd within Medicross Clinics and the front shops of the in-house retail pharmacies operated by Netcare Pharmacies (Pty) Ltd within Netcare Hospitals Case No. LM055Jul16.
39 Item 4 of the conditions attached to the Tribunal’s order dated 10 November 2016.
40 Item 5 of the conditions attached to the Tribunal’s order dated 10 November 2016.
41 Item 6 of the conditions attached to the Tribunal’s order dated 10 November 2016.

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Netcare Hospitals and Lakeview Hospital

In September 2017, the Commission prohibited a small merger whereby Netcare Hospitals (Pty) Ltd (Netcare Hospitals) acquired the Lakeview Hospital. The acquisition had taken place in December 2016 and was already implemented by the time the Commission called for a filing to be made.

The Commission found that there is a horizontal overlap between the activities of the merging parties in the provision of multidisciplinary private healthcare services in the Benoni area and that the merger would result in the removal of the Lakeview Hospital as an effective competitive constraint in Benoni.

In particular, the Commission conducted a tariff analysis of the Netcare and Lakeview Hospitals based on a sample of medical aid schemes to determine which hospital had higher tariffs pre-merger. The Commission found that there is a significant difference in tariffs for insured patients between Netcare and the Lakeview Hospital. The Commission’s investigation found that the hospital groups, such as Netcare, negotiate tariffs to be applicable in their hospitals on a national basis and Netcare would have a uniform pricing policy across all its hospitals in the country.

The Commission thus found that the tariffs at the Lakeview Hospital are likely to generally increase significantly across the various procedures assessed, once the Lakeview Hospital adopts the Netcare tariff schedule.

The Commission was of the view that these price increases would be as a direct result of the merger. As such, the Commission concluded that the merger substantially lessens or prevents competition in the Benoni area and prohibited the merger.

The parties applied for a reconsideration of the decision by the Tribunal. On 6 June 2018 (eight months after the initial prohibition), the Tribunal overturned the Commission’s prohibition subject to conditions tendered by the merging parties. The conditions include that any medical scheme will be at a 5 per cent discount to the Nectare tariff negotiated with each of the medical schemes for fee-for-services reimbursement in respect of its general acute hospitals and for alternative reimbursement model services. The conditions apply for a period of seven years.

Greif and Rheem South Africa

In June 2017, the Commission prohibited the proposed intermediate merger between Greif International BV (Greif) and Rheem South Africa (Pty) Ltd (Rheem).

The merging parties had previously, in 2004 sought to enter into a proposed transaction. The transaction was, however, prohibited at that stage on the basis that Greif and Rheem were the only manufacturers of steel drums in KwaZulu-Natal and Gauteng. The Commission found that it was likely that the merged entity would be in a position to unilaterally increase prices.

Faced with the merger in 2017, the Commission again assessed the market for the manufacture and supply of large steel drums and found that the transaction would effectively be a merger to a monopoly regardless of the geographic market considered. In addition, the

Commission found that barriers to entry are high and that the proposed merger would likely result in the merged entity being in a position to unilaterally increase prices (the same theory of harm identified in 2004).

Accordingly, the Commission found that the merger would result in a substantial prevention or lessening of competition in the manufacture and supply of large steel drums in KwaZulu-Natal and Gauteng and that any public interest gains resulting from this merger would not outweigh the anticompetitive effects arising from the merger.

Similar to the Netcare merger, the merging parties have applied to the Tribunal for a reconsideration of the transaction. No decision has yet been made.

**Nippon Yusen Kabushiki Kaisha, Mitsui OSK Lines and Kawasaki Kisen Kaisha**

In June 2017, the Commission also prohibited the proposed intermediate merger between Nippon Yusen Kabushiki Kaisha (NYK), Mitsui OSK Lines Ltd (MOL) and Kawasaki Kisen Kaisha Ltd (KL) (joint venture partners), which intended to merge their container liner shipping businesses to form a joint venture in that market. This was a global merger that received approval from competition authorities around the world.

In considering the merger, the Commission considered the impact of the proposed transaction on the market for the provision of container liner shipping services. The Commission also considered the impact of the proposed transaction on the adjacent market of the car carriers shipping market where the joint venture partners also compete.

The Commission found that the structure of the container liner shipping market is conducive to coordination based on previous collusive conduct in the container liner market in other parts of the world. The Commission stated further that the merger increases the likelihood of coordination as it creates further structural linkages in the container liner market. Furthermore, the Commission found that the proposed transaction creates a platform for coordination in the car carrier market, which has a history of collusion involving the merging parties.

Accordingly, the Commission was of the view that the proposed merger is likely to increase the scope for coordination in the car carrier market. The Commission found that there were no efficiencies that outweigh the anticompetitive effects of this transaction and that there are also no remedies sufficient to address the anticompetitive effects. The transaction was therefore prohibited.

The merging parties have applied to the Tribunal or a reconsideration of the transaction. The Tribunal overturned the Commission's prohibition and approved the transaction subject to conditions to address concerns pertaining to the exchange of commercially sensitive information and cross directorships in the adjacent car carrier shipping and bulk shipping businesses between the parties.

**SA Airlink (Pty) Ltd and Safair Operations (Pty) Ltd**

In February 2018, the Commission prohibited the proposed merger between SA Airlink (Pty) Ltd (SA Airlink) and Safair Operations (Pty) Ltd (Safair) on the basis that the transaction is likely to result in a substantial prevention of competition.

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After investigation of the merger, the Commission is of the view that the merger is likely to result in the removal of an effective competitor to SA Airlink on the routes it currently operates on. The Commission noted that Safair offers competitive prices and has been growing in the market both in terms of its existing routes, as well as recently entering new routes. The Commission also found that the merger is likely to result in coordinated effects through the exchange of competitively sensitive information between South African Airways (SAA) and Safair (and SA Airlink) since SAA has a shareholding in SA Airlink. In this regard, the Commission found that the merger would likely result in the enhancement and facilitation of coordinated conduct.

The Commission found that no remedies could sufficiently address the competition concerns identified. In light of the above, the Commission found that the merger is likely to result in a substantial prevention of competition and the Commission therefore prohibited the proposed transaction. This transaction is also before the Tribunal for reconsideration.

### Structural and behavioural remedies

In addition to the extensive public interest conditions imposed, a number of behavioural and structural conditions were imposed in 16 mergers in the 2016/2017 financial year. Remedies aimed at limiting the extent to which directors sit on the boards of competing companies and limiting the exchange of commercially sensitive information between competitors with common shareholders and directors were imposed in several transactions.

#### Southern Sun Hotel and Hospitality Property Fund

In the merger between Southern Sun Hotel (Pty) Ltd (Southern Sun) and Hospitality Property Fund Ltd (HPF), competition concerns related to information exchange and input foreclosure was raised by third-party hotel operators. The Commission proposed conditions aimed at addressing these concerns, however, the merging parties opposed the conditions.

Prior to the hearing before the Tribunal, the merging parties and the Commission reached agreement on the conditions to be imposed. The initial conditions proposed by the Commission were aimed at keeping the operations of the acquiring and target firms separate. This included physical separation and requiring that there be no cross-directorship on the boards of Southern Sun and HPF. On review, the Commission submitted that it would be more pertinent to prevent exposure of third parties’ competitive information to Southern Sun. The conditions that were ultimately imposed included:

- the merging parties will ensure that HPF has its own executive management team that will be responsible for day to day operations of HPF such as marketing and pricing;
- the executive management of HPF will not include any person employed in an executive management capacity at Southern Sun, save for the provision of central services;
- HPF management and directors will ensure strict compliance with any confidentiality obligations contained in the lease agreements with third-party hotel operators in respect of confidential information provided to HPF, including that the confidential information will not be disclosed to employees of Southern Sun;

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47 Southern Sun Hotels (Pty) Ltd and Hospitality Property Fund Limited Case No. LM218Jan16.
any directors appointed to the board of HPF will comply with their fiduciary duties in respect of HPF and will not disclose any confidential information relating to any hotels which are leased from HPF by third-party hotel operators to employees of Southern Sun;

HPF will not seek to enforce any specific term of any existing lease agreement to the extent that it requires any third-party hotel operator that currently leases or operates hotels located at properties owned by HPF, to provide it with any third-party information. This condition will not limit HPF’s ability to procure information other than third-party information that is specifically relevant to the management and operations of the particular hotels that are owned by HP and that are leased to or operated by third-party hotel operators.

**Media24 and Novus Holdings**

In the merger between Media24 (Pty) Ltd (Media24) and Novus Holdings Ltd (Novus), the transaction had already been implemented by the time the competition authorities considered the transaction. The transaction has a long history with Media24 (part of the Naspers group) acquiring joint control from the Retief family in 2000. In 2014, Media24 and the Retief family entered into a further transaction in terms of which Media24 would acquire sole control over Novus (Paarl Media and Paarl Coldset at the time). This transaction was, however, abandoned.

Following on from the abandoned merger, Novus announced its intention to list its shares on the Johannesburg Stock Exchange (JSE). In terms of the JSE listing requirements, Media24 and Novus had to implement an agreement (the restated management agreement) which would give Media24 sole control. Caxton, a competitor, brought an application to the Tribunal arguing that the transaction should be notified as a merger. Ultimately, on appeal, the CAC found that the transaction ought to be notified. This decision is therefore as a result of the CAC’s finding that the transaction should be notified as a merger.

As part of the merger notification Media24 offered to divest part of its holdings in Novus from 66.5 to 19 per cent. In light of the fact that Media24 could still have control by virtue of the restated management agreement and director appointments, further conditions in addition to the divestment condition were imposed. These included:

- **a** the termination of the restated management agreement;
- **b** Naspers will not appoint any members to the executive committee or board of directors of Novus; and
- **c** the divested shares would be acquired by the existing shareholders of Novus that are not related to the Naspers Group.

**Ferro South Africa and Revertex South Africa**

On 4 August 2016 the Tribunal approved a large merger between Ferro South Africa (Pty) (Ferro) and Revertex South Africa (Revertex) subject to a divestiture condition. The merger raised competition concerns in the powdered coating market, in that it would create a structural

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48 **Media 24 (Pty) Ltd and Novus Holdings Limited** Case No. LM012Apr16.
49 **Ferro South Africa (Pty) Ltd and Revertex South Africa** Case No. LM261Mar16.
50 **Ferro South Africa (Pty) Ltd and Revertex South Africa** Case No. LM261Mar16.

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information-sharing opportunity between Akzo Nobel (one of the shareholders of Revertex’s joint venture, Arkem) and Ferro. In order to alleviate the potential information-sharing concerns, the merger was approved subject to the following divestiture conditions:

\( a \) first divestiture – the merging parties shall purchase the 50 per cent shareholding held by Akzo Nobel in Arkem;

\( b \) second divestiture – if the merging parties fail to acquire the shareholding within a certain period of time from approval of the transaction,\(^51\) the merging parties must dispose of their 50 per cent shareholding in Arkem to an independent third party; and

\( c \) third divestiture – if the merging parties fail to conclude the second divestiture within a certain period of time from the first divestiture period,\(^52\) the trustee (a party independent of the merging parties and Akzo Nobel) shall dispose of the merging parties’ 50 per cent shareholding in Arkem to an independent third party.

iv Increasingly interventionist approach to merger control

From the above cases, it is clear that large international transactions garner significant interest by the ministers and trade unions and, where appropriate, significant creative conditions are imposed. In past years, conditions addressing employment concerns have been common, and continue to play a big role. However, in addition to maintaining employment levels, the competition authorities have now imposed far more onerous conditions on merging parties to ensure local procurement, continued promotion of historically disadvantaged individuals through equity shareholding, educational opportunities and the creation of large funds. These funds in particular have significantly increased over the years, from a 200 million rand fund in the Walmart/Massmart merger in 2012 to a 1 billion rand fund in 2016 in the AB Inbev merger. Furthermore, investment into South Africa is on the rise with Sinopec committing to 6 billion rand into the CSA refinery to *inter alia* increase capacity.

The conditions imposed, while aimed at protecting local industry, increase the cost of investing in South Africa.

In addition to the trend to impose extensive public interest conditions, the Commission is also taking a more interventionist approach by prohibiting mergers between competitors that create, or have the potential to create, high-market share accretion or a monopoly position. In the past, the Tribunal has been more willing to impose conditions aimed at addressing these concerns than to prohibit these transactions outright. It will remain to be seen what the outcome of the reconsideration applications is.

This interventionist trend is likely to continue, particularly with the implementation of the Public Interest Guidelines, which clearly indicate the Commission’s approach in merger transactions. Considering the current economic climate, the competition authorities are likely to focus on ensuring the protection of local industry, employment and businesses owned by historically disadvantaged individuals.

In addition to extensive conditions imposed relating to public interest concerns, the conditions imposed to address competition concerns have focused to a large degree on information exchange associated with cross-directorship. Remedies aimed at limiting the extent to which directors sit on the boards of competing companies, placing an obligation to supply and limiting the exchange of commercially sensitive information between competitors with common shareholders and directors were imposed in several transactions.

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51 The time period within which the condition must be fulfilled has been claimed as confidential.

52 The time period within which the condition must be fulfilled has been claimed as confidential.
III THE MERGER CONTROL REGIME

In terms of Section 12(1)(a) of the Competition Act, ‘a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.’

i Change of control

Changes in indirect, as well as direct, control may give rise to a notifiable merger.\(^{53}\)

The Tribunal has previously found that the list mentioned in Section 12(2) of the Competition Act merely lists instances of control and that the list is not exhaustive. The Tribunal stressed that whether control is in fact acquired is a factual question. This question cannot purely be answered by examining the shareholding acquired in the relevant target firm. The very fact that a transaction may not give the acquiring firm more than a 50 per cent shareholding in the target firm does not mean that there has not been a change in control. As the CAC noted in the Distillers case:

\[\ldots\text{the Act was designed to ensure that the competition authorities examine the widest possible range of merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation of the Act}\ldots.\text{For this reason the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of market structure and in particular reduces the level of competition in the relevant market.}\]

This approach is embodied in Section 12(2)(g) of the Competition Act, which refers to a person acquiring control when he or she ‘has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in Paragraphs (a) to (f)’.\(^{54}\)

On 25 November 2015, the CAC provided some useful guidance in the Media 24 decision,\(^{55}\) on the interpretation of Section 12(2)(g) of the Competition Act in overturning a decision of the Tribunal. Pre-merger, Media 24 and Lambert Philips Retief (Retief) jointly controlled Novus Holding Limited (Novus) by virtue of a management agreement dated 6 October 2008 (the old agreement). The proposed transaction contemplated the conclusion of a new management agreement (the new agreement) between Retief, Novus and Media 24 to be effective on the listing of Novus on the JSE Limited. The issue that the CAC had to determine was whether the joint control that Retief shared with Media 24 under the old agreement had been diminished by the provisions of the new agreement to the extent that Media 24 acquired sole control.\(^{56}\) In South Africa, parties are required to notify the change from joint to sole control.

\(^{53}\) Distillers Corporation (South Africa) Limited and Stellenbosch Farmers’ Winery Group Limited/Bulmer (SA) Proprietary Limited, Seagram Africa Proprietary Limited Case No. 08/CAC/May01.

\(^{54}\) Distillers Corporation SA Ltd v. Stellenbosch Farmers’ Winery Group Limited and Bulmers (SA) Pty Ltd and Seagram Africa Pty Ltd Case No. 08/CAC/May01.

\(^{55}\) Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others Case No. 136/CAC/March 2015.

It was argued by Caxton and CTP Publishers and Printers Limited (Caxton), an interested party in the proposed transaction, that while Retief retained certain of his former functions under the new agreement, he had been stripped of all power-sharing and accordingly no longer had material influence over the strategic aspects of Novus. The change was largely required as a result of the listing of Novus that then necessitated compliance with Section 66(1) of the Companies Act 2008. This Section of the Companies Act provides that:

…the business and affairs of a company must be managed by or under the direction of its board, which has authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.

The memorandum of incorporation to be implemented on listing did not refer to either the new or old agreements.

The CAC found that, even though the new agreement did confer certain powers on Mr Retief, those powers were still subject to the intervention and overriding powers of the board of Novus if it preferred a different course of action. Retief was therefore found to no longer have the ability to materially influence the policy of Novus in a manner contemplated in Section 12(2)(g) of the Competition Act because he could be overridden by the board of directors at any time.

The CAC also made some useful remarks regarding the ambit of Section 12(2)(g):

a the ‘policy’ that is being materially influenced must relate to issues of strategy, which is usually guided by the board or the shareholders;\(^57\)

b the issue of ‘materiality’ of influence relates to the range of matters over which the power extends rather than the decisiveness of each matter;\(^58\) and

c ‘ability’ refers to both a power to do something and a power to prevent something from being done.\(^59\)

In the \textit{Multichoice} case,\(^60\) the Tribunal on 11 February 2016\(^61\) found that an agreement between Multichoice and South African Broadcasting Corporation (SABC) in terms of which SABC agreed that all channel signals in respect of SABC FTA channels, as transmitted by SABC on the SABC DTT platform, would be submitted on behalf of the SABC by Multichoice did not constitute a notifiable merger.

The Tribunal found that:

a in ordinary commercial practice, a person enjoys at least an ongoing form of control over the company and not merely a specific aspect of it;\(^62\)

b the emphasis of control in terms of the Competition Act is the ability to influence the competitive inclination of a company. This suggests that control should only be

\(^{57}\) Caxton and CTP Publishers and Printers and Media 24 Proprietary Limited and Others Case No. 136/CAC/ March 2015 Paragraph 46.


\(^{60}\) Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others Case No. 020727.

\(^{61}\) The reasons were issued on 11 February 2016 but the hearing took place on 30 September 2015.

\(^{62}\) Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others Case No. 020727 Paragraph 94.
inferred when the policy covers a wider ambit not a limited specific aspect, particularly in the context of a target firm whose business covers a range of other activities, which remain unfettered by the influence of the putative controller;\textsuperscript{63} and there is a danger in giving this Section of the Competition Act too broad an application since there are many outsiders that may be able to influence a company on one aspect of its business, or at a particular finite moment in time. Accordingly, Section 12(2)(g) of the Competition Act should be given some sensible limitation to both the scope and time of the policy matter in question.\textsuperscript{64}

Based on the above factors, the Tribunal was of the view that the agreement on encryption and access did not constitute control by Multichoice over SABC’s business for the purpose of Section 12(2)(g) of the Competition Act. This decision was, however, taken on appeal. The CAC, in considering the evidence, found that the obligation of SABC to cooperate with Multichoice to ensure that the Minister of Communication’s decision on encryption does not become a burdensome obligation on Multichoice could result in SABC losing its autonomy to decide on and adopt a policy that is consistent with its interests. There was, however, insufficient information to conclude on this issue and the CAC granted the alternative relief sought by Caxton, namely that the Commission investigate whether or not the agreement gives rise to a merger.\textsuperscript{65} It remains to be seen what the Commission’s investigation will reveal.

In the \textit{Tsogo Sun} case,\textsuperscript{66} the question to be considered was whether the acquiring firm, being Hosken Consolidated Investments Limited (HCI), having obtained prior approval from the Commission to acquire sole control of an entity over which it exerts control, must still obtain merger approval when it crosses a bright line (i.e., when its shareholding increases to more than 50 per cent). Prior to 2014, Tsogo Sun Holdings Limited (Tsogo Sun) was jointly controlled by HCI and SABMiller plc (SABMiller). In 2014, SABMiller divested its shareholding in Tsogo Sun, which left HCI as the sole controller of Tsogo Sun. The transaction was assessed and approved unconditionally at the time on the basis of sole control even though HCI only owned 47.61 per cent of the shares.

In 2017, HCI intended to increase its shareholding from 47.61 to more than 50 per cent. The Commission and the Tribunal argued that the transaction was notifiable because the proposed transaction would result in the crossing of a bright line. That is, HCI would increase its shareholding in Tsogo Sun from the current 47.61 per cent to more than 50 per cent resulting in HCI beneficially owning more than half of the issued share capital of Tsogo Sun, a form of control specified in Section 12(2)(a) of the Competition Act.

HCI did not agree and ultimately appealed to the CAC. In explaining sole control, the CAC referred to a helpful test in the Official Journal of the European Union C95/16 that states:

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\textsuperscript{63} \textit{Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others} Case No. 020727 Paragraph 94.

\textsuperscript{64} \textit{Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others} Case No. 020727 Paragraph 95.

\textsuperscript{65} \textit{Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others} Case No. 140/CAC/Mar 16 CT.

\textsuperscript{66} \textit{Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v. the Competition Commission} Case No. 154/CAC/Sept17.

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Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking... determine the strategic commercial decision of the other undertaking and where one shareholder can veto strategic in an undertaking.

HCI and Tsogo Sun contended that the acquisition of sole control is a ‘once-off’ affair and accordingly that, once they have received approval for HCI to acquire sole control over Tsogo Sun, there is no requirement for HCI to obtain any further permission to increase its shareholding in Tsogo Sun over 50 per cent.

Based on this, the CAC confirmed its finding in previous cases where it held that a change of control is a once-off affair. The CAC found that where a shareholder already has sole control by virtue of the ability to materially influence the policy of a firm for example, that firm will not need to re-notify a merger if it crosses a bright line (i.e., by acquiring more than 50 per cent of the shares for example). On the facts, the CAC found that pre-merger HCI exercised sole control over Tsogo Sun by virtue of Sections 12(2)(g) (the ability to materially influence the policy of the firm) and 12(2)(c) (the ability to appoint or veto the appointment of the majority of the directors to the board) of the Competition Act. HCI did not therefore need to obtain approval from the competition authorities to increase its shareholding to more than 50 per cent.

The Commission has appealed to the Constitutional Court, the highest court in South Africa. The matter has not yet been decided by the Constitutional Court.

ii Part of a business

There is no definition of ‘part of a business’ in the Competition Act, but the Tribunal has previously found that in order to fall within the definition of a merger the acquiring firm must acquire something more than a bare asset that would enhance its competitive position. The Tribunal held that:

…when the acquisition of an asset constitutes the acquisition of a business or part of a business is a question of fact that must be examined in the context of the whole transaction. Is the acquiring firm, by acquiring the asset, acquiring something more than a bare asset that would enhance its competitive position? One example would be where the purchase of an asset enables the acquiring firm to increase its market share or pre-empt a rival from increasing its...67

In the Multichoice case, the Tribunal found that the right to use material from an archive does not amount to productive capacity that could be considered a business.68 There was also no evidence to support the contention that the agreement would transfer market share. In reaching this decision, the Tribunal considered the following facts concerning the entertainment channel:

a Multichoice has the exclusive right to broadcast the material that comprises the entertainment channel for a period of five years;

b the material is made up of SABC archives;

67 Competition Commission and Edgars Consolidated Stores Ltd and Others Case No. 95/FN/Dec02 (24 March 2003).

68 Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others Case No. 020727 Paragraph 57.
South Africa

c SABC is entitled to broadcast the entertainment channel on its own services, subject to a minimum time delay from date of broadcast by Multichoice, and provided further that it must be in the same format and schedule as broadcast by Multichoice;
d SABC may not authorise any third party to use the material utilised on the Entertainment channel during the course of the agreement;
e a clause in the agreement restrains SABC from distributing a channel that is ‘substantially similar’ to the entertainment channel;
f the channel would utilise less than 1 per cent of the archives content;
g other than the above, the agreement does not confer any control over the archive on Multichoice; and
h the choice of what content goes on the entertainment channel is made by the SABC, although Multichoice has a right to veto content it deems to not conform with the standard; and advertising revenue sold on the channel goes to SABC and not Multichoice.69

On appeal, the CAC came to the same decision but on different grounds. The CAC found that even though Multichoice is given extensive say over the material distributed through the Entertainment channel and SABC is constricted in its ability to reuse the material on its own channels, these two facts do not allow for a conclusion that there has been a change of control over a part of a business. Additional facts would be required to draw this conclusion.70

iii Thresholds

Mergers are classified as small, intermediate or large, based on the thresholds for notification.

Small mergers are not required to be notified to the Commission and may be implemented without approval unless notification is specifically requested by the Commission. The Commission has issued a Guideline on small merger notification,71 which provides that the Commission will require notification of small mergers where the merging parties are under investigation by the competition authorities in terms of Chapter 2 (the Section dealing with prohibited practices) of the Competition Act, or if the merging parties are respondents to pending proceedings referred by the Commission to the Tribunal in terms of the Chapter 2 of the Competition Act.

Intermediate and large mergers require notification to the competition authorities by the merger parties and may not be implemented until approved.

An intermediate merger is one where the ‘combined figure’ is 600 million rand or more and the asset value in South Africa or the turnover value in, into or from South Africa of the target firm (depending on which is the highest) in the preceding financial year is equal to or more than 100 million rand.72

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69 Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others Case No. 020727 Paragraph 49.
70 Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others Case No. 140/ CAC/Mar 16 CT paras 43 and 44.
72 Government gazette No. 41124 of 15 September 2017.
A large merger is one where the asset value in South Africa or the turnover value in, into or from South Africa of the target firm (depending on which is the highest) in the preceding financial year is equal to or more than 190 million rand and the ‘combined figure’ is 6.6 billion rand or more.73

The ‘combined figure’ is the combined asset values in South Africa, or turnover values in, into or from South Africa of the acquiring firm and the target firm in their respective preceding financial years or the assets of the one and the turnover of the other, whichever combination reaches the highest figure. Importantly, both branches of the inquiry must be met.

iv Procedures and filing fees

In order to assist merging parties in complying with the legislative requirements, the Commission issued a practice note: Practitioner Update Issue 6: Complete Merger Filing Requirements.74 This document sets out the documents and information, which the Commission will require merging parties to supply in a merger filing.

The competition authorities charge merging parties a fee for analysing the matter. The filing fee for an intermediate merger is currently 150,000 rand, and for a large merger, 500,000 rand. No VAT is payable.75

v Service on trade unions

In terms of Section 13A(2) of the Competition Act, parties to an intermediate or large merger must provide a copy of the non-confidential version of the merger filing to any registered trade union that represents a substantial number of its employees; or the employees or employee representative if there is no registered trade union. Table CCR1 of Annexure 1 to the Rules for the Conduct of Proceedings in the Competition Commission (the Commission Rules) provides that proper service of documents or notices to trade unions is only deemed to have taken place in intermediate and large merger proceedings where such notice is served to the main office (i.e., the national head office) of that trade union.76 The above procedure recently received attention in the Tribunal decision of *RMB Ventures Seven and Gemelli case*,77 where the merging parties had only served a non-confidential version of the merger filing on the local office and not on the head office. The Commission and the merging parties had to agree to take the matter off the roll to allow for the trade union’s head office to make submissions in relation to the transaction once a copy of the merging filing had been served on it. As a result, in order to avoid delays, a copy of the non-confidential version of the merger filing should be served on both the local and head office of any trade union.

In terms of Rule 37 of the Commission Rules, trade unions or employees are entitled to participate in merger proceedings by filing a Form CC5(1) within five business days after the date on which the merger filing was received. In practice, the competition authorities permit participation even if notice of participation is received after the five-day period.78

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73 Government gazette No. 41124 of 15 September 2017.
75 Government gazette No. 41124 of 15 September 2017.
76 www.compcom.co.za/the-competition-commission-rules/.
77 *RMB Ventures Seven (Pty) Ltd And Gemelli (Pty) Ltd* Case No. LM279Feb18.
78 Published under government gazette No. 22015 of 1 February 2001.
vi  Time periods

Intermediate mergers

The Commission has up to 60 business days to review intermediate merger filings.

In terms of the Competition Act, the Commission has an initial 20 business day period to investigate an intermediate merger but this review period may be extended by the Commission for a further period of up to 40 business days subsequent to the issuance of an extension certificate.79

If upon the expiry of the 20-business-day period, or the extended period, as the case may be, the Commission has not issued any certificate evidencing its determination, then the Commission will be deemed to have approved the proposed merger.80

Large mergers

There is no time limit for the review of large mergers.

The Commission has an initial 40-business-day period within which to review the transaction, and make a recommendation to the Tribunal. This period may, however, be extended for up to 15 business days at a time for an unlimited number of times with the agreement of the merging parties. In the event that the Commission requires an extension, and the merging parties do not consent to an extension, it must apply to the Tribunal, which almost always grants extensions to the Commission on good cause. At the conclusion of its investigation, the Commission must prepare and submit a recommendation on the merger to the Tribunal.

Once the Commission makes its recommendation to the Tribunal, a pre-hearing must be scheduled within 10 business days, although this period too can be extended.

The Tribunal must then hold a hearing to consider the proposed transaction. During this hearing, interested parties (for example, competitors, customers, or employees) may be granted the opportunity to make submissions and all hearings are public. The timetable for the procedures leading up to and the actual hearing of the matter by the Tribunal will be scheduled at the pre-hearing referred to above.

After the hearing, the Tribunal has to decide whether to confirm or overrule the recommendation of the Commission. The Tribunal must approve, approve subject to conditions or prohibit the merger within 10 business days after the end of the hearing, and within 20 business days thereafter issue written reasons for its decision and publish a notice of its decision in the government gazette.

vii  Acceleration of review period

Unfortunately, there is not much scope to accelerate the review procedure as the competition authorities are only bound by the legislated time periods. The competition authorities are, however, mindful of merging parties’ need to implement transactions swiftly and accordingly, do work as fast as possible to investigate and decide upon mergers.

The Commission has issued a helpful guideline on the timelines applicable to merger reviews in South Africa, and it aims, where possible, to stick to these timelines. The 2015 Mergers and Acquisitions Service Standards (the 2015 Service Standards)81 set out the

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79  Section 14(1) of the Competition Act.
80  Section 14(2) of the Competition Act.
maximum number of business days that the Commission anticipates to complete its review of notified transactions. The 2015 Service Standards replaced the 2010 Service Standards. The rationale for the revision of the timelines takes into account the volume of notifications and the increasing complexity of mergers notified.82

The 2015 Service Standards contemplate the following timelines.

Phase I (non-complex)
The Commission aims to review a Phase I merger within 20 business days. These are mergers in which there is little or no overlap between the activities of the merging parties, no public interest issues and a simple control structure.

Phase II (complex)
The Commission aims to review a Phase II merger within 45 business days. These are mergers between direct or potential competitors, or between customers and suppliers, where the merging parties have a combined market share of more than 15 per cent, or where public interest issues arise.

Phase III (very complex)
The Commission aims to review a Phase III intermediate merger within 60 business days and a Phase III large merger within 120 business days. Phase III mergers are likely to result in a substantial prevention or lessening of competition (including any transactions involving ‘leading market participants’ where the combined market share of the transacting parties is more than 30 per cent).

viii Third-party access to the file and rights to challenge mergers

Intervention in merger proceedings is specifically provided for in Section 18 of the Competition Act, albeit only in respect of the Minister of Economic Development83 and the Minister of Finance84 (in relation to transactions falling within the jurisdiction of the Banks Act 1990). Furthermore, Rule 37 of the Commission Rules permits participation in merger proceedings by trade unions or employee representatives. These rules have been used on a number of occasions, both by the Ministers and trade unions to intervene in merger transactions and extract some benefit, usually for the public interest. These interventions have been used with success in some of the most publicised merger cases in South Africa, namely the Walmart/Massmart merger, the SABMiller/AB Inbev merger and the SOIHL merger.

In addition to the above rules, ‘any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.’85

Rule 46 of the Rules for the Conduct of Proceedings in the Tribunal (the Tribunal Rules)86 indicates that, at any time after an ‘initiating document’ is filed, any person who has a material interest in the matter may apply to intervene in the Tribunal proceedings by

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82 Page 5 of the 2015 Mergers & Acquisitions Service Standards.
84 See Rule 36 of the Competition Commission Rules and Rule 30 of the Competition Tribunal Rules.
85 Section 13B(3) of the Competition Act.
86 Published under government gazette No. 22025 of 1 February 2001.
filing the prescribed forms that must include a concise statement of the nature of the person’s interest in the proceedings, and the representations the person will make.\textsuperscript{87} The Tribunal will be required to make an order allowing the applicant to intervene and can place limitations on the intervention.\textsuperscript{88}

If an order is granted permitting the intervention, the Registrar of the Tribunal must send a list of all the documents that have been filed in the proceedings prior to the day on which the intervention application was granted. The intervenor will be permitted access, subject to any order on restriction of access.\textsuperscript{89}

In the \textit{Caxton} decision,\textsuperscript{90} Caxton was granted permission on 9 November 2015 to participate in the merger hearing, including the right to:

\begin{itemize}
    \item[a] attend pre-hearing conferences;
    \item[b] have access to, and inspect any, document filed by the merging parties and other parties subject to confidential information only being available to legal representatives;
    \item[c] call for discovery of further documents;
    \item[d] request the Tribunal to direct or summon a person to appear at the merger hearing or produce documents;
    \item[e] participate in any interlocutory proceedings in respect of the merger hearing;
    \item[f] adduce oral and documentary evidence at the merger hearing;
    \item[g] cross-examine any of the witnesses; and
    \item[h] present an argument at the merger hearing.
\end{itemize}

Caxton’s participation was limited in certain respects, and in particular to certain key issues.

Intervention by interested parties in mergers has not been prominent over the past year, but it is likely when one considers the competition authorities increasing interventionist approach in approving transactions subject to conditions that interested parties may view merger control as a platform to raise concerns and gain support from the competition authorities to impose remedies. This has been seen most recently in the SABMiller bottling merger and the AB InBev transactions.

\section*{ix\hspace{1em} Effect of regulatory review}

In terms of the Competition Act it is not possible for a transaction to be considered simultaneously by both the Commission and Tribunal. A merger transaction in terms of the Competition Act can only be investigated by the Commission. If the transaction is a large merger, once the Commission has completed its investigation it will refer the merger to the Tribunal to consider and make a determination.

It is, however, possible for more than one competition authority in multiple jurisdictions to consider the same transaction simultaneously. In these instances, each competition authority considers the effect that the transaction will have on its own jurisdiction. The time periods for consideration of the merger are those set out in each jurisdiction’s respective competition legislation. Across Africa, the competition authorities are mindful of each other’s processes and try as far as possible to work within merging parties’ time frames to ensure

\begin{itemize}
    \item[87] Rule 46(1) of the Competition Tribunal Rules.
    \item[88] Rule 46(2) of the Competition Tribunal Rules.
    \item[89] Rule 46(3) of the Competition Tribunal Rules.
    \item[90] \textit{Caxton and CTP Publishers and Printers Limited and Media 24 (Proprietary) Limited and Others} Case No. 019323.
\end{itemize}
clearance at similar times. Various competition authorities across Africa have also entered into memorandums of understanding (MOU) to govern the relationships between them in dealing with multi-jurisdictional filings.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

Coordination with other jurisdictions is predominantly done through MOUs entered into between regulators.

In 2015, the Commission entered into its first MOU with the Namibian Competition Commission. In May 2016, the Commission signed an MOU between the competition authorities of the South African Development Community, and the MOU between the competition authorities of Brazil, Russia, India, China and South Africa (BRICS). Further MOUs have been entered into with the European Commission (22 June 2016), the Competition Authority of Kenya (6 October 2016), the Federal Antimonopoly Service (6 October 2016), the Competition Commission of Mauritius (13 October 2016) and the Administrative Council for Economic Defence of Brazil (1 December 2016).

While the MOUs provide for cooperation, this is predominantly in relation to improving and strengthening the effective enforcement of competition laws.

The Southern African Development Community MOU, for example (of which the Namibian Competition Commission is a party) does, however, specifically provide for the cooperation and coordinating with each other in the investigation of mergers.

ii Financial distress and insolvency

In assessing a merger transaction in South Africa, the competition authorities must determine whether or not the merger is likely to substantially prevent or lessen competition. In making this determination, the competition authorities must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or cooperatively, taking into account any factor that is relevant to competition, including whether the business of a party to the merger has failed or is likely to fail.91

The Competition Act permits merging parties to raise a ‘failing firm’ argument as a defence to a problematic merger. The principal case dealing with the test one must satisfy in order to meet the ‘failing firm’ criteria in terms of Section 12 of the Competition Act is the large merger between Iscor and Saldana Steel.92 This case makes it clear that whether a firm is truly ‘failing’ (in the sense of about to exit the market totally) is only one factor among many that should be considered when the competition authorities decide to approve a merger or not. The Tribunal suggests that the merging parties need to show that the target firm would exit the market absent the merger, that its market share would largely accrue to the acquiring firm anyway, and that there were no other potential purchasers who would present fewer competition concerns. This is an old case (2001).

Despite established South African case law and international precedent that the onus is on the merging firm to provide the evidence necessary to invoke the failing firm doctrine,

91 Section 12A(2) of the Competition Act.
92 Iscor Limited and Saldana Steel (Pty) Ltd Case No. 67LMDec01.

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the Tribunal, in the Santam case\textsuperscript{93} curiously found that it was not the merging parties who invoked the failing firm argument but rather the Commission. The merging parties therefore did not put up any evidence to support the failing firm defence. After new evidence surfaced that the target firm had an alternative bidder, the Commission changed its stance and no longer indicated that the firm was failing. As a result, the Tribunal found that the target firm had failed to meet the requirements of a failing firm. However, in a 2016 decision, the Tribunal discussed and applied the failing firm doctrine in accordance with the principles set out in the Iscor and Saldana Steel decision in the CTP case.\textsuperscript{94} In this case the Tribunal found that CDT (the target firm) met the requirements of a failing firm and as such the merger was approved with conditions. It is noteworthy that merging parties do not often rely on the failing firm defence and almost always prefer to argue that their merger is not anti-competitive, or even if it is, that it should be allowed on efficiency or public interest grounds.

The fact that a firm is in financial distress can also be raised as a public interest benefit of the merger, especially in circumstances where, absent the merger, the target firm will not survive and this will have a negative impact on employment.

It is possible, in extreme circumstances, for a merger transaction to receive clearance on an expedited basis, if there are compelling financial considerations.

For example, in the merger between Stefannuti Stocks and Energotec,\textsuperscript{95} the transaction was approved within three days of filing the merger, because the target firm was in provisional liquidation with imminent job losses and prejudice to its customers.\textsuperscript{96} This is, of course, an unusual course of action, but given the competition authorities’ focus on public interest concerns and in particular job losses, an outcome of this nature is not impossible and is in fact highly persuasive. It bears mentioning, however, that merely indicating that a company is in business rescue will not prompt such rapid clearance. The facts must be sufficient to support such a contention.

This was demonstrated in the merger between CTP and Compact Disc Technologies,\textsuperscript{97} where the Commission rejected the failing firm defence because the merging parties had not met the necessary requirements of that defence – in particular, proof that there was no other buyer for the target firm.\textsuperscript{98}

\section{OUTLOOK & CONCLUSIONS}

The past year has demonstrated the Commission’s increasing interventionist approach to merger control, both in terms of the number of mergers prohibited and also the conditions imposed in approving the transactions.

\textsuperscript{93} Santam Ltd/Emerald Insurance Company Ltd and another [2009] 2 CPLR 453 (CT).
\textsuperscript{94} CTP Ltd and Compact Disc Technologies (a division of Times Media (Pty) Ltd) v. Competition Commission [2016] 1 CPLR 105 (CT).
\textsuperscript{95} Stefannuti Stocks (Pty) Ltd and Energotec (a division of First Strut) (Pty) Ltd Case No. 017590.
\textsuperscript{96} Stefannuti Stocks (Pty) Ltd and Energotec (a division of First Strut) (Pty) Ltd Case No. 017590 Paragraph 1.
\textsuperscript{97} CTP Limited and Compact Disc Technologies (a division of Times Media (Pty) Ltd) and the Competition Commission Case No. IM232Feb16.
\textsuperscript{98} CTP Limited and Compact Disc Technologies (a division of Times Media (Pty) Ltd) and the Competition Commission Case No. IM232Feb16 Paragraph 10.
The cases dealt with above show the Commission’s developing jurisprudence, and their ability to impose both pragmatic and creative conditions to address concerns raised by interested parties.

The ministers and trade unions have demonstrated their willingness to participate in mergers, which in their view have significant public interest concerns. The competition authorities pay careful attention to those concerns raised and work pragmatically with the parties to address the concerns. By way of example, the Department of Economic Development raised significant public interest concerns in the SOIHL merger, which resulted in extensive conditions being imposed.

The creative conditions imposed in recent transactions show that the scope of interpretation of the conditions that can be imposed to address public interest concerns is continuously broadening. It remains to be seen how widely these conditions will develop in the future.

The conditions that have been imposed in South Africa also have a significant impact both on the transaction costs and the timeline for approval. For example, Sinopec is, in terms of the conditions imposed, required to invest significantly into South Africa by establishing a head office in South Africa, investing 6 billion rand in CSA’s refinery as well as through the creation of a fund.

The Public Interest Guidelines published in June 2016 will require analysis by merging parties, and it is recommended that in transactions where public interest issues are of concern that the parties proactively assess and address these concerns to avoid unnecessary delays in the approval process and the potential for unnecessarily broad conditions.

What is apparent from these years is that public interest considerations will continue to play a large role in merger proceedings, and merging parties should ensure that they are prepared for interactions with trade unions, the ministers and the competition authorities to address any concerns that may arise or risk prohibition of their transactions.

In addition, on 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill (the Draft Bill) for public comment. The Minister of Economic Development and the Commission have expressed concerns that the current provisions of the Act do not adequately allow the competition authorities to address issues created by the large number of highly concentrated markets in South Africa.

The background note to the Draft Bill specifically mentions that strengthening the provisions related to mergers is one of the Draft Bill’s five priorities.

The Draft Bill provides for, among others, scrutiny of market concentration and the racially skewed spread of ownership of the South African economy and the proposed amendments seek to empower the competition authorities to create more opportunities to advance transformation of ownership of the economy. The most significant changes are aimed at addressing concerns that concentrated markets inhibit new entrants and exclude large numbers of black South Africans from the opportunity to run successful enterprises.

The changes proposed will have a substantial impact on all business operating in South Africa and will increase the complexity associated with complying with the Competition Act. The proposed amendments will, if implemented, radically change the way that prohibited practices and mergers are investigated and prosecuted by the competition authorities.

There has been significant public comment on the Draft Bill and it remains to be seen in what form it will be implemented.
Chapter 37

SPAIN

Pedro Callol

I INTRODUCTION

i Regulations

The merger control regime is regulated by the Competition Act\(^2\) and its implementing regulation\(^3\) and interpretative guidelines.

Authorities

The national competition authority is the National Competition and Markets Commission (CNMC).

The CNMC was created in 2013 bringing together under a single roof the pre-existing National Competition Commission and various sector national regulatory authorities (energy, telecommunications and media, railways, postal, airports).\(^4\) This had an impact over mergers in regulated sectors, hitherto subject to the need for a cross-report from the relevant regulatory authority. The creation of the CNMC eliminated the need for cross-reports from regulators in industry sectors that are now dealt with by the CNMC. Hence, the CNMC modified its Notice on Short Form Merger Filings in October 2015, to eliminate the rule that short-form merger filings were not available when a cross-report from the competent regulatory Authority was required. Reduced form filings are now possible also in industry sectors where the CNMC has authority (although standard merger filing forms will still be required in industry sectors where the CNMC has no authority, such as banking mergers).\(^5\)

The CNMC has a dual structure, which reflects on its regulatory and competition enforcement rules. A collegiate body, the Council, is the decision-making organ of the CNMC. The Council has 10 members divided into two chambers of five members each, one chamber dealing with competition matters and presided over by the President of the CNMC; the other dealing with regulatory supervision and led by the Vice-President. The chambers may meet separately or jointly in a plenary session. The President has the deciding vote in case of a tied vote at the Council.

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2 Law 15/2007 of 3 July on Competition.
3 Royal Decree 261/2008 of 22 February, approving the Competition Implementing Regulation.
4 For more details on the combination of regulators resulting in the CNMC, see my article in *The European Competition Law Review*, September 2013 edition, “Ever doubted the “convergence” of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof.”
5 CNMC Notice of 21 October 2015 on cases where the short-form filings may be used.
In the area of merger control, the Council of Ministers (the Cabinet) has a role in problematic mergers where the CNMC either considers prohibition or submission to conditions. This role of the Council of Ministers is further described below.

Appointment of the CNMC Council members, including the President and Vice-President, is entrusted to the government upon proposal of the Ministry of Economy. CNMC Council members are appointed for non-renewable terms of six years. The bulk of the CNMC is made of the various directorates, which deal with the investigations and provide the substantial back office research and knowledge required for the day to day work of the CNMC. One of those directorates is the Competition Directorate, which is in turn divided into various sub-directorates of industry and energy, information society, services, leniency and cartels and, finally, a monitoring sub-directorate. There is no specific merger task force, which means that mergers are allocated internally.

Pre-merger notification and approval

Which transactions qualify as a merger

A concentration takes place when a stable change of control of an undertaking takes place as a result of a merger of two previously independent undertakings; an acquisition of control of an undertaking or a part thereof by another undertaking; or the creation of a joint venture or the acquisition of joint control of an undertaking, provided the joint venture is full-function and performs its economic activity on a long-term basis.

An acquisition of control results from contracts, rights or any other means that, taking into account the circumstances of fact and law, confer the possibility of exercising decisive influence over the acquired undertaking. The concept of control encompasses ownership of shares or assets, contracts, rights or other means that provide decisive influence over the composition, deliberations or decisions of the governing organs of the company.

Purely internal restructurings within a company group do not constitute a change of control. Likewise, the acquisition of control must involve a business having access to the market and therefore a business to which a market share or market turnover can be assigned. Hence an acquisition of a business previously providing an internal service solely to the selling group will not amount to a merger, provided that no sales from the acquired business take place to third parties within a start-up period from the acquisition (start-up period of generally three years). Temporary shareholdings by financial entities, holding companies and receiverships are excluded in the circumstances described by the Competition Act.

Thresholds triggering merger control in Spain

The Competition Act orders that concentrations that meet either one of the following thresholds must be notified to the CNMC for merger control purposes:

- That, as a result of the concentration, a market share of 30 per cent or more of the relevant product market in Spain, or a relevant geographic market within Spain, is acquired or increased. A de minimis exemption applies if:
  - the turnover of the acquired undertaking in Spain does not exceed €10 million; and
  - the concentration does not lead to acquiring or increasing a market share of 50 per cent or higher in the relevant product or service market or in any other market affected by the concentration; or
That the aggregated turnover in Spain of the parties to the concentration exceeds €240 million in the last accounting year, if at least two of the parties to the concentration each have an individual turnover exceeding €60 million in Spain.

If either one of the above thresholds is met, filing is mandatory and the concentration cannot be implemented prior to having been authorised. The Competition Act provides for a derogation system that enables total or partial closing of a merger prior to having gained merger control clearance. This is further discussed under Section III, infra.

Consequences of failing to notify a reportable transaction
Closing a transaction without having obtained the required merger control approval is a serious infringement under the Competition Act. The CNMC has been quite active in recent years in monitoring gun jumping, particularly of transactions that had to be reported pursuant to the market share threshold, which the CNMC has shown it has will to enforce. Closing a reportable transaction without having gained merger control approval may carry fines of up to 5 per cent of the turnover of the acquiring group.\(^6\) Closing in contravention of the terms of a merger control decision may result in fines of up to 10 per cent of turnover. Fines are imposed following a separate administrative investigation on gun jumping. Furthermore, companies condemned for gun jumping, may potentially be disqualified from supplying goods and services to the public administrations under the public procurement laws.

Filing fee
A filing fee must be paid and proof of payment included as part of the merger filing. The amount of the fee is determined in an Annex to Law 3/2013 of 4 June, on the creation of the CNMC. The amount of the fee may be updated annually and is currently as follows:

- \(a\) €5,502.15 when the aggregate turnover of the merging parties is equal or less than €240 million;
- \(b\) €11,004.31 when the aggregate turnover of the merging parties is between €240 million and €480 million;
- \(c\) €22,008.62 when the aggregate turnover of the merging parties is between €240 million and €3 billion; and
- \(d\) a fixed amount of €43,944 when the aggregate turnover of the merging parties is above €3 billion, adding €11,004.31 to the fee for each additional €3 billion of aggregate turnover of the parties up to a maximum fee amount of €109,906.

The filing fee for short form filings currently amounts to €1,530.15.

II YEAR IN REVIEW

Although more active than in some of the prior years in terms of deal flow, 2017 has been a rather standard year in merger review terms, with no transaction having been subjected

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\(^6\) It is to be noted that, in some cases, worldwide turnover of the infringing group has been used as a basis for the calculation of the fine (Decision of 26 January 2010, Abertis/Inarlia, SNC/0003/09). Also occasionally turnover of both acquirer and target are taken into account for the calculation of the fine (Decision of 22 July 2011, Dorfl/Reit, file SNC 0009/11).
to Phase II. Conversely, we see some innovative and interesting Phase I reviews in exciting sectors, including some transactions in the ‘new’ economy. In addition, the CNMC has been quite proactive in approving merger transactions, even highly problematic ones, in Phase I, when necessary, subject to commitments.

Overall, roughly 100 concentrations were subject to merger control in 2017, in all sectors including advertising spending, retail distribution of automotive fuels, waste treatment, e-commerce, computer programs, pharmaceutical sector and manufacturing operations of automated teller machines. We set out below some significant merger cases.

i Acquisition of the newspaper business of Publicaciones y Ediciones de Alto Aragón, SA (PEASA) by Heraldo Aragón, SA (Heraldo)\(^8\)

The acquisition by Heraldo of the exclusive control of PEASA implied the market exit of the main operator in the printed newspaper business in the province of Huesca, and the advertising associated with it, including advertising in local radio and television in Huesca. The main effects of the operation occur in the regional or local advertising market in daily printed press in the province of Huesca, where the concentration is a three-to-two merger, with the resulting entity acquiring 90–100 per cent of the market.

The notifying party presents the transaction as the only viable outcome to preserve the acquired business, due to the continuous decline of the printed daily press business.

The CNMC cleared the merger unconditionally, based on the substantial decline of sales of printed newspaper copies in recent years.

ii Acquisition of Mallinckrodt Chemical Holdings (Mallinckrodt) By Glo Bidco, SARL (Glo Bidco)\(^9\)

The operation consists in the acquisition of exclusive control of the business of radiopharmaceuticals for nuclear images of Mallinckrodt.

There are two types of diagnostic technologies in nuclear medicine: single-photon emission computed tomography (SPECT) and positron emission tomography (PET). The operation results in an overlap in the market of industrial SPECT and a vertical relationship between the industrial SPECT market and the downstream market for SPECT unit doses preparation.

The transaction led to substantial market concentration and this was a three-to-two merger in various relevant markets. However, the CNMC granted unconditional, Phase I, clearance, on the basis of a number of powerful merger defences. The barriers to entry to these markets are basically regulatory, the technology is well known and has not evolved significantly, industrial SPECT products are not generally protected by patent and although it is necessary to make an investment to establish a manufacturing plant, which requires specific equipment for industrial SPECT, such investment is perfectly viable for companies operating in the pharmaceutical industry. Furthermore, market shares in the relevant markets are volatile as these are bidding markets where opportunity windows to compete are opened with each tender called by hospitals of the public sector, with contracts not exceeding four

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\(^7\) At the moment of editing this chapter the CNMC had not yet published its memory of activities for 2017.

\(^8\) Decision of 5 May 2016, HERALDO/PEASA, file C/0734/16.

\(^9\) Decision of 3 November 2016, GLO BIDCO/MALLINCKRODT, file C/0803/16.
years, the most usual being the concession for periods of one year renewable for one extra year. Regulated cap pricing and monopsony power of the public health system were important factors taken into account to afford quick clearance.

iii Acquisition of Codman Neurosurgery Business by Integra Lifesciences Holdings Corporation (Integra) subject to commitments

The transaction consisted of the acquisition by Integra of the exclusive control of Codman Neurosurgery Business (CNS), this being a business division of Depuy Synthes Inc, a 100 per cent subsidiary of the Johnson & Johnson Group, active in the field of medical devices for neurosurgery.

The transaction involved the acquisition by Integra of new assets complementary to its business such as antimicrobial catheters and programmable valves that are key products in the area of neurosurgery involving access to the brain or other parts of the central nervous system. There were overlaps in the following markets: (1) intracranial pressure internal monitoring (ICP); (2) external ventricular drainage (DVE); (3) DVE collection bags; (4) valves for the treatment of hydrocephalus; (5) dura repair products; (6) bipolar electrosurgical forceps; and (7) cranial access instruments.

In the ICP market, Integra reinforced its position and posed a risk to effective competition. Therefore, Integra put forward the possibility to: (1) divest the PIC business of Integra, or (2) divest the PIC business of CNS.

The commitments included already a description of the features the buyer should comply with in order to be adequate, as well as the procedure and periods to carry out the divestment. Integra also committed not to reacquire the divested business and to preserve the viability of the business.

iv Merger of Servired, Sistema 4B and Euro 6000

The CNMC has authorised with commitments the combination of the three card payment service companies operating in Spain: Servired, Sistema 4B and Euro 6000 (SMP), of which practically all the banking entities in Spain were shareholders. The operation was subordinated to the fulfilment of a series of requirements aimed at guaranteeing greater competition in card payment applications in Spain for the benefit of financial entities, business and end users.

With the operation, one of the peculiarities of the Spanish card payment sector disappears (in other countries of the European Union the most usual is that there is a single SMP). In addition, the shareholder’s agreement foresees that the resulting entity will face the necessary investments to develop its own payment application that will offer a domestic payment system with all the functions in competition with other payment systems, including international systems. The commitments are aimed at ensuring the proper functioning of the competition in the card payment systems in Spain as well as its openness and accessibility by banking operators subject to objective terms, and including a dispute resolution system for entities to which access to the system is denied.

v Gun jumping – CNMC fines Consenur, SLU (Consenur) for failure to notify the acquisition of certain assets of Cathisa Medioambiente, SL (Cathisa)\(^\text{12}\)

The CNMC fined Consenur, SLU (Consenur) for having closed the acquisition of Cathisa Medioambiente, SL (Cathisa) in August 2015 without having notified nor gained the relevant antitrust approval.

According to the decision, the CNMC and Consenur agreed on considering relevant the product market for the treatment and disposal of hazardous sanitary waste. However, Consenur argued that the geographic market was national, while the CNMC concluded that the geographic market was limited to the Canary Islands where Consenur had a market share of 79 per cent in 2014.

Consenur was found to have acted negligently as, in case of doubt, Consenur could have applied for formal guidance to the CNMC for a ruling on whether or not the transaction was reportable (see Section IV, below, for a discussion of this formal guidance procedure).

Consenur has been fined a low figure (€20,000), taking into account factors such as the irregular situation being maintained only shortly (a merger filing was carried out quickly upon notice) and that the merger did not raise any substantive issues.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Pre-notification is customary and is advised when possible. Pre-notification is not subject to statutory deadlines. In most cases, two or three weeks should be allowed, although it can take longer if the transaction is complex from a competitive standpoint, or if the CNMC requires additional information to be included in the notification form.

The formal merger control investigation is divided into Phase I and Phase II proceedings. The majority of files are cleared in Phase I, whereas only a fraction is referred to Phase II in-depth analysis.

Phase I proceedings last in principle for one month, counted from the date when a complete notification is filed with the CNMC. Where the notifying party submits commitments (this possibility exists during the 20-day period after the filing), the Phase I statutory maximum period is extended by 10 additional days.

Phase II proceedings maximum period is of two months, counted from the date when the CNMC decides to open a Phase II. The maximum period is extended for 15 additional days if commitments are submitted in Phase II (the notifying party can offer commitments up to 35 days after the start of Phase II).

In the event of Phase II decisions blocking or imposing obligations, the Minister of Economy is entitled to refer the case to the Council of Ministers within 15 days of the Phase II decision being issued. If referred to it, the Council of Ministers has one month to issue a final decision, which may confirm the Phase IICNMC decision or may authorise the merger, with or without conditions.

All maximum periods can be interrupted by the CNMC in regulated events such as formal information requests.

\(^{12}\) Decision 14 March 2017, Consenur, file SNC/DC/0074/16.
ii Parties’ ability to accelerate the review procedure, tender offers and hostile transactions

As discussed, pre-notification in practice normally makes the review easier. The merger cannot be closed prior to having gained the prerequisite merger clearance. It is possible to request a derogation from the suspension effect of the merger filing. This derogation is nowadays very rarely granted. In the past, the exception has been used in limited instances to enable quick closing of a merger in non-problematic geographic areas, while enabling a Phase II review limited to problematic areas (for instance in supermarket, gas station and other mergers with local geographic markets). As a general rule, the CNMC in practice has a preference not to use this derogation procedure, as it entails considerable analysis; rather, where possible, the CNMC prefers to move towards quick merger clearance if the circumstances merit it.

Public offers can be launched including as condition for the validity the merger control clearance. The Competition Act enables launching of a public tender without having gained merger control provided that the CNMC is notified the merger within five days from the formal application for authorisation of the public tender with the Securities Exchange Commission (CNMV); and that the voting rights are not exercised save when required to preserve the value of an investment, with the authorisation of the CNMC.

Hostile public offers are rare in Spain. Past experience shows that hostile takeovers particularly in strategic sectors can be extremely complex. The hostile bid for Endesa launched by Gas Natural in the prior decade was not successful, and competing offers required intervention from the European Commission under Article 21 of the ECMR. On that same transaction, the initial merger control authorisation gained by the first bidder (Gas Natural) was frozen by the Supreme Court on interim review.

iii Third-party access to the file and rights to challenge mergers

Third-party access is expressly contemplated in the Competition Act in Phase II merger proceedings. Parties with a legitimate interest have the possibility to access the merger file and submit comments to the statement of objections and proposed commitments. This is normal dynamics in Phase II, where third parties have a relevant role and provide inputs which help shape the outcome of the merger proceedings.

The law does not foresee the possibility that interested parties have a role in Phase I. Phase I proceedings are confidential and the file cannot be accessed by third parties. However, as there is no express provision banning participation of third parties in Phase I merger proceedings, it is accepted, and has become quite standard, that third parties make representations and submissions to the CNMC regarding a merger also during Phase I merger proceedings. A recent example of this is the Helios/Quiron merger,13 where the participation of a third party in the proceedings was expressly discussed in the merger decision.

Indeed, the CNMC will listen to third parties concerns and if these have merit, the CNMC should be expected to raise the level of scrutiny of a given merger.

Third parties also play a role in reporting mergers that should have been filed for merger review but were not.14

14 For example, Decision of 29 July 2010, Bergé/Maritima Candina, file R/0006/10.
Resolution of authorities’ competition concerns, appeals and judicial review

The CNMC should, at least in theory, solve most initial concerns in pre-notification. The CNMC will make use of formal information requests stopping the clock when necessary. Once the proposed transaction has been formally filed, the CNMC may be keen, depending on the circumstances, to deal with any questions informally, without stopping the clock (particularly if the transaction has been pre-notified).

Merger decisions by the CNMC may be appealed within two months before the High Court. In instances where the Council of Ministers decides on the merger, the Supreme Court is competent to review the merger decision.

Effect of regulatory review

Mergers reviewed by the CNMC may be reviewed concurrently by other administrative agencies dealing, for instance, with regulatory and licensing issues. The potential friction and lack of coordination between the CNMC and sector regulators has been minimised in some instances in economic sectors where the CNMC acts also as a regulatory authority. In areas such as banking, where the regulator is not within the CNMC, merger review is suspended while the sector regulator completes its review.

OTHER STRATEGIC CONSIDERATIONS

Generally speaking, it is far better to pre-notify transactions if at all possible. The CNMC has in the past recommended pre-notification and it clearly does not like that transactions are notified for merger control without pre-notification. Furthermore, pre-notification enables discussion on a preliminary basis on many strategic issues, including the recurrent usage of the short-form filing, occasionally even in situations not expressly foreseen by the applicable regulation.

Another benefit of pre-notification is expected timing for approval. Even though initially pre-notification implies additional delay, in practice the CNMC will reduce the time dedicated to the review and often issue speedier approval if pre-notification has taken place. In non-problematic cases, recent experience shows that the CNMC is often granting approval in 10–20 days from filing.

It is possible to apply for formal guidance from the CNMC regarding whether or not a change of control arises as a result of the projected merger and the merger thresholds are met. One issue here is the lack of a binding deadline for the CNMC to act on a request for formal guidance, an area that might change in the future.

Merger control is an important tool and CNMC has in the past vigorously investigated and pursued gun jumping or closing of reportable transactions without having obtained the necessary merger clearance. The CNMC has made it clear recently that it is ready to use its powers to punish individual directors and managers for competition breaches (which has hitherto not been the case in situations of gun jumping, a situation that may change). Likewise, new legislation that entered into force recently arguably makes it possible to exclude from public tender those companies that have been condemned for gun jumping.
V OUTLOOK & CONCLUSIONS

The current CNMC is the result of the integration of Spain’s main national regulatory authorities in various network industries and regulated sectors into the Competition Authority back in 2013 (see above). That integration was criticised at the time. In the short to medium term, another legal reform might be expected to separate, again, those national regulatory authorities from the Competition Authority.

The CNMC is well aware that the formal guidance procedure enabling it to give clarity on the reportability of a merger is impaired by the lack of a binding deadline. This may perhaps change by dealing with the matter in the new legislation that will possibly be introduced to revert to the previous model of separation between competition enforcer and sector regulators.

In conclusion, no radical changes are in principle to be expected in the merger control arena in Spain, with the qualification of the limited changes likely to arise (primarily but perhaps not exclusively) at the institutional enforcement level if the CNMC goes back to its previous form (with the competition and regulatory authorities separated again). The CNMC or its successor is likely to continue to enforce competition policy vigorously, including merger control laws. Going forward it cannot be ruled out, perhaps, that the CNMC will include individuals in fines for gun jumping, in line with what is the trend in antitrust enforcement cases, and may also increase the amount of fines, in line with what seems like a trend at European Commission level and in neighbouring countries such as France.
Chapter 38

SWITZERLAND

Pascal G Favre and Marquard Christen

I INTRODUCTION

Merger control in Switzerland is governed by the Federal Act on Cartels and Other Restrictions of Competition (ACart) and the Merger Control Ordinance (MCO). These competition regulations came into force on 1 July 1996 and were first revised in 2003.

Concentrations are assessed by the Competition Commission, an independent federal authority based in Bern that consists of up to 15 members. There are currently 12 members who were nominated by the federal government, the majority of which are independent experts (i.e., law and economics professors). Deputies of business associations and consumer organisations take the other seats. Cases are prepared and processed by the Secretariat of the Competition Commission (with a staff of 72 employees at the end of 2017 (full-time and part-time), mostly lawyers and economists), divided into four departments: product markets, services, infrastructure and construction.

The types of transactions that are subject to merger control are mergers of previously independent undertakings; and direct or indirect acquisitions of control by one or more undertakings over one or more previously independent undertakings, or parts thereof. Joint ventures are also subject to merger control if the joint venture company exercises all the functions of an independent business entity on a lasting basis; if a joint venture company is newly established, it is subject to merger control if, in addition to the above criteria, the business activities of at least one of the controlling shareholders are transferred to it.

Pursuant to Article 9 ACart, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year prior to the concentration:

a the undertakings concerned must have reported a worldwide aggregate turnover of at least 2 billion Swiss francs or a Swiss aggregate turnover of at least 500 million Swiss francs; and

b at least two of the undertakings concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

These thresholds are considered to be relatively high in comparison with international standards. Alternatively, a particularity of the Swiss regime is that if the Competition Commission has previously issued a legally binding decision stating that an undertaking holds a dominant position in a particular market, such undertaking will have to notify all
its concentrations, regardless of the turnover thresholds, provided that the concentration concerns that particular market or an upstream, downstream or neighbouring market. According to Article 4(2) ACart, an undertaking is considered to hold a dominant position if it is able, as regards supply and demand, to behave in a substantially independent manner with regard to the other participants in the market (competitors, suppliers, buyers)¹.

If the thresholds are met, or in the case of a dominant undertaking as explained above, the concentration must be notified to the Competition Commission prior to its completion. If a transaction is implemented without notification or before clearance by the Competition Commission (or if the remedies imposed are not fulfilled), the companies involved may be fined up to 1 million Swiss francs. Members of the management may also be fined up to 20,000 Swiss francs. So far, the Competition Commission has imposed several fines on companies for failure to notify, but there has been no criminal sanction of members of management. Furthermore, the Competition Commission may order the parties to reinstate effective competition by, for instance, unwinding the transaction.

The ACart does not stipulate any exemptions to the notification requirements. However, if the Competition Commission has prohibited a concentration, the parties may in exceptional cases seek approval from the federal government if it can be demonstrated that the concentration is necessary for compelling public interest reasons. Such approval has, however, not been granted so far.

Specific rules apply to certain sectors. Thus, a concentration in the banking sector may be subject to a review by the Swiss Financial Market Supervisory Authority, which may take over a case involving banking institutions subject to the Federal Law on Banks and Saving Banks, and authorise or refuse a concentration for reasons of creditor protection, irrespective of the competition issues. If the parties involved in a concentration hold special concessions (e.g., radio, television, telecommunications, rail, air transport), a special authorisation by the sector-specific regulator may be required. Moreover, under the Federal Law on the Acquisition of Real Estate by Foreign Persons, for any concentration involving a foreign undertaking and a Swiss real estate company holding a portfolio of residential properties in Switzerland, the approval of the competent cantonal or local authorities may also be necessary.

The Swiss merger control regime features a very high standard of assessment compared with other jurisdictions, which is sometimes called the ‘dominance-plus test’. Pursuant to Article 10 ACart, the Competition Commission must prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

a. creates or strengthens a dominant position;

b. is capable of eliminating effective competition; and

c. causes harmful effects that cannot be outweighed by any improvement in competition in another market.

In two decisions issued in 2007, Swissgrid and Berner Zeitung AG/20 Minuten (Schweiz) AG, the Swiss Supreme Court had to determine whether a concentration could be prohibited if there was a mere creation or strengthening of a dominant position or whether conditions (a) and (b) (i.e., creation or strengthening of a dominant position and elimination of effective competition) were cumulative. This question has significant practical consequences, because if the two conditions are cumulative, then a concentration must be authorised even if a dominant position is created or strengthened if it cannot be established that the concentration will eliminate effective competition. In the Swissgrid case, seven Swiss electricity companies wanted to integrate their electricity-carrying network under a common company. The Swiss
Supreme Court held that conditions (a) and (b) were cumulative. The reasoning followed by the Supreme Court was that merger control is part of the control of market structure. Therefore, to justify an administrative intervention, the concentration must result in a concrete negative change in the market structure and the competition must be altered. In this case, the Court found that competition did not exist prior to the concentration. Accordingly, the concentration would not change the market conditions and the administrative intervention was not justified. In more recent cases (notably the Tamedia/PPSR (Edipresse) case), the Competition Commission examined whether the concentration could eliminate effective competition, but in a way that might indicate that it is in fact reluctant to give an autonomous scope to that criterion. In practice, the efficiency gains provided in condition (c) have so far played no role.

II YEAR IN REVIEW

2018 opened with the changing of the guard at the Competition Commission. Vincent Martinet, who had been leading the efforts of the federal enforcer since 2010, stepped down after 12 years of service with the Commission. He handed over the baton to Andreas Heinemann, his former deputy for the past six years.

In 2017, there was an increase in the number of notifications of company mergers, with 32 reports (in contrast to 22 the previous year), reflecting increasing M&A activity. Twenty-seven cases were cleared after a preliminary investigation (Phase I). Three in-depth investigations (Phase II) were launched.

Considering the substantive test applicable to Swiss merger control (see Section I above), in the past, the Competition Commission prohibited only two concentrations back in 2004 and 2010, namely the acquisition of (joint) control of Berner Zeitung over free newspaper 20 Minuten (the prohibition had been overturned on appeal) and the intended takeover of telecommunication company Sunrise by competitor Orange (now Salt). In 2017, the Commission vetoed a deal for the third time in its history. In the spotlight was the acquisition of a joint control by Ticketcorner Holding AG and Tamedia AG over Ticketcorner AG and, indirectly (as a 100 per cent subsidiary of Ticketcorner AG post-transaction), Starticket (a subsidiary of Tamedia). In addition to being the two most popular brokers for the sale of show tickets online and offline to audiences across Switzerland, both Ticketcorner and Starticket provide marketing services to promoters in the show business via advertising campaigns in the media and social networks and by giving promoters access to a software allowing them to do direct sales. While the Competition Commission's detailed review of the deal revealed no threats to the markets for direct sales, it provided enough evidence to show the already dominant position of Ticketcorner in the market for primary ticketing. The Commission determined that the merger would give the two companies unchallenged control over that market in Switzerland. The Commission's ban was prompted by an in-depth analysis of both companies already present in the market and potential entries of future competitors, as well as market trends and the increasing clout of global players such as Spotify, Facebook and Google. The Commission concluded that, in spite of clear technological advances, the newly merged companies could still easily withstand behavioural pressure from competitors and thus refused to grant approval. The decision has been challenged by Ticketcorner in the Federal Administrative Court.

Another merger received a great deal of publicity, involving in-patient hospital services: On 18 September 2017, the Competition Commission approved the planned merger...
between the University Hospital of Basel and the Cantonal Hospital of Baselland resulting in the creation of a joint hospital group. At the outset, the Competition Commission dealt quite extensively with the material scope of the ACart and its applicability in the healthcare sector. It considered that all activities of the concerned hospitals fall under the ACart, except for the creation of hospital lists as well as the control of the SwissDRG and TARMED. While the Commission determined that the newly created hospital group may attain an important competitive edge in the market for acute in-patient services in the Basel area, the enforcer failed short of proving that the merger would create a dominant position liable to eliminate effective competition in that region. Thus, lacking the necessary statutory requirements, the Commission could not intervene – the planned merger received a green light.

The Competition Commission also had the opportunity to provide useful clarification in relation to undertakings in the financial sector willing to create a full-function joint venture structured under French law, the purpose of which was to set up and provide SMEs a post-trade blockchain infrastructure for securities on Euronext markets. The parent companies planned to invest in the joint venture but would not transfer any commercial activity, assets, know-how or human capital to the said joint venture. As a matter of principle, such transaction would fall under Swiss merger control. However, since the capital injected by the parent companies was not intended to be used as a means for commercial activities but rather to help set up an independent entity and an IT solution, the Competition Commission considered that the transaction was not subject to Swiss merger control.

Several other green lights were granted by the Commission across a variety of sectors in the course of 2017.

In the telecommunications sector, after a preliminary examination, the Commission allowed the entry of BuyIn SA as an autonomous entity into the market. BuyIn SA had been set up in 2011 as a non-full function joint venture between German Telecom AG and Orange SA.

A similar outcome was enjoyed by two notable mergers in the media and advertising sector, as Tamedia received the coveted ‘go-ahead’ of the Commission on the account of acquiring exclusive controls both over Tradono Switzerland, active in the market for small ad apps, and over Neo Advertising, operating in the field of outdoor communications.

In the energy sector, a couple of mergers successfully underwent the scrutiny of the Swiss federal competition authorities. Among those, the joint venture between Energiedienst Holding AG, Hälg & Co AG and Inretis Beteiligungen AG aiming to provide solutions to network energy systems architecture. The other notable case that received the Commission’s approval was the acquisition of joint control by Electricité de France (EDF) and Caisse des dépôts et consignations (CDU) of the Reseau de transport d’électricité (RTE), previously under EDF’s exclusive control.

Other sectors across the industry, including transportation, digital security, IT and data protection, have also kept the Commission busy over concentration notices, all of which eventually received a green light. In the container shipping industry, it was the takeover of the Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG (HSDG) by Maersk Line A/S, while in freight rail transportation it was the merger by BLS AG and Transport Ferroviaire Holding SAS (a subsidiary of SNCF Mobilités). In the digital world, approvals were granted to the joint acquisition by SwissPost AG and the Swiss Federal Railways (SBB) of SwissSign AG, identity and certification services provider, and to Tech Data Corporation for its acquisition of the Avnet Technology Solutions business division from Avnet Inc.
III THE MERGER CONTROL REGIME

If the turnover thresholds are reached by the undertakings concerned or if the concentration involves a company holding an established dominant position (see Section I, above), the filing of a merger notification is mandatory prior to the completion of the transaction. Under Swiss law, there are no deadlines for filing. A transaction can be notified prior to the signing of the final agreements. However, the parties must demonstrate a good faith intention to enter into a binding agreement and to complete the transaction (in practice, the standard is similar to that of the European Commission). The Secretariat of the Competition Commission can be contacted on an informal basis before the notification. This can speed up the notification procedure (for example, the Secretariat can agree to waive some legal requirements in relation to the content of the notification).

In the case of mergers, the notification must be made jointly by the merging undertakings. If the transaction is an acquisition of control, the undertaking acquiring control is responsible for the filing. The filing fee for a Phase I investigation is a lump sum of 5,000 Swiss francs (but the Secretariat of the Competition Commission announced in 2015 that if the assessment of incomplete draft notifications involves a large amount of work, in future the Secretariat would invoice this work as chargeable advisory activity). In Phase II investigations, the Secretariat of the Competition Commission charges an hourly rate of 100 to 400 Swiss francs.

Once the notification form has been filed, if the Competition Commission considers that the filing was complete on the date of the filing, it will conduct a preliminary investigation and will have to decide within one month whether there is a need to open an in-depth investigation (Phase I). If the Competition Commission decides to launch an in-depth investigation (Phase II), it will have to complete it within four months. As regards the internal organisation, under its internal rules of procedure (revised on 15 June 2015) the Competition Commission has created a Chamber for merger control, which has been granted the power to decide whether a detailed examination (Phase II) should be started and whether the merger can be implemented ahead of the normal schedule. However, the Competition Commission retains a certain residual power in the preliminary assessment, in that it will be informed of the Chamber's decision and may conduct an examination independent of the Chamber (and, as the case may be, overrule the Chamber's decision). The Commission can also delegate other tasks to the Chamber if practical considerations indicate that this is appropriate. Pursuant to the new internal rules of procedure (in force since 1 November 2015), Andreas Heinemann (President), Armin Schmutzler and Danièle Wüthrich-Meyer (both Vice-Presidents of the Competition Commission) have been appointed as members of the Chamber for merger control (effective as of the beginning of 2018).

As a rule, the closing of a transaction should not take place prior to the competition authorities’ clearance. However, in specific cases, the authorities may allow a closing prior to clearance, for important reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid. Contrary to the European merger control rules (Article 7, Paragraph 2 of Council Regulation (EC) No. 139/2004), no exception for public bids is provided under Swiss law. Therefore, each case will be assessed individually. In the Schaeffler/Continental case (where Schaeffler and Continental eventually agreed on the conditions of a public takeover), the Competition Commission decided that a request for an early implementation of a concentration can be granted before the notification is submitted if three conditions are fulfilled:
the Competition Commission must be informed adequately about the concentration; 
b specific reasons must be given on why the notification cannot be submitted yet; and 
c whether the transaction can be unwound must be assessed in the event that the concentration is not allowed by the Competition Commission after its review.

In that case, these conditions were fulfilled. However, the Competition Commission imposed two additional conditions: the obligation not to exercise the voting rights except to conserve the full value of the investment, and the obligation to submit a full notification within a relatively short period of time.

In practice, the one-month period for the Phase I investigation can be shortened in less complex filings, especially if a draft filing was submitted to the Competition Commission for review prior to the formal notification.

If the Competition Commission decides to launch a Phase II investigation, it will publish this decision. It will then send questionnaires to the parties, as well as their competitors, suppliers and clients. Usually, a Phase II hearing with the parties takes place. If the parties propose remedies, close contact is established between the Secretariat of the Competition Commission and the undertakings involved to determine the scope. Ultimately, however, the authority to impose remedies lies with the Competition Commission, which enjoys a wide power of discretion (subject to compliance with the principle of proportionality).

Third parties have no formal procedural rights at any point in the procedure. If the Competition Commission opens a Phase II procedure, it will publish basic information about the concentration and allow third parties to state their position in writing within a certain deadline. The Competition Commission is not bound by third-party opinions, or by answers to questionnaires. Third parties have no access to documents and no right to be heard. Moreover, the Swiss Supreme Court has held that third parties are not entitled to any remedy against a decision of the Competition Commission to permit or prohibit a concentration.

A decision of the competition authority may be appealed within 30 days to the Federal Administrative Tribunal and ultimately to the Swiss Supreme Court. The duration of an appeal procedure varies, but may well exceed one year at each stage. On 28 February 2018, the Secretariat of the Competition Commission published an updated version of its communication dated 25 March 2009 on the notification and assessment practice regarding merger control (Merger Control Communication).

The Merger Control Communication first clarifies the concept of ‘effect’ in the Swiss market in the case of a joint venture. Article 2 of the ACart provides that the Act ‘applies to practices that have an effect in Switzerland’. Until the Merger Control Communication, the Competition Commission and the Swiss courts held that if the turnover thresholds of Article 9 ACart were reached, it should always be considered that there was an effect in the Swiss market. Thus, in the case of the creation of a joint venture with no activity in Switzerland but where the turnover thresholds were met by the parent companies, a notification was required (see, e.g., the Merial decision of the Swiss Supreme Court of 24 April 2001). However, in the Merger Control Communication, the Competition Commission takes a different approach: if the joint venture is not active in Switzerland (no activity or turnover in Switzerland – in particular no deliveries in Switzerland) and does not plan to be active in Switzerland in the future, then the creation of this joint venture does not have any effect in Switzerland and accordingly no notification is required, even if the turnover thresholds are met by the parent companies. In the Axel Springer/Ringier case (dated May 2010), Ringier AG and
Axel Springer AG formed a joint venture in Switzerland, in which they concentrated all the printed and electronic media activities they had in eastern European countries. In light of the criteria set out in the Merger Control Communication, the Competition Commission took the view that the joint venture was subject to Swiss merger control, since some of the entities concentrated in it had achieved a turnover in Switzerland in the year preceding the concentration, while others had made deliveries in Switzerland.

The second jurisdictional issue dealt with by the Merger Control Communication generalises the position taken by the Competition Commission in its Tamedia/PPSR (Edipresse) decision dated 17 September 2009. In this case, the deal was structured into three phases over a period of three years, with a shift from joint to sole control by Tamedia over that period. The Competition Commission decided that the deal could be regarded as a single concentration only if the three following conditions were met:

- constitution of a joint control during a transition period;
- a shift from joint control to sole control concluded in a binding agreement; and
- a maximum transition period of one year.

Until that decision, the Competition Commission considered that a transition period of up to three years was acceptable to analyse a case as a single concentration. However, to align its practice with that of the European Commission in its Jurisdictional Notice of 10 July 2007, the Competition Commission decided to reduce the transition period to one year.

On a related topic, the Secretariat of the Competition Commission provided in an informal consultation dated 2017 a clarification in relation to a series of transactions according to which the first transaction would lead to the sole acquisition of a target company by one undertaking and a second transaction to the acquisition of joint control over the same target by several undertakings (including the undertaking that acquired sole control in the first place). The Secretariat of the Competition Commission held that only the second transaction would trigger a duty to notify, provided the various transactions are dependent on each other and together form a single operation.

The Merger Control Communication also addresses the subject of the geographic allocation of turnovers. In general, the test for the geographic allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where the competition with other alternative suppliers takes place respectively. The billing address is not relevant. Special rules apply to the calculation of turnovers based on the provision of services.

The Merger Control Communication also clarifies the examination criteria and the notification requirements for markets affected by concentrations in which only one of the participants operates, but has a market share of 30 per cent or more. The issue is the extent to which the other companies involved in the concentration may be categorised as potential competitors. According to the Competition Commission’s practice, a planned takeover leads to the exclusion of potential competitors if an undertaking involved plans to enter the problematic market or if it has pursued this objective in the past two years (e.g., the development of competing medicines that has entered an advanced phase may be interpreted as the intention to enter a new market). An exclusion of potential competitors is also possible if an undertaking involved holds important intellectual property rights in this market, even where it is not active in the market concerned. Special attention must be given to cases in which another undertaking involved is already active in the same product, but not geographic market or in an upstream, downstream or neighbouring market closely linked with the market in which the relevant undertaking holds a market share of at least 30 per cent.
IV OTHER STRATEGIC CONSIDERATIONS

The Competition Commission maintains close links with the European Commission. It accepts that, in cases where a notification has also been filed with the European Commission, the parties provide the Form CO filing, annexed to the Swiss notification for reference. This reduces the workload for the drafting of the Swiss notification, as the parties therefore only have to add specific data regarding the Swiss market. That said, while annexes to the Swiss notification may be provided in English, the main part of the notification must be drafted in one of the Swiss official languages (French, German or Italian).

The Competition Commission aims to give a decision coherent with that of the European Commission if a case has been notified both in Brussels and in Bern. To ensure compatible decision-making, it is advisable for the parties to provide a waiver that allows the Competition Commission to liaise directly with the European Commission.

More generally, the report of the Taskforce Cartel Act presented in January 2009 (see Section V, below) states that in the context of growing globalisation, it would be appropriate for Switzerland to conclude cooperation agreements with its main trading partners to make possible the exchange of confidential information between competition authorities. On 17 May 2013, the government signed an agreement between the Swiss Confederation and the European Union concerning cooperation on the application of their competition laws (Agreement). In essence, the Agreement regulates cooperation between the Swiss and European competition authorities. It is a purely procedural agreement and does not provide for any substantive harmonisation of competition laws. The two competition authorities shall notify each other in writing of enforcement activities that could affect the important interests of the other contracting party. A list is given of examples of cases in which notification must be given, and the time for notifications in relation to mergers and other cases is also set out (Article 3, Paragraphs 3 and 4). Furthermore, the Agreement creates the legal basis for the competition authorities to be able to coordinate their enforcement activities with regard to related matters. The Agreement entered into force on 1 December 2014.

The Competition Act does not contain any specific rules regarding public takeover bids. The Competition Commission should be contacted in advance so that it can coordinate its course of action with the Swiss Takeover Board. This is particularly important for hostile bids. Past practice has shown that in most cases the Competition Commission substantially follows the rules of the EU Merger Control Regulation on public takeover bids. In addition, it is possible to request provisional completion specifically in public takeover bids (see Section III, above).

V OUTLOOK & CONCLUSIONS

On 14 January 2009, the federal government was presented with a synthesis report issued by the Taskforce Cartel Act, a panel formed in 2006/2007 by the head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the ACart. Article 59a of the ACart requires the federal government to evaluate the efficiency and conformity of any proposed measure under the Act before submitting a report and recommendation to Parliament in relation to such measure. As regards concentrations, the Taskforce Cartel Act took the view that, compared with other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition (‘dominance-plus test’), is deficient and provides a relatively weak arsenal to enhance competition effectively. According to the experts, a risk exists that concentrations adversely impacting competition might be approved.
They recommended a harmonisation of the Swiss merger control system with the EU merger control system to eliminate that risk and to reduce the administrative workload with respect to transnational concentrations, as well as the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (the SIEC test, efficiency defence and dynamic consumer welfare standard).

On 30 June 2010, the federal government published a set of draft amendments to the ACart for public consultation. The government proposed, inter alia, to replace the currently applied ‘dominance-plus test’ either with a simple dominance test (whereby the criterion of a possible elimination of competition would be dropped) or with a significant impediment to effective competition (SIEC) test analogous to EU law. As regards notification obligations, the government proposed maintaining the existing turnover thresholds, but suggested a new exception to eliminate duplicate proceedings where every relevant market geographically extends over Switzerland plus at least the European Economic Area and the concentration is being appraised by the European Commission.

Based on the results of the consultation procedure, on 22 February 2012 the federal government released a dispatch to Parliament on the revision of the ACart together with a set of draft amendments. Regarding merger control, the draft amendments confirmed the willingness of the federal government to change the assessment criteria for the merger control procedure (introduction of the SIEC test) combined with a relaxation of regulations on undertakings in the case of concentrations with defined international markets and in relation to deadlines (harmonisation with conditions in the EU). Additional changes in the merger regime included more flexible review periods. The present review periods in Switzerland are one month for Phase I and an additional four months for Phase II (see Section III, above). The reform would have introduced the possibility to extend the review period in Phase I by 21 days and in Phase II by two months. Such extension would have to be agreed between the authorities and the undertakings concerned. Finally, the reform would have included a waiver of the notification obligation in the case of a concentration where all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration is assessed by the European Commission. In such cases, the filing of a copy of Form CE with the Swiss authorities for information purposes but without review would have been sufficient.

In the parliamentary debate, the Council of States approved the Federal Council draft for the revision of the Cartel Act at its first reading in March 2013, subject to various amendments. However, the National Council at its first reading in March 2014 decided not to consider the revision. After the Council of States adhered to its decision in June 2014, but the National Council again decided not to consider the revision in its second reading in September 2014, the final outcome was that the Cartel Act would not be revised.

According to the Competition Commission, rejection of the revised Cartel Act without even considering it was a missed opportunity to meet the need for reform highlighted in the evaluation. It also means that several changes proposed by the Council of States, including changes to the merger control procedure, are no longer on the table.

In the course of 2014, 2015 and 2016, individual parliamentary proposals were submitted with the aim of revising specific points in the Cartel Act. Based on its report on preventing parallel imports dated 22 June 2016, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on modernising the merger control procedures in the Cartel Act. The Federal Council takes the view that the current merger control procedures take too little account of the negative and positive effects of mergers, and that the test for market dominance currently provided for in the Cartel Act
could be replaced by the SIEC test. The Federal Council expects this possible change to have positive effects in the medium to long term on the competitive environment in Switzerland. The State Secretariat for Economic Affairs has overall responsibility for drafting the bill to be submitted for consultation; it commissioned a report on the implications of the introduction of the SIEC test on the Swiss control regime, which was released on 27 October 2017 and which, among other conclusions, recommends that such test be introduced. Also, the Buman Parliamentary Initiative of 30 September 2016 demands that four specific undisputed points in the rejected revision of 2014 be reintroduced, namely the merger control procedure for companies. The initiative has not yet been debated in Parliament.
Chapter 39

TAIWAN

Victor I Chang, Margaret Huang and Rose Lin

I INTRODUCTION

Taiwan established comprehensive regulation of antitrust and unfair competition activities when the Fair Trade Act was enacted in 1991 and made effective in 1992. The Fair Trade Act was most recently amended in June 2017 (2017 amendment). Under the 2017 amendment, the waiting period of a merger application has been extended in a practical manner and additional procedures have been added to merger control review.

Taiwan plays an active role in the international community with respect to competition policy and law, and in particular with respect to merger control. Since 1997, the TFTC has created and maintained the APEC Competition Policy and Law Database on behalf of the 21 member economies that comprise the Asia-Pacific Economic Cooperation Forum (APEC). The Database allows APEC’s member economies to share experiences and exchange views on complex issues of competition policy and law. Additionally, the TFTC is a member of the International Competition Network (ICN), which was created in 2001 to provide competition authorities with an informal, specialised venue for maintaining regular contact with competition authorities in other jurisdictions and addressing practical competition concerns. As a member of the ICN, the TFTC hosted the annual ICN Merger Workshop in 2009, which was attended by members from around the world. Taiwan also regularly participates as an observer in discussions on competition law in the OECD as well as regional forums, where it shares information and receives input from other jurisdictions.

II YEAR IN REVIEW

i Recent TFTC review of extraterritorial mergers

**Google LLC and Communications Global Certification Inc**

In September 2017, Google LLC (Google) intended to acquire all of the issued shares of Communications Global Certification Inc (CGC) from HTC Corporation. As the revenue of Google and CGC in the previous fiscal year exceeded the threshold amount announced by the TFTC, and one of the parties possessed one-quarter of the market share in the area in which it operates, Alphabet Inc, the parent company of Google, filed pre-merger notification with the TFTC.

Given that Google mainly provides search engine, mobile operating system and online advertisement services, and CGC focused on the mobile device verification and testing, the TFTC determined that the proposed transaction between Google and CGC was a

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conglomerate merger. The TFTC decided that there were no material potential competitive relationships between Google and CGC in that the proposed transaction would possibly result in the elimination of potential competition. Further, there was no incentive for Google to enlarge its market power in Android and exclusive APPs into the market of mobile device verification and testing through bundling or refusal to license after the completion of the transaction. Thus, the TFTC concluded that the proposed transaction did not pose a significant anticompetitive impact and the transaction was not prohibited.

**Chang Wah and SHAP**

In September 2016, Chang Wah Electromaterials Inc (CWE) and Chang Wah Technology Co, Ltd (CWT) proposed to acquire 100 per cent common shares of SH Asia Pacific Pte Ltd (SHAP) from its parent company, SH Materials Co, Ltd. As CWE and CWT intended to acquire the voting shares of more than one-third of the total voting shares of SHAP, and CWE and CWT would directly or indirectly control the business operation, the appointment or discharge of personnel of SHAP, CWE, as the ultimate parent company, filed the pre-merger notification with the TFTC in December 2016.

Since the LED lead frames manufactured by CWT and IC lead frames produced by SHT (the subsidiary of SHAP in Taiwan) have both been sold through CWE for years, the TFTC determined that the proposed transaction between CWE, CWT, SHAP and SHT is a vertical merger. The TFTC determined that the potential abuse of market position from the combination was not high owing to insignificant barriers to entry in the lead frame market and vigorous competition of the relevant worldwide market. Moreover, the lead frame market would not be impacted drastically after the transaction as the downstream enterprises in such market held strong bargaining power, and the proposed transaction only turns the existing cooperation between the participating enterprises into an intra-group cooperation. Thus, the TFTC decided that the proposed transaction did not pose a significant anticompetitive impact in the lead frame market, and did not prohibit the transaction.

**Recent proposed mergers prohibited by the TFTC**

From the time the Fair Trade Act was promulgated in 1992 until March 2018, 6,916 applications were submitted for merger approval (for filings made prior to the amendments to the Fair Trade Act in February 2002) or merger notifications (for filings made starting in February 2002 subsequent to the amendments to the Fair Trade Act). Of those filings, only 10 of the proposed transactions have been refused or prohibited by the TFTC, representing much less than 0.01 per cent of all applications. No statistics are, however, provided with respect to those mergers that are approved or cleared subject to specific conditions. Such conditions are not uncommon, particularly in cases requiring more complex analysis and a detailed balancing between overall economic benefits with restraints on competitiveness. Some conditions may be very cumbersome on the parties, and in effect prohibit the completion of the deal.

In 2016 and 2017, 69 and 44 merger notifications were filed with the TFTC respectively; none was prohibited. In 2018, 13 merger notifications were filed, and none had been prohibited as of March 2018, according to the most updated statistics dated 18 April 2018. In 2010, only one out of the 44 merger notifications filed with the TFTC was prohibited. The prohibited transaction was the proposed acquisition by Uni-President Enterprise Co Ltd (Uni-President) for more than half of the shares of Wei-Li Food Industry Co Ltd (Wei-Li Food). In 2009, only two out of the 57 merger notifications filed with the
TFTC were prohibited, both of which were proposed mergers between domestic companies. The prohibited transactions were the proposed mergers between Holiday Co Ltd (Holiday) and Cashbox Co Ltd (Cashbox) and between Yieh United Steel Corp (Yieh Steel) and Tang Eng Iron Works Co Ltd (Tang Iron).

**Uni-President and Wei-Li Food – instant noodles**

This prohibited transaction concerned a share acquisition between two entities that are the top two market share leaders manufacturing instant noodles in Taiwan. The published decision primarily discussed whether the product market was limited to instant noodles or whether a larger definition was permissible.

The relevant market takes into consideration the product’s capabilities, uses, special characteristics, pricing, high demands and whether the product is replaceable. The applicant, Uni-President, had proposed that the relevant market include each of the following:

- **a** cookies and desserts (including cookies, bread, potato chips, rice crackers and chocolate);
- **b** perishable food products (including sandwiches sold at 7-Eleven stores, supermarket bento boxes, Taiwanese cuisine marinated in soy sauce, deep-fried chicken, tempura, fried dumplings and rice balls);
- **c** entrée noodle dishes (including noodles, instant noodles, mung bean noodles and rice, flavoured by consumers using separately purchased sauces); and
- **d** sauces (satay sauce, XO sauce and others) and frozen foods (including cooked lamb, spaghetti, risotto, dumplings and fried rice).

Uni-President suggested that these are all replaceable products and should therefore comprise one product market in the view of the TFTC. Under Uni-President’s proposed product market, its combined market share with Wei-Li Food would only be about 9.04 per cent.

The TFTC did not accept Uni-President’s proposed product market definition. The TFTC noted that instant noodles could be used as a main entrée and stored for long periods without spoiling at room temperature (for about six months). Cookies and desserts were snacks, and were not generally used as main entrées. Perishable foods would need to be consumed on the date of purchase and could not be stored for more than a few days. Frozen foods were of a price much higher than instant noodles, and required the use of a microwave and a freezer. Non-instant noodles and sauces required significant preparation time, unlike instant noodles. Furthermore, upon interviews with other manufacturers of instant noodles and consumers, the TFTC determined that instant noodles are not replaceable with the other types of food products as suggested by Uni-President, as the pricing strategy and the demands of the consumer were very unique to instant noodles. Therefore, the TFTC determined the relevant market to be instant noodles, beverages, and the manufacture and sale of cooking oil, and determined that the parties’ market share in instant noodles was in excess of 70 per cent. Under the more limited definition of the relevant market determined by the TFTC, the parties’ proposed combination was prohibited, as harm to the economy was not outweighed by the benefits. Uni-President appealed to the administrative courts, and the Supreme Administrative Court ruled against Uni-President on 15 August 2013. This decision cannot be appealed.

In February 2009, the TFTC sanctioned Uni-President for indirectly controlling Wei-Li’s board of directors and supervisors, and also for failure to report its acquisition of a
stake in Wei-Li. Uni-President challenged the TFTC’s decision in court. The Supreme Court ruled in favour of Uni-President on 28 March 2013, confirming the lower court’s finding that the TFTC had not provided sufficient proof of control.

**Holiday and Cashbox**

The planned merger between Holiday and Cashbox has a long and drawn-out history. The parties had negotiated a merger in 2003, when the TFTC had cleared the merger subject to various post-combination restrictions, including certain broad, general prohibitions on preferential treatment to affiliated entities, but the parties ultimately did not complete the transaction at that time. However, in 2007 and again in 2008, the parties again notified the TFTC of the intended merger; in both cases, the TFTC determined that the damage to competition was likely to outweigh any benefits to the overall economy. Primarily, the TFTC focused on the fact that a merger between the two parties would eliminate competition in this market in Taipei City and Taipei County, leading to decreased incentives for market participants to innovate and improve the quality of their service and inflated prices for consumers. Additionally, upstream karaoke video distributors would only be able to negotiate with one major purchaser after the proposed merger, and this would give the merged parties the ability to extort pricing concessions or completely shut out one distributor in favour of another. Because of these reasons, the TFTC determined that the parties’ proposed merger was prohibited under Article 12(1) of the Fair Trade Act. The parties were able to appeal the TFTC’s decision in 2008, but when they again notified the TFTC of a proposed merger in 2009, the merger was yet again prohibited for the same reasons. The TFTC also noted that while the parties were granted conditional approval in 2003, the parties did not complete the proposed merger within the time limits prescribed at that time and the market was no longer the same in 2009 as it had been in 2003.

In March 2010, Holiday and Cashbox again drew the attention of the TFTC when the TFTC determined that Cashbox and Holiday were jointly operating their businesses, and that Cashbox controlled Holiday’s board of directors and supervisors, which are both situations constituting a merger under the Fair Trade Act and requiring a filing with the TFTC. The TFTC ruled that the parties were in violation of the law for failure to make the required filing, and that the way that they were operating their businesses violated repeated prior rulings from the TFTC. Furthermore, the parties were required, within a specified period of time, to disengage their joint business activities and remove directors and officers simultaneously serving both entities, and to pay a significant fine. Cashbox challenged the TFTC’s decision in court. Cashbox lost the case in the court of first instance on 19 January 2012.

**Yieh Steel and Tang Iron**

In May 2009, the proposed merger in which Yieh Steel intended to acquire 34 per cent of the shares of Tang Iron on the Taiwan Stock Exchange was prohibited. Both parties were in the business of manufacturing sheets of stainless steel, which are generally manufactured using either a hot-rolling or process a cold-rolling process. Tang Iron did not manufacture sheets of stainless steel using the hot-rolling process, but instead offered such sheets for sale using goods obtained from a subcontractor. After the merger, the TFTC determined that the parties’ combined gross revenue would represent 57.25 per cent of the market, which is greater than 50 per cent of the market. The TFTC also considered that there are high barriers to enter the market for manufacturing sheets of stainless steel and a significant preparation period is required before another enterprise could begin to manufacture sheets of stainless steel.
steel. As such, this proposed merger would lead to decreased competition and a decrease in
the quality of services for downstream purchasers of stainless steel, and the TFTC determined
that the proposed merger was prohibited under Article 12(1) of the Fair Trade Act. Yieh Steel
challenged the TFTC’s decision in court, and the case was remanded to the lower court for
further review by the Supreme Administrative Court on 12 December 2013. The lower court,
upon further review, entered a judgment in favour of the TFTC on 25 December 2014.
However, the lower court’s decision was revoked by the Supreme Administrative Court and
the case remanded to the lower court for review on 31 March 2016.

III THE MERGER CONTROL REGIME

When two or more enterprises merge or combine their businesses, greater efficiency is often
achieved in their operations. Along with such efficiency, however, a concentration in the
market share will often occur as well. The objective of the TFTC in regulating mergers is to
prevent enterprises from raising the concentration of a market to the extent that it weakens or
impedes free competition in Taiwan through a proposed merger. To avoid these undesirable
results, the Fair Trade Act requires parties intending to ‘merge’ as defined by the statute
to notify the TFTC when certain market thresholds are attained. The TFTC is then given
an opportunity to review and, if necessary, prohibit or impose conditions on the proposed
merger.

i Covered transactions

Any transaction that is considered a ‘merger’ under Article 10 of the Fair Trade Act is subject
to pre-merger notification under Taiwan law. The following transactions are covered:

a two enterprises merge into one;

b an enterprise acquires the voting shares of, or makes capital contributions to, another
enterprise equal to more than one-third of the total voting shares or capital of the other
enterprise;

c an enterprise obtains an assignment of or a lease of all or substantially all of the business
or assets of another enterprise;

d an enterprise jointly operates a business with another enterprise on a regular basis or
agrees to operate another enterprise’s business under a trust agreement; or

e an enterprise directly or indirectly controls the business operations or the appointment
or discharge of personnel of another enterprise.

Note that the transactions covered under the definition of ‘merger’ are more expansive than the generally
accepted legal meaning afforded to that term in many jurisdictions where a merger is generally understood
to mean a legal mechanism by which one entity is absorbed into another with only one surviving entity.
Under Taiwan law, and as may be seen in the English translations of the pre-merger notification forms, the
concept of ‘merger’ also includes the concept of business combinations or the acquisition of control using
varying methods as described under the statutory definition. After a proposed transaction is determined to
be a statutory merger as defined by the Fair Trade Act, the filing requirement then turns on whether certain
market share or turnover thresholds are met.
Under the Fair Trade Act, when determining whether the one-third of voting shares and capital contributions threshold specified in Article 10(b) is met, all shares and capital contributions of the subordinate companies controlled by the same company (or companies) as the merger participant must be included in the calculation.

ii Filing thresholds: market share and turnover

Under Article 11 of the Fair Trade Act, two types of thresholds have been set forth to determine whether a merger notification should be filed with the TFTC. The first is based on market share and the second is based on the amount of turnover generated in the preceding fiscal year by the parties to the proposed merger.

In determining market share, the TFTC will take into account the production, sales, inventory and data relating to import and export value and volume for the applicable enterprise and the particular market in which it operates. The ‘market share threshold’ requires that the applicable party or parties file a merger notification with the TFTC under two circumstances:

a if, as a result of the merger, the enterprises will possess one-third of the market share of the area in which they operate; or

b if, regardless of the merger, one of the enterprises intending to merge possesses one-quarter of the market share of the area in which it operates.

Regarding the market share threshold, the TFTC is most concerned about having the chance to review mergers that will create a concentration in a particular market, which will be determined by the consideration of various factors (including sales, which is the same factor used for the second type of notification threshold). The large number of fairly broad variables included in the determination of market share ensures greater flexibility should the TFTC decide to exert its authority over notifiable mergers. In practice, the TFTC often consults statistical yearbooks published by government authorities to determine the applicable market.

Turnover is defined under the regulations to mean the total sale or operating revenue of an enterprise, which is conceptually the same as gross revenue. The ‘turnover threshold’ requires that the applicable parties file a merger notification with the TFTC if sales for the preceding fiscal year exceed the threshold amount publicly announced from time to time by the TFTC. According to the rule the TFTC announced in March 2015, the threshold amount is met for non-financial enterprises if one party has sales in the preceding fiscal year in excess of NT$15 billion and the other party has sales in the preceding fiscal year in excess of NT$2 billion. For financial enterprises, the threshold amount is met if one party has sales in the preceding fiscal year in excess of NT$30 billion and the other party has sales in the preceding fiscal year in excess of NT$2 billion. In addition, based on the rule the TFTC announced in December 2016, the threshold amount is also met if the aggregate ‘global’ sales of all enterprises in the proposed merger in the preceding fiscal year exceed NT$40 billion and at least two of such enterprises each has sales in excess of NT$2 billion in Taiwan in the preceding fiscal year. Other than the above sales revenue threshold amount set forth for financial and non-financial enterprises and all enterprises, the Fair Trade Act provides the TFTC with the discretion to decide different sales revenue threshold amounts by issuing an administrative order for enterprises in different industries.

In addition, the sales revenue of companies with controlling and subordinate relationships with the merger participants, and the sales revenue of subordinate companies controlled by the same companies as the merger participants, should be included when calculating the total sales revenue of an enterprise.
Under the current Fair Trade Act, transactions exempt from merger filing include four additional types of transactions: (1) merger of an enterprise with another enterprise that has controlling and subordinate relationship with such enterprise; (2) merger of an enterprise with another subordinate enterprise controlled by the same companies as such enterprise; (3) transfer of all or part of an enterprise’s outstanding voting shares or equity capital of a third party to another enterprise that has controlling and subordinate relation with such enterprise; and (4) transfer of all or part of an enterprise’s outstanding voting shares or equity capital of a third party to another subordinate enterprise controlled by the same companies as such enterprise.

iii Standard for review: overall economic benefits in excess of competition restraints

The standard under which the TFTC must review any merger notifications is fairly expansive. Under Article 13 of the Fair Trade Act, the TFTC may not prohibit any filed merger if the overall economic benefits of the merger outweigh the disadvantages resulting from the competition restraints that it would cause. Therefore, the standard does not require an absolute bar on mergers causing competition restraints. Rather, the TFTC will balance the restraints on competition with the overall benefit to the economy prior to determining whether such a merger should be prohibited. Under regulations set forth by the TFTC, a non-exclusive list of factors to be considered are consumer interests, whether the parties to be merged had weaker positions in the market prior to the proposed merger, whether one of the merging parties is a failing enterprise and how closely related the concrete results of the proposed merger may be to the stated economic benefits.

At times, the overall economic benefits to Taiwan as a whole relative to the global market have been a factor in the TFTC’s decisions. In 2000, a merger involving three of Taiwan’s semiconductor foundries was proposed for review. In this transaction, Taiwan-Acer Manufacturing Corp and Worldwide Semiconductor Manufacturing Corp would both merge into and be survived by Taiwan Semiconductor Manufacturing Corp (TSMC). After the combination, TSMC’s share of the domestic foundry market would rise from 53 per cent to over 60 per cent, which would give TSMC, along with only one other remaining market participant, nearly 100 per cent of the domestic market. The TFTC recognised that competition in Taiwan’s domestic foundry market would be restricted or hindered, but that it was more important to ‘the overall economic interests of the nation’ for the combination to take place, as it would ‘solidify Taiwan’s leadership role in the foundry market, bring increased economies of scale to Taiwan’s IC market, and give Taiwan a greater leadership role in the global IC market’. Additionally, the TFTC noted that upstream and downstream participants would also benefit from enhancement of the merged entity’s global competitiveness.

iv Waiting periods and time frames

Under the 2017 amendment, enterprises must not proceed to merge within 30 working days (instead of 30 calendar days before the 2017 amendment) from the date that the TFTC accepts the filing materials as complete, which in a practical manner extends the waiting period for the merger control review. Should the TFTC in its discretion determine that the filing materials are incomplete and request that supplemental information be provided, the 30-working day waiting period will restart on the date of submission of the supplemental information if it is deemed complete. This waiting period may be shortened or extended as deemed necessary by the TFTC in writing. In our experience, the waiting period is rarely shortened unless a special request is made to the TFTC relating to the timing pressures of
the proposed deal. The TFTC will, however, in its discretion and often for more complex transactions, extend the waiting period, with such extension not exceeding the statutory limit of an additional 60 working days under the 2017 amendment.

Certain proposed transactions having limited market shares or not posing any potential significant competition restraints may be eligible for shortened waiting periods (expedited notifications). Additionally, supporting information filed along with the notification form may include documents relating to production, sale and inventory for a shorter historical period.

v Third-party challenge, external opinion and judicial review
Third parties do not have the right to access merger files under the TFTC’s custody; however, during the seven-day TFTC public opinion solicitation period, they may challenge the proposed merger. Persuasive challenges may prompt the TFTC to request more information from the merging parties, thereby, in some cases, delaying or breaking the deal. Under the 2017 amendment, the TFTC is also provided with the discretion to seek external opinion, and if necessary, appoint an academic research institution to conduct industrial economic analysis to supplement its review of the merger application. In addition, the TFTC shall provide necessary merger application information to the targeted enterprise in the hostile acquisition and consult with the targeted enterprise before a decision is made. Should parties be dissatisfied with the TFTC’s decision, they have the right to file for an administrative litigation directly without first going through an administrative appeal within two months of the day after receiving the disposition letter.

vi Concurrent regulatory review
The National Communications Commission (NCC) has concurrent merger control authority with the TFTC over the media sector. Pursuant to the agreement between the two agencies, the TFTC must first consult the NCC before substantively reviewing a merger filing of parties in the media sector.

IV OTHER STRATEGIC CONSIDERATIONS
i Requests for waiver
In certain cases, it may be difficult to determine whether the proposed transaction is a covered transaction, or to determine whether the filing thresholds have been met for various reasons (e.g., because the relevant market is not easily defined). In such cases, a request for waiver may be made to the TFTC in the form of a letter. However, we note that the TFTC is prone not to respond to such request for a waiver recently, as the TFTC appears to be less willing to bear the risks for such preliminary judgment prior to receipt of the complete filing materials.

ii Confidentiality
Unless qualified for expedited notification as described above, the TFTC will post basic information on its website to gather public comments on the proposed transaction. Such basic information will include the names of the merging parties and their relevant markets, the type of merger to be conducted as set forth in the Fair Trade Act, the period during which comments are accepted and the forum by which comments may be made to the TFTC. Furthermore, the TFTC has entered into agreements with certain foreign authorities, which
will require the exchange of information in circumstances where the notification would affect the jurisdictions with which the agreements are entered. However, in a merger case, the TFTC will maintain the confidentiality of the filing if it determines that a filing is not necessary due to a lack of jurisdiction or a failure to meet filing thresholds.

Parties to a proposed transaction still being negotiated may enquire whether a filing is necessary by submitting anonymous queries to the TFTC. However, at some point, if the parties intend to proceed with a transaction and if a filing is required, identifying details will need to be disclosed to the TFTC.

Parties will not have access to the TFTC’s files during the review process in principle; however, the TFTC is required to provide necessary merger application information to the targeted enterprise in the hostile acquisition and consult with the targeted enterprise after the 2017 amendment. Also, in more complex cases and in the event that the parties have special requirements with respect to the review of their transactions, we have often been able to successfully request special meetings with the TFTC to discuss the review and any relevant facts that are to be specially communicated. Additionally, parties may request that the TFTC maintain certain portions of its information in absolute confidentiality if such portions are clearly denoted pursuant to applicable laws.

V OUTLOOK & CONCLUSIONS

Since enactment of the Fair Trade Act, Taiwan has actively and conscientiously developed a full body of competition law to ensure that the basic principles of fair trade are followed. The merger control regime in Taiwan is robust, as demonstrated by the technical assistance that the TFTC provides to nearby jurisdictions such as Mongolia, Indonesia and Thailand.

The 2017 amendment prolonged the waiting period for merger applications to 90 working days. The enterprises in a merger transaction should be aware of the extended waiting period to better plan out the deal schedule and duly forecast the expected closing date of the deal. Such impact on merger application practice is worth monitoring.
Chapter 40

TURKEY

Gönenç Gürkaynak and K Korhan Yıldırım

I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority consists of the Competition Board, the Presidency, Service Departments and the Advisory Department. As the competent decision-making body of the Turkish Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is based in Ankara. The Service Departments consist of five technical units, one research unit, one decisions unit, one information management unit, one external relations unit, one management services unit, and one strategy development unit. There is a 'sectoral' job definition for each technical unit.

The relevant legislation on merger control is Law No. 4,054 on Protection of Competition and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. The Competition Authority has also issued many guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules. The Guideline on Market Definition was issued in 2008, and is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C372/03). The Competition Board released five comprehensive guidelines on merger control matters. The first is the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, covering certain topics and questions about the concepts of undertakings concerned, turnover calculations and ancillary restraints. It is closely modelled on Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings. The second is the Guideline on Remedies Acceptable to the Turkish Competition Authority in Mergers and Acquisitions (Guidelines on Remedies). The Guidelines on Remedies is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004. The third and fourth are the Guidelines on Horizontal Mergers and Acquisitions (Horizontal Guidelines) and the Guidelines on Non-horizontal Mergers and Acquisitions (Non-horizontal Guidelines). These Guidelines are in line with EU competition law regulations and seek to retain harmony.

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between EU and Turkish competition law instruments. Finally, the Competition Board released the Guidelines on Merger and Acquisition Transactions and the Concept of Control, also closely modelled on the respective EC guidelines.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control on a lasting basis are subject to the Competition Board’s approval, provided that they reach the applicable turnover thresholds. ‘Control’ is defined as the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions of a company, and it can be exercised de jure or de facto.

The Authority has recently introduced Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced in Communiqué No. 2010/4 is that Article 1 of Communiqué No. 2017/2 abolished Article 7(2) of Communiqué No. 2010/4 which had required that ‘The thresholds … are re-determined by the Board biannually’. Through this amendment, the Board no longer has the duty to re-establish turnover thresholds for concentrations every two years. As a result, there is no specific timeline for the review of the relevant turnover thresholds set forth by Article 7(1) of Communiqué No. 2010/4. Secondly, Article 2 of Communiqué No. 2017/2 modified Article 8(5) of Communiqué No. 2010/4. Together with this amendment, the Board will now be in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period. Lastly, Communiqué No. 2017/2 introduced a new regulation concerning public bids and series of transactions in securities. This newly introduced provision is similar to Article 7(2) of the European Merger Regulation. It provides that the applicable suspension requirement will not prevent the implementation of a public bid or of a series of transactions in securities on the conditions that (1) the transaction is notified to the Turkish Competition Authority without delay, and (2) the acquirer does not exercise the voting rights or does so only to maintain the full value of the investment based on a derogation granted by the Board. The Board may condition the derogation upon certain remedies to maintain effective competition.

Prior to this amendment, there was no specific regulation on the implementation of public bids and series of transactions. There were, however, certain precedents that laid down the same principles as the new regulation.

i Thresholds

Article 7 of Communiqué No. 2010/4 provides for the following thresholds:

\( a \) the total turnover of the parties to a concentration in Turkey exceeds 100 million liras and the respective Turkish turnover of at least two of the parties individually exceed 30 million liras; or

\( b \) the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 30 million liras, or the Turkish turnover of any of the parties in mergers exceeds 30 million liras; and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million liras.

Communique No. 2010/4 no longer seeks the existence of an ‘affected market’ in assessing whether a transaction triggers a notification requirement. Under the old regime, transactions that did not affect a market did not trigger a pre-merger notification or approval requirement,
even if they exceeded the turnover thresholds. Joint venture transactions were the exception to this rule, and they required pre-merger notification and approval if they exceeded the thresholds, regardless of whether they resulted in an affected market. Now, the existence of an affected market is not a condition to triggering a merger control filing requirement.

The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions has also been amended in line with the changes in the jurisdictional thresholds. Before the amendments, a horizontal or vertical overlap between the worldwide activities of the transaction parties was sufficient to infer the existence of an affected market, provided that one of the transaction parties was active in such an overlapping segment in Turkey. Following the amendments, existence of an affected market is no longer a requirement for a merger filing to the Competition Authority, and all discussions and explanations on the concept of affected market have been removed from the Guideline altogether.

Foreign-to-foreign transactions are caught if they exceed the applicable thresholds. Acquisition of a minority shareholding can constitute a notifiable merger if and to the extent that it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives are subject to notification to, and the approval of, the Competition Board. As per Article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

The implementing regulations provide for important exemptions and special rules. In particular:

- Article 19 of Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;
- mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;
- intra-corporate transactions that do not lead to a change in control are not notifiable;
- acquisitions by inheritance are not subject to merger control;
- acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour;
- two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years are deemed a single transaction for turnover calculation purposes following the amendments brought by Communiqué No. 2017/2. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector, or whether they were notified before.

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents, insurance companies and pension companies. The Turkish merger control regime does not, however, recognise any de minimis exceptions.

Failing to file or closing the transaction before the Competition Board’s approval can result in a turnover-based monetary fine. The fine is calculated according to the annual
local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquiring party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, not be less than 21,036 lira for 2018. This monetary fine does not depend on whether the Turkish Competition Authority will ultimately clear the transaction.

If, however, there truly is a risk that the transaction is problematic under the dominance test applicable in Turkey, the Turkish Competition Authority may *ex officio* launch an investigation into the transaction; order structural and behavioural remedies to restore the situation as before the closing (restitutio in integrum); and impose a turnover-based fine of up to 10 per cent of the parties’ annual turnover. Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carveout or hold-separate arrangements proposed by merging undertakings. Communiqué No. 2010/4 provides that a transaction is deemed to be ‘realised’ (i.e., closed) ‘on the date when the change in control occurs’. While the wording allows some room to speculate that carveout or hold-separate arrangements are now allowed, it remains to be seen if the Turkish Competition Authority will interpret this provision in such a way. As noted above, this has so far been consistently rejected by the Competition Board, which argues that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

**II YEAR IN REVIEW**

Pursuant to the Merger and Acquisition Insight Report of the Authority (the Report) for 2017, the Board reviewed a total of 184 transactions in 2017; these transactions included five privatisations. Among these transactions four concentrations regarding the roll-on, roll-off (ro-ro) transportation services, agriculture, port services and optics sectors were subjected to Phase II review in 2017. Moreover, the Board refused to grant approval to one concentration notified and subjected to Phase II review in 2017. The other three of these transactions are still under review. In 2017, 94 transactions notified to the Board were foreign-to-foreign transactions, which constitute over half of the concentrations notified in 2017.

The Board’s most important merger control decisions in 2017 were as follows.

In May 2017, the Competition Board granted an unconditional approval to the transaction concerning the acquisition by Maersk Line A/S (Maersk) of all shares and sole control of Hamburg Südamerikanische Dampfschifffahrts – Gesellschaft KG (HSDG). Maersk (the buyer) is the largest container shipping company, while HSDG is among the top 10 worldwide. Maersk and HSDG offer their services on trade routes through cooperation agreements with other shipping companies based on vessel-sharing agreements where members decide jointly on capacity setting, scheduling and ports of call, which are all important parameters of competition. In its decision, the Competition Board clearly indicated that in its assessment of the proposed transaction it took into consideration the commitments that the parties submitted to the European Commission, specifically with respect to the trade routes.

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to and from the Mediterranean Sea. The European Commission had cleared the proposed acquisition (Case M.8330 – Maersk/Hamburg (2017)) conditionally upon the withdrawal of HSDG from five consortia on trade routes. Among these routes, the ones connecting (1) the Mediterranean and West Coast South America and (2) the Mediterranean and East Coast South America are related to the Turkish markets. The Commission stated in its press release dated 10 April 2017 that this will entirely remove the problematic links between Maersk and HSDG’s consortia that would have been created by the transaction. In view of the proposed remedies, the Commission concluded that the proposed transaction, as modified, would no longer raise competition concerns. The Commission’s decision is conditional upon full compliance with the commitments.

In November 2017, the Competition Board granted unconditional approval to the transaction concerning the reinstatement of certain minority protection rights granted to Anheuser-Busch InBev (ABI) over Anadolu Efes and the formation of a joint venture between those two undertakings (23 November 2017, 17-38/611-267) through concluding that the relevant transaction will not create of a dominant position or strengthen an existing dominant position, and will not significantly impede competition. The transaction is important as it was a cross-border deal between ABI, one of the biggest players in the production of beer worldwide, and Anadolu Efes, the largest beer producer in Turkey and a significant player in eastern Europe where ABI acquired joint control over Anadolu Efes due to reinstatement of certain strategic veto rights.

In November 2017, the Competition Board concluded its Phase II review of the acquisition of Ulusoy Deniz Taşımacılığı AŞ, Ulusoy Gemi İşletmeleri AŞ, Ulusoy Ro-Ro İşletmeleri AŞ, Ulusoy Ro-Ro Yatırımları AŞ, Ulusoy Gemi Acenteliği AŞ, Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri AŞ and Ulusoy Çeşme Liman İşletmesi AŞ (Ulusoy Ro-Ro) by UN Ro-Ro İşletmeleri AŞ (UN Ro-Ro). The Competition Board concluded that the transaction would strengthen UN Ro-Ro’s dominant position in the market for ro-ro transport between Turkey and Europe, UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon the consummation of the transaction, the transaction would significantly impede competition in these markets and the behavioural remedies submitted by the parties would not be not sufficient to eliminate the competition law concerns arising from the transaction. In light of this, the Competition Board did not approve the transaction.

The approach of the Competition Board to market shares and concentration levels is similar to that of the European Commission, and in line with the approach spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). The first factor discussed under the Horizontal Guidelines is that market shares above 50 per cent can be considered an indication of a dominant position, while the market share of the combined entity remaining below 20 per cent would not require further inquiry into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board’s approach to market shares and the Herfindahl-Hirschman Index (HHI) levels is provided, the Horizontal Guidelines’ emphasis on an effects-based analysis (coordinated and uncoordinated effects) without further discussion of the criteria to be used in evaluating the presence of a dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054 on the Protection of Competition. Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:
the anticompetitive effects that a merger would have in the relevant markets;
the buyer power as a countervailing factor to anticompetitive effects resulting from the merger;
the role of entry in maintaining effective competition in the relevant markets;
efficiencies as a factor countering the harmful effects on competition that might otherwise result from the merger; and
the conditions of a failing company defence.

The Horizontal Guidelines also discuss coordinated effects that might arise from a merger of competitors. They confirm that coordinated effects may increase the concentration levels and may even lead to collective dominance. As regards efficiencies, the Horizontal Guidelines indicate that efficiencies should be verifiable and that the passing-on effect should be evident.

The Non-horizontal Guidelines confirm that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 25 per cent and the post-merger HHI is below 2,500 (except where special circumstances are present) are unlikely to raise competition law concerns, similarly to the Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board’s approach to market shares and concentration levels, the other two factors covered in the Non-horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-horizontal Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

The Turkish Competition Authority is expected to retain its well-established practice of paying close attention to developments in EU competition law and seeking to retain harmony between EU and Turkish competition law instruments.

Another significant development in competition law enforcement was the change in the competent body for appeals against the Competition Board’s decisions. The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will (1) go through the case file both on procedural and substantive grounds and (2) investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court’s review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Competition Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past five years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.3

In line with this trend, the Turkish Competition Authority issued the Guidelines on Remedies. The Guidelines on Remedies aims to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may

otherwise be deemed as problematic under the dominance test. The Guidelines on Remedies sets out the general principles applicable to the remedies acceptable to the Competition Board, the main types of commitments that may be accepted by the Competition Board, the specific requirements that commitment proposals need to fulfil and the main mechanisms for the implementation of such commitments.

III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (i.e., a mandatory waiting period): a notifiable transaction (whether or not it is problematic under the applicable dominance test) is invalid, with all the ensuing legal consequences, unless and until the Turkish Competition Authority approves it.

The notification is deemed filed when the Turkish Competition Authority receives it in its complete form. If the information provided to the Competition Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board’s subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final, executed or current version of the transaction agreement.

The Competition Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an ‘approval’ through an implied approval mechanism introduced with the relevant legislation. While the wording of the law implies that the Competition Board should decide within 15 calendar days whether to proceed with Phase II, the Competition Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information. In practice, the Turkish Competition Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommendable that the filing be done at least 40 to 45 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 40 to 45 days after the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the public announcement of tender specifications. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.

There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and if there is a genuine inability to provide information due to the one-sided nature of the transaction, the Turkish Competition Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.
Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

The Competition Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Competition Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition, may request a hearing from the Competition Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Competition Board’s decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

The Competition Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation and right of access. As noted above, the number of conditional clearances has increased significantly in recent years.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before administrative courts. The appellants may make a submission by filing an appeal within 60 days of the parties’ receipt of the Competition Board’s reasoned decision. Decisions of the Competition Board are considered as administrative acts. Filing an appeal does not automatically stay the execution of the Competition Board’s decision. However, upon request of the plaintiff, the Court may decide to stay the execution. The Court will stay the execution of the challenged act only if execution of the decision is likely to cause irreparable damages, and there is a prima facie reason to believe that the decision is highly likely to violate the law.

The appeal process may take two-and-a-half years or more.

IV OTHER STRATEGIC CONSIDERATIONS

With the recent changes in Law No. 4054, the Competition Board has geared up for a merger control regime focusing much more on deterrents. As part of that trend, monetary fines have increased significantly for not filing or for closing a transaction without the Competition Board’s approval. It is now even more advisable for the transaction parties to observe the notification and suspension requirements and avoid potential violations. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. As noted above, the Competition Board is currently rather dismissive of carveout and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carveout or hold-separate arrangements are now allowed. Because the position the Turkish Competition Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early-closing mechanisms recognised by the Competition Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 also will require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Competition Board is willing to cooperate more
with other jurisdictions in reviewing cross-border transactions. Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Turkish Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures.

V OUTLOOK & CONCLUSIONS

The Draft Competition Law, which was issued by the Turkish Competition Authority in 2013 and officially submitted to the Presidency of the Turkish parliament, which is a separate body within the parliament, on 23 January 2014, is now null and void following the beginning of the new legislative year of the Turkish parliament. In order to re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish parliament. At this stage, it remains unknown whether the new Turkish parliament or the government will renew the draft law. However, it could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft.

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4 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.
Chapter 41

UNITED KINGDOM

Jordan Ellison and Paul Walter

I INTRODUCTION

Mergers qualify for review under the UK rules if they meet a test relating to the turnover of the target or, alternatively, a ‘share of supply’ test. Where the UK turnover of the target exceeds £70 million, the turnover test will be satisfied. The share of supply test will be satisfied where the merger creates an enlarged business supplying 25 per cent or more of goods or services of any reasonable description or enhances a pre-existing share of supply of 25 per cent or more. The UK government has recently introduced alternative turnover and share of supply tests for certain sectors on national security grounds (see Section III.i, below).

The Competition and Markets Authority (CMA) has the power to carry out an initial Phase I investigation, and has a duty to refer any qualifying transaction for a detailed Phase II investigation where it believes that the merger could give rise to a substantial lessening of competition. Phase I decision-making is undertaken by the senior director of mergers or another senior CMA official, while Phase II decision-making is undertaken by an independent panel drawn from a pool of senior experts in a variety of fields.

Remedy undertakings in lieu of a Phase II reference may be accepted by the CMA. The CMA's in-depth Phase II investigation may lead to a prohibition decision, a decision that the transaction should be allowed to proceed subject to undertakings, or an unconditional clearance.

Notification under the UK system of merger control is ‘voluntary’ in the sense that there is no obligation under the Enterprise Act 2002 (EA) to apply for CMA clearance before completing a transaction. The CMA may, however, become aware of the transaction through its market intelligence functions (including through the receipt of complaints) and impose interim orders preventing or unwinding integration of the two enterprises pending its review. There is a risk that it may then refer the transaction for a Phase II investigation, which could ultimately result in an order for divestment.

In certain limited circumstances (where the merger raises a defined public interest consideration), the UK system allows the relevant Secretary of State to intervene in relation to mergers. Currently, public interest considerations are limited to national security, quality and plurality in the media, accurate presentation of news and free expression in newspaper mergers, and the maintenance of stability in the UK financial system.²

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1 Jordan Ellison is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would also like to thank Henry Llewellyn, associate at Slaughter and May, for his help in preparing this chapter.

2 Intervention notices have been served in two recent transactions: (1) in March 2017, a European Intervention Notice in 21st Century Fox’s acquisition of Sky on media plurality grounds (the European Commission cleared the deal in April 2017; the Secretary of State for Digital, Culture, Media and Sport
The CMA has published detailed non-binding guidelines on jurisdictional issues and its procedures for the review of mergers.\(^3\) It has also adopted other guidance documents published by its predecessor organisations, the Office of Fair Trading (OFT) and the Competition Commission (CC).\(^4\)

The Competition Appeal Tribunal (CAT) may review decisions made by the CMA or the Secretary of State in connection with a reference, or possible reference, of a merger. An appeal lies, on a point of law only, from a decision of the CAT to the Court of Appeal and requires the leave of either the CAT or the Court of Appeal.

II YEAR IN REVIEW

i Workload

The number of Phase I merger decisions made by the CMA in the 2017–2018 financial year (62) was slightly up from the 57 decisions taken in the preceding financial year, and significantly down from the peak of 210 merger decisions made by the OFT in the 2005–2006 financial year.\(^5\)

Of the 62 cases decided during the year, 41 were cleared unconditionally, representing around 66 per cent of cases, down from 74 per cent in the preceding year (including cases cleared under the de minimis exception – see Section III.vii, below). Nine cases were referred for Phase II review, which is around 15 per cent of cases, up from 9 per cent in the preceding year. Undertakings in lieu of a reference were accepted in 12 cases, up from nine in the preceding year.

At the time of writing, three of the nine transactions referred to Phase II have been cleared unconditionally, three have been cleared with remedies, one was cancelled (as the merger in question was abandoned) and two are still under review.

A total of five Phase II decisions were published by the CMA in the 2017–2018 financial year, down from seven published by the CMA in the previous year. Three were unconditional clearances and two were granted clearance subject to divestiture remedies. The CMA did not prohibit any mergers during the 2017–2018 financial year, whereas it prohibited one merger in the preceding year.\(^6\)

Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 23 per cent of cases in the 2017–2018 financial year, which is around four times the rate of intervention from the European Commission over a similar period. The higher intervention rate can be explained by the voluntary nature of the UK merger control regime, which means that parties may elect not to notify transactions that do not give rise to significant competition issues.
ii  Interim measures

The CMA has powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action, including in relation to anticipated mergers at Phase I (see Section III.vi, below). This ensures that, while notification is voluntary in the United Kingdom, the CMA is able to prevent action being taken that would result in irreversible damage to competition. The CMA imposed initial enforcement orders or accepted initial undertakings in 20 Phase I cases in the 2017–2018 financial year. Interim orders were imposed in two Phase II cases in the financial year. The CMA granted a total of 29 derogations from initial enforcement orders in the financial year, down significantly from 72 derogations in the previous year.7 At the time of writing, the CMA has not yet used its powers to reverse integration steps taken before issuing an order.

iii  Information requirements and timetables

The CMA merger notice requires a large amount of information. The CMA therefore strongly encourages parties to make contact in advance of notification to seek advice on their submission, not only to ensure that the notification is complete, but also to lessen the risk of burdensome information requests post-notification.

One of the key features of the UK regime is the existence of a statutory 40-working-day timetable at Phase I. The CMA recognises that this presents its own challenges, in particular balancing the need to obtain as much information as possible upfront (before the clock starts running) against the burden such information requests may place on businesses. The CMA has also acknowledged the need to take care that pre-notification discussions do not extend for longer than is appropriate. The CMA aims to start the statutory clock within 20 working days (on average across all cases) of submission of a substantially complete draft merger notice. The average length of the total pre-notification period was 28 working days in the 2017–2018 financial year, down from 33 working days in the previous year.8 Some cases, however, still require longer pre-notification periods. The CMA has emphasised that pre-notification will be quicker the more complete the draft notification is, including draft annexes containing internal documents, contact details, etc. The CMA continues to work to streamline its processes, with a revised version of the Merger Notice introduced in September 2017, new processes introduced for ‘file lists’ and submission of electronic files and continued senior involvement at the early stage of cases.9

While the CMA has indicated its willingness to adopt a reasonable approach to assessing what type of information will be required for a complete notification, it also retains the power to ‘stop the clock’ where the parties have failed to comply with the requirements of a post-notification formal information request (see Section III.iv, below). The CMA formally paused the statutory timetable in seven Phase I cases during the 2017–2018 financial year.10 During the 2017–2018 financial year, the average length of Phase I was 34 working days, compared to 35 working days in the preceding year.11

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7  Mergers updates, Law Society Competition Section seminar, 13 March 2018.
8  Ibid.
9  Ibid.
10  Ibid. This figure is accurate as at 28 February 2018.
11  Ibid. The figure for the 2017–2018 financial year is accurate as at 28 February 2018.
Local market analysis

When examining retail mergers, the CMA tends to assess the impact on competition both at a national level and at a narrower local level. This approach often results in the merging parties offering to divest a number of businesses in local areas in order to secure clearance for the overall transaction. This trend has continued during the last year. In Heineken/Punch, where Heineken was proposing to buy approximately 1,900 pubs from Punch Taverns, the CMA’s final report identified 33 local areas in which the merger may have been expected to result in a substantial lessening of competition and required the divestment of pubs in each of these areas. The CMA subsequently approved the sale by Heineken and Punch of 30 pubs.

In 2017, the CMA published an updated commentary on the assessment of retail mergers, which explains the principles applied in past retail mergers and the issues frequently involved. In addition to updating the text on catchment areas, effects on local and national competition and upward price pressure indices, the updated commentary also provides a detailed explanation of the use of filters, diversion ratios and econometric evidence, and includes an assessment of the competitive interaction between bricks-and-mortar and online retail businesses.

Online constraints

Online constraints are increasingly an important feature in the CMA’s assessment of mergers, particularly in retail and media cases. In its updated retail mergers commentary, the CMA notes that the competitive interaction between the online and bricks-and-mortar channels is evolving rapidly in some sectors and this needs to be taken into account in its analysis. The CMA typically uses customer surveys, internal documents, econometric analysis and third party views to assess the strength of constraint imposed by online retailers on bricks-and-mortar retailers (and vice versa).

The CMA has demonstrated its approach to analysing the impact of such constraints in several recent cases. For example, in Future/Miura, the CMA noted that there had been a material level of migration from printed magazines to online content albeit that there was a significant variation in the constraint exercised by digital content within different categories of interest. Although the parties would have a combined share of 100 per cent in gaming magazines, the CMA found no realistic prospect of a substantial lessening of competition based, among other things, on the strong competitive constraint imposed by online content. In Ladbrokes/Coral, the CMA considered the nature of competition between online and bricks-and-mortar suppliers of gambling services. Although the CMA did not include online supply in the product market due to the relatively low levels of online diversion, price differentials and differences in use, it did note that online constraint was inherently incorporated in the evidence underlying its local competition assessment. The CMA adopted a similar position in JD Sports/Go Outdoors, where it considered that the evidence did not support a single relevant market for bricks and mortar and online sales, but it still treated online sales as a constraint on the parties when considering merger effects at the local level.

12 Retail mergers commentary: CMA62 (April 2017).
III THE MERGER CONTROL REGIME

i Threshold issues

Under the UK system, a ‘relevant merger situation’ (i.e., a transaction potentially qualifying for review) occurs when two or more enterprises have ceased to be distinct. This can occur either through common ownership or common control. Common ownership involves the acquisition of an enterprise so that two previously distinct enterprises become one. Common control involves the acquisition of at least one of the following: *de jure* or legal control (a controlling interest); *de facto* control (control of commercial policy); or material influence (the ability to make or influence commercial policy).

The concept of material influence has been drawn widely by the UK competition authorities. For example, the breadth of the concept can be seen in *JCDecaux/Concourse* where the OFT found that, even in the absence of an equity stake, material influence had been acquired by virtue of an option to appoint two out of three board members and the ability to restrict the target’s capability for expansion.\(^{13}\)

A merger situation will qualify for review if it meets the turnover test or the share of supply test (see Section I, above). On 15 March 2018, the UK government announced its decision to change the thresholds enterprises on national security grounds for certain defined sectors involving the development of military and dual-use (i.e., civilian and military) equipment and systems, as well as parts of the advanced technology sector.\(^{14}\) For these sectors, the turnover threshold is lowered from £70 million to £1 million and the share of supply test is met if the pre-merger share of sale of the target is 25 per cent or more (irrespective of whether that share is increased). The new changes exist alongside the existing regime.

If the CMA believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market, then it will refer the merger for a Phase II investigation.

In general, a completed merger will no longer qualify for a Phase II reference four months after the date of implementation of the merger. Time will not begin to run, however, until the ‘material facts’ of the merger (i.e., the names of the parties, nature of the transaction and completion date) have been made public or are given to the CMA (if neither occurs prior to completion). Time will not run where undertakings in lieu of reference are under negotiation, where the parties are yet to comply with an information request from the CMA, or where a request has been made by the United Kingdom for review of the transaction by the European Commission in accordance with Article 22(3) of the EU Merger Regulation.

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\(^{13}\) Material influence also formed the jurisdictional basis for the investigations by the OFT and the CC in relation to the 29.82 per cent shareholding acquired by Ryanair in Aer Lingus in the context of a takeover bid. The CC ultimately found that the existence of Ryanair’s minority shareholding led or may have been expected to lead to a substantial lessening of competition in the markets concerned and decided that the most effective and proportionate remedy was to compel the airline to reduce its stake in Aer Lingus to 5 per cent. This case illustrates how a would-be acquirer who builds a minority stake in advance of a full takeover bid remains exposed to a CMA investigation and ultimately risks being ordered to divest the stake, even if the takeover bid fails.

(EUMR) (see the European Union chapter for details of this procedure). The four-month period may also be extended by agreement between the CMA and the merging enterprises, but for no more than 20 days.

ii Substantive test

In its assessment of mergers, the CMA considers whether the transaction may be expected to give rise to a substantial lessening of competition. At Phase I, a reference must be made if it is or may be the case that a merger may give rise to a substantial lessening of competition (known as the ‘realistic prospect’ threshold), while at Phase II a ‘balance of probabilities’ threshold applies. As a result, it is relatively common for mergers to be referred to Phase II and subsequently cleared unconditionally.

The CMA has adopted substantive assessment guidelines that illustrate, in particular, the shift away from traditional merger control analysis, which proceeds from the definition of the relevant product and geographical markets to measure post-merger levels of concentration, towards a more direct assessment of competitive effects taking into account factors such as differentiated products, closeness of competition and price sensitivity of customers. For example, the CMA will often use margin and switching data (commonly based on customer surveys) to estimate the upward pricing pressure arising from a merger. For these purposes, the CMA has adopted guidance on the design and presentation of consumer survey evidence in merger inquiries. The CMA has also published commentary on the assessment of retail mergers (see Section II.iv, above).

iii Counterfactuals

The CMA applies different approaches at Phase I and Phase II to assessing the merger counterfactual. At Phase I, the transaction is generally measured against the prevailing conditions of competition (unless it is unrealistic to do so or there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). At Phase II, the CMA will measure the transaction against the ‘most likely scenario’.

The most notable situation where the CMA may use a counterfactual different to the prevailing conditions of competition is in a failing firm scenario. However, in practice, it is often difficult to argue for its application, especially at Phase I. The CMA considered the failing firm test in three Phase I cases in the 2017–2018 financial year. In each case, the parties failed to provide sufficient evidence of a probability of market exit by the failing firm. In one case, the parties provided sufficient evidence for the counterfactual to be satisfied in relation to some assets of the failing firm but not in relation to other assets. In the other case, the parties failed to provide sufficient evidence of a probability of market exit by the failing firm and the CMA considered the failing firm was likely to have continued to operate.

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15 See OFT v. IBA Health Ltd [2004] EWCA Civ 142.
16 Merger Assessment Guidelines (September 2010) OFT 1254, CC 2.
17 Good practice in the design and presentation of consumer survey evidence in merger inquiries (March 2011) OFT 1230, CC2 com 1.
18 Euro Car Parts/Andrew Page.
19 Just Eat/Hungryhouse.
iv  The notification procedure
An application for clearance is made using the formal merger notice.20 The initial period within which the CMA must make a decision whether to make a reference is 40 working days from the first working day after the CMA confirms to the parties that the merger notice is complete. This initial period may be extended where the parties have failed to comply with the requirements of a formal information request under Section 109 of the EA, where the Secretary of State has served a public interest intervention notice, or where the European Commission is considering whether to accept a request from the United Kingdom for the merger to be referred to Brussels under Article 22(3) of the EUMR.

As noted in Section II.iii, above, the CMA encourages parties to enter into pre-notification discussions at an early stage both to ensure that the notification is complete and to avoid as far as possible the need for extensions to the statutory timetable. Pre-notification discussions will also help the CMA to determine any jurisdictional issues (e.g., whether the CMA is best placed to review the case or whether a reference to the European Commission should be sought under the EUMR – see Section IV.ii, below) and whether a case is likely to give rise to any substantive issues that might trigger its duty to refer.

It is possible for the parties to request that the CMA ‘fast-tracks’ a merger reference where there is evidence that an in-depth review is likely to be required. This option may be attractive to parties in cases where a reference appears inevitable, as it allows for Phase I of the review process to be truncated.

The CMA levies substantial filing fees in respect of the mergers it reviews, with fees of between £40,000 and £160,000 depending on the turnover of the target business.

v  Informal advice
Where there is evidence of a good-faith intention to proceed and there is a genuine competition issue, prior to submitting a merger notice or initiating pre-notification discussions, it may be possible to obtain informal advice from the CMA as to whether it is likely to refer the merger for a Phase II investigation. There is no standard timetable for the provision of informal advice, but where it is intended that the advice will be given following the conclusion of a meeting, the CMA will endeavour to schedule that meeting within 10 working days of receipt of the original application. The resulting advice is confidential and does not bind the CMA.

vi  Interim measures
As outlined above, the CMA has powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action. Financial penalties may be imposed for breaches of such measures (capped at 5 per cent of the aggregate group worldwide turnover). If there are relatively high risks of pre-emptive action or concerns about compliance with the interim order, the CMA also has the power to require a monitoring trustee to be appointed in order to ensure compliance with the interim orders.

The CMA issued new guidance on the use of initial enforcement orders in September 2017, providing further clarification on: the circumstances in which an initial enforcement

20 The CMA has made a number of changes to the merger notice form, reflecting comments received in a consultation in 2017, that are intended to reduce the overall amount of information that businesses need to provide.
order will typically be imposed; the form that an initial enforcement order will typically take; the type of derogations that the CMA is likely to grant; and the timing for imposing and revoking initial enforcement orders and granting derogation.21

The CMA will normally make an interim order where it has reasonable grounds to suspect that two or more enterprises have ceased to be distinct (i.e., in respect of completed mergers) and will normally do so almost immediately. All of the 17 Phase I cases decided in the 2017–2018 financial year in which initial enforcement orders were imposed were completed mergers.

Given that the risk of pre-emptive action is generally much lower in relation to anticipated mergers, the CMA has noted that it would typically engage with parties before making an order in those circumstances.

The CMA has stated that it would generally not expect to impose an order limiting the parties’ ability to complete an anticipated merger unless it had strong reasons to believe that completion will occur prior to the end of Phase I and the act of completion itself might amount to pre-emptive action that would be difficult or costly to reverse (e.g., where the act of completion would automatically lead to the loss of key staff or management capability for the acquired business). The CMA may also consider creating a tailored interim order in cases where this is likely to optimise procedural efficiency and avoid unnecessary disruption to the merging parties’ businesses. Therefore, absent exceptional circumstances, it is expected that parties will still be able to complete transactions prior to CMA clearance.

The CMA is willing to grant derogations from interim orders. The CMA advises parties to raise derogation requests as early in the process as possible, preferably in a single comprehensive request. The CMA will often grant the following types of derogation requests where sufficiently specified, reasoned and evidenced: (1) the provision of back-office support services by the acquirer to the target; (2) the exclusion from the scope of the interim order of parts of one party’s business that are not engaged in activities that are related to the other party’s business; (3) the exclusion from the scope of the interim order of parts of either parties’ business that have no relevance to the merging parties’ relevant activities in the United Kingdom; (4) the replacement of specified key staff at the target or substantive changes to the merging parties’ organisational or management structures; and (5) continued access to key staff members where integration is staggered.

The CMA will seek to release merging parties from some or all of the obligations incumbent in an interim order as early as is appropriate in the circumstances of the case, including during Phase II for parts of the business about which the CMA is no longer concerned. The CMA may also release interim orders following a state of play meeting if it is decided that the case will be cleared.

vii Exceptions to the duty to refer

As explained above, the CMA has a statutory duty to refer a relevant merger situation for a Phase II investigation where it believes that it is or may be the case that a merger has resulted

21 Guidance on initial enforcement orders and derogations in merger investigations (September 2017), CMA60. On 12 June 2018, the CMA published for consultation draft new guidance on the use of interim measures in merger investigations. The new draft guidance includes text on initial enforcement orders and is intended to replace the September 2017 guidance document.
or may be expected to result in a substantial lessening of competition in a UK market. The CMA has adopted guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase II investigation.\(^\text{22}\)

The guidance sets out the criteria for accepting undertakings that may be offered by the merging parties in lieu of a reference. To discharge the CMA’s duty to refer, any undertakings offered by the parties should restore competitiveness to pre-merger levels and must be proportionate. It is most common for undertakings to relate to the sale of a part of the merged assets; the CMA is generally reluctant to accept behavioural remedies, although it has recently accepted a number of ‘quasi-structural’ remedies with behavioural features.\(^\text{23}\)

It is becoming increasingly common for the CMA to require an ‘upfront buyer’, in other words, for a buyer of the divestment assets to be identified and approved by the CMA before clearance is granted.

The merging parties have five working days from the issuance of a substantial lessening of competition decision (SLC decision) to offer undertakings to the CMA, although they may offer them in advance should they wish to do so. The CMA then has until the 10th working day after the SLC decision to decide whether the offered undertakings might, in principle, be acceptable as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might, in principle, be acceptable, a period of negotiation and third-party consultation follows. The CMA is required to decide formally whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

The CMA’s duty to refer may also be discharged in other circumstances, namely in respect of small markets (\textit{de minimis} mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced. In relation to \textit{de minimis} mergers, the guidance states that, for markets with an aggregate turnover exceeding £15 million, the benefits of an in-depth Phase II investigation may be expected to outweigh the costs. However, for markets with an aggregate turnover of less than £5 million, the CMA will generally not consider a reference to be cost-effective or justified provided that there is, in principle, no clear-cut undertaking in lieu of reference available. For markets with an aggregate turnover of between £5 million and £15 million, the CMA

\(^{22}\) Exceptions to the Duty to Refer and Undertakings in Lieu of Reference Guidance (December 2010) OFT 1122. On 12 June 2018, the CMA published for consultation new draft guidance on the exceptions to the duty to refer mergers for in-depth Phase II investigations. On the same date, the CMA also published for consultation new draft guidance to explain its approach and requirements in the selection, design and implementation of remedies in Phase I and Phase II merger investigations.

\(^{23}\) For example, in \textit{Mastercard/VocaLink} the CMA accepted a network access remedy under which VocaLink agreed to make its connectivity infrastructure available to a new supplier of infrastructure services to the LINK ATM network. In addition, VocaLink agreed to transfer to LINK the intellectual property rights relating to a particular messaging standard and MasterCard agreed to contribute to LINK members’ switching costs. In \textit{Müller UK & Ireland/Dairy Crest}, the CMA accepted a toll-processing agreement as a remedy, taking comfort from the fact that these were relatively common in the dairy industry and that it would have the ability to approve the counterparty to the agreement. In \textit{Reckitt Benckiser/K-Y brand}, the CMA accepted the licensing of the relevant UK rights to the K-Y brand to a third party as a final undertaking at Phase II. The CMA was concerned that there would be significant practical difficulties associated with a divestment of the K-Y brand and that a prohibition would not be effective due to the high risk that the seller would close the business.
will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a Phase II reference. The CMA applied the *de minimis* exception in four cases during the 2017–2018 financial year.

viii  Phase II investigations

Upon the making of a Phase II reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the CMA. When a reference is made in relation to a merger that has not yet been completed, the EA automatically prohibits the parties from acquiring interests in each other’s shares until such time as the Phase II inquiry is finally determined. This restriction can be lifted only with the CMA’s consent.

In relation to completed mergers, from the point of reference, the EA prohibits any further integration of the businesses or any transfer of ownership or control of businesses to which the reference relates (although in practice, the CMA is likely to have imposed an interim order at Phase I in any event).

Unless the CMA releases or replaces an interim order made during Phase I, it will continue in force for the duration of the Phase II inquiry. If an interim order was not made at Phase I or if it is necessary to supplement the measures previously put in place at Phase I, the CMA may impose a new order or accept interim undertakings from the parties.

The CMA is obliged to publish a report, setting out its reasoned decisions, within a statutory maximum of 24 weeks (extendible in special cases for a period of up to eight weeks). The CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase II review within which to implement any remedies offered by the parties.

ix  Appeals

Any party aggrieved by a decision of the CMA (including a decision not to refer a merger for a Phase II investigation) or the Secretary of State may apply to the CAT for a review of that decision. Appeals against merger decisions must be lodged within four weeks of the date the applicant was notified of the disputed decision or the date of publication, if earlier. Lodging an appeal does not have a suspensory effect on the decision to which the appeal relates. In determining an application for review, the CAT is statutorily bound to apply the same principles as would be applied by the High Court on an application for judicial review.

Appeals against merger decisions have been relatively rare since the establishment of the CAT. In the past two years, only one merger case was subject to judgment from the court. In November 2016, Intercontinental Exchange (ICE) appealed the CMA’s decision prohibiting its completed acquisition of Trayport. The CMA had concluded that only complete divestiture of Trayport by ICE would address its competition concerns and that the parties must unwind an ancillary post-transaction agreement. ICE argued that the CMA had failed to properly assess its proposed remedies and that it had no statutory power to require the parties to unwind the agreement. The CAT quashed the CMA’s final report to the extent that it required the unwinding of the agreement and remitted the point to the CMA to reconsider.24 The CAT dismissed ICE’s other claims and refused permission to appeal to the Court of Appeal.25 Upon remittal, the CMA concluded that the loss of competition

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identified in the original merger investigation would not be comprehensively remedied if the agreement remained in place, and therefore confirmed its decision to require ICE to end the commercial agreement.

IV OTHER STRATEGIC CONSIDERATIONS

i Whether to notify

Given that notification under the UK system is voluntary, the question of whether clearance should be sought from the CMA in a particular case is one for the parties – and, in particular, the purchaser – to consider. This is essentially a question of what level of commercial risk is acceptable.

Where the parties elect not to notify a transaction, the CMA may still become aware of it as a result of its own market intelligence functions, including through the receipt of complaints. The CMA has a dedicated Mergers Intelligence Committee responsible for monitoring non-notified merger activity and liaising with other competition authorities, and is increasingly focusing on this. The CMA has recently updated its guidance on its mergers intelligence function, which clarifies when merging companies who do not propose to notify their transaction to the CMA should submit a briefing note.26 When deciding whether to call in a non-notified merger, the CMA has powers to request information from the parties and will also accept submissions from the parties on jurisdictional, de minimis and substantive issues. The CMA is willing to give an informal indication that it does not at that point in time intend to call in a merger.

The Committee reviewed over 550 transactions during the 2017–2018 financial year, down from 650 transactions in the previous year. Ten Phase I investigations were launched during the financial year as a result of the Committee’s work. One of these cases resulted in a Phase II referral and one resulted in clearance under the de minimis exception.

As noted above, the fact that a merger has been completed does not prevent the CMA from investigating and referring it for a Phase II investigation or accepting undertakings in lieu of a reference. While the substantive assessment of anticipated and completed mergers ought to be identical, the CMA can be expected to impose interim orders while it considers a completed merger. In addition to ordering the parties to stop any integration that might constitute pre-emptive action, the CMA may also require the parties to unwind any integration steps that have already taken place.

An additional risk to bear in mind is that the initial period for a Phase I investigation may be reduced to less than 40 working days if the parties elect not to notify a completed merger. The CMA must comply with the four-month statutory deadline for a reference under the EA, which will start to run when the ‘material facts’ of the merger have been made public or are given to the CMA. If the CMA’s timetable is compressed in this manner, it may mean that it has insufficient time to obtain evidence that would support a Phase I clearance, without the need for a Phase II investigation.

ii United Kingdom or European Union?

If a merger has an ‘EU dimension’, as defined in the EUMR, it falls under the exclusive jurisdiction of the European Commission and cannot be completed until it has been notified.

26 CMA’s mergers intelligence function: CMA56 (September 2017).
and cleared. Conversely, the CMA is in principle competent to investigate mergers that do not have an EU dimension but qualify for review under the UK rules. This is often referred to as the ‘one-stop-shop’ principle. This simple allocation of jurisdiction is, however, subject to the EUMR processes relating to the reallocation of jurisdiction (see the European Union chapter for details of these procedures).

The decision whether to make a pre-notification referral request is a strategic issue for the parties, and will depend on where the competition issues lie and the degree of risk that the Member States may request a post-notification referral. The European Commission granted Article 4(4) requests by parties to transactions with an EU dimension for the case to be referred to the CMA on three occasions in the 2017–2018 financial year.

As regards post-notification referrals, in the 2017–2018 financial year, the CMA did not make any Article 9 requests for cases to be referred from the European Commission, or any Article 22 requests for cases to be referred to the European Commission.

The CMA’s mergers guidance recommends that, in all cases in which a referral back might be considered appropriate, parties contact the CMA prior to notification to the European Commission to discuss any UK issues raised by the transaction.

iii  Cross-border cooperation

Parties should be aware that the CMA is part of the European Competition Network, and as such is informed of mergers notified to the competition authorities of the other 27 EU Member States and the European Commission. It also participates in the International Competition Network, an informal network that seeks to develop best practice among competition agencies around the world.

V  OUTLOOK & CONCLUSIONS

In its Annual Plan 2018–19, the CMA stated that it will build on the changes it has made in the past four years in order to ensure an efficient, effective and targeted merger control end-to-end process during both Phase I and Phase II. It stated that it will continue its programme of reviews of existing remedies, seeking where possible to remove remedies that are no longer appropriate. It will also continue to ensure that organisations adhere to remedies ordered by the CMA and where necessary will issue public directions to organisations which do not comply.

The CMA stated that it will seek to minimise the cost and duration of Phase II investigations by ensuring continued staff crossover between phases while continuing to ensure the independence of Phase II decision-making and using evidence given by main parties and by third parties during Phase I investigations. It stated that it will continue to fast-track appropriate mergers to Phase II, as soon as possible.

The CMA announced also three targets for its assessment of mergers:

\[ a \] to clear at least 70 per cent of merger cases that are less complex within 35 working days;

\[ b \] to complete 70 per cent of Phase II merger cases without an extension to the statutory deadline; and

\[ c \] to implement Phase II merger remedies without the need for an extension to the statutory deadline in at least 80 per cent of cases.
On 23 June 2016, the UK electorate voted to leave the European Union. It is expected that the United Kingdom will withdraw from both the European Union and European Economic Area (EEA), which could cause significant changes to merger control regulation. It is likely that businesses may need to submit parallel notifications in the United Kingdom and European Union in order to obtain clearance for a deal, as the ‘one-stop-shop’ principle may no longer apply. This could lead to a number of challenges for merging businesses, including increased regulatory burden. The CMA has indicated that, from its perspective, the removal of the ‘one-stop shop’ principle would lead to an increased workload and consequently have an effect on resources. In addition, this will affect the CMA’s role in global mergers and its relationships with foreign regulators.\(^\text{27}\) Transitional arrangements would also need to be put in place as soon as possible to clarify how cases currently in train would be handled.

It is also possible that the UK government’s development of a new industrial strategy could affect the national merger control regime. In particular, this has already entailed changes to the regime in relation to thresholds for specific economic sectors (see section III.i, above), with the current government suggesting that the UK may develop a more politically interventionist approach to the ownership and control of critical infrastructure.

\(^{27}\) Mergers updates, Law Society Competition Section seminar, 13 March 2018.
UNITED STATES

Ilene Knable Gotts

I INTRODUCTION

In 1976, the United States became the first jurisdiction with a mandatory pre-merger notification requirement when Congress promulgated the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act) to enhance enforcement of Section 7 of the Clayton Act. Under the HSR Act, the US Federal Trade Commission (FTC or the Commission) and the US Department of Justice’s Antitrust Division (DOJ) (collectively, the agencies) receive such notifications concurrently and, through a clearance process, decide which agency will investigate transactions that potentially raise issues under Section 7 of the Clayton Act. The HSR Act provides both a ‘size-of-transaction’ test and a ‘size-of-person’ test for determining whether a filing is required. Subject to certain exemptions, for 2018, the size-of-transaction test is satisfied if the acquirer would hold an aggregate total amount of voting securities and assets of the target in excess of $84.4 million. Transactions in which holdings post-acquisition will be valued between $84.4 million and $337.6 million are reportable only if the size-of-person threshold is also met: either the acquiring or acquired person must have total assets or annual net sales of at least $168.8 million, and at least one other person must have total assets or annual net sales of $16.9 million. Transactions valued over $337.6 million are not subject to the size-of-person test, and are reportable unless otherwise exempt.

Important exemptions are provided in the implementing regulations, most notably for (1) acquisitions of goods or real property in the ordinary course of business; (2) acquisitions of bonds, mortgages and other debt obligations; (3) acquisitions of voting securities by an acquirer holding at least 50 per cent of the issuer’s voting securities prior to the acquisition; (4) acquisitions made solely for investment purposes in which, as a result of the acquisition, the acquirer holds 10 per cent or less of the outstanding voting securities of the issuer; (5) intra-corporate transactions; (6) acquisitions of convertible voting securities (but not the conversion of such securities); (7) acquisitions by securities underwriters in the process of underwriting; (8) acquisitions of collateral by creditors upon default; and (9) acquisitions involving foreign persons if the assets or revenues involved fall below certain adjusted thresholds that are intended to focus on assets located in the United States or for which there are sufficient sales in or into the United States. Failure to file can result in civil penalties of up to $41,484 for every day that the person does not comply with the HSR Act.

1 Ilene Knable Gotts is a partner at Wachtell, Lipton, Rosen & Katz.
2 The jurisdictional thresholds are inflation adjusted each year. The current thresholds are available at www.ftc.gov/enforcement/premerger-notification-program/current-thresholds.
3 16 CFR Part 802.
The non-reportability of a transaction under the HSR Act does not preclude either the FTC or the DOJ from reviewing, and even challenging, a transaction under Section 7 of the Clayton Act. Nor does the expiry or termination of the HSR Act waiting period immunise a transaction from post-consummation challenge under Section 7. In addition, even in reportable transactions, state attorneys general may review transactions, typically in conjunction with the federal enforcement agency investigating the transaction. Certain industries also require pre-merger approval of federal regulatory agencies. For instance, the Federal Energy Regulatory Commission will review electric utility and interstate pipeline mergers; the Federal Communications Commission will review telecommunications and media mergers; the Board of Governors of the Federal Reserve System will review bank mergers; and the Surface Transportation Board will review railroad mergers.

State public utilities commissions may have separate authority to review telecommunications and utility mergers. Finally, under the Exon-Florio Act, the Committee on Foreign Investment in the United States may review acquisitions by foreign persons that raise national security issues.

II YEAR IN REVIEW

The agencies entered into a number of enforcement actions during 2017. The FTC uniquely possesses the ability to seek a preliminary injunction to block completion of a proposed merger in federal district court and to challenge both proposed and completed mergers in its own administrative proceeding. In addition, the FTC can enter into a binding consent decree with the transaction parties without judicial intervention. In contrast, the DOJ must bring its challenges (and file any consents) in federal district court, with a judge ultimately deciding the case. The duration of the administrative process is sufficiently long that rarely will a pending transaction survive the appeals process. For instance, the FTC’s administrative challenge of a completed acquisition by Polypore International, Inc that commenced in September 2008 resulted in a March 2010 ruling by the administrative law judge that the acquisition violated the law. The transaction parties appealed the ruling to the full Commission, which held an oral argument on 28 July 2010 and unanimously affirmed the decision on 8 November 2010 (over two years after the challenge commenced); the Eleventh Circuit affirmed the Commission’s decision almost two years later (i.e., over four years after it challenged the merger). The US Supreme Court denied certiorari in 2013. During 2017, the FTC continued to have an impressive track record in its federal court activities. The FTC won both of its pending healthcare cases. In June 2017, the FTC filed suit

4 See Ilene Knable Gotts, Antitrust Report 1 (May 2018), for a more detailed discussion of enforcement activities.
7 Polypore Int’l, Inc v. FTC, 688 F3d 1208 (11th Cir 2012).
9 See press release, FTC, ‘Statement from Federal Trade Commission’s Bureau of Competition Acting Director on District Court Ruling to Enjoin Advocate/NorthShore Hospital Merger’ (7 March 2017).
to block the merger of two fantasy sports sites, DraftKings and FanDuel;\(^\text{10}\) a month later, the parties abandoned the transaction. In December 2017, the FTC brought an administrative action challenging Tronox’s acquisition of National Titanium Dioxide Company Limited, alleging that the deal would combine the two largest producers of titanium dioxide.\(^\text{11}\) That case remains pending. In addition, the FTC challenged in administrative court Otto Bock’s consummated acquisition of rival microprocessor prosthetic knee manufacturer FIH Group Holdings dba Freedom Innovations.\(^\text{12}\)

In 2017, the FTC entered into 14 consents involving proposed mergers. In the Walgreens/Rite Aid matter, in June 2017, the parties abandoned their original deal after almost 20 months of FTC investigation and announced a significantly smaller transaction instead. In a rare split decision by the two seated Commissioners, the restructured transaction was permitted to proceed subject to a further reduction in the number of stores and distribution centres acquired.\(^\text{13}\)

At the beginning of 2017, the DOJ had four merger cases pending in district court.\(^\text{14}\) The parties abandoned one of these transactions prior to trial\(^\text{15}\) and, in the other three, the DOJ prevailed at trial.\(^\text{16}\) In September 2017, the DOJ filed a suit challenging the consummated

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acquisition of CLARCOR Inc by Parker-Hannifin Corporation. On 18 December 2017, the DOJ entered into a settlement with Parker-Hannifin that required the divestiture of Parker-Hannifin's Facet filtration business.

On 20 November 2017, the DOJ filed suit challenging AT&T Inc's proposed acquisition of Time Warner Inc. Although the agencies have raised antitrust concerns in vertical mergers, these concerns are typically settled by the parties' entering into a consent decree. This time, however, a settlement could not be reached. A six-week trial commenced in March 2018. The district court issued its decision on 12 June 2018, ruling for the defendants. The transaction closed on 14 June 2018. It is unclear whether the DOJ will appeal. Regardless, the case remains important in providing the current DOJ leadership's views toward the efficacy and appropriateness of behavioural remedies.

The DOJ also entered into seven consents involving proposed transactions and into one consent involving a consummated transaction in 2017.

III THE MERGER CONTROL REGIME

Parties may approach the agencies prior to the filing of an HSR Act notification (or, in transactions that are not notifiable but that may raise antitrust concerns, in lieu of filing under the HSR Act), and the agencies can extend confidentiality to any substantive discussions by officially commencing an investigation. In contrast with many other jurisdictions, such consultations are not common prior to the public announcement of a transaction.

An acquisition that is subject to an HSR Act notification may not be completed until the requisite HSR forms have been filed with the agencies and the applicable waiting period has expired or has been terminated early. In most transactions, the acquired and the acquiring parties must file separate HSR forms, and the waiting period will not commence until both parties make their filings. In tender offers, the waiting period commences with the filing of the HSR form by the acquirer.

The initial waiting period is 30 days (or 15 days, in the case of a cash tender offer or bankruptcy filing). If the period expires on a weekend or holiday, then it will be extended until the following business day. At the parties' request, the waiting period can be terminated earlier by the agencies. Technically, the waiting period may not be extended other than by the issuance of a request for additional information and documentary material (second request). In practice, however, the merging parties may withdraw and refile their HSR forms (recommencing the waiting period), agree not to complete the transaction to grant the antitrust enforcement agencies additional time, or agree with the enforcement agency out of court that compliance with the HSR Act will not occur until a further submission is made.

The FTC and the DOJ have concurrent jurisdiction over HSR Act notifications. A clearance process exists between the agencies whereby one of the agencies can get 'cleared' to investigate the transaction. Once an agency is cleared, it can contact the parties (and

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third parties) for information relating to the transaction. The agencies have adopted policies to facilitate the investigation of transactions during the initial waiting period, aimed at decreasing the number of transactions in which second requests are issued and developing more precise second requests. The ability to engage in meaningful review of a transaction during this initial waiting period, however, depends on the transaction parties’ being willing to provide certain documents and information quickly and voluntarily.

If, prior to the expiry of the initial waiting period, the reviewing agency issues a second request (typically on the last business day of the waiting period), then the clock stops until the transaction parties comply with the second request. Unless terminated earlier or otherwise agreed to by the parties, the second waiting period ends on the 30th day (or, in the case of a cash tender offer or bankruptcy, the 10th day) following substantial compliance with the second request. Again, if the waiting period expires on a weekend or holiday, it is extended to the following business day. In tender offers, the waiting period is determined according to when the acquiring party substantially complies with the second request. It is not unusual for the parties to agree to extend the waiting period in exchange for a dialogue with the agency about the concerns presented, particularly if the parties are willing to resolve any remaining concerns with a consent decree.

In merger investigations, the agencies typically seek information from third parties (competitors, customers, suppliers, etc.) that is relevant to the review of the transaction. The information may be requested or required. Both agencies can also seek interviews or depositions. Generally, the information provided by the merger parties and third parties is not subject to public disclosure. State attorneys general can also review mergers – a process has been in place for about a decade that facilitates their participation in the HSR review. With the consent of the merger parties, the agencies will discuss the information received by them and coordinate their investigations with the state enforcers. Ultimately, if the transaction is challenged, the state attorneys general often, but not always, join with the agency as plaintiffs. In some transactions, the state attorneys general will seek additional relief. State attorneys general sometimes will also require transaction parties to pay ‘attorneys’ fees’ for their review of the transaction as part of the settlement. In addition, US antitrust authorities regularly consult with their foreign counterparts during a merger investigation. Such coordination and dialogue require consent from the transaction parties. The US authorities recently signed a cooperation agreement with China to facilitate such cooperation.

A high percentage of the transactions for which an agency issues a second request will result in some type of enforcement action (i.e., court challenge, consent decree or restructuring). The agencies have a strong preference for structural relief, and require either upfront buyers or short (i.e., 60 to 90 days) divestiture periods. The DOJ will sometimes forgo the need for a consent decree if the merger parties eliminate the potential anticompetitive problems through a voluntary restructuring of the transaction or a sale of assets (a ‘fix-it-first’ solution). The DOJ also uses ‘pocket consent decrees’ (decrees that are entered into by the parties and the DOJ but not filed with the court unless either the agency decides that it needs relief or the parties fail to implement the remedy or obtain a regulatory order). These pocket consent decrees can also be used to permit a transaction to proceed before the agency completes its investigation; for instance, in a hostile tender offer situation where the target is uncooperative and seeks to use the HSR review as a means of delay or process denial. Both the FTC and the DOJ permit the transaction to close once they provisionally accept the consent decree and publish it for comment. The FTC approves the final consent decree after the public comment period expires and the staff sends its recommendation to
the Commission; the DOJ files the proposed judgment with a federal district court and seeks approval and entry of the judgment by the judge following the public comment period provided under the Tunney Act.\textsuperscript{19}

If the parties and the reviewing agency are unable to reach an agreement that resolves the agency’s concerns, then the agency can seek a preliminary injunction from a federal district court to block the transaction’s completion. The DOJ can also challenge a completed merger in federal district court. The FTC, regardless of whether it seeks a preliminary injunction, can also challenge a proposed or consummated merger in its own administrative court.

The agencies can challenge a transaction at any time post-consummation. There is no statute of limitations barring the challenge or suspensory effect from the expiration of the HSR waiting periods. State attorneys general can bring challenges as well, on their own behalf or as \textit{parens patriae} of citizens. Private parties can bring challenges, although, in most jurisdictions, the standing requirements may be difficult to meet.

\section*{IV \quad OTHER STRATEGIC CONSIDERATIONS}

Although providing the state attorneys general with an active role in the HSR review may complicate the process and potentially delay the resolution of the review at the agency, it is generally advisable that transaction parties consent to such a request. Most states have compulsory process authority and, absent the protocol, can issue subpoenas for information, documents and even testimony. States can also bring challenges. Having the states work with the agency eliminates confusion, an additional burden of compliance with requests and potentially diverging outcomes. In some recent DOJ consents and challenges, for instance, state attorneys general joined in the DOJ’s decisions.

Similarly, many transactions meeting the jurisdictional thresholds of the HSR Act will also require notification in a number of other jurisdictions.\textsuperscript{20} The trend is for the FTC and the DOJ to cooperate with other jurisdictions in reviewing cross-border mergers. In that regard, the US agencies have entered into several bilateral and multilateral cooperation agreements. The agencies have cooperated extensively with Canada, Mexico and the European Commission on several mergers, and this cooperation is likely to continue. Parties should consider agreeing to such cooperation for the same reasons as with the states: to avoid confusion, the burden of compliance with requests and potential diverging outcomes. Such coordination is particularly crucial when remedies are likely to be required that affect assets or businesses in more than one jurisdiction. Even with such cooperation, however, geographic and analytical differences can exist among reviewing jurisdictions. It is more likely that divergence will occur between the established competition authorities (e.g., the United States’ and the European Commission’s) and the newer competition authorities (e.g., India’s and China’s).

\section*{V \quad OUTLOOK & CONCLUSIONS}

From the very outset of the Obama administration, the antitrust leadership of the federal antitrust agencies had a clear objective of influencing antitrust policy and establishing

\textsuperscript{19} Antitrust Procedures and Penalties Act, 15 USC Sections 16(b)-(h), Section 2(b).

precedent. The FTC and the DOJ issued new horizontal merger guidelines on 19 August 2010. These guidelines marked the first major revision of the guidelines in over 25 years. On 17 June 2011, the DOJ issued an updated policy guide to merger remedies. The merger remedies guide considers not only the components that constitute an effective structural remedy, but also the role of behavioural provisions, particularly in vertical mergers and in transactions involving intellectual property. On 3 February 2017, the FTC released a staff study analysing the effectiveness of certain FTC consents entered into between 2006 and 2012. The report finds that the vast majority of the Commission's remedies protect or restore competition. The study underscored the desirability of structural remedies and upfront buyers. Also, as evidenced in the Anthem/Cigna challenge, 'natural' market theories remained in vogue in enforcement challenges to the very end of the Obama administration's term.

The simultaneous district court and administrative court litigation strategy being used by the FTC raises the question of whether there should be different standards for the FTC and the DOJ in merger cases. Section 13(b) of the FTC Act authorises the FTC in a ‘proper case’ to seek permanent injunctive relief against entities that have violated or threatened to violate any of the laws it administers. The statute provides that an injunction may be granted only ‘upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest’. In contrast, under traditional equitable standards, a plaintiff must show a likelihood of success on the merits. The circuit courts have not reached an agreement on what the FTC’s burden of proof should be. Reference to a public interest criterion has resulted in some circuits relaxing the standard imposed on the FTC from the traditional equitable standards applicable to the DOJ and other plaintiffs in an injunctive proceeding. There is a bill pending in Congress that would conform the process and standard applied to the two agencies. There are also pending in Congress bills that would potentially radically reform the burdens of proof and standards applied in merger reviews; it is by no means clear that these bills will pass in Congress.

United States antitrust enforcement continues unabated as of the date of this Chapter. United States antitrust agencies’ leadership changes have just recently been implemented. Nonetheless, the change in the leadership is expected potentially to result in some policy changes – and enforcement activity – particularly in close calls in which the parties proffer remedies. It is, however, simply too early to tell how significant these changes will be and how long it will be before these changes take place.

24 15 USC Section 53(b).
25 Id.
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Anastasios A Antoniou is an advocate of the Supreme Court of Cyprus. He established his law practice in 2009, having qualified and practised at a major Limassol law firm. Prior to co-founding Antoniou McCollum & Co., he was the Cyprus law leader of an international law practice. He holds graduate and research degrees in law from Kingston University and the London School of Economics. He is a member of the European Competition Lawyers Forum.

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Peter Armitage is a senior partner in Ashurst Australia’s competition and consumer protection team and has been a partner since 1992. He is recognised as one of Australia’s leading competition law practitioners. He specialises in complex merger clearances in both domestic and international transactions. He also has a long track record of effectively defending clients in investigations and legal actions by the ACCC.

Mr Armitage has advised on competition law issues and obtained merger clearances from the ACCC in numerous acquisitions in the pharmaceutical, hospitals, medical equipment, payments, telecommunications, food ingredients, gas, paper, chemicals, entertainment, sugar, airline catering, metal manufacturing, automotive components, building materials, plastics, explosives, clothing and mining equipment sectors.

Mr Armitage advised Pick n Pay on the merger clearance process for the sale of its Franklins business to Metcash. He is very experienced in working with overseas counsel in the coordination of global merger clearances. For example, he acted for Office Depot in its proposed acquisition by Staples, for Wyeth in its acquisition by Pfizer, for Google in its acquisitions of DoubleClick and Motorola Mobility, for Adidas in its global acquisition of Reebok, for Boston Scientific in its acquisition of Guidant and for Bucyrus in its acquisition of Terex’s earthmoving equipment business.
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Mr Bock advises clients on cutting-edge matters in the US and in Europe, including leading merger control cases and horizontal cooperation matters, cartel investigations and follow-on civil litigation across an array of industries and jurisdictions, vertical restraint investigations, as well as dominance and market power investigations.

Mr Bock received an undergraduate degree in Economics and International Studies, *magna cum laude*, from Yale University in 2000 and a JD degree from Harvard Law School in 2003. After spending three years in Cleary’s Washington, DC office following graduation from Harvard, he served in Cleary’s Brussels office for three years, before returning to Washington and being elevated to partner in 2013. He is a partner in the firm’s Brussels and Cologne offices. Mr Bock is actively involved in the ABA’s Antitrust Section.

In 2015, *Global Competition Review* ranked Mr Bock as one of the top, young antitrust lawyers in its 40 Under 40 Survey and in 2017, *Who’s Who Legal* recognises Mr Bock as a ‘future leader’ in its 2017 global industry rankings for competition law.

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Maxim Boulba heads the competition group at CMS Russia and advises the clients on competition law issues, such as merger control as well as antitrust behavioural and regulatory matters.

Maxim has been practising competition law since 2000.

Maxim handled a large number of difficult merger clearances in Russia and the other CIS countries.

As part of M&A transactions and corporate reorganisations, Maxim advises foreign investors on Russian merger control requirements and obtaining merger clearance in relation to the acquisition of companies and assets located in Russia and the CIS.
He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

Maxim was chosen as one of the leading practitioners in the competition sphere according to Best Lawyers in Russia, and has been ranked by the Chambers and Partners legal directory since 2012.

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Maïja regularly advises international and Moroccan clients on merger control in Morocco, and represents them before the Moroccan competition authorities.

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She is the co-author of Canada’s leading textbook on merger review, the co-author of an annual Annotated Competition Act, and was an adjunct professor of competition law at Osgoode Hall.

Ms Brown has worked on some of Canada’s most complex and high-profile transactions, including Pembina/Veresen, Trican/Canyon, AMEC/Foster Wheeler, Agrium/Potash Corporation, Suncor/Canadian Oil Sands Limited, CPP/Glencore, Holcim/Lafarge, Marine Harvest/Grieg Seafood, Pembina/Riverstone/Mistral, Synthes/Johnson & Johnson, Continental Airlines/United Airlines, Nestle/Novartis, Nestle/Kraft Foods and Nestle/Vitality Foodservice.

She is recognised as a leading competition lawyer in The Legal 500 Canada 2018 (Competition and Antitrust) and Who’s Who Legal: Competition – Future Leaders 2017, which profiles the foremost practitioners in the competition community aged 45 and under.

Ms Brown obtained her joint BCL/LLB from McGill University in 2008 and holds a bachelor of commerce degree in economics and law from the University of Alberta.

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Mr Callol is the president of the Fulbright Alumni Association of Spain, the secretary of the board of the Chicago Alumni Association of Spain and member of the board of directors of the Spanish Competition Law Association (AEDC) and of the advisory board of the American Antitrust Institute, Washington, DC.

He was twice acknowledged as one of the ‘top 40 under 40’ by Iberian Lawyer and he is a specialist currently recognised by Chambers and Partners, Global Competition Review, Best Lawyers, The Legal 500 and Who’s Who Legal. He is the author of many specialist publications and is the Spanish correspondent of the European Competition Law Review. He leads specialist seminars in the Carlos III and San Pablo Law Schools.

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Inês Ferrari Careto joined the Cuatrecasas team in 2016 as a trainee lawyer. In her short career, she has already completed an LLM in European and economic law at the Katholieke Universiteit Leuven in Belgium and an internship at King and Wood Mallesons at its Brussels office, where she was involved in cases related to competition, trade and European law.
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Elsa is co-head of the firm’s competition and antitrust practice. She regularly assists clients on complex antitrust matters, including merger control, global cartel and abuse of dominance investigations.

Elsa was recognised by Who’s Who Legal as ‘the top merger control practitioner in Singapore’ and ‘a leading name in the Singaporean market’, and was one of the only two economists named as a thought leader in North America and the rest of the world. Featured in the 100 elite women globally by Global Competition Review (GCR) in multiple Women in Antitrust peer-nominated surveys, Elsa was also named amongst the 10 competition economists globally in GCR’s Women in Antitrust 2016: Economists.

A pioneer member of the Competition Commission of Singapore, now known as the Competition and Consumer Commission of Singapore (CCCS), Elsa has assisted on close to 90 per cent of complex CCCS merger reviews requiring commitments, including the first foreign-to-foreign merger with commitments (Thomson/Reuters) and the first CCCS conditional merger clearance requiring local commitments (SEEK/JobStreet).

Elsa has assisted on drafting of legislation, codes, policies and regulatory regimes, including the merger control framework for the Airport Competition Code, the Media Market Conduct Code, and economic aspects of competition law in the electricity and gas markets.

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Sophie Chen is an associate at Norton Rose Fulbright’s Asia antitrust, competition and regulatory practice in Hong Kong. She has experience in multi-jurisdictional merger filings (with a particular focus on Asian jurisdictions), market abuse and investigations issues, and general competition compliance matters in a number of industry sectors such as energy, financial services, chemicals, trade, and fast moving consumer goods.

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Apart from merger control proceedings (including the coordination of multi-jurisdictional filings), Marquard’s relevant experience includes representing clients in investigations of the Swiss Competition Commission and in appeal proceedings related to, *inter alia*, horizontal price fixing, bid rigging, information exchange, vertical allocation of territories, resale price maintenance and abuse of dominance, advising on complex cooperation projects related to technology transfer, specialisation and joint R&D (recently in the payment, telecommunications, electricity and retail sectors), developing and implementing antitrust compliance programmes and supporting companies in the (re)organisation of their distribution systems. Due to his other practice area of public procurement law, Marquard is particularly experienced in competition law matters related to public tenders such as bid rigging.

Marquard graduated from the universities of Fribourg (*summa cum laude*) and Leuven, Belgium (EU law) and completed postgraduate studies in Sydney and Geneva (international law). He has been admitted to the bar in 2003.

Marquard regularly lectures and publishes on competition law. His most recent publication (April 2018) is a contribution to a commentary on so-far unpublished advice given by the Secretariat of the Competition Commission to companies under Article 23(2) ACart.

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Mr Chung is ranked as a leading antitrust lawyer by numerous international publications, including *GCR’s Who’s Who Legal: Competition, Chambers Asia, Chambers Global* and *Euromoney’s Expert Guides*. In addition, he has a rare distinction of being ranked as both a US antitrust law expert based abroad (Korea) and foreign (US-licensed) expert on Korean antitrust law by *Chambers Global*.

Mr Chung is active with various bar associations and international organisations. His competition and antitrust-related leadership roles include vice chair of the International Committee and member of the Procedural Transparency Task Force of the Antitrust Section of the ABA; vice chair of the International Antitrust Committee of the International Section of the ABA; and member of the Mergers Working Group of the Antitrust Committee of the IBA.

Mr Chung has written and lectured extensively on various Korean, US and EU antitrust, consumer protection and other legal issues. Furthermore, since 1997 he has advised and assisted the Korea Fair Trade Commission to modernise its antitrust and consumer protection enforcement programme. He has spoken at various international conferences organised by the ABA’s Antitrust Section and International Section, GCR, MLex, PaRR, Seoul Bar Association and the Croatian Bar Association.

Mr Chung received his BS in economics from the Wharton School, University of Pennsylvania in 1985 and JD from Cornell Law School in 1988. He is a member of the California and District of Columbia Bars.

**SCOTT CLEMENTS**

*Allen & Gledhill LLP*

Scott is a competition law specialist, and his experience spans nearly 11 years in Singapore.

With extensive experience in relation to contentious and non-contentious competition law matters, he has been involved in a number of Phase I and Phase II merger assessments, and has negotiated merger-specific commitments on behalf of clients. Scott was also involved in the first set of appeals made to the Competition Appeal Board in respect of a cartel matter, and in the appeal of the first ever abuse of dominance case.

Recognised as a leading competition lawyer by *Chambers Asia-Pacific, The Legal 500 Asia Pacific* and *Who’s Who Legal*, a client notes that Scott ‘brings out the perspective of a former competition regulator to the table, which is very valuable’, while another source singles him out for his ‘detailed understanding of economics in the market’ (*Chambers Asia-Pacific*). Scott was also named as one of Singapore’s 40 most influential lawyers aged 40 and under in 2015, by the *Singapore Business Review*.

Scott is qualified as an advocate and solicitor of Singapore, and a barrister and solicitor of the High Court of New Zealand.
FRANCESCA COSTANTINI
*Caiazzo Donnini Pappalardo & Associati – CDP Studio Legale*

Francesca Costantini is a senior associate in Caiazzo Donnini Pappalardo & Associati’s competition law and regulatory practice group.

She practises in the areas of competition law, telecommunications and energy law and EU law. She graduated in law from the University Luiss Guido Carli in Rome in 2004 and was admitted to the Italian Bar in 2007.

GORAN DURMIŠ
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Goran Durmiš is a partner of Law Firm Bekina, Škurala, Durmiš and Spajić Ltd. He graduated from the Law Faculty of the University of Zagreb in 2002 with merits. He was admitted to the Croatian Bar Association as an attorney in 2006. He provides legal support to a large base of international clients in various commercial and company law matters. Goran Durmiš has extensive experience in litigation and also advises clients in infrastructure projects and arbitration. Advising domestic and foreign clients in mergers and acquisitions constitutes an area of his special professional interest.

JORDAN ELLISON
*Slaughter and May*

Jordan Ellison joined Slaughter and May in 2005 and became a partner in 2014. He has significant experience of UK merger cases, including Phase II references, in sectors ranging from consumer goods to telecommunications. He previously worked on secondment in the mergers division of the OFT. He also has substantial experience representing clients before the European Commission in merger and antitrust cases.

MARIA ERMOLAEVA
*CMS Russia*

Maria Ermolaeva is an associate in the competition team of CMS Russia. Her practice focuses on competition law.

Maria advises clients on a broad range of anti-monopoly matters such as anticompetitive agreements, concerted actions, distribution structuring, and obtaining merger clearances. Her experience also includes advising on general competition compliance and industry-specific anti-monopoly issues.

GUILLAUME FABRE
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Guillaume Fabre is an associate at the Brussels office of Bredin Prat specialising in antitrust law. He was recently involved in significant merger cases before the French Competition Authority (as well as before the EU Commission).
ENRIQUE DE LA PEÑA FAJARDO

Valdés Abascal Abogados SC

Enrique de la Peña Fajardo obtained his law degree from the Mexico Autonomous Institute of Technology (ITAM). He has also studied public and private international law at The Hague Academy of International Law.

His practice in Valdés Abascal Abogados SC focuses mainly in litigation and counselling in competition law. Prior to joining the firm, he worked in the areas of litigation (civil, commercial and administrative law), commercial arbitration and corporate law. In the federal government, he served in the areas of budget law and consultancy.

He is a member of the Competition Law Committee of the ANADE and is ranked as next generation lawyer on competition and antitrust in Mexico by The Legal 500.

PASCAL G FAVRE

CMS von Erlach Poncet Ltd

Dr Pascal G Favre is the head of the competition practice group in Geneva. Pascal focuses his practice on Swiss competition and distribution laws, in addition to corporate and M&A. He frequently handles, on behalf of corporate clients, the competition law aspects of their domestic or cross-border M&A transactions. Pascal is valued and sought after by corporate clients for his solid experience in notifications on concentrations and merger control procedures involving Swiss or foreign companies operating in Switzerland. He also regularly represents companies in complex antitrust proceedings brought before the Swiss Competition Commission. In addition to advising on matters involving searches and internal investigations, Pascal counsels companies on compliance and leniency programmes in the context of a continuously evolving competition regulatory environment.

Pascal achieved a doctor of laws, summa cum laude (Fribourg, 2005; awarded three prizes). He regularly publishes articles and updates on a wide range of legal issues. He is a co-author of a legal essay on the main principles of Swiss dominance law (Fiches juridiques suisses, No. 337, ‘L’abus de position dominante en droit de la concurrence’) and has drafted the second edition of a chapter dedicated to Swiss merger control in the Commentaire romand, the most comprehensive French-language commentary on Swiss competition law (co-author). He has also co-edited with Professor Pierre Tercier (honorary chair of the International Chamber of Commerce’s International Court of Arbitration and former chair of the Swiss Competition Commission) the fourth edition of Les Contrats Spéciaux, which serves as a standard book in the field of Swiss contract law.

Pascal is a well-established competition practitioner recognised both by clients and ranking publications. Most recently, he has been identified by Global Competition Review in 2018 and the SNCF Mobilités deal led by Pascal was highlighted in the 18th edition of GCR 100 Global Elite. Pascal is fluent in French, English and German.

ANTÓNIO JOSÉ D R DA ROCHA FROTA

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António José D R da Rocha Frota has been an associate in the competition and antitrust practice at Motta Fernandes since 2014. Mr Frota has a bachelor of laws degree from Pontifícia Universidade Católica de São Paulo. He has been an elected member of the Council for
About the Authors

Competition and Economic Regulation Studies of the São Paulo Bar Association (CECORE) since 2016, and speaks Portuguese and English.

TING GONG

*King & Wood Mallesons*

Ting has an active China and the EU competition law practice and has extensive experience of advising clients on a range of China and European competition law issues, focusing on securing merger clearances for cross-border M&A transactions and providing advice on behavioural arrangements under competition rules.

Ting participated in KWM’s antitrust team in early 2015. Before joining KWM, Ting worked with prestigious competition law teams in Brussels. In 2010, she took traineeship at the European Commission DG Competition for six months.

Ting received her bachelor’s law degree from Peking University in 2004 and obtained an LLM in European Community law from Leiden University in 2005.

Ting speaks Chinese, English and French.

ILENE KNABLE GOTTS

*Wachtell, Lipton, Rosen & Katz*

A member of Wachtell, Lipton, Rosen & Katz’s antitrust department, Ilene Knable Gotts represents and counsels clients on a range of antitrust matters, particularly those relating to mergers and acquisitions. Ms Gotts began her career as a staff attorney at the Bureau of Competition of the Federal Trade Commission in conduct and merger investigations.

In 1995, Ms Gotts served as the president of the Washington Council of Lawyers. She was the chair of the antitrust and trade regulation section of the Federal Bar Association from 1995 to 1997 and the chair of the antitrust section of the New York State Bar Association from 2005 to 2006.

Ms Gotts is currently a member of the Board of Governors of the American Bar Association, having served as the chair of the ABA Section of Antitrust Law from 2009 to 2010 and in a variety of other leadership positions in the Section, including as the international officer and on the council. Ms Gotts is regularly recognised as one of the world’s top antitrust lawyers, including being selected in the 2007 through 2018 editions of *Who’s Who Legal*, as one of the top 15 global competition lawyers, in the first-tier ranking of *Chambers Global Guide* and *Chambers USA Guide*, and as one of the ‘leading individuals’ in PLC’s *Which Lawyer? Yearbook*.

Ms Gotts served as the editor of the ABA’s treatise on the antitrust merger review process for 25 years, and has had over 200 articles published on antitrust issues relating to mergers and acquisitions and Hart-Scott-Rodino compliance. She is also a frequent lecturer on antitrust topics.

Ms Gotts received her bachelor’s degree, *magna cum laude*, from the University of Maryland in 1980, where she was elected to Phi Beta Kappa. Her law degree was awarded, *cum laude*, by Georgetown University Law Center in 1984. She currently serves on the Counsel’s Council of Lincoln Center. In 2011, the New York State Bar Association antitrust section awarded Ms Gotts the William T Lifland Service Award for her service to the antitrust bar.
GÖNENÇ GÜRKAYNAK
ELIG Gürkaynak Attorneys-at-Law

Mr Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 87 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counseling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the High Administrative Court, and over 60 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

C SCOTT HATAWAY
Paul Hastings LLP

Scott Hataway is global chair of the antitrust and competition practice at Paul Hastings. His work spans the field of competition law, including company-side cartel defence; district court and appellate litigation; and strategic advocacy in relation to various business combinations under antitrust scrutiny. In addition to court appearances, he has appeared before the US Department of Justice, US Federal Trade Commission, the European Commission, China’s Ministry of Commerce, the Korean Fair Trade Commission, and the Japan Fair Trade Commission.

As a former trial attorney with the US Department of Justice’s Antitrust Division, Mr Hataway combines pragmatism with an extensive knowledge of agency practice and procedure. He has successfully led strategic merger review cases in a wide range of industries, including consumer electronics, telecommunications, national defence, information technology, energy infrastructure, primary metal production, broadcast communications, and transportation, among others. He has also represented clients in criminal and civil non-merger investigations, including grand jury investigations into alleged collusion in the shipping industry, the transportation industry, and the electronics industry; federal inquiries into unlawful licensing practices in the music industry; actions by state attorneys general into alleged tying and standard setting violations in the communications industry; and federal investigation into alleged monopolisation in the pharmaceuticals industry.
Complementing his work with federal agencies, Mr Hataway also represents clients involved in various competition-related disputes in state and federal court, including alleged Sherman Act violations, trademark infringement, copyright infringement, trade secret misappropriation and other unfair business practices.

MARGARET HUANG
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Margaret Huang is a partner at LCS and has extensive experience in antitrust law. She is a member of the Arbitration Association of the Republic of China. She has handled merger notifications and waiver filings with the Fair Trade Commission for all of the firm's mergers and acquisitions transactions, and has assisted several multinational clients in resolving all of their antitrust law issues in Taiwan. She has also been involved in amendments of Taiwan's Fair Trade Act. Ms Huang has published numerous articles regarding antitrust law issues in professional journals and newspapers.

SHIVAM JHA
*AZB & Partners*

Shivam Jha is an associate in the competition practice group at AZB & Partners. He represents clients at the CCI as well as the NCLAT in antitrust investigations. He has been involved in investigations into cartels and abuse of dominance issues and also has experience in merger control proceedings before the CCI. He has also been involved in compliance training for various enterprises.

Shivam earned his BA LLB with honours at Jindal Global Law School in 2016.

SHANTHI KANDIAH
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Shanthi Kandiah is the head of SK Chambers, legal and regulatory advisers specialising in competition law, telco regulatory, data protection and cybersecurity. Her competition law practice covers cartels, sectoral competition laws, including merger control. She regularly advises many corporations in sectors such as insurance, media and telecommunications, aviation, FMCG, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Noteworthy recent assignments include defending clients in a cartel allegation (involving highest proposed fines to date in Malaysia), advising on a full-function joint venture in the aviation services sector and successfully securing a no-objection letter for an acquisition in the communications and multimedia industry. Shanthi has a master's in law from King's College London. She holds a postgraduate diploma in competition economics, also from King's College, London.

CORINNE KHAYAT
*UGGC Law Firm*

Corinne Khayat co-heads the competition department of UGGC Avocats. She represents clients in all areas of French, EU and Moroccan competition law. She also regularly advises on issues involving both antitrust and intellectual property. Corinne was also a professor of
EU competition law at the Institut Catholique and has given lectures on competition law at
the University of Paris I Panthéon-Sorbonne.

Corinne regularly advises international and Moroccan clients on merger control in
Morocco, and represents them before the Moroccan competition authorities.

KYOUNG YEON KIM
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Ms Kyoung Yeon Kim is a partner at Yulchon and practises primarily in the areas of antitrust,
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matters. She joined Yulchon as an associate in 2001 and became a partner in 2009.

Ms Kim also worked on secondment at Cleary Gottlieb Steen & Hamilton’s Hong
Kong office from 2007 to 2008.

Some of the major projects she participated in are the sale of Hyundai Merchant
Marine’s terminal, the sale of Hynix Semiconductor’s display division, Crown Confectionery’s
acquisition of Haitai Confectionery & Foods, the joint venture of Samsung Electronics and
Samsung SDI for AMOLED business, and the incorporation of Samsung LED, the merger
case of KED Korea, the merger case of Lotte Shopping Co, Ltd and GS Retail Co, Ltd, and
the merger case of Lotte Shopping Co, Ltd and HiMart Co, Ltd.

Ms Kim’s articles include ‘Establishing the regulatory foundation for Big Data 2’, Data
Protection Law & Policy, Vol. 12, Issue 5 (2015); the Korea chapter in Competition Law in
Asia Pacific – A Practical Guide, Wolters Kluwer (2015); the Korea chapter in The Cartels
and Leniency Review, second to fifth editions, Law Business Research (2014-2017); ‘Korea’s
Aggressive Antitrust Enforcement in Financial Product Markets’, Asian-Mena Counsel, Volume
12, Issue 5 (2014–15); ‘Early Signs of Protectionist Merger Control in Korea? Probably No,
At Least Not Yet’, Competition Policy International’s Antitrust Chronicle (October 2014); and
the Korea chapter in The Merger Control Review, third to seventh editions, Law Business

KYU HYUN KIM
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Mr Kyu Hyun Kim is a partner at Yulchon and practises primarily in regulatory areas,
including antitrust and media and communications; he also advises on intellectual property
issues. He joined Yulchon as an associate in 2007 and became a partner in 2015. Before
joining Yulchon, Mr Kim served as a judge advocate in the Korean army.

Mr Kim’s representative matters include Dell’s acquisition of EMC, Qualcomm’s abuse
of dominant market position, Honam Petrochemical’s acquisition of Titan, and the global
photocopy paper manufacturers’ cartel case.

Mr Kim has published many articles, including the Korea chapter of The Merger Control
Review, fifth to seventh editions, Law Business Research (2014–2016); and the Korea chapter

Mr Kim received his LLB from Seoul National University in 2001 and his LLM from
University of Michigan Law School in 2012. He is a member of the Korea and New York
Bars.
GARY W KUBEK
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Gary Kubek, a litigation partner in the New York office of Debevoise & Plimpton, is engaged primarily in antitrust litigation, merger review and counselling; federal securities, shareholder class and derivative actions; merger and acquisition litigation and counselling; and general commercial litigation.

Mr Kubek’s antitrust practice includes private civil litigation, government review of proposed mergers, acquisitions and joint ventures, and other government investigations. He also counsels clients with respect to antitrust issues involved in a wide variety of distribution and other commercial arrangements. His shareholder litigation practice includes representation of corporations and their directors and officers in federal securities class actions, state court litigation challenging acquisitions, derivative actions, and independent special committee investigations.

Mr Kubek is a member of the litigation, antitrust and business sections of the American Bar Association and has served as vice chair of various committees of the antitrust section. He is a co-author of *Takeovers: A Strategic Guide to Mergers & Acquisitions* (Wolters Kluwer 3rd edition 2010 and 2016 Supp) and has frequently written and spoken on antitrust, securities and corporate governance topics.

Mr Kubek received his BA *summa cum laude* from Yale College in 1975 and his JD from Yale Law School in 1978. Prior to joining the firm in 1979, he served as a law clerk to the Honorable J Joseph Smith of the US Court of Appeals for the Second Circuit.

SEUK JOON LEE
Yulchon LLC

Mr Seuk Joon Lee is a senior foreign counsel and vice chair of the antitrust practice group at Yulchon, and primarily practises in the areas of antitrust, medicine and pharmaceutical, and broadcasting and telecommunications. At Yulchon, Mr Lee has handled antitrust matters in all practice areas including cartels, merger reviews, abuses of market dominance and unfair trade practices. For example, Mr Lee has successfully represented many companies in domestic and international cartels involving products and services such as LPG, air cargo, marine hoses, copy paper, beverages, life insurance and credit rating services. He has also successfully represented many international and domestic companies in merger review cases, including Texas Instrument’s acquisition of National Semiconductor and Lotte Shopping’s acquisition of GS Mart.

As the head of Yulchon’s healthcare practice team, Mr Lee has also successfully represented many prominent Korean and international pharmaceutical companies regarding antitrust issues, including unfair trade practices.

Prior to joining Yulchon in 2006, Mr Lee spent over 21 years working for government agencies such as the Korea Fair Trade Commission (KFTC), the Economic Planning Board and the Ministry of Information and Communication. At the KFTC, he took a leading role in investigating many historically important antitrust cases in Korea, including abuse of market dominance cases involving Microsoft, Intel and Qualcomm. In addition, Mr Lee took a prominent role in the development of fair trade policies and the revisions of the Monopoly Regulation and Fair Trade Act (MRFTA) and relevant regulations, in particular as they relate to large Korean conglomerates.
Mr Lee has published many articles, including ‘Recognition of Leniency Status for Companies under the Common Control’ (Competition Journal No. 143, 2009), ‘Comparative Study on the US and EU Regulation Concerning Price Squeezes of Vertical Integrated Companies’ (Competition Journal No. 144, 2009) and ‘Review on Competition Law Issues in Online Distributors’ Business Combinations’ (Competition Journal No. 145, 2009).

Mr Lee received his JD from Syracuse Law School in 1999 and a master’s degree in accounting from Syracuse University Graduate School of Management in 2000. He has been a member of the New York Bar since 2000 and AICPA in New York since 2001.

**NICHOLAS LEVY**
*Cleary Gottlieb Steen & Hamilton LLP*

Nicholas Levy’s practice focuses on EU and UK antitrust law. He has extensive experience in notifying mergers and joint ventures under the EU Merger Regulation, coordinating the notification of international transactions, and advising on all aspects of antitrust law, including anti-cartel enforcement, collaborative arrangements, vertical agreements and unilateral conduct.

Over the past 25 years, he has been involved in numerous matters before the European Commission, the UK Competition and Markets Authority, the EU Courts in Luxembourg, and the UK Competition Appeal Tribunal.

He is recognised as a leading antitrust lawyer by *Chambers and Partners* and was included in Euromoney’s *Guide to the World’s Leading Competition Lawyers* and *Global Competition Review*’s ‘45 Under 45’ and ‘40 Under 40’ surveys of the world’s brightest young antitrust lawyers.

Mr Levy has written and spoken widely on a broad array of European competition law issues, and has authored a two-volume treatise entitled European Merger Control Law: A Guide to the Merger Regulation, published by LexisNexis. Mr Levy joined Cleary Gottlieb in 1990 and became a partner in 1999. He is a graduate of Oxford University and the City University of London.

Mr Levy is a member of the Bar of England and Wales and a solicitor of the senior courts of England and Wales.

**ROSE LIN**
*LCS & Partners*

Rose Lin practises in the areas of antitrust law, public and private mergers and acquisitions, and multi-jurisdictional transactions including real estate transactions and securitisation of real estate. She negotiates and drafts cross-border-related agreements, compiles and submits applications and notifications related to merger control, and assists clients to resolve antitrust-related issues.

**FRÉDÉRIC LOUIS**
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Frédéric Louis is a partner in WilmerHale’s Brussels office. He has been practising EU competition law for 20 years, including behavioural investigations, litigation in national and EU courts, merger notifications and state aid. He has been involved in some 30 merger
filings, including Phase II and complex Phase I EU procedures such as Alcatel/Lucent, LSG Sky Chefs/Gate Gourmet, StatoilHydro/ConocoPhillips (JET) and Lufthansa/Brussels Airlines. In 1998, he was voted one of Global Competition Review’s ‘40 under 40’. Mr Louis has represented clients before the European Commission, and the Belgian, Dutch and French competition authorities, and has appeared before domestic courts in Belgium, France and the Netherlands.

LUIS MARÍN-TOBAR
Pérez Bustamante & Ponce

Luis Marín-Tobar was admitted to practise in 2007 and is a senior associate at Pérez Bustamante & Ponce (and also a member of the IP and antitrust practice). He obtained his JD at the Universidad San Francisco de Quito, Ecuador, a master’s degree in international legal studies from Georgetown University Law Center and a postgraduate diploma in economics for competition law from King’s College London. Mr Marín Tobar worked as an international associate with the competition disputes team of White & Case LLP in Brussels during 2013.

LINDA MARTERER
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Linda Marterer is an associate at CMS Reich-Rohrwig Hainz in Vienna. Her main areas of expertise include mergers and acquisitions, competition and antitrust law as well as general corporate law. Linda holds a master’s degree from the University of Vienna. Prior to joining CMS, she has been an intern with a well-known international law firm in Vienna with a focus on competition and antitrust law and has also worked as an inhouse counsel in the legal department of an international automotive group.

JÉRÉMIE MARTHAN
Linklaters LLP

Jérémie is a counsel in the competition and antitrust practice of Linklaters in Paris, specialising in EU and French competition law (merger control, cartels, horizontal cooperation, vertical restraints, abuse of dominant position, litigation before the French Competition Authority and the European Commission). Particular sectors where Jérémie has expertise include energy, media and telecommunications.

Jérémie was admitted to the Bar in 2005 after graduating in both European law and international business law. Jérémie has published various articles and academic papers in the field of competition law. Jérémie is also a lecturer at the Toulouse School of Economics and at the Institut d’Etudes Politiques de Paris (Sciences-Po) teaching competition law to postgraduate students.

Jérémie has been involved in major merger and cartel cases before the European as well as before the French Competition Authority.

Jérémie was featured in the 2017 edition of Who’s Who Legal as a ‘future leader’ in competition law.
CHRISTINA MCCOLLUM
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Christina McCollum is a solicitor of England and Wales. Prior to partnership in Antoniou McCollum & Co. Christina qualified and practised as a solicitor with a major law firm in the City of London and at two international law practices in Cyprus. She read law at University College London and completed her LPC at the College of Law. She is an active member of the Law Society of England and Wales and the Cyprus Bar Association.

KRISTEL MCMEEKIN
MinterEllisonRuddWatts

Kristel is a competition and regulatory specialist, with extensive experience in both New Zealand and Australia advising large corporations and regulated network businesses on complex competition and regulatory issues, and is ranked as an associate to watch in competition law by Chambers Asia Pacific (2017).

Kristel advises on the full suite of competition related matters: clearances and authorisations of mergers and acquisitions; cartels; Commerce Commission investigations; Commerce Act implications of commercial arrangements and behaviour; and consumer protection.

Kristel returned to New Zealand in 2014 after five years in Australia, where she was a senior associate in Minter Ellison’s competition and regulatory team. She recently advised Heinz NZ on its successful application (subject to a divestment undertaking) for clearance of its acquisition of the food and instant coffee business of Cerebos Gregg’s, Two Degrees Mobile Limited and Television New Zealand in the successful opposition of the applications for Commerce Commission clearance of the proposed merger of Vodafone and Sky Network Television Limited in New Zealand, and Television New Zealand in relation to the unsuccessful application by NZME Limited and Fairfax NZ Limited seeking Commerce Commission authorisation to merge their media operations in New Zealand.

OLIVER MEECH
MinterEllisonRuddWatts

Oliver is an experienced general litigator and specialises in handling complex commercial litigation, and competition, regulatory and consumer law matters.

Oliver advises on contentious and non-contentious aspects of competition, regulatory and consumer law.

He advises on mergers and acquisitions, restrictive trade practices, unilateral conduct and regulation. He advises clients in Commerce and Fair Trading Act investigations and with their interactions with the commercial regulators. He advises on front-end compliance and, in the consumer law area, has represented clients before the courts and before the Advertising Standards Complaints Board.

In 2016, he advised the New Zealand Racing Board on its successful authorisation application to the NZCC to enter into an international commingling arrangement, and also represented Youi NZ Pty Limited and Trustpower Limited throughout Fair Trading Act investigations and prosecutions. In 2017 he advised Wellington Electricity on its customised price path application to the NZCC.
Chambers Asia Pacific (2018) describes Oliver as ‘a well-reputed competition and consumer law specialist, with one client praising his “expert strategic advice on engagement with competition and consumer regulators”’.

BOJANA MILJANOVIĆ
Karanović & Nikolić

Bojana Miljanović is an independent attorney-at-law in cooperation with Karanović & Nikolić, and a senior associate in the competition practice group. She has worked on numerous corporate transactions and competition matters involving specialised advice on competition law, namely merger control and antitrust issues. Her focus are clients in FMCG and pharma industries. Bojana is qualified to practise in both Serbia and New York.

DANIEL MUHEME
ALTIUS

Daniel Muheme is an associate in the competition and commercial team at ALTIUS. He specialises in all aspects of competition law at the European and national levels, including cartel cases, distribution networks, abuse of dominance, and state aid. Daniel has experience in drafting and reviewing a broad range of commercial contracts. Prior to joining ALTIUS, Daniel completed an internship at the European Commission's Competition Directorate-General and then worked as a full-time research and teaching assistant in European and Belgium competition law at the University of Liège (Liege Competition and Innovation Institute). At the same time, Daniel also worked in a boutique law firm in Brussels, where he practised general business law and competition law. Daniel obtained his master of laws at the Universiteit Antwerpen. Afterwards he complemented his master of laws with an LLM in European Competition and Intellectual Property law from the Université de Liège (magna cum laude). During his studies, he also participated in an exchange programme at the Université Laval, Canada. Daniel recently obtained an LLM in global antitrust and economics from George Mason University in Washington DC and did an internship at the Office of International Affairs of the US Federal Trade Commission.

YUSUKE NAKANO
Anderson Mōri & Tomotsune

Yusuke Nakano is a partner at Anderson Mōri & Tomotsune with broad experience in all aspects of antitrust and competition regulation. He has represented a variety of companies with respect to administrative investigations and hearing procedures conducted by the JFTC, as well as in criminal and civil antitrust cases. He has extensive knowledge and experience in merger control, and was involved in the first foreign-to-foreign merger case that was the subject of an investigation by the JFTC.

Mr Nakano has assisted many Japanese companies and individuals involved in antitrust cases in foreign jurisdictions in close cooperation with co-counsel in those jurisdictions. As a result, Mr Nakano has gained substantial experience in the actual enforcement of competition law by foreign authorities, such as the US Department of Justice and the European Commission.

Mr Nakano is a graduate of the University of Tokyo (LLB, 1994) and Harvard Law School (LLM, 2001). He is admitted to the Bar in Japan and New York, and previously
was a lecturer at Hitotsubashi University Law School. He is a co-author of *Leniency Regimes* (European Lawyer Reference, fifth edition, 2015) and the Japanese chapters of various other publications.

**MARIO NAVARRETE-SERRANO**  
*Pérez Bustamante & Ponce*

Mario Navarrete-Serrano was admitted to practise in 2012 and is an associate at Pérez Bustamante & Ponce. He obtained a JD at Universidad San Francisco de Quito and a master’s in competition, information and innovation law at the New York University School of Law and a postgraduate diploma in economics for competition law from King's College London. Mario is professor of competition law at the Universidad San Francisco de Quito where he also heads the Centre for Investigation of Competition Law. His practice is focused on competition and economic law.

**SUSAN NING**  
*King & Wood Mallesons*

Susan is a senior partner and the head of the commercial and regulatory group of King & Wood Mallesons. She was one of the first legal practitioners in China to set up an antitrust and competition specialist division.

Susan’s current practice focuses on advising merger clearance before the Ministry of Commerce, and advising on Anti-Monopoly Law (AML) compliance issues. Since the enactment of the AML, Susan has undertaken more than 250 antitrust merger control filings on behalf of blue-chip clients, which consist mostly of multinational companies.

She has taken a very active role in assisting and advising the government on the AML legislation and its implementing rules, through which she has built and maintained a close working relationship with the antitrust authorities in China.

Both Susan and her antitrust team have received numerous awards and accolades for antitrust and competition work in China.

Susan holds a bachelor of laws from Peking University and a master in law from McGill University. She was admitted as a Chinese lawyer in 1988.

**CORMAC O’DALY**  
*Wilmer Cutler Pickering Hale and Dorr LLP*

Cormac O’Daly is a special counsel based in WilmerHale’s London and Brussels offices. He has practised for over 12 years and advises on a wide range of EU and UK competition law issues. These include merger control, cartels and related litigation, licensing and other vertical and horizontal agreements, other potentially restrictive practices and alleged abuses of market power. He regularly advises on areas at the convergence of competition and intellectual property laws. Mr O’Daly has been involved in over 20 merger proceedings, some with remedies, including Oracle/PeopleSoft, Statoil/Hydro, Cisco/Tandberg, Halliburton/Baker Hughes and GE/Baker Hughes.
EDGAR ODIO

Pragma Legal

Edgar Odio is a founding partner of Pragma Legal. He has been licensed to practise law in Costa Rica since 1989. He has a master’s degree in economic development from Essex University, and a postgraduate in EU competition law and economics for competition from King’s College London.

His practice focuses on foreign investment and mergers and acquisitions. He has served as a local consultant for the Competition for Latin America Programme (COMPAL) implemented by the United Nations Conference for Trade and Development (UNCTAD) to draft the amendment to the competition law. He served for four years as member of COPROCOM, the local competitions authority. He served as senior adviser in competition for UNCTAD in Geneva, Switzerland, and is a member of the Advisory Group of Experts of COMPAL. In this capacity, he has participated in training and advisory missions to countries including Bolivia and Guatemala. He teaches a competition course at University of La Salle and a postgraduate course on competition and intellectual property at UNED, the distance learning university. He is regularly invited to workshops and training sessions by local and multinational companies, and continuously offers advice on competition matters to local and foreign clients.

GERRIT OOSTERHUIS

Houthoff

Gerrit Oosterhuis is a counsel at the offices of Houthoff in Brussels and Amsterdam. He focuses on merger control work, cartel defence litigation and abuse of dominance procedures.

In the field of merger control, he regularly acts for private equity funds as well as strategic buyers, acting in recent joint ventures such as Varol/Argos DSE/Vitol/Carlyle/Reggeborgh, DEME/Oceanflore and Parcom/Pon/Imtech Marine, concentrations in the food sectors such as FrieslandCampina/Zijerveld and major Dutch cases such as Euretco/Intres and Shanks/Van Gansewinkel. Mr Oosterhuis has been involved in defence work in major Dutch cartel cases. He has a substantial behavioural practice, advising clients such as SHV Energy, Hasbro Europe and Royal Bunge.

Mr Oosterhuis joined Houthoff in 1999. He works from Houthoff’s Brussels and Amsterdam offices.

IVANA OSTOJIĆ

Law Firm Bekina, Škurla, Durmiš and Spajić Ltd

Ivana Ostojić graduated from the Faculty of Law of the University of Zagreb in 2010 and passed the Bar examination in 2013. Ivana has passed the exam for certified court interpreters for the English language. Her practice areas include: civil law, execution law, commercial law, company law, labour law, real estate law and energy law. Ivana has also participated in many due diligence procedures for both domestic and international clients.
ROSS PATTERSON
Minter Ellison Rudd Watts

Ross heads the firm’s competition and economic regulation practice. He has more than 25 years of specialist experience, as a lawyer and regulator, and is recognised by Chambers Asia Pacific (2017; 2018) as a senior statesman in both competition and telecommunications.

He was a partner at Rudd Watts and Stone (now Minter Ellison Rudd Watts) between 1989 and 1998, and at Minter Ellison (Sydney) from 1998 to 2007, where he headed Minter Ellison’s competition and regulation practice. Between 2007 and 2012 he was New Zealand’s Telecommunications Commissioner, and a member of the Commerce Commission.

Ross has represented clients in relation to merger clearances, authorisations and Commerce Commission investigations, and advised on the Commerce Act aspects of commercial arrangements and behaviour. He recently advised Heinz NZ on its successful application (subject to a divestment undertaking) for clearance of its acquisition of the food and instant coffee business of Cerebos Gregg’s, Two Degrees Mobile Limited and Television New Zealand in the successful opposition of the applications for Commerce Commission clearance of the proposed merger of Vodafone and Sky Network Television Limited in New Zealand, and Television New Zealand in relation to the unsuccessful application by NZME Limited and Fairfax NZ Limited seeking Commerce Commission authorisation to merge their media operations in New Zealand.

Ross has a PhD in competition law. He has published many articles on competition and telecommunications issues, and is a regular speaker at conferences.

DIEGO PÉREZ-ORDÓÑEZ
Pérez Bustamante & Ponce

Diego Pérez-Ordóñez was admitted to practise in 1996 and holds a doctor of law from the Catholic University of Quito. He completed an undergraduate microeconomics course at the London School of Economics in 1990. Mr Pérez-Ordóñez is a partner with Pérez Bustamante & Ponce (and a member of its M&A antitrust practice). On the academic front, he is a professor of constitutional law (1999–present) at the Universidad San Francisco de Quito.

RASTKO PETAKOVIĆ
Karanović & Nikolić

Rastko Petaković is a senior partner at Karanović & Nikolić, specialising in M&A, competition law and business regulation. He is also head of the firm’s regional competition practice group. He advises clients on the most complex antitrust matters, cross-border transactions and business regulation and is ranked by independent directories as the leading competition and M&A lawyer in the country. Rastko has advised clients on the most complex antitrust investigations and the largest M&A deals in the region to date. He particularly focuses on private equity clients and specialises in telecom and FMCG. Rastko is a member of the board of directors of the Serbian Private Equity Association (SPEA) and was selected as a winner of the 2015 and 2017 European Emerging Leaders Awards by the M&A Advisor.
NOAH B PINEGAR

*Paul Hastings LLP*

Noah Pinegar is an associate in the Antitrust and Competition practice of Paul Hastings and is based in the firm’s Washington, DC office. Mr Pinegar represents clients in merger reviews before the Federal Trade Commission, the US Department of Justice, and international enforcers, as well as in civil and criminal investigations and litigation.

During his time as an attorney with the Federal Trade Commission, Mergers I division, Mr. Pinegar was a member of multiple litigation and trial teams, including *FTC v. Staples/Office Depot*, and high-profile investigations in industries including pharmaceuticals, medical devices, pharmacies and pharmacy benefit management.

WOJCIECH PODLASIN

*Linklaters C Wiśniewski I Wspólnicy Sp K*

Wojciech Podlasin is an associate in Linklaters’ Warsaw competition and antitrust group. He specialises in antitrust, merger control and state aid cases and gained extensive practical experience as a member of Linklaters’ Warsaw and Beijing competition teams.

Mr Podlasin read law at the University of Warsaw and the London School of Economics, and finance at the Warsaw School of Economics. He is the co-author of a leading commentary to the Polish competition act in the part concerning merger control.

Mr Podlasin is a qualified Polish lawyer and member of the Warsaw Bar.

TATJANA POPOVSKI-BULOSKI

*Polenak Law Firm*

Tatjana Popovski-Buloski is a founding partner at Polenak Law Firm. She specialises in competition law, corporate law, mergers and acquisitions and litigation. In relation to competition law, she advises and represents clients with regard to the implementation of merger control proceedings at the Macedonian Commission for Protection of Competition that involve domestic or multi-jurisdictional transactions, and proceedings related to abuse of dominant positions. Her experience also involves compliance systems, the contractual aspects of competition and antitrust law, licensing agreements, distribution agreements and cartels in different industries, including telecommunications, energy, construction, pharmaceuticals and aviation.

JULIA POTTER

*Blake, Cassels & Graydon LLP*

Julia Potter is an associate in Blakes’ competition, antitrust and foreign investment group. Her practice focuses on all aspects of competition law, including mergers and acquisitions, criminal and civil investigations, and regulatory compliance matters. She also advises on foreign investment merger review under the Investment Canada Act. Ms Potter has advised international and Canadian clients on a wide variety of competition law matters, and has been involved in a number of mergers in a variety of industries including financial services, energy, consumer products and manufacturing.

Ms Potter has worked on a number of complex and high-profile transactions, including *Praxair/Linde, Zodiac Aerospace/Safran, Washington Companies/Dominion Diamond, Brand*
Ms Potter first joined Blakes as a summer law student in 2012 and subsequently articled with the firm. In 2014, she was seconded to a multinational package delivery company where she worked on a variety of corporate and commercial matters. Ms Potter obtained her JD from the University of Toronto in 2013 and holds a master of science degree in economics from the London School of Economics and a bachelor of arts degree in economics from McGill University.

TEA RADMILO

Law Firm Bekina, Škurla, Durmiš and Spajić Ltd

Tea Radmilo is an associate at Law Firm Bekina, Škurla, Durmiš and Spajić Ltd. She graduated from the Law Faculty of the University of Zagreb in 2015 and joined the Law Firm Bekina, Škurla, Durmiš and Spajić the same year. Tea has passed the exam for certified court interpreters for the English language. Within the firm’s legal practice, Tea’s main points of interest are commercial and corporate law. Her professional work also includes assistance in providing advice on matters related to compliance and regulatory affairs.

RAHUL RAI

AZB & Partners

Rahul Rai is a partner in the competition practice group at AZB & Partners. He’s been practising competition law for close to 10 years and is one of the most experienced members of the Indian competition law Bar. Leading publications, including Who’s Who Legal, Global Competition Review and Euromoney Expert Guides have recognised Rahul as one of the world’s future leaders and practitioners for 2018.

In almost 10 years of practice, Rahul has advised clients on a number of global transactions, as well as complex cartel investigations and abuse of dominance matters across various industries. In the run up to the implementation of the Indian competition law, Rahul worked with the Competition Commission of India (CCI) on its advocacy initiatives and was part of the working group responsible for formulating the CCI’s merger control regulations. He has also represented the CCI in its major litigation at various courts and tribunals, including the Competition Appellate Tribunal (COMPAT), the National Company Law Appellate Tribunal (NCLAT) the Delhi High Court and the Supreme Court of India (Supreme Court). Rahul has been involved in formulating competition policy for sovereign governments and was part of the team engaged to review and redraft competition law for Afghanistan. He advises private companies from a wide range of sectors, including airlines, telecommunications, media and entertainment, internet and internet-enabled services, pharmaceuticals, automobile, cement, steel and tyres in proceedings before the CCI.

Rahul regularly writes on trade and competition law related issues for leading global journals, Indian business dailies and periodicals. He has also been invited to give lectures on trade and competition law, including at National University of Juridical Sciences (NUJS), Indian Institute of Corporate Affairs and the Institute of Chartered Accountants of India.

Rahul earned his BA LLB with honours at NUJS in India in 2007. He completed his LLM in international economic law, business and policy from Stanford Law School in 2012.
JOHN RATLIFF
Wilmer Cutler Pickering Hale and Dorr LLP

John Ratliff is a partner in WilmerHale’s Brussels office. He has been practising EU competition law for more than 30 years, dealing with all aspects. In the mergers field, he has been involved in some 40 cases, some with remedies, including Phase II and complex Phase I EU procedures such as Boeing/McDonnell Douglas, Unilever/Bestfoods, Statoil/Hydro, StatoilHydro/ConocoPhillips (JET), Halliburton/Baker Hughes and GE/Baker Hughes. He has handled numerous worldwide filings with local counsel. In April 2015 he chaired the panel at the ABA Spring Meeting on international merger remedies: ‘Cross-Border Remedies – Still safe in Antarctica?’. Mr Ratliff has also represented companies before the European courts in competition law cases and works in other EU law areas.

ALEXANDER RINNE
Milbank, Tweed, Hadley & McCloy LLP

Alexander Rinne is a partner of Milbank, Tweed, Hadley & McCloy. He joined Milbank in mid-2010 to establish the firm’s German and European antitrust practice.

For almost two decades Alexander Rinne has focused on both German and European competition law.

He specialises in merger control procedures and has broad experience in applying merger control regulations to complex private equity and hedge fund structures, as well as in the strategic planning and subsequent implementation of acquisitions by companies that are already market leaders in their respective areas.

Alexander regularly represents leading market players in cartel investigations and dominance cases before the relevant antitrust authorities. He also has extensive expertise in antitrust litigation before German and European courts where he represents clients particularly in the context of antitrust damages cases, refusal to supply actions and cases in relation to merger control decisions.

In addition, Alexander regularly advises clients in relation to the antitrust aspects of joint ventures, strategic alliances, distribution agreements and general antitrust compliance issues.

Prior to joining Milbank, Alexander Rinne was head of the German antitrust practice of a major international law firm and head of its Munich office.

MICHAEL SCHAPER
Debevoise & Plimpton LLP

Michael Schaper, a litigation partner in the New York office of Debevoise & Plimpton, focuses primarily on antitrust litigation, merger review and other antitrust counselling, as well as other types of complex civil and intellectual property litigation.

Mr Schaper joined the firm in 2001 and became a partner in 2011. He received a JD in 2001 from the University of Chicago Law School, where he received the Edwin F Mandel Award for outstanding contribution to the school’s clinical education programme. He received a BA magna cum laude from Tufts University in 1998. Mr Schaper is admitted to appear in numerous courts, including the Southern and Eastern Districts of New York, and the Second Circuit Court of Appeals.
Mr Schaper is a member of the Antitrust Section of the American Bar Association and the Association of the Bar of the City of New York. Mr Schaper also serves on the Board of Directors of Volunteer Lawyers for the Arts.

**SHASHANK SHARMA**  
*A ZB & Partners*

Shashank Sharma is a senior associate in the competition practice group at AZB & Partners. He has represented clients in several antitrust investigations covering cartels (including leniency proceedings), anticompetitive vertical restraints, and abuse of dominance. He has also advised on some of the most complex merger control proceedings in India, including many of the biggest global mergers over the past few years. He has been involved in compliance training exercises for various domestic and multinational enterprises. Shashank’s experience cuts across multiple industries, including telecommunications, electronics, airlines, media and entertainment, internet and internet-enabled services, pharmaceuticals, automobile, and cement.

Shashank has been invited to speak on competition law issues at several forums, including at the National Law University, Jodhpur, and the Indian Institute of Corporate Affairs.

Shashank earned his BA LLB with honours at National Law School of India University, Bangalore in 2013. He has a keen interest in economic analysis and earned the European Master in Law and Economics (separate degrees from Erasmus University, Rotterdam; Hamburg University, Hamburg; and Aix-Marseille University, Aix-en-Provence) with Distinction in 2017.

**DAREN SHIAU**  
*Allen & Gledhill LLP*

Daren Shiau, PBM, is a leading regional competition law specialist whose practice covers antitrust litigation, international cartels and merger control. He is co-head of the firm’s corporate and commercial department, and competition and antitrust practice.

A pioneering competition law specialist in Singapore and ASEAN with unparalleled antitrust experience in South-East Asia, Daren has been cited as ‘the most highly nominated practitioner’, ‘Singapore’s top competition lawyer’, ‘a real expert according to rivals’, and one of the ‘finest lawyers in the region’ by *Who’s Who Legal*.

He has successfully advised on more than 70 per cent of Singapore’s merger control cases, acted for the successful amnesty applicant of Singapore’s first global cartel decision, the successful leniency applicant to its second one, and defended parties in 100 per cent. of Singapore’s international cartel decisions to-date.

Daren has also worked on multiple landmark abuse of dominance cases to-date, including the first appeal to the Competition Appeal Board.

A commissioned trainer of the high-level ASEAN Experts Group On Competition, Daren is a principal examiner on competition law for the Singapore Institute of Legal Education’s foreign practitioners examinations, and the Singapore Bar examinations. He is also Singapore’s first appointed non-governmental adviser at the International Competition Network.
JULIE A SOLOWAY
Blake, Cassels & Graydon LLP

Julie A Soloway is a partner in Blakes’ competition, antitrust and foreign investment group. She advises both domestic and foreign clients on all aspects of competition law, with a particular emphasis on multinational mergers and acquisitions. She also provides advice on strategic alliances, unilateral conduct matters, as well as criminal and civil investigations and compliance matters. She has advised many foreign investors, including state-owned investors, on the Investment Canada Act (including the State-Owned Enterprise Guidelines), which regulate the acquisition of foreign control of Canadian businesses. She has secured approvals for foreign investors in many of Canada’s key industries, including technology, oil and gas, pharmaceutical, and financial services.

Ms Soloway has worked in a leading capacity on some of Canada’s most complex and high-profile transactions, including Sagard/Fairfax Financial/Sports Group Ltd, Thermo Fisher/Patheon, Office Depot/Staples, HNA/Ingram, Koch/Infor, CPP/Glencore, BCE/Glentel, ExxonMobil/Celtic, Marubeni/Gavilon, Outokumpu Oyj/Inoxum, and Intact/AXA.

She is recognised as a leading competition lawyer in The Canadian Legal Lexpert Directory 2018, Chambers Global: The World’s Leading Lawyers for Business 2018, Who’s Who Legal: Thought Leaders 2018, The Legal 500 Canada 2018, Euromoney’s Guide to the World’s Leading Competition & Antitrust Experts 2018, and Chambers Canada: Canada’s Leading Lawyers for Business 2018. Ms Soloway has served on the American Bar Association’s Section of Antitrust Law (SAL) leadership for over 11 years. She is currently co-chair of SAL’s International Committee. She is co-founder of the group Canadian Women in Competition Law and co-author of Leading the Way: Canadian Women in the Law. Ms Soloway is on the editorial board of Corporate Lawyer’s Competition Law Quarterly Legal Reviews. She is published in a wide range of journals and has spoken at legal conferences around the world on competition and foreign investment issues.

Ms Soloway has a strong international background, including a diploma in European competition law from King’s College London, a doctorate in international trade law (Toronto) and a degree in international, european and comparative law (Brussels).

TAKESHI SUZUKI
Anderson Mōri & Tomotsune

Takeshi Suzuki is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A transactions and other corporate legal affairs.

Mr Suzuki is a graduate of Kyoto University (LLB, 2006), and is admitted to the Bar in Japan. Prior to joining Anderson Mōri & Tomotsune, he engaged in cross-border M&A transaction matters as well as Japan and EU competition law in Tokyo and Brussels for approximately four years at a leading UK firm. Mr Suzuki then worked for the merger investigation division of the Japan Fair Trade Commission as a chief case handler of merger filings for approximately two years. At Anderson Mōri & Tomotsune, his practice focuses on Japan and international competition law with a particular emphasis on merger control.
NIHAD SIJERČIĆ

Independent attorney-at-law in cooperation with Karanović & Nikolić

Nihad is an independent attorney at law practising in Sarajevo in cooperation with Karanović & Nikolić and is the partner heading the Bosnian practice. With over 10 years of experience, Nihad regularly advises clients on all aspects of corporate and commercial law, with a particular focus on competition and banking and finance matters. He has extensive M&A experience and has worked with both domestic and international clients on structuring, negotiating, implementing and security domestic and cross-border corporate and asset transfers.

MAŁGORZATA SZWAJ

Linklaters C Wiśniewski I Wspólnicy Sp K

Małgorzata Szwaj is a partner and head of the competition and antitrust group in Poland and the CEE region. She specialises in Polish and European competition law and has experience in Polish and EU merger control, restrictive agreements, cartels, abuses of dominant position, state aid and other areas of European law, including free movement of goods and services. She regularly represents clients before the OCCP, the Polish competition courts and the European Commission. She advises on the largest and most significant merger control proceedings involving companies active in Poland. The particular sectors in which Mrs Szwaj excels include telecommunications, infrastructure, retail, chemicals, pharmaceuticals, energy and media.

Mrs Szwaj is a graduate of the faculty of law at Warsaw University and Queen Mary and Westfield College, London. She is highly acclaimed for her command of a wide range of competition matters and is a recognised leader in her field by both Polish and foreign law firm rankings (Chambers Europe, Legal 500 EMEA, Polityka Insight and Rzeczpospolita).

Mrs Szwaj is a qualified Polish lawyer and member of the Warsaw Bar.

AMANDA TESVIC

Ashurst

Amanda Tesvic is a senior associate in the competition and consumer protection team. She advises on all aspects of competition law in Australia.

CANDICE UPFOLD

Norton Rose Fulbright South Africa Inc

Candice is a senior associate in the antitrust and competition team. She has extensive experience providing competition law opinions and obtaining merger clearances from the competition authorities within South Africa, other sub-Saharan African jurisdictions and COMESA. She has assisted with several large mergers in the industrial, manufacturing, insurance and mining sectors.

Candice also has experience in cartel investigations, including applications for corporate leniency, dawn raids and settlement negotiations.

Candice also advises clients in proceedings before sectoral regulators such as the National Energy Regulator of South Africa and the International Trade Administration Commission.

Candice has provided a comparative analysis of the European Merger Regulation in an exclusive chapter in the 2014 International Economic Law and African Development
guide. The chapter deals with the jurisdiction of the COMESA Competition Commission for merger transactions.

She also presented a paper at the Seventh Annual Conference on Competition Law, Economics and Policy, comparing the approach taken by COMESA and the European Union to jurisdiction over mergers and thresholds, and is contributor of articles on competition law and related issues to legal journals, including the Competition Policy International’s *Antitrust Chronicle*, the *Global Antitrust Compliance Handbook*, *The Private Competition Enforcement Review* and *The Public Competition Enforcement Review*.

Candice joined the practice as a candidate attorney in January 2010, and holds both an LLB and LLM degree in business law from the University of KwaZulu-Natal. She also holds an LLM degree in international law with a focus on international trade law from the University of the Witwatersrand, Johannesburg.

RAFAEL VALDÉS ABASCAL

*Valdés Abascal Abogados SC*

Rafael Valdés-Abascal obtained his law degree from the Universidad Panamericana Law School, where he has the chair as competition law professor and has been member of its Academic Council.

He began his practice in the corporate law area. He joined the public sector in 1990 where he held office, among others, as head of the legal counselling office for the chief of staff of the Mexican president. Later, he was appointed as the executive secretary of the Federal Competition Commission (CFC).

In 1996, he left the public sector to start his own law firm (then Valdes Abascal y Brito Anderson). He has undertaken an intensive practice on competition and antitrust counselling and litigation, being involved in several of the most important cases that have taken place since the creation of the CFC. He has rendered services to several important domestic and foreign companies, and has advised several federal government agencies.

He has headed the Competition Law Committee of the Corporate Lawyers National Bar Association (ANADE) and has been appointed by the competition authority as non-governmental adviser for the International Competition Network.

He is ranked as leading lawyer on competition and antitrust in Mexico by *Chambers and Partners*, *The Legal 500*, *Who’s Who Legal*, *Best Lawyers* and *Legal Media Group’s Expert Guides*, among other publications.

RITA LEANDRO VASCONCELOS

*Cuatrecasas*

Rita has been a counsel at Cuatrecasas since 2016, and before that she was an associate lawyer of Cuatrecasas from 2003. In recent years, Rita Leandro Vasconcelos has advised on complex acquisitions (including multi-jurisdictional filings) in the air passenger transport, energy, financial markets, motorways, electronic communications and consumer goods sectors. She has also advised on proceedings relating to restrictive competition practices in several sectors, as well as state aid. The work managed by Rita is also noteworthy for the wording and analysis of distribution systems and vertical restraints, analysis of adequacy of pricing systems and rebates, agreements’ auto-evaluation, and her overseeing of competition compliance programmes.
Rita Leandro Vasconcelos is also experienced in leading litigation processes relating to in competition law matters (either both appeals of fining decisions and private enforcement actions for damages) with national and European courts, as well as in leading appeals to the European Court of the Human Rights.

Rita holds a master’s in competition law (Lisbon University) and a master’s in economics in competition law (King’s College). She is now a PhD candidate at the Universidade Católica Portuguesa.

She has been active as secretary-general for both the Portuguese Association for European Law and the Portuguese Circle of Competition Lawyers. As such, Rita has been involved in organising the XXVIII Congress of the International Federation for European Law (FIDE), which is the most important EU law and policy congress, and was held in Portugal in May 2018.

CARMEN VERDONCK

*ALTIUS*

Carmen Verdonck is a partner heading the competition team at ALTIUS. She advises a wide range of domestic and multinational clients on all aspects of Belgian and EU competition law, including strategic alliances, cartel investigations, the establishment and operation of distribution systems, technology licensing, abuses of dominant positions and state aid. She has also assisted various multinational clients in the design and implementation of compliance programmes and training courses. In merger control cases, Ms Verdonck has assisted numerous clients in obtaining merger control clearance from the Belgian Competition Authority and the European Commission, and in the coordination of merger filings in various other countries. She holds a bachelor’s degree in law from the Université de Namur, a master of laws from the University of Leuven (1995 Lic Jur magna cum laude) and an LLM in European law from the University of Bristol (1996). She has been a member of the Brussels Bar since 1996, and is first vice president of the International League of Competition Law, former President of the Association pour l’Etude du Droit de la Concurrence; a member of the legal committee of the Belgian Franchising Federation and a member of the Women’s Competition Network. Ms Verdonck has been appointed as assessor in the Belgian Competition Authority since 2013. Ms Verdonck is also maître de conférences at the University of Liège and lectures on Belgian competition law in the LLM programme in European competition and IP law. She has written numerous articles and other publications on competition law.

WEYER VERLOREN VAN THEMAAT

*Houthoff*

Weyer VerLoren van Themaat has been assisting international clients for over 25 years in the most challenging and complex cases related to merger control and cartel defence litigation, and leads Houthoff’s competition practice group. In the field of merger control, he has acted, *inter alia*, in European cases such as *TomTom/TeleAtlas*. He has a substantial healthcare practice. He was involved in almost all Dutch Phase II hospital mergers and received assignments for litigating merger fines from, *inter alia*, Singapore Airlines.

He was resident partner at Houthoff’s Brussels office from 1997 to 2005, after which he returned to Amsterdam. He is chair emeritus of Lex Mundi’s Antitrust Competition and Trade Group and a non-governmental adviser to the Dutch Authority for Consumers and Markets (ACM). He publishes and speaks regularly on competition law-related subjects. Mr

CECILIA VIDIGAL M DE BARROS
Motta Fernandes Advogados

Cecilia Vidigal M Barros has been a senior partner in the competition and antitrust practice at Motta Fernandes since 2011. Ms Vidigal holds doctorate, LLM and LLB degrees from the Law School of Universidade de São Paulo. She is a member of the Brazilian Institute for International Competition, Consumer and International Trade (IBRAC) and has been an elected member of the Council for Competition and Economic Regulation Studies of the São Paulo Bar Association (CECORE) since 2016, and speaks Portuguese, English, German and French.

PAUL WALTER
Slaughter and May

Paul Walter is a special adviser in the Slaughter and May competition group focusing on marketing and business development. He has represented clients in respect of a broad range of competition cases in front of the UK competition authorities, the European Commission and other competition regulators around the world.

KIYOKO YAGAMI
Anderson Mōri & Tomotsune

Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune working mainly in the fields of antitrust and competition law, M&A, international dispute resolutions and other corporate legal affairs.

Ms Yagami is a graduate of Chuo University (LLB 2000), Temple University Beasley School of Law (LLM 2001), China University of Political Science and Law (LLM 2002) and Waseda Law School (JD 2007), and is admitted to the Bar in Japan and New York. She worked as a trainee in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of Foreign Affairs of Japan prior to joining Anderson Mōri & Tomotsune in 2008.

K KORHAN YILDIRIM
ELIG Gürkaynak Attorneys-at-Law

Mr K Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006. He has been working with ELIG Gürkaynak Attorneys-at-Law for more than 13 years and has been a partner in the competition law and regulatory department since January 2014.
Mr Yıldırım has extensive experience in all areas of competition law including cartel agreements, abuse of dominance, concentrations and joint ventures. He has represented various multinational and national companies before the Turkish Competition Authority, Administrative Courts and the High State Court. Mr Yıldırım has given numerous legal opinions and trainings in relation to compliance to competition law rules. Mr Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia. He is fluent in English and French.

SAI REE YUN
Yulchon LLC

Mr Yun, a founding partner of Yulchon, is the managing partner of the firm. Mr Yun practises primarily in the areas of corporate (with an emphasis on M&A), antitrust, tax and governmental relations. Before founding Yulchon, Mr Yun was a prosecutor with the Pusan District Prosecutor’s Office, an associate with the law firms of Lee & Ko and Baker McKenzie (Chicago and New York), and a partner at Yoon & Partners.

Mr Yun has written many articles for various publications and has given lectures at both the Judicial Research and Training Institute and Seoul National University Law School. He has served as outside legal adviser to various government agencies such as the Korea Fair Trade Commission (KFTC) and the Ministry of Trade, Industry, and Energy, and was a member of the Competition Policy Advisory Board for the KFTC. In addition, Mr Yun has been on the legal advisory committee of the Korean Broadcasting Commission, and was a technical adviser for the Tax Policy Review Council for the Ministry of Finance and Economy.

In recent years, Mr Yun was selected as one of the world’s leading M&A lawyers by the International Financial Law Review, as a Practical Law Company cross-border M&A leading lawyer, as a Chambers Global leading banking and finance and corporate lawyer, as a Global Competition Review leading (competition) lawyer and as one of Asia’s leading (competition) lawyers by AsiaLaw. He has been selected by Who’s Who Legal as a leading competition lawyer every year since 2004. Additionally, Mr Yun has received a Prime Minister’s Award for antitrust administration and a Deputy Prime Minister’s Award for tax administration. Mr Yun was also chosen as a leading lawyer of 2009 by IFLR1000.

Mr Yun has successfully represented numerous major corporations, including AMD, Bridgestone Corporation, the Carlyle Group, Citigroup, Daum Communications, GE, Goldman Sachs, Hyundai Capital, Hyundai Merchant Marine, Hyundai Motors, LG Philips LCD, Lotte Shopping, LVMH, RealNetworks, Samsung Electronics, Samsung Life Insurance, SK Corporation and SK Telecom.

MARC WAHA
Norton Rose Fulbright

Marc Waha leads the Asia antitrust, competition and regulatory team at Norton Rose Fulbright. He advises international companies on emerging antitrust regimes in East Asia, and Asian companies on global competition compliance issues, multi-jurisdictional merger filings and international cartel investigations. He has represented Asian, US and European clients active in a number of industrial sectors. His merger experience includes multi-jurisdictional filings (including conditional approvals in China) for multibillion-dollar transactions in diverse sectors including life sciences, financial services, petrochemicals and food.
MICHAEL S WISE
*Paul Hastings LLP*

Michael Wise is of counsel in Paul Hastings’ Washington, DC office. Mr Wise focuses his practice on antitrust and competition issues arising in the United States and abroad. His recent representations include contested transactions in the telecommunications, transportation, broadcast television and healthcare sectors. In several matters, he has successfully coordinated multi-jurisdictional merger control filings and reviews for companies with global footprints.

In addition, Mr Wise has handled complex civil and criminal litigation matters arising under the Sherman Act and state unfair competition laws. His experience includes managing international investigations into anticompetitive practices. He also counsels clients on competition compliance issues, including developing internal compliance protocols and assisting with compliance training and auditing functions.

PEARL YEUNG
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