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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.

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 before, 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 32 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, 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 before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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 Patriarche 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

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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.

The United States and the European Commission both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as ‘gun-jumping’, even fining companies who are found to be in violation. For example, the European Commission (EC) imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. 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 before approval appears to be considered an element of gun-jumping. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

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 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 addition, the European Commission has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the Facebook/WhatsApp acquisition).

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 antitrust 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 US, 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 is very evident. For instance, the transaction parties in Applied Materials/Tokyo Electron ultimately abandoned the transaction following 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. This past year, for instance, many jurisdictions coordinated on the Linde/Praxair and the Bayer/Monsanto transactions. 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 JV’s (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 2019
Part I

GENERAL PAPERS
Chapter 1

CHINA’S MERGER CONTROL IN THE PHARMACEUTICAL SECTOR

Susan Ning, Ruohan Zhang 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 2019. In April 2018, China’s three antitrust authorities, namely the National Development and Reform Commission (NDRC) in charge of price-related antitrust matters, the Ministry of Commerce (MOFCOM) in charge of merger review, and the State Administration for Industry and Commerce (SAIC) responsible for non-price related antitrust matters, consolidated into one unified agency: the State Administration for Market Supervision (SAMR). This institutional consolidation is expected to reduce duplicate enforcement mandates and improve efficiencies, as companies will only deal with a single AML agency with a more unified enforcement

1 Susan Ning is a senior partner, Ruohan Zhang is a 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.
standard. According to its newly released working plan for 2019, SAMR emphasises that the enforcement priorities of the AML will be focused on public utilities, active pharmaceutical ingredients (APIs), building materials, daily consumer goods and other areas of livelihood. 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 NDRC, which is also one of China's antitrust authorities in charge of price-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 prices and the prices should be decided through market competition. In early 2016, the government launched the ‘two-invoice system’ for pharmaceutical distribution, which aims to control pharmaceutical prices, 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.

From the AML’s perspective, SAMR has punished a few pharmaceutical companies for their AML violations. Condemned behaviours include cartels, vertical restraints and abuse of dominance. In the past two years, China's antitrust authorities have gradually strengthened their enforcement in the pharmaceutical industry. For instance, in its latest decision in the pharmaceutical industry, SAMR has imposed a fine on one of the undertakings, with a level of 8 per cent of the undertaking's 2017 sales revenue, for its abuse of dominance in the domestic market for chlorpheniramine maleate APIs. This is the case with the highest penalty level so far among all the cases published by China's AML authorities.

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5 Refer to the SAMR chief Zhang Mao’s Speaking at the National Market Supervision Work Conference on the 27 December 2018.

6 Refer to the Opinions on Facilitating Reform of Pharmaceutical Price published by NDRC together with other authorities on 4 May 2015.

7 Refer to the Notice on Issuing Key Work Tasks in 2016 Pharmaceutical and Cleaning System Reform released on 21 April 2016.
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 authority to define the relevant product market\(^8\) and the relevant geographic market.\(^9\) 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.\(^10\)

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.

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8 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.

9 Relevant geographic market is a scope of geographic areas within which consumers can acquire products that have a relatively strong substitution relationship.

10 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.
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.

IV FACTORS TO BE CONSIDERED IN 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 the authority 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, the authority 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, regarding 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; that is, 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, the authority 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 the authority’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.
ii Behavioural 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.

iii 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.

The authority 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 the authority 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:

- 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
- 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.
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 contains the legal framework and principal provisions of EU merger control. It was designed 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’. 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 addresses procedural matters and, among other things, contains Form CO and Short Form, the forms prescribed for the notification of reportable transactions.

1 Nicholas Levy, Patrick Bock and Esther Kelly are attorneys 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 various editions of Nicholas Levy and Christopher Cook, European Merger Control Law (Matthew Bender & Co).


3 Recital 6, EC Merger Regulation.


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
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’.9

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 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 the years since the EC Merger Regulation’s adoption, the Commission has emphasised the Regulation’s ‘fundamental objective of protecting consumers against the effects of monopoly

8 The Commission Best Practices Guidelines on the conduct of merger control proceedings explain matters relevant to the day-to-day handling of merger cases and the Commission’s relationship with the merging parties and interested third parties (the Best Practices Guidelines). DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings.
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).
power (higher prices, lower quality, lower production, less innovation), 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:

[T]he 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.

Commissioner Vestager has consistently defended these principles, reasserting the Commission's independence and, in the wake of the Commission's prohibition of the Siemens/Alstom transaction in 2019, has rejected calls to take greater account of political considerations and industrial policy, so as to permit the creation of European champions:

Competition policy ensures that we have open and fair competition in the European Single Market. It keeps our companies on their toes. A company is not going to be competitive abroad if it does not have any competition at home. Unchallenged companies are not likely to be innovative, flexible or efficient . . . in the global market place.

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

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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').
13 Commissioner Vestager, Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland, 6 February 2019 (Commission Press Release STATEMENT/19/889).
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 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,17 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.18

The Commission has also considered, but ultimately decided against pursuing, expanding the EC Merger Regulation’s jurisdictional scope. 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.19 A year later, in July 2014, the Commission issued a White Paper20 and a Staff Working Document21 confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings. Shortly after her appointment, however, Commissioner Vestager appeared determined not to advance these proposals, suggesting 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’.22

18 See, e.g., Telefónica Deutschland/E-Plus, Case COMP/M.7018, Commission decision of 2 July 2014; Liberty Global/Ziggo, Case COMP/M.7000, Commission decision of 10 October 2014; Orange/Jazztel, Case COMP/M.7421, Commission decision of 26 January 2015; Altice/PT Portugal, Case COMP/M.7499, Commission decision of 20 April 2015; and Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 4 December 2015.
22 Margrethe Vestager, Competition Commissioner, Thoughts on Merger Reform and Market Definition, Keynote address at Studienvereinigung Kartellrecht Brussels, 12 March 2015 (‘What have we learned from the replies? While many acknowledge that there may be an enforcement gap, there is widespread concern regarding the proportionality of the White Paper’s approach to closing the gap. Is it balanced? Will it work well? Against this background, my conclusion is 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...”)
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 jurisdictional thresholds.\(^{23}\) The Commission is particularly concerned with ‘killer acquisitions’ of small, innovative companies that are at risk of ‘disappearing’, ‘not because they’re not worth it, not because they couldn’t be successful with customers, but because bigger businesses buy them – in order to kill them’.\(^{24}\) It seems unlikely, however, that this proposal will be adopted in the near future. The July 2017 publication of responses to the Commission’s consultation made clear 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 EC Merger Regulation], which would require legislative action.’\(^{25}\)

More recently, in 2019, the Commission’s expert report on Competition Policy for the Digital Era concluded that it was ‘too early’ to change the thresholds under the EC Merger Regulation and recommended postponing any legislative action pending a review of the consequences of the value-based thresholds introduced in Germany and Austria.\(^{26}\) In reaching this conclusion, the experts noted the effectiveness of the referral process for addressing transactions such as *Apple/Shazam*\(^{27}\) and *Facebook/WhatsApp*.\(^{28}\)

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’.\(^{29}\) In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.\(^{30}\)

Third, as to its enforcement practice, between 2012 and 31 December 2018, the Commission prohibited six concentrations,\(^{31}\) conditionally approved a number of others on
the basis of far-reaching remedies,32 and led a number of companies to abandon concentrations to avoid likely prohibition decisions,33 provoking suggestions that it had become more interventionist.34 In 2019, the Commission prohibited three further transactions: Siemens/Alstom,35 Wieland/Aurubis36 and Tata/ThyssenKrupp.37

The Commission has maintained its focus on unilateral effects, showing greater readiness to focus on the competition that will be lost through a merger,38 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.39 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,40 by causing the abandonment of a four-to-three transaction between two Danish telecommunications operators,41 prohibiting a four-to-three transaction between two UK operators,42 and approving a transaction between two major Italian telecommunications operators only after the merging companies agreed to divest sufficient assets to facilitate the

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32 See, e.g., Südzucker/ED&F Man, Case COMP/M.6286, Commission decision of 16 May 2012; Universal Music Group/EMI Music, Case COMP/M.6458, Commission decision of 21 September 2012; Outokumpu/Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012; and Hutchison 3G Austria/Orange Austria, Case COMP/M.6497, Commission decision of 12 December 2012.

33 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 US Department of Justice made clear it would seek to enjoin it from closing).

34 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 a bit surprised by such remarks – and by their dogged reiteration – because they do not correspond at all to the facts. So, let’s recognize the facts: it is simply not true that the Commission is putting the brakes on the legitimate efforts of Europe’s firms to scale up. This is a thing that anyone can verify reading the newspapers or the Official Journal’).

35 Siemens/Alstom, Case COMP/M.8677, Commission decision of 6 February 2019.

36 Wieland/Aurubis, Case COMP/M.8900, Commission decision of 6 February 2019.

37 Tata/Thyssen Krup Jv, Case COMP/M.8713, Commission decision of 11 June 2019.

38 See, e.g., Syniverse/MACH, Case COMP/M.6690, Commission decision of 29 May 2013.


40 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 Deutschländer/E-Plus, Case COMP/M.7018, Commission decision of 2 July 2014.

41 TeliaSonera/Telenor/JV, Case COMP/M.7419, withdrawn on 11 September 2015.

42 Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 11 May 2016.

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establishment of a new market operator. In late 2018, however, the Commission allowed the combination of the third- and fourth-largest mobile operators in the Netherlands in T-Mobile Netherlands/Tele 2 on the ground that, because Tele2 did not have a significant role in the Dutch market, its acquisition would not remove an important competitive constraint on T-Mobile.

In a number of other cases, the Commission has 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. Even in cases where remedies were not ultimately imposed, the Commission has shown a readiness to engage in extended reviews of conglomerate theories of harm, most notably in Essilor/Luxottica, which was ultimately cleared without remedies after a protracted Phase II investigation.

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 data collected and stored in the ordinary course of business operations and expanded the range of internal documents that must be provided with notifications. 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. The Commission’s focus on detailed economic data and analysis, and more systematic review of internal business

43 Hutchison 3G Italy/WIND/JV, Case COMP/M.7758, Commission decision of 1 September 2016.
44 T-Mobile NL/Tele 2 NL, Case COMP/M.8792, Commission decision of 27 November 2018.
45 AB InBev/SABMiller, Case COMP/M.7881, Commission decision of 24 May 2016.
46 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; Microsoft/LinkedIn, Case COMP/M.8124, Commission decision of 6 December 2016; and Qualcomm/NXL, Case COMP M. 9306, Commission decision of 18 January 2018.
47 Essilor/Luxottica, Case COMP/M.8394, Commission decision of 1 March 2018.
49 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’).
50 Introduction, para. 1.8, Form CO.
51 Section 5.4, Form CO.
52 See, e.g., Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 11 May 2016 (notifying parties submitted over 300,000 internal documents, which the Commission reviewed to support its conclusion that Three and O2 competed closely with each other); and Hutchison 3G Italy/WIND/JV, Case COMP/M.7758, Commission decision of 1 September 2016 (WIND submitted over 1 million internal documents, which the Commission analysed to determine whether the merging companies were close competitors).
documents, have lengthened the merger review timetable, particularly in complex Phase II cases. In 2018, the Courts confirmed that the right to timely access to econometric models used by the Commission is a critical part of parties’ rights of defence and that failure to provide such access can lead to annulment of a decision.

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 on the use and production of internal documents. By publishing guidance, the Commission hopes to ‘help businesses handle requests for internal documents more efficiently without compromising on [its] responsibility to protect consumers’. The Commission subsequently consulted informally on a draft of those Guidelines. At the time of writing, the final Guidelines are yet to be published. In practice, however, the Commission has been open to using new technologies to facilitate the production and review of internal documents, saving time and costs for the Commission and merging parties. Notably, in Thales/Gemalto, the Commission accepted, for the first time, the use of technology-assisted review in the production of internal documents, aligning the document requests and collection methods with those adopted in the same case by the US federal agencies.

In December 2018, the Commission issued an OECD working paper on legal privilege in competition proceedings, clarifying certain issues, including the treatment of material that would be privileged under US law. This document formally acknowledged the Commission’s recent practice of agreeing with merging parties only to request documents that may be privileged under US law through a mandatory information request. In the Commission’s view, this procedural mechanism should reduce the risk of inadvertent waiver of privilege over those documents in US proceedings.

Fifth, the Commission has expanded its consideration of effects on innovation competition beyond the pharmaceuticals sector and has introduced new theories of

53 In 2012–2014, the average length of Phase II cases was 148 working days, ranging from 105 days (UTC/Goodrich, Case COMP/M.6410, Commission decision of 26 July 2012) to 133 days (Syniverse/Mach, Case COMP/M.6690, Commission decision of 29 May 2013) to 147 days (Liberty Global/Ziggo, Case COMP/M.7000, Commission decision of 10 October 2014) to 160 days (UPS/TNT Express, Case COMP/M.6570, Commission decision of 30 January 2014) to 172 days (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., Hutchison 3G UK/Telefónica UK, Case COMP/M.7612, Commission decision of 11 May 2016 (eight months); Dow/DuPont, Case COMP/M.7932, Commission decision of 27 March 2017 (nine months); and Siemens/Alstom, Case COMP/M.8677, Commission decision of 6 February 2019 (eight months)). In 2018, the average length of Phase II cases (excluding Siemens/Alstom) was 219 calendar days. These figures, based on the time between notification and a decision, fail to take account of the very substantial pre-notification period, which continues to increase.


55 Johannes Laitenberger, Director General, DG COMP, Enforcing EU competition law in a time of change, W@competition Conference, Brussels, 1 March 2018.

56 DG Competition Draft Best Practices on requests for internal documents under the EU Merger Regulation.


58 See, e.g., Pfizer/Pharmacia, Case COMP/M.2922, Commission decision of 27 February 2003, para. 22; and Novartis/GlaxoSmithKline Oncology Business, Case COMP/M.7275, Commission decision of
harm aimed at capturing negative effects of concentrations on overall innovation, outside individual product markets. In *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; in *General Electric/Alstom*, the Commission 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’, and, in *Dow/DuPont*, 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 market has been controversial and some commentators have been concerned by the lack of clear conditions and criteria for the innovation theory to apply.

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’. In 2019, the Commission imposed a fine of €52 million on General Electric for providing incorrect information in connection with its acquisition of LM Wind.

There has also been an uptick in the number of gun-jumping cases pursued by the Commission. In 2014, the Commission imposed fines on Marine Harvest for premature implementation of its acquisition of Morpol. It imposed separate fines – confirmed by

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62 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’).
63 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).
66 Case COMP/M.7184, Commission decision of 23 July 2014.
the General Court\textsuperscript{67} – 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.\textsuperscript{68} The Commission found, inter alia, that the transaction agreements granted Altice ‘the possibility to exercise decisive influence over PT Portugal’s business’ while the Commission’s review was still ongoing and that, in certain cases, ‘Altice actually exercised decisive influence’ over aspects of the target’s business.\textsuperscript{69} The Altice decision was followed by 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).\textsuperscript{70}

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 review\textsuperscript{71} and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013.\textsuperscript{72} 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/JV,\textsuperscript{73} Hutchison 3G UK/Telefonica Ireland,\textsuperscript{74} Telefonica Deutschland/E-Plus,\textsuperscript{75} Liberty Global/Ziggo\textsuperscript{76} and Huntsman Corporation/Equity Interests held by Rockwood Holdings\textsuperscript{77}), as did three of the seven Phase II commitments decisions rendered in 2015 (Zimmer/Biomet,\textsuperscript{78} Orange/Jazztel\textsuperscript{79} and General Electric/Alstom\textsuperscript{80}), three of the six Phase II commitments decisions rendered in 2016 (Staples/Office Depot,\textsuperscript{81} Ball/Recam,\textsuperscript{82} and Liberty Global/BASE Belgium\textsuperscript{83}), one of the two Phase II commitment decisions rendered in 2017 (Dow/DuPont),\textsuperscript{84} and three of the six Phase


\textsuperscript{68} Altice/PT Portugal, Case COMP/M.7993, Commission decision of 24 April 2018. See Mergers:

\textsuperscript{69} Altice/PT Portugal, Case COMP/M.7993, Commission decision of 24 April 2018.

\textsuperscript{70} 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, which occurred directly after rival Ernst & Young had agreed to purchase KPMG Denmark, but before merger approval had been obtained, did not constitute gun-jumping because Ernst & Young did not acquire the possibility to exercise influence on KPMG Denmark by that termination).

\textsuperscript{71} See, e.g., Outokumpu/Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012, paras. 966 et seq.

\textsuperscript{72} Model Text for Divestiture Commitments.

\textsuperscript{73} Case COMP/M.6905, Commission decision of 8 May 2014.

\textsuperscript{74} Case COMP/M.6992, Commission decision of 28 May 2014.

\textsuperscript{75} Case COMP/M.7018, Commission decision of 2 July 2014.

\textsuperscript{76} Case COMP/M.7000, Commission decision of 10 October 2014.

\textsuperscript{77} Case COMP/M.7061, Commission decision of 10 September 2014.

\textsuperscript{78} Case COMP/M.7265, Commission decision of 30 March 2015.

\textsuperscript{79} Case COMP/M.7421, Commission decision of 19 May 2015.

\textsuperscript{80} Case COMP/M.7278, Commission decision of 8 September 2015.

\textsuperscript{81} Case COMP/M.7555, Commission decision of 10 February 2016.

\textsuperscript{82} Case COMP/M.7567, Commission decision of 15 January 2016.

\textsuperscript{83} Case COMP/M.7637, Commission decision of 4 February 2016.

\textsuperscript{84} Case COMP/M.7932, Commission decision of 27 March 2017.
II commitment decisions rendered in 2018 (Bayer/Monsanto, Tronox/Cristal and Praxair/Linde). The trend appears to be continuing in 2019, with up-front buyer requirements required in Nidec/Whirlpool (Embraco Business) and BASF/Solvay. 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. The Commission has also increased scrutiny on compliance with commitments, issuing its first-ever statement of objections for breach of commitments in 2018.

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. However, more recent attempts to rely on the failing firm defence have been less successful, even in cases where the target assets hailed from a bankrupt company.

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 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. In 2015, the General Court upheld the Commission’s prohibition of the then-contemplated combination of Deutsche Börse and NYSE/Euronext, confirming the Commission’s broad discretion concerning the types of evidence that need be adduced to support its findings. In 2017, however, 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. The judgment was upheld on appeal in 2019. It remains to be seen whether UPS will be successful in obtaining the almost €2 billion in damages that it is reportedly seeking as compensation from the Commission.

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

99 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’).

100 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)’).


102 Case COMP/M.6166, Commission decision of 1 February 2012.

103 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).


concentrations impacting the telecommunications sector.\textsuperscript{107} Shortly after her appointment, Commissioner Vestager affirmed the Commission’s commitment to ‘a strong competition culture [that] keep[s] protectionism at bay’,\textsuperscript{108} recognising that antitrust enforcement often serves wider political goals, but maintaining that individual cases are never subject to political interference.\textsuperscript{109}

Tensions re-emerged in 2018–2019 as a result of the review, and ultimate prohibition, of the Siemens/Alstom transaction. In December 2018, 19 EU governments called for a ‘new political impetus’ to ensure the competitiveness of Europe, while the French and German governments called, in February 2019, for a fundamental reform of EU competition law, inspired by a desire to increase Member State influence over Commission decisions. The proposals have been opposed by the Commission, as well as various practitioners,\textsuperscript{110} academics and certain national competition agencies.\textsuperscript{111} It remains to be seen whether the EU governments will pursue these proposals or maintain the existing objectives and architecture of EU merger control.

### 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’.

\textsuperscript{107} See, e.g., Regulators revolt against Telefónica and E-Plus merger, \textit{Financial Times}, 20 June 2014 (Commission proposal to approve a transaction impacting the German telecommunications sector faced opposition from a number of Member State agencies, including the German Federal Cartel Office, but was ultimately approved (\textit{Telefónica Deutschland/E-Plus}, Case COMP/M.7018, Commission decision of 2 July 2014)).

\textsuperscript{108} Margrethe Vestager, Vestager Vows to Resist Protectionism, Antitrust Politicization, \textit{MLex Insight}, September 2014.

\textsuperscript{109} Margrethe Vestager, Independence is non-negotiable, Introductory remarks at the Chatham House Competition Policy Conference, London, 18 June 2015 (‘Independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it. . . . Independence means enforcing the rules impartially without taking instructions from anyone’).


\textsuperscript{111} See, e.g., J Brunsden and M Kahn, \textit{Financial Times}, Franco-German eurozone reform plan faces growing opposition, 22 June 2018 (‘The Netherlands, Austria and Finland are among 12 Governments questioning the need for any joint eurozone “fiscal capacity”, challenging a central tenet of French President Emmanuel Macron’s vision for the eurozone that he has successfully pressed Berlin to endorse’); and S Marks and J Posaner, \textit{Politico}, Macron’s battle against European unity, 6 March 2019 (‘Disagreements over the single market are flaring up all over the Continent. They pit France – and to a lesser extent Germany – against not just newer EU members like Romania, Poland and Hungary, but also against free-market champions like the Netherlands, Ireland and Sweden’).
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 spill-over
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 anticompetitive agreements and 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.\(^{112}\)

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,\(^{113}\) 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:

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

Between September 1990, when it entered into force, and 31 December 2018, the Commission had rendered around 7,000 decisions, of which around 6,400 (91 per cent) approved concentrations unconditionally in Phase I; 55 (1 per cent) found the EC Merger Regulation to be inapplicable; 308 (4 per cent) approved transactions subject to undertakings given in Phase I;\(^{115}\) 62 (1 per cent) approved transactions unconditionally during Phase II;

\[\text{112 In addition to reviewing appeals of Commission decisions, the EU courts have also issued a number of important judgments following preliminary references from national courts, most recently in}\text{ Austria Asphalt v. Bundeskartellamt (Austria Asphalt), Case C-248/16 EU:C:2017:643 (clarifying the circumstances in which the Merger Regulation applies to changes from joint to sole control); and}\text{ Ernst & Young P/S v. Konkurrencerådet (Ernst & Young), Case C-633/16 EU:C:2018:371 (clarifying EU rules on gun-jumping rules).}\]

\[\text{113 For perspective, since the EC Treaty came into force in 1965, the Commission has rendered approximately 100 decisions applying what is now Article 102 of the TFEU, which prohibits abusive conduct by dominant companies.}\]

\[\text{114 Mario Monti, Merger Control in the European Union: A Radical Reform, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002 (Commission Press Release SPEECH/02/545).}\]

\[\text{115 Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.}\]
and 128 (2 per cent) approved concentrations subject to undertakings given in Phase II. As at December 2018, 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 appeal by the EU courts.116 Around 200 notifications have been withdrawn, of which 44 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.117 The Commission has referred around 240 concentrations in whole or in part to Member State authorities (3 per cent of all notified concentrations).

In the 28 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:

a 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;

b the Commission has over time employed an increasingly rigorous, quantitative, and economically orientated approach to market definition and substantive assessment;

c 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;

d the Commission has used interpretative Notices to codify the law and bring greater transparency;

e 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;

f the Commission has devoted time, effort, and resources to shaping and enforcing remedies;

g the Commission has attached increasing importance to requesting and reviewing internal documents; and

h 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


117 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, US notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to US regulators. See, e.g., Gavin Robert, Merger Control Procedure and Enforcement: An International Comparison, [2014] December, European Competition Journal, pp. 523–549.
handling of the concentrations in question (Air
tours,118 Schneider119 and Tetra Laval120). The principal criticism made was that the same Commission officials assess the evidence, state 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,121 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.122

In response to the judgments in Airtours, Schneider and Tetra Laval, the Commission acknowledged that ‘the system put in place in 1990 [was] showing some signs of strain’123 and recognised that a ‘radical’124 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’,125 and maintain the existing institutional framework in which the Commission approves or prohibits mergers.126 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’.127 In December 2002, the

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119 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.
120 Tetra Laval BV v. Commission, Case T-5/02 EU:T:2002:264. This case was decided concurrently with Tetra Laval BV v. Commission, Case T-80/02 EU:T:2002:265. The two cases are collectively referred to as Tetra Laval.
121 See, e.g., Donna Patterson and Carl Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons, 17 Antitrust, Fall 2002, p. 18 (‘The most fundamental process difference between the U.S. and EU system is the fact that U.S. authorities must obtain an order from an independent judicial authority prior to blocking a transaction. By contrast, the Competition Commission plays the role of investigator, prosecutor and judge in each transaction that it reviews’).
122 See, e.g., William J Kolasky, Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels, George Mason University Symposium, Washington, DC, 9 November 2001. (‘If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder . . . After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making’).
124 Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, 20 September 2002 (‘we will propose radical changes in areas where radical changes are needed’).
126 See too Mario Monti, Europe’s Merger Monitor, The Economist, 9 November 2002, who summarised the objectives of the Commission’s proposals as follows: ‘[T]o improve the Commission’s decision-making process, making sure that our investigations of proposed mergers are more thorough, more focused, and – most importantly – more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties.’
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’.128

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*129 and *Menarini*130 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’.131 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.132 This agreement has led to high level dialogue at political, senior
management and academic level, about convergence on jurisdictional, substantive and
procedural issues.133

The last significant disagreement between the Commission and US agencies occurred in
2001 in connection with the *General Electric/Honeywell* transaction.134 The US Department of
Justice concluded that, subject to certain divestitures in those areas where the merging parties

130 *Menarini Diagnostics v. Italy*, Application No. 43509/08, judgment of 27 September 2011.
131 See too Wouter P J Wils, The Compatibility with Fundamental Rights of the EU Antitrust Enforcement
System in which the European Commission Acts both as Investigator and as First-instance Decision Maker,
5–25.
132 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).
133 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"’).
134 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
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 endeavoured to avoid similar disagreements and the years following General Electric/Honeywell have been characterised by ‘quiet and business-like cooperation’.

In 2017–2019, the Tronox/Cristal saga provided salutary perspective on the complex challenges that can arise in transactions that raise issues on both sides of the Atlantic. In December 2017, the FTC sued to block the transaction shortly after the Hart-Scott-Rodino waiting period expired, but did not seek a preliminary injunction as the Commission’s review was ongoing (and so the deal could not yet close). In July 2018, Tronox/Cristal was cleared by the Commission, subject to commitments (including an up-front buyer requirement). Similar divestitures were reportedly offered to the FTC but an agreement was not reached. In December 2018, an administrative judge blocked the transaction in the US based on a complaint by the FTC. Following a government shutdown that delayed the US process further, a consent agreement was finally reached with the FTC in April 2019, based on North American divestitures similar to those agreed one year earlier with the Commission.

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. Likewise, EU counsel should increasingly cooperate with their US colleagues when it comes to document production in complex cases. Costs and the risk of inconsistency can be significantly reduced by coordinating the response to ‘second requests’ in the US with the now inevitable production of documents in Europe. 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.

A former senior US regulator characterised the divergent results as reflecting an ‘absolutely fundamental disagreement’ between the US and EU authorities (Charles A James, International Antitrust in the Bush Administration, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, 21 September 2001), while another described the Commission’s decision as ‘not strongly grounded in economic theory or empirical evidence’ (William J Kolasky, US and EU Competition Policy: Cartels, Mergers, and Beyond, Council for the United States and Italy, 25 January 2002).


Pallavi Guniganti, Tronox appeases FTC with Cristal divestiture, Global Competition Review, 11 April 2019.
V OUTLOOK AND 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.

Commissioner Vestager’s mandate has attracted most attention for decisions outside the scope of merger control (in particular, state aid and abuse of dominance). However, 2018 and 2019 saw a renewed focus on the objectives of EU merger control and the independence of enforcement. During her confirmation hearings, Commissioner Vestager made clear that:

Neutrality, impartiality and rigour: on the facts, on the economics, on the law – that will be the basis for my actions. I will listen to everyone, from the largest multinationals to the representatives of small firms; from states to citizens. But the analysis of my staff and my own judgement will not be swayed by anyone.¹³⁹

While the outcome of recent cases on the law and the facts may be fiercely debated, Commissioner Vestager would doubtless see her recent prohibition decisions as confirming this commitment from 2014.

The challenges for the next Commissioner 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 encourage the harmonisation of national rules and procedures; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.

Chapter 3

INTERNATIONAL MERGER REMEDIES

John Ratliff, Frédéric Louis and Cormac O’Daly

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.

1 John Ratliff and Frédéric Louis are partners and Cormac O’Daly is special counsel at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). With thanks to Virginia Del Pozo for her assistance.
2 For example, the EC relied on cooperation with multiple foreign antitrust authorities in 55 per cent of all cases it investigated in 2016 to 2017, including merger and antitrust cases. See MLex report of 4 May 2018.
4 See, for example, the BIAC contribution to the OECD Roundtable on ‘Cross-Border Merger Control: Challenges for Developing and Emerging Countries’, February 2011 (OECD report, 2011) at pp. 316–19.
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. 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).
International Merger Remedies

We then outline some of the key context, drawing on useful OECD studies⁷ (see Section III). We also refer to the ICN’s Merger Guides. Finally, we offer some practical conclusions for companies and their advisers (see Section IV).

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.

As a result of the two transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater.⁸ Ultimately, most jurisdictions decided to clear the transactions in the sector for hard disk drives for storage of digital data (HDDs) on the condition that Western Digital (WD) sold some production assets to Toshiba. However, while China’s MOFCOM⁹ allowed the transactions to go through, it imposed materially different remedies with worldwide impact. The main points of interest are as follows.

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.¹⁰ 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 authorities¹¹ cleared the Seagate/Samsung transaction without any remedy, whereas MOFCOM required the two businesses to be held separate until potential subsequent approval.

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

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 Since May 2018, the State Administration for Market Regulation (SAMR) is responsible for Chinese merger control.
¹⁰ Similarly, when assessing the three recent deals in the agricultural chemicals sector, the EC assessed the transactions on a priority or 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. When assessing Bayer’s acquisition of Monsanto, the EC took account of both the Dow/DuPont and ChemChina/Syngenta deals and the remedies offered in those two proceedings.
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.

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 more innovative products.

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. 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 and some of the merging parties’ production facilities were also in China. So one could argue that China had a particularly strong interest in these cases.

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. MOFCOM was also evidently concerned by the prospect of reduced competition; it 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.

15 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.
16 MOFCOM 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/ Brocade MOFCOM imposed a prohibition on tying or bundling of certain products in addition to remedies designed to maintain interoperability and confidentiality of business secrets, see http://english. mofcom.gov.cn/article/policyrelease/announcement/201709/20170902639616.shtml; remedies relating to interoperability and confidentiality were also imposed in both the European Union and the United States.
17 Federal Register, op. cit. 9, p. 14,525, column 3.
18 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.
19 MOFCOM Seagate/Samsung and WD/Viviti decisions, Paragraph 2.6.
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.

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.

In October 2015, MOFCOM partially lifted the hold-separate obligation on WD/
Viviti and, in November 2015, MOFCOM removed the hold-separate obligation on the
Seagate/Samsung transaction, allowing full integration (while still maintaining certain other
behavioural commitments). 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 (including 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.

and the MLex report of 16 November 2015.
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.
23 Case M.7932, Dow/DuPont: http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.
pdf.
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.

\textbf{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 many 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{30} In contrast, reduced competition in innovation was a concern in Canada (www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html). The Australian Competition & Consumer Commission (ACC) noted that its competition concerns would ‘be addressed by the global divestments’ (www.accc.gov.au/media-release/accc-wont-oppose-proposed-merger-of-dow-and-dupont-in-australia).
\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.\(^{33}\) MOFCOM raised concerns 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;\(^{34}\)
\(b\) 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.\(^{35}\)

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.\(^{36}\) 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

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34 As far as we are aware, the first instance of MOFCOM requiring divestiture of assets outside China was Panasonic/Sanyo, where Panasonic acquired Sanyo in 2009 (for further discussion on this, see the 2014 edition of this book at p. 492). MOFCOM is clearly not the only authority to require divestitures outside its jurisdiction. For example, in Anheuser-Busch InBev/Grupo Modelo, the DOJ required the sale of a Mexican brewery, which was located only five miles from the US border and had good transport links to the United States, and which was therefore a key part of a US remedy. See www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case. The purchaser was also required to expand the brewery’s capacity and meet defined expansion milestones.

35 Similar issues appear to have arisen when MOFCOM cleared Marubeni/Gavilon, which involved the acquisition by Marubeni, the Japanese trading house, of the agricultural trader, Gavilon. See http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml (Chinese text).

36 See the EC’s decision in Case No. COMP/M.5669, Cisco/Tandberg, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5669_2153_2.pdf.
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

41 The US contribution to the OECD 2013 Roundtable also highlights the cooperation between the EC and the FTC in the General Electric/Avio investigation at p. 85. Regarding the EU contribution, the interesting example of Pfizer/Wyeth is also highlighted, including the close coordination between the EU and US authorities on the setup of two different EU and US divestment packages to two purchasers; the cooperation between two trustees, where one sub-contracted to the other on ad hoc basis on some issues; and the transitional supply of a product divested in the EU package by manufacturing in the premises divested in the US package (see p. 43).
remedies, since the competition authorities work with their specific laws and from their different regional or national perspectives, and often with different approaches and inputs (e.g., in terms of market testing results).44

Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD45 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. 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’. Among 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

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.
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 Nestlé/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 Nestlé/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.

\(^{67}\) See the Singapore contribution to the OECD report, 2011, p. 249.
\(^{68}\) See the South African contribution to the OECD report, 2011, p. 260.
\(^{69}\) 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 Korea notes in the OECD report, 2011:

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.\textsuperscript{70}

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction’s remedy to ensure enforcement.\textsuperscript{71} 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.\textsuperscript{72} 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.\textsuperscript{73}

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.\textsuperscript{74} It also appears often to be the position of newer competition authorities, or those in smaller countries.\textsuperscript{75}

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

\textsuperscript{70} See the Korea contribution to the OECD report, 2011, p. 170.
\textsuperscript{71} See the OECD report, 2011, p. 30.
\textsuperscript{72} See Undertaking to the ACCC, 30 March 2010, available on the ACCC website, http://transition.acc.gov.au/content/index.phtml/itemId/921363, Paragraphs 2.16–2.18 and Paragraphs 43 and 44.
\textsuperscript{73} See OECD 2013 Roundtable at p. 30 for Brazil requiring similar locally enforceable remedies.
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, 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.

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

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77 See the Australian contribution to the OECD 2013 Roundtable at p. 16, which cites the ACCC and the FTC’s parallel approval of the same upfront buyer in the Pfizer/Wyeth transaction. See also www.ftc.gov/news-events/press-releases/2009/10/ftc-order-prevents-anticompetitive-effects-pfizers-acquisition and www.ftc.gov/news-events/press-releases/2009/10/ftc-order-prevents-anticompetitive-effects-pfizers-acquisition. Interestingly, in Nestlé/Pfizer Nutrition, the ACCC consulted with the SACC over the suitability of an upfront buyer that previously had been an exclusive licensee for Pfizer products in South Africa; see OECD 2013 Roundtable at pp. 17 and 18. Apart from the cooperation between the ACCC and the CCP noted above, the Chilean, Colombian and Mexican authorities also cooperated closely during their investigations; see OECD 2013 Roundtable at p. 68.

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.

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.\textsuperscript{79}

That may mean:

\begin{enumerate}
\item 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 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 talking to less-central authorities early on to ensure that they have enough information to consider that they could reasonably defer to others.
\end{enumerate}

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) \textit{Shell/Montecatini} 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.\textsuperscript{80}

As illustrated in some of the case studies in Section II, the Chinese process often takes longer than others. As such, early contact with (now) SAMR is advisable.\textsuperscript{81}

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.\textsuperscript{82} Generally, such solutions are manageable with willingness, creativity and patience.

\textsuperscript{79} id, p. 22.

\textsuperscript{80} 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.

\textsuperscript{81} MOFCOM’s delay in clearing the planned \textit{Omnicon/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.

\textsuperscript{82} The need for flexibility was recently illustrated by the \textit{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.
INTRODUCTION

After several years of relative calm in US antitrust enforcement in high-technology sectors, we have seen in recent months a number of signs that technology companies will face a coming period of increased uncertainty and scrutiny from US regulators. As the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) continue their efforts at enforcement, they face increasing pressure from the public, and from Congress and various presidential hopefuls to score points against perceived ‘technology giants’ and rethink the antitrust law principles that have allowed these companies to prosper. However, the US antitrust regime does not lend itself to rapid change, and while the agencies are rethinking certain enforcement priorities and policies with respect to high-technology mergers, they are faced with the reality that law is primarily developed through litigated cases, and courts are not always receptive to changing standards. The interplay of these factors is likely to drive an increasing degree of risk for high-technology deals, and parties would be well-counseled to address these risks proactively before reaching a signed transaction agreement.

SEARCHING FOR APPROPRIATE STANDARDS

A recurring theme at the intersection of antitrust and high technology is whether existing antitrust enforcement standards are sufficient to police potential threats to the functioning of efficient markets. In recent years, the US agencies have generally adhered to the mantra that existing tools are suitable for challenges in high-technology markets. However, there has been increasing pressure for the agencies to give these issues greater attention and emphasis, including from various influential political candidates who have come out in favour of stepped-up antitrust enforcement against large data companies and social media platforms, among others.

Mounting political pressure surrounding antitrust and high technology

Over the past year there have been regular calls from various members of the public to reconsider whether the current approach to antitrust enforcement, based on protection of ‘consumer welfare’, is appropriate in the 21st century. As FTC Commissioner Christine Wilson explained in a recent speech, ‘[u]nder the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any
relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act. Critics, on the other hand, have argued that focusing on consumer welfare has caused the FTC and DOJ to allow companies to become too large and otherwise been an impediment to more aggressive antitrust enforcement. Attacks on the consumer welfare standard from academics and advocates have included contentions that it maximises value rather than protecting the process of competition, fails to account for systems of market power in the modern economy, and even that it promotes income inequality and jeopardises individual liberty and democracy. As one commentator explained during testimony before the Senate Judiciary Committee:

Antitrust is also about protecting and fostering civil society – robust communities in which individuals have multiple sources of information, deep connections to one another, roots in local and regional economies, abiding commitments to the institutions they share, and freedom from intimidation, whether from a giant government or giant corporations that know everything there is to know about them.

This public debate has not been limited to high technology, but it has particular application to some of the largest high-technology platforms and those that are engaged in media, innovation and public discourse.

During the past year, the US agencies have actively taken up consideration of these issues. One of the most significant steps to date has been the FTC’s announcement of a series of 14 public Hearings on Competition and Consumer Protection in the 21st Century. These hearings were targeted at considering ‘whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustment to competition and consumer protection law, enforcement priorities, and policy’. Among other topics, the FTC’s hearings focused on antitrust treatment of algorithms and artificial intelligence, the intersection of big data, privacy and competition, and competition in communications, information and media technology markets. These hearings concluded in June 2019 and at this point they have yet to result in any announced changes in US antitrust policy. However, over the next year we expect to see continued emphasis from the FTC, and likely divergence among the various commissioners, as the agency wrestles with

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how to apply learning from these hearings to cases before it. At a minimum, the focus on these issues injects a degree of added uncertainty for parties to high-technology deals, who could face agency staff looking for opportunities to set new precedent in these cases.

Separately, the FTC announced in February 2019 that it would be establishing a new Technology Task Force dedicated to high-technology issues. According to the FTC, the Technology Task Force will focus its attention on various complex technology markets, including ‘online advertising, social networking, mobile operating systems and apps, and platform businesses’. At this point, the Task Force is still in its early days and, like the FTC’s hearings, its existence has not resulted in discernable policy changes. Critics have suggested it could be seen as a bow to pressure from Democrats to proactively address high-technology issues, or alternatively as a means of gaining more expertise to wrestle certain high-technology merger reviews away from the DOJ’s review process. However, technology companies should take note that the Technology Task Force is patterned after a prior FTC Task Force on Merger Litigation, which precipitated a number of successfully litigated challenges to mergers in the healthcare and retail sectors.

Even more recently, in June 2019 the House Judiciary Committee announced that it would launch a ‘top-to-bottom’ antitrust investigation of the tech industry. The probe is expected to be wide-ranging, and will focus at least initially on the largest technology companies. While various members of Congress and future presidential candidates have gone so far as to call for using antitrust law to break up some of these technology companies in the manner of intervention in the telephone industry in the 1980s, it remains to be seen whether this rhetoric will drive such severe actions by US regulators.

### ii Regulatory divergence

Not surprisingly, in the midst of significant dialogue on the role of antitrust in high-technology markets, we are seeing a degree of divergence between FTC, DOJ and other agency approaches to major deals. These points of divergence have largely revolved around balancing of the merits of intellectual property protections and future innovation against the perceived need for present-day competition.

In one key example, the DOJ and FTC found themselves in opposition to each other in the final stages of the FTC’s litigation against chipmaker Qualcomm. While not a merger case, this litigation involved key issues that inevitably come up in a merger review context as well – specifically, the interplay between intellectual property rights and antitrust, and the balancing of present competition and the potential for increased future innovation. The FTC’s case was based on the position that Qualcomm’s licensing practices for its patents, including standard essential patents, violated the antitrust laws by excluding potential competitors. The FTC asked the court to impose a remedy that would require Qualcomm to renegotiate all of its contracts to remove the allegedly anticompetitive provisions.

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In response to the FTC’s request, the DOJ took the unprecedented step of filing its own brief with the court on the issue of an appropriate remedy. According to the DOJ, the court should hold hearings to consider how to more narrowly tailor a remedy to avoid excessive burden on Qualcomm. The DOJ specifically expressed concern that an unnecessarily broad remedy would limit Qualcomm’s ability and incentive to develop 5G technology. The FTC made a short response, arguing that the DOJ filing was ‘untimely’, that the FTC did not request it, and that the FTC disagreed with the DOJ’s positions. Ultimately, the court sided largely with the FTC, but the more important takeaway for technology companies monitoring the case is the increased divergence between apparent DOJ and FTC treatment of patent licensing issues.

Another recent instance of regulatory divergence arose in the review of T-Mobile’s acquisition of wireless service competitor Sprint. On 20 May 2019, the FCC, which has concurrent jurisdiction over wireless telecommunications mergers and a mandate to consider competition issues, stated that it would approve the T-Mobile/Sprint transaction, subject to various concessions, including the divestiture of Sprint’s ‘Boost’ brand of pre-paid service. The FCC noted that the merger would address top priorities, including ‘closing the digital divide in rural America and advancing United States leadership in 5G’. According to press reports, however, the DOJ staff has objected to the FCC’s approach, believing it does not go far enough in addressing potential competition issues. And while the DOJ may ultimately accept a settlement to resolve competition concerns, on 11 June several state attorneys general filed a lawsuit to block the transaction on antitrust grounds, creating additional uncertainty. The fact that the FCC, the DOJ and the state attorneys general are all independently raising concerns over the deal’s impact on competition highlights the difficulty in projecting agency receptiveness to high-technology deals.

III AT&T-TIME WARNER RESULT SHOWS ANTITRUST LAW’S LIMITS ON NON-HORIZONTAL ENFORCEMENT

Because US antitrust law is primarily driven by decisions in litigated court cases, the US agencies have limited opportunities to bring about changes in the law. They must find an appropriate case, bring a lawsuit and prevail at trial. In terms of modifying standards relevant to high technology, the DOJ attempted to bring about change by challenging a key vertical deal when it sued to block AT&T’s merger with Time Warner. A victory would have clarified the legal standard by which to measure anticompetitive harm in a vertical transaction, with potentially significant implications for large technology platforms and media companies.

It was, after all, the first purely vertical transaction litigated on antitrust grounds in four decades. Observers welcomed the chance at some clarification – the US enforcers’ own guidelines reflecting their approach to such transactions date to 1984.

US antitrust law and supporting economics have long recognised the potential for efficiency-enhancing benefits from vertical transactions. Among the benefits are the elimination of double-marginalisation and contracting costs between vertically connected firms. And unlike horizontal deals, where US enforcers benefit from a structural presumption of harm based on increased concentration in a relevant market, no such presumption exists in vertical deals.

As we have discussed in previous editions, US antitrust enforcement agencies face a particularly high burden when seeking to expand or create precedent, even when backed by modern economics, and the trial judge perhaps predictably ruled against the government, allowing the deal to proceed. Before the DC Circuit on appeal, the government sought review of just a single alleged theory of harm: whether the combined firm’s leverage in negotiations would increase as a result of the deal and allow it to raise prices by threatening blackouts. Importantly, shortly after the Antitrust Division had filed suit to block the deal, Time Warner subsidiary Turner Broadcasting committed to about 1,000 distributors to engage in arbitration if the parties failed to reach agreement on renewal. The arbitration commitment – modelled after a commitment accepted by DOJ in the earlier Comcast-NBC Universal transaction – was compelling to both the trial and appellate courts. The DC Circuit affirmed the decision allowing the transaction to proceed.

While the case outcome provides little additional clarity on the standard, there are lessons to be drawn: (1) US law’s ironclad recognition that vertical transactions can bring significant pro-competitive benefits, and (2) the continued relevance of behavioural remedies – restricting or prescribing certain conduct – to mollify concerns about anticompetitive harm in vertical transactions. Both points are likely to have significant implications for future deals in high-technology sectors.

IV MULTI-SIDED MARKETS

Following the US Supreme Court’s decision in Ohio v. American Express, merging parties are arguably now equipped with a new arrow in the quiver of defences to agency action. In rejecting the government’s non-merger challenge to certain anticompetitive effects from the defendant’s commercial practices, the American Express Court expressly held that courts must consider both sides of a multi-sided market when weighing net effects under the antitrust ‘rule of reason’. Though untested in the merger context, the concept seems likely to significantly increase the complexity of merger review, allowing parties to argue that anticompetitive effects aimed at one class of market participants may be overcome by significant pro-competitive effects benefiting another class. By merging the various ‘sides’ of today’s multi-sided technology platforms, the Court has arguably introduced a new

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Machiavellian twist to merger review, allowing for far greater aggregation of power in discrete corners of the market so long as the ‘ends’ of overall market efficiency justify the ‘means’ of local anticompetitive effects.

Despite strong reactions from observers, the case remains limited in application and arguably outside the mainstream of agency merger decision-making. But we expect increasing pressure on the agencies to consider multi-sided effects analysis where deals involve platforms that unite multiple sides of the economy, such as online shopping platforms and platforms driving the sharing economy.

V CONCLUSION

As the next presidential election cycle heats up through the remainder of 2019 and 2020, it appears that antitrust and high-technology issues will increasingly be in focus. With that increased focus comes increased divergence, as competing views vie for dominance. In the long run, we can anticipate that the US will settle on a more uniform approach to high-technology cases, with that view ultimately baked into the slow, steady machinery of the US federal judiciary. In the meantime, companies in this space will face a prolonged period of uncertainty that will demand a new degree of caution and complex analysis before deploying resources associated with large M&A activity.
Chapter 5

US MERGER CONTROL IN THE MEDIA SECTOR

Ted Hassi and Michael Schaper

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.2 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 of large amounts of data regarding the companies’ pricing and sales (typically with the help of an outside economist); 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

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1 Ted Hassi and Michael Schaper are partners at Debevoise & Plimpton LLP. The authors would like to thank Gary W Kubek, a litigation partner and co-author of prior editions of this chapter, as well as Will Bucher, a litigation associate, and Ethan D Roman, a former litigation associate, in the New York office of Debevoise & Plimpton LLP, for their assistance in preparing this chapter.

2 In some circumstances the parties may decide to ‘pull and refile’ to allow the agencies an additional 30 days to review the transaction without issuing a second request.

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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).

ii 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.

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4 See Sallet, supra note 3; In re Charter, supra note 3 Paragraph 27.
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 between radio and television stations or between daily newspapers and radio or television stations. 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. The FCC also may send requests for information to the applicants and third parties. The FCC may approve a transaction or approve it with conditions necessary to ensure that the public interest is served. 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. If the FCC is unable to approve a transaction, it designates the transaction for review by an administrative law judge (ALJ). Once the ALJ issues an initial decision, the full Commission will then vote on whether to approve the application.

The FCC typically seeks to complete its review within 180 days. 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 2019, in addition to more modest-sized deals in the television and radio spaces. The most prominent recent transaction is AT&T’s 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

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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 distribution’.\(^{16}\) 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’.\(^{17}\)

The antitrust review of the \textit{AT&T/Time Warner} deal received considerable attention, including in the 2016 US presidential election campaign. As a candidate, now-President Trump expressed opposition to the transaction.\(^{18}\) 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.\(^{19}\) On 18 December 2017, AT&T announced that the company was unable to reach a satisfactory settlement with the DOJ.\(^{20}\) A six-week trial on the DOJ’s challenge to the merger began on 19 March 2018 becoming the first vertical merger challenge litigated to judgment in nearly 40 years. 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. In February 2019, the Court of Appeals for the DC Circuit affirmed the trial court’s ruling.

\textbf{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.\(^{21}\) Shortly following this announcement, FCC commissioner Ajit Pai confirmed that he did not expect the FCC to review the merger.\(^{22}\)

\textbf{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 \textit{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.\(^{23}\)


\(^{17}\) See id.


\(^{19}\) See www.bloomberg.com/politics/articles/2017-03-21/trump-antitrust-pick-saw-few-hurdles-for-at-t-time-warner-nod (last visited 24 May 2017).


\(^{23}\) \textit{US v. AT&T}, Complaint, pg. 15.
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 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 expensive to recruit back and are unlikely to return, (3) internal studies by DirecTV 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. 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 increases 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 have advance notice that a competitor cable provider was likely to lose access to the Time Warner content, putting the merged company in a position to specifically target customers moving away from that provider, which would provide additional financial incentive for the merged entity to engage in anticompetitive conduct.

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.

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. 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

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24 id. at pp. 16–18.
25 id. at pp. 18.
26 id. at pp. 20.
27 id. at pp. 20.
competing distributors or would gain increased negotiating leverage given the high cost of forgoing affiliate fees and advertising revenue. And the judge found testimony by AT&T’s competitors opposing the merger to be unpersuasive.

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 negotiating leverage that would result in higher prices. The DOJ’s expert witness conceded that the merger would result in savings of $352 million annually through elimination of double marginalisation, a concession he failed to overcome when the court rejected his projected price increases. 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. One week after the DOJ filed its complaint, AT&T irrevocably committed Turner to ‘baseball-style’ arbitration to settle fee disputes with other cable distributors for seven years after the merger closed. The court 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. The DOJ remains sceptical, but recently announced it is considering how such offers may affect future merger challenges. 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.

On 26 February 2019, the DC Circuit Court of Appeals affirmed the District Court’s ruling.28 The appeals court, which reviewed the District Court’s determination for clear error, found that the government failed to respond to defendant’s expert’s ‘analysis of real-world data for prior vertical mergers in the industry that showed “no statistically significant effect on content prices”’.29 It stated that ‘the government offered no comparable analysis of data and its expert opinion and modeling.’ The appeals court also concluded that the

28 United States v. AT&T Inc, 916 F.3d 1029, 1032 (D.C. Cir. 2019).
29 United States v. AT&T Inc, 916 F.3d 1029, 1031 (D.C. Cir. 2019).
government's economic model ‘failed to take into account Turner Broadcasting System's post-litigation irrevocable offers of no-blackout arbitration agreements, which a government expert acknowledged would require a new model’.

Further, the appeals court was convinced that ‘the industry had become dynamic in recent years with the emergence, for example, of Netflix and Hulu.’ While the decision itself does little to expand upon the District Court decision, it does solidify its findings and further suggests that future vertical mergers in the media sector may be difficult for the government to challenge successfully.

**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. The FCC’s reviews also highlighted its goal of geographic expansion of high-speed internet access to underserved areas of the United States. 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.

**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’. FCC Chairman Wheeler stated that the merger ‘would have created a company with the most broadband and video subscribers in

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30 United States v. AT&T Inc, 916 F.3d 1029, 1032 (D.C. Cir. 2019).
35 See ‘Statement from FCC Chairman Tom Wheeler on the Comcast–Time Warner Cable Merger’, supra note 16.
the nation alongside the ownership of significant programming interests’. 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’.

**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.

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.

**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 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:

> because 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,

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36 id.
37 id.
39 In re Charter, supra note 2 Paragraph 37.
40 id. Paragraph 47.
41 id.
42 See id. Paragraph 382.
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.\(^{43}\) Moreover, to increase competition, it required that at least 1 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.\(^{44}\)

**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.\(^{45}\) 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 alert the FCC if they did occur.\(^{46}\)

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.\(^{47}\)

**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’.\(^{48}\) 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’.\(^{49}\) The DOJ imposed several

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\(^{43}\) Specifically, New Charter must provide access of at least 60 megabytes per second (Mbps). id. Paragraph 388.

\(^{44}\) id.

\(^{45}\) See id. Paragraph 132.

\(^{46}\) See id. Paragraphs 135–36.


\(^{49}\) See id.
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.50 The DOJ also precluded the new company from taking advantage of other distributors’ most-favoured-nation provisions if they are inconsistent with this prohibition.51 Lastly, the DOJ barred the new company from retaliating against programmers for licensing to OVDs.52

iii Other media mergers

**Nexstar Broadcasting Group Inc and Tribune Media**

In late 2018, Nexstar Media announced its intent to acquire Tribune Media, bringing together two large television station operators and further expanding Nexstar’s broadcast television station portfolio. In anticipation of potential regulatory oversight, the announcement was accompanied by a statement of Nexstar’s intention to divest 14 television stations in 14 markets to comply with regulatory ownership limits.53 Ultimately, 19 stations were spun off in two separate divestiture deals. As a result, on 16 April 2019 the Justice Department announced it would permit the merger and terminated its review of the merger early.54 No conditions were placed on the merged entity by the Justice Department. As at the time of writing, the FCC had not completed its review.55

**Meredith Corporation’s Time Inc acquisition**

Meredith Corporation completed its acquisition in January 2018. Time Inc was a leading multi-platform consumer media company. Time’s influential brands included the magazines *People, Time, Fortune, Sports Illustrated, Instyle, Real Simple, Southern Living and Travel + Leisure*, as well as approximately 60 international brands. Although the merger brought two large magazine providers together, the deal ultimately received an early termination of the regulatory review period.56 This is consistent with US regulatory agencies’ generally permissive attitude towards mergers in the traditional media relative to deals involving emerging media and digital distribution.

**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*.57 The transaction would have combined the two largest newspapers in Chicago. The DOJ immediately began an investigation

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51 See id.
52 See id.
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.58

**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.59 The parties did receive a second request from the DOJ, but the DOJ ultimately allowed the deal to proceed without any remedy.60 On 6 March 2018, it was announced that the deal had closed.61

**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]’.62 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.63

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58 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’, 12 July 2017.
63 See id.
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 the merger would result in impermissibly high levels of concentration, with post-merger HHIs of 3,800–10,000. The consent decree called for divestiture of either the AMC or the Carmike theatres in each of these markets.

AT&T and DirecTV

In July 2015, the FCC approved the AT&T/DirecTV merger, with several conditions. 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.

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. Gray and Schurz each owned television broadcast stations in various designated market areas (or media markets), including South Bend, Indiana and Wichita, Kansas, in which Gray and Schurz competed head-to-head in the sale of broadcast television spot advertising (which targets viewers in specific geographic areas). 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).

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

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67 id. Paragraphs 4, 8.
70 id.
71 See id. at 4.
72 id. at 5.
73 See id. at 1–2.
**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 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.\(^{74}\) 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.\(^{75}\)

**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.\(^{76}\) 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.\(^{77}\) The DOJ also alleged that the Entercom and Lincoln stations were particularly close substitutes that (among other things) targeted similar customers.\(^{78}\) 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.\(^{79}\) To address these concerns, Entercom agreed to divest three of its Denver area radio stations.\(^{80}\)

**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 advertising prices.\(^{81}\) 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

\(^{74}\) See *US v. Disney and Twenty-First Century Fox Inc*, Complaint (27 June 2018).

\(^{75}\) 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).


\(^{78}\) See id. at 6.

\(^{79}\) See id. at 7.


demographics, and the stations competed against each other on price.\textsuperscript{82} To remedy these concerns, the final judgment required divestiture of the CBS radio stations in the Boston, Sacramento and San Francisco markets.\textsuperscript{83}

**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*,\textsuperscript{84} while Freedom owned local newspapers in Orange County and Riverside County, both of which are in the greater Los Angeles area.\textsuperscript{85} 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.\textsuperscript{86} The court agreed with the DOJ, noting that local newspapers serve the unique function of creating local content.\textsuperscript{87} 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.\textsuperscript{88} The court held that ‘such a concentration clearly constitutes a threat to competition’.\textsuperscript{89} 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.\textsuperscript{90} 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 public interest considerations. 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.

\begin{footnotesize}

\begin{enumerate}
\item[82] id. at 7.
\item[85] See id.
\item[86] See id. at 5–7.
\item[87] See id.
\item[88] See id at 8.
\item[89] See id.
\item[90] See id.
\end{enumerate}

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US MERGER CONTROL IN THE
PHARMACEUTICAL SECTOR

Margaret Segall D’Amico and A Maya Khan

I INTRODUCTION

In the United States, mergers and acquisitions are reviewed by the Department of Justice (DOJ) or the Federal Trade Commission (FTC). These agencies are also responsible for imposing and enforcing appropriate remedies to maintain a competitive market. Parties seeking to merge must receive approval from the relevant agency with jurisdiction over the industry. The DOJ and FTC divide review by subject matter, based on each agency’s previous experience and expertise. Mergers between pharmaceutical companies are reviewed by the FTC, which has developed principles and patterns for evaluating the effects of transactions involving prescription drugs. The FTC division known as Mergers I is responsible for examining transactions in healthcare-related industries, including pharmaceuticals. The FTC also has a separate Health Care Division, which investigates business practices of health professionals, pharmaceutical companies, institutional providers and insurers, in addition to reviewing transactions involving healthcare products and services. Pharmaceuticals are also regulated by the US Food and Drug Administration (FDA), and the FTC’s review accounts for the complexity of this highly regulated industry.

This chapter contains three main sections. Section II provides an overview of the FTC’s general review process, including the steps merging firms generally must follow and a brief discussion of the FTC’s view of the relevant geographic and product markets. Section III discusses merger remedies in the pharmaceutical sector, and what parties can expect from an FTC consent decree. Section IV discusses recent developments in US merger review in the pharmaceutical sector, including potential changes to FTC policy towards certain divestiture remedies.

II OVERVIEW OF FTC REVIEW

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR), a merger or acquisition above a minimum dollar threshold must be reported to and receive pre-merger clearance from the antitrust regulatory agencies. The minimum thresholds are updated annually. The critical thresholds are the minimum ‘size-of-transaction’ and ‘size-of-person’ tests. If a merger or acquisition meets the minimum size-of-transaction threshold, and the parties meet the minimum size-of-person thresholds, the transaction is HSR-reportable. As

1 Margaret Segall D’Amico is a partner and A Maya Khan is an associate at Cravath, Swaine & Moore LLP.
3 id. at 19.
of February 2019, the minimum size-of-transaction threshold is $90 million. The minimum size-of-person thresholds are $18 million and $180 million in either annual sales or total assets, respectively. For transactions valued at less than $90 million, no HSR filing is required. For transactions valued between $90 million and $359.9 million, HSR notification is only required if one or both parties satisfy each of the size-of-person thresholds. For transactions valued above $359.9 million, an HSR filing is required regardless of whether the parties meet the size-of-person thresholds. These values are adjusted annually for inflation.

For HSR-reportable transactions, the FTC’s review of pharmaceutical deals generally follows the same process as mergers in other industries: reviewing a submitted HSR filing, engaging in discussions with the parties, requesting and reviewing additional information about any overlapping products and, if necessary, negotiating and approving a settlement. However, the FTC’s experience with prescription drugs has also led to some particular procedures in reviewing mergers in this industry, as described further below.

The process begins when the transacting parties submit general information about their companies and the proposed transaction in the HSR filing form. Once each of the parties have filed their respective HSR forms, the FTC has 30 days for its preliminary review. The parties may not close the transaction during this 30-day waiting period. In its preliminary review, the FTC may require additional documents and information from the companies, and engage in discussions and meetings with the parties. For pharmaceutical transactions, the FTC will provide the parties with a standardised chart to be completed with specific information about each company’s existing and pipeline products to expedite the agency’s identification and review of any potential overlaps. If the FTC determines that the proposed transaction does not raise any antitrust concerns or questions warranting further investigation, it may terminate the 30-day waiting period (referred to as ‘early termination’), or simply allow the waiting period to expire without further action. Following early termination or the expiration of the waiting period, the parties may close the transaction. If, however, the FTC cannot resolve its questions or concerns about the potential competitive effects of the transaction in the initial waiting period, it may issue a Second Request, which extends the timeline of the agency’s review and allows the FTC to delve more closely into a transaction.\(^4\) A Second Request is a detailed request for additional information from each of the parties, including both documents and data, and its issuance ‘stops the clock’ for the FTC’s review period. Once each of the parties has declared that they have ‘substantially complied’ with their respective Second Requests, the FTC has 30 days either to complete its review, by closing its investigation or negotiating and entering into a settlement with the parties to remedy any competitive concerns, or to take legal action to block the merger in federal court or through the FTC’s administrative process.\(^5\) However, for proposed transactions in the pharmaceutical agency, given the particular nature of the products at issue, and the extremely broad nature of a Second Request, it is not uncommon for parties to choose not to substantially comply with the request and instead provide the FTC with more targeted information about the products at issue in order to either attempt to resolve the agency’s concerns or negotiate a remedy in the most efficient way possible. If the parties agree to a settlement (typically a divestiture) to alleviate any FTC concerns about harm to competition from the proposed merger, the

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\(^5\) id.
parties and the FTC staff will work with the FTC Compliance Division to draft a settlement agreement. The settlement must be approved by the directors of the Bureau of Competition and the Bureau of Economics, and ultimately by a vote of the full Commission.

The FTC’s antitrust review focuses on the potential harm to competition as a result of the proposed merger. In analysing the effect of a merger on competition in a particular industry, the FTC will determine the relevant geographic market and the relevant product market. In the pharmaceutical drug industry, the relevant geographic market is generally the United States. FDA regulatory requirements govern the prescription drug approval process, and once a product is FDA-approved, it can generally be marketed across the United States without restraunt from state regulations.

To determine the relevant product market, the FTC will examine how different products interact with each other in terms of price and substitutability. For transactions involving prescription drugs, the agency will evaluate how certain drugs are prescribed to and used by patients, working with both healthcare providers and physicians to determine which pharmaceutical products are interchangeable for treating particular conditions. The FTC will also examine whether two particular drugs are used in the same way. For example, two branded drugs in the same general therapeutic category but with different product attributes and labelling may be used by patients similarly, such that pricing decisions for each drug closely affect the other. In this case, the drugs would be likely to be considered as part of the same product market. By contrast, two branded products in the same general therapeutic category could be aimed at different types of patients, or have different side effects for particular patients, and could thus be considered part of two separate product markets. Products may also be distinguished based on the mechanisms for their use or the means by which they are administered. For example, the market for an injectable product may be distinguishable from the market for an oral medication aimed at treating the same condition.

Generally, the FTC views branded or innovative prescription drugs and generic prescription drugs as competing in two distinct product markets. Under the 1984 Drug Price Competition and Patent Term Restoration Act, known as the Hatch-Waxman Act, generic prescription drugs that are bioequivalent to a branded version and that have the same labelling may be substituted by a pharmacist for patient use without specific permission from the prescriber. Under Hatch-Waxman, generic drugs may be launched in the market upon the expiration of the branded product’s patent, or if before such expiration, with certification to the FDA that the generic version does not infringe the branded product’s patent. When multiple generic versions of a particular branded drug enter the market, those generics will compete with each other on price. By contrast, the branded version of the same drug will typically stay priced at or above its pre-generic entry level to continue earning as much as possible from sales to patients and prescribers who prefer to use the branded product instead of moving to the generic version.

Thus, when two merging companies each have a branded drug that treats the same condition, the FTC will carefully scrutinise the transaction. Similarly, mergers between companies that each have generic drugs that are substitutable
for the same branded drug will also be closely evaluated. But because of the different pricing strategies companies pursue for branded and generic drugs, a merger between a company with a branded product and a company with a substitutable generic typically draws less scrutiny, unless the relevant generic product will be or is the only generic substitute (or perhaps is one of only two) on the market.

As part of its review, the FTC will also consider whether each company also has products in development or pending FDA approval, commonly referred to as pipeline products, that may compete against the other party's pipeline or marketed products. By evaluating pipeline products in the antitrust review process, the FTC is able to assess a company's full portfolio of assets, including intellectual property and research and development efforts, rather than just its products currently on the market. The FTC has a stated goal of encouraging innovation in healthcare markets, and ensuring that merging companies continue to bring new or improved products to patients.\(^8\) Evaluating the parties' pipeline products also relates to this goal, as the agency may tailor its review or structure an eventual settlement in a way designed to incentivise the parties to successfully bring the new product into the market.

Over the course of the FTC's investigation, it will determine whether the transaction is likely to harm competition through (1) unilateral effects or (2) coordinated effects. Under a theory of harm focusing on unilateral effects, the FTC will assess the level to which the products are substitutes for each other, and whether the elimination of competition as a result of the merger will allow the merged firm to unilaterally raise prices in the relevant markets. The more closely the parties compete, the more likely the merged firm will be able to raise prices, as the lost sales as a result of the merger are more likely to shift to the merged firm. Under a coordinated effects theory, the FTC will assess whether the merger is anticompetitive because it facilitates coordination among competitors, leading to collusion or other harmful results. If the FTC determines that a transaction is likely to harm competition based on either of these theories, the agency will require that the parties remedy this harm before the transaction is allowed to close.

**III REMEDIES**

If the FTC believes that the effect of the transaction 'may be substantially to lessen competition'\(^9\) in a particular market (or markets), the FTC may seek remedial action such as pursuing a settlement or attempting to block the merger in court or through the agency's administrative process. FTC enforcement actions in the pharmaceutical sector typically result in settlement between the parties and the government, rather than litigation. These settlement agreements are referred to as 'consent decrees'. While the FTC evaluates each proposed remedy based on the facts of a particular case, prior consent decrees can provide insight into the typical structure and provisions of a divestiture involving pharmaceutical products.

The FTC's goal in crafting a remedy is to prevent or eliminate likely anticompetitive effects of a merger, and therefore is structured to maintain or restore any competition lost as a result of the merger. While the FTC has discretion in pursuing settlements in merger cases, the most common remedy in a pharmaceutical consent decree is a structural remedy, which typically involves divesting one of the parties' overlapping pharmaceutical products and its

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9 15 USC Section 18.
related assets. The FTC generally prefers the divestiture of assets that comprise a separate ongoing business. In the FTC’s view, divesting an ongoing stand-alone business poses less risk that the acquired divested business will fail, by providing the buyer with the assets necessary to begin operations immediately.\textsuperscript{10} Divestiture of an ongoing business also eliminates the difficulties of separating commingled assets between a seller and a purchaser competing in the same market.

The FTC must approve the buyer in any consent decree requiring a divestiture. In most instances, the settlement will involve an up-front buyer, wherein the merging parties must identify a suitable buyer and negotiate a divestiture agreement before the parties can receive clearance from the FTC to close their proposed transaction. The assets to be divested, the proposed buyer and the negotiated divestiture agreement will be vetted by the FTC staff, and then must be examined and approved by a vote of the Commission. The parties must propose a buyer that is familiar with and committed to the relevant market, including current involvement in the same or adjacent markets and prior dealings with the same customers and suppliers, and that has the financial ability to acquire and maintain the divested assets.\textsuperscript{11}

Typically, most pharmaceutical settlements provide for the appointment of an interim monitor, who is responsible for overseeing the transfer of the divestiture assets and the buyer’s actions in connection with the new business. The monitor will make periodic reports to the FTC to provide information on the parties’ compliance with the order and the buyers’ progress in securing FDA approval related to the divested assets.\textsuperscript{12} Many consent decrees will also require that the merged firm supply buyers with inputs or products for a specified period of time post-divestiture. These supply agreements can support the buyer’s ability to immediately compete successfully in the market. Similarly, consent decrees may include transition services agreements, which require the merged firm to provide the buyer with back-office and other functions for a limited period of time until the buyer can perform the services on its own.

In addition to these general principles concerning divestiture remedies, the FTC’s experience with settlements in the pharmaceutical industry has led to certain patterns and expected practices for divestitures in this area. For example, the FTC has stated that the merging parties should expect to divest the ‘easier to divest’ product when possible, including products made at third-party manufacturing sites.\textsuperscript{13} The parties should provide complete information to the proposed buyer, including any production problems or supply chain issues, and work with the buyer to develop a comprehensive technology transfer plan. The parties should identify specific employees that will oversee the transfer to the new manufacturing facility, and work with the appointed monitor to facilitate development of the technology transfer plan.\textsuperscript{14} Finally, the buyer is expected to identify any necessary third-party contract manufacturers for the divested products that the buyer will not manufacture in its own facilities.

\textsuperscript{11} id. at 24.
\textsuperscript{12} id. at 10.
\textsuperscript{13} id. at 36.
\textsuperscript{14} id. at 37.
IV RECENT DEVELOPMENTS

Antitrust review in the pharmaceutical sector has generally remained consistent with the transition from the Obama administration into the Trump administration, beginning in January 2017. This consistency is in contrast to other industries, where the new administration has shifted some direction in oversight and review. Recent FTC actions in mergers involving pharmaceutical products have generally followed the principles outlined in the sections above.

For example, in July 2017, Baxter International Inc and Claris Lifesciences Limited entered into a consent decree, agreeing to divest two types of generic pharmaceutical products – one an antifungal agent in saline intravenous bags called fluconazole, used to treat fungal and yeast infections, and the other a dextrose intravenous bag used as a short-term treatment for life-threatening heart failure called milrinone – as a condition of closing Baxter’s $625 million acquisition of Claris’s injectable drug business.\(^{15}\) The FTC’s complaint stated that the markets for fluconazole in saline intravenous bags would have been reduced from four to three suppliers as a result of the acquisition, which would ‘likely . . . harm consumers through higher drug prices’.\(^{16}\) Likewise, Baxter was one of three companies currently selling intravenous milrinone, while Claris was expected to enter the market once its pending application with the FDA was approved.\(^{17}\) The FTC stated that in a market with three current suppliers, ‘depriving consumers of a pending, fourth viable supplier’ would likely keep prices at higher levels than they would be if the expected market entry had occurred.\(^{18}\) Under the consent decree, Baxter and Claris agreed to divest Claris’s rights to fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags to Renaissance Lakewood LLC.

Similarly, in July 2018, the FTC sought and obtained a settlement agreement in Amneal Pharmaceuticals LLC’s $1.45 billion acquisition of a 75 per cent equity share in Impax Laboratories Inc. The FTC’s press release regarding the settlement stated that, without a remedy, the acquisition would harm current or future competition in the markets for 10 different generic products. The FTC’s complaint filed in connection with the settlement alleged that new entrants into the market for these products would not be sufficient to deter or counteract the anticompetitive effects of the acquisition, as drug development and FDA approval would take up to two years.\(^{19}\) Under the terms of the settlement agreement, Impax divested its rights and assets to seven generic pharmaceuticals to ANI Pharmaceuticals, Inc. For the three remaining products, Impax divested its rights in generic pharmaceutical products that were co-owned or manufactured by other companies. Perrigo Company plc

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16 id.
17 id.
18 id.
acquired Impax’s rights to two products that it had partnered with Impax to develop and manufacture, while G&W Laboratories acquired Impax’s marketing rights to a product manufactured by G&W for Impax.20

The FTC’s most recent consent decree requiring a divestiture of branded products was finalised in February 2017, when the agency approved a final order in connection with CH Boehringer Sohn AG’s (Boehringer Ingleheim) $13.53 billion acquisition of Sanofi’s animal health business.21 The FTC stated that without the divestitures, the acquisition would have harmed competition in the US markets for five different types of vaccines for pets, such as canine, feline and rabies vaccines, and certain parasite control products for cattle and sheep.22 The consent decree required Boehringer Ingelheim to divest its companion animal products, including the Fel-O-Vax and Fel-O-Guard cat vaccine product lines, to Eli Lilly and Company’s Elanco Animal Health Division. The parasite control products, marketed under the name Cydectin, were divested to Bayer AG.23

Though these recent settlement agreements have followed expected patterns, there are some signals that FTC review and enforcement in the pharmaceutical sector may see some changes. At a February 2018 conference, Bruce Hoffman, then the Acting Director of the FTC’s Bureau of Competition and now holding the same position on a non-interim basis, spoke about the FTC’s shifting approach to structuring a remedy in transactions where the merging parties have an overlap between a branded and pipeline product. Mr Hoffman stated that in transactions where two merging companies have ‘complex pharmaceutical products such as inhalants or injectables’ that need to be divested, the FTC will require that the currently marketed branded product be divested instead of the pipeline product.24 This approach reflects the FTC’s view that divesting a pipeline product, where the divestiture buyer must navigate the final development and approval of the to-be marketed drug, places the risk of failure onto consumers. If the divested pipeline product fails to enter the market, consumers will not benefit from the lower drug prices that would result from an additional competitor in the market. By contrast, if the parties divest the product that is already successfully on the market and keep the pipeline product, the risk of the pipeline product’s failure shifts to the merging parties rather than consumers.25 This is also in keeping with the FTC’s stated mission of encouraging innovation, as it incentivises the merged firm to continue channelling resources towards new pipeline products. Though Mr Hoffman’s remarks focused on complex pharmaceutical products such as inhalants and injectables, these principles may also be applied to other types of products in the future.


23 id.


25 id.
V CONCLUSION

Merger review in the US pharmaceutical industry has developed and followed steady patterns over time, based on the FTC’s experience and understanding of the area. Parties pursuing a merger or acquisition can expect many of the FTC’s standard merger review processes, as well as some pharmaceutical industry-specific nuances. The agency will examine the transaction for likely harm to competition, looking within the relevant geographic market of the United States and in the relevant product markets, which are generally distinct for generic and branded prescription drugs. Should the FTC identify such a likelihood of anticompetitive harm, the agency will likely pursue a settlement agreement with the parties involving the divestiture of products in the markets raising concern. The parties may look to the FTC’s prior consent decrees with other companies to understand what such agreements generally entail, such as a preference that the parties divest a stand-alone ongoing business, the inclusion of a temporary supply agreement, or the appointment of a monitor to oversee the transfer of the business to an FTC-approved buyer. The FTC’s recent actions in mergers involving pharmaceutical products have generally followed these principles, but there is some indication that the agency will continue to finesse its approach to evaluating transactions in this complex industry.
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 may also investigate closed transactions where it has concerns but the parties did not request informal clearance.

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)).

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.

For example, the ACCC investigated Primary Health Care’s completed acquisition of Healthscope’s pathology assets in Queensland in 2015, Qube Logistics’ acquisition of Maritime Container Services in 2018 and Qantas Airways Limited’s acquisition of 19.9 per cent stake in Alliance Aviation Services Limited in 2019.
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.\(^8\)

<table>
<thead>
<tr>
<th>Matters (pre-)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>
<th>2018 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>
<td>29</td>
</tr>
<tr>
<td>Not opposed</td>
<td>55</td>
<td>36</td>
<td>35</td>
<td>17</td>
<td>21</td>
<td>17</td>
</tr>
<tr>
<td>Finished – no decision (including withdrawn)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-SOI</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>5</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Publicly opposed outright</td>
<td>6</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</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>
<td>1</td>
</tr>
<tr>
<td>Resolved through undertakings</td>
<td>2</td>
<td>10</td>
<td>7</td>
<td>5</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Variation to remedy accepted</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Variation to remedy rejected</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total matters (pre-)assessed and reviews undertaken</td>
<td>289</td>
<td>297</td>
<td>322</td>
<td>319</td>
<td>288</td>
<td>281</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. As a result, it is sometimes difficult to predict whether a transaction will be pre-assessed or publicly reviewed. This uncertainty can be challenging for parties to manage, particularly when the timing of clearance is important. In the past 12 months (approximately),\(^10\) the ACCC has publicly opposed only two mergers – Pacific National’s proposed acquisition of intermodal assets from Aurizon\(^11\) and the proposed merger between TPG Telecom and Vodafone Hutchison Australia.\(^12\) 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.

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9 Final figures for the 2019 FY were not available at the time of publishing.
10 1 May 2018 to 8 May 2019.
outlining serious competition concerns with the transaction (see, for example, MYOB’s proposed acquisition of Reckon’s Accountants Group\(^{13}\) and Siemens’ proposal to combine its rail mobility business with Alstom\(^{14}\)).

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

i  **ACCC’s losing record in litigation opposing mergers continues**

In the past 12 months the ACCC commenced its first court proceedings challenging a merger since 2011. In July 2018 it opposed Pacific National Pty Limited’s (PN) proposed acquisition of Aurizon Holdings Limited’s intermodal assets and commenced proceedings against the parties alleging that PN’s proposed acquisition of the Acacia Ridge Intermodal Terminal would have the likely effect of substantially lessening competition.\(^{15}\)

However, the ACCC’s case was not restricted to the merger. It also alleged that the parties entered into two anticompetitive agreements in the course of pre-merger negotiations. First, the ACCC alleged that an agreement for PN to provide some terminal services at the interstate side of the Acacia Ridge Terminal under a sub-contract if it could not acquire the whole terminal would result in a substantial lessening competition in the interstate and Queensland intermodal rail markets in contravention of Section 45 of the CCA. Secondly, the ACCC alleged that the parties reached an anticompetitive understanding that would lead to Aurizon exiting its intermodal business through a combination of closure and the transactions with PN. This second allegation was abandoned by the ACCC during the course of the trial.

In making its case against the parties broader than simply whether the merger would have the effect or likely effect of substantially lessening competition, the ACCC has indicated its willingness to scrutinise subsidiary arrangements between merger parties and to take on complex cases, even where its track record of opposing mergers in Court has not been good. Once again in this case, the ACCC was unsuccessful in Court.\(^{16}\) Litigation has also commenced in response to the ACCC’s decision to oppose the merger of TPG Telecom and Vodafone Hutchison Australia, another very difficult case for the ACCC.

The chairman of the ACCC, Rod Sims, has noted that the PN/Aurizon case ‘illustrates the significant hurdles faced by the ACCC in opposing mergers in Court’ and has said ‘we need a real re-think of how merger issues are dealt with in Australia.’

ii  **‘Gun-jumping’: a new ACCC target**

Continuing the theme of scrutinising conduct surrounding mergers in addition to the transaction itself, the ACCC brought its first ‘gun-jumping’ case this year. In July 2018 it instituted proceedings against Cryosite Limited for alleged cartel conduct in relation to its entry into an asset sale agreement with Cell Care Australia Pty Limited. Before the
agreement, Cryosite and Cell Care Australia were the only private suppliers of cord blood and tissue banking services in Australia. The asset sale agreement required Cryosite to refer all customer enquiries to Cell Care after the agreement was signed but before the acquisition was completed. Cryosite gave effect to this requirement by referring a small number of customers to Cell Care.

While this was referred to by the ACCC as ‘gun-jumping’, it differs from the more commonly understood ‘procedural’ form of gun-jumping in other jurisdictions, namely parties exercising control over a (non-overlapping) target before a compulsory waiting period has expired. Cryosite’s ‘gun-jumping’ conduct was substantive cartel conduct in the form of market sharing, which took place in the period between signing and completion.

Cryosite was fined A$1.05 million for its conduct, which was a substantial amount when taking into account its small size and financial position. Much higher maximum penalties may apply for other companies engaging in similar conduct.

iii  More documents and data required in contentious merger reviews

In recent years, the courts have been critical of the theoretical nature of the evidence relied on by the ACCC in cases where it has opposed a merger. As a result, in August 2017 the ACCC announced changes to its merger review process for contentious mergers that were designed to ensure that it is armed with sufficiently probative evidence should it oppose a merger. In practice this means that in a small number of contentious mergers the ACCC will use 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, it may be a factor in parties offering remedies earlier in the process, to avoid having to respond to time-consuming and burdensome document and information requests.

iv  ACCC’s theories of harm continue to focus on concentrated markets

The ACCC has long been concerned about mergers that result in highly concentrated markets because of the potential for such mergers to result in increased prices and reduced service levels, and in the past 12 months the ACCC seems to have further cemented its views. In his speech to launch the ACCC’s Compliance and Enforcement priorities for 2019, Rod Sims highlighted what he called a ‘current bias to excessive consolidation’. He suggested that the ACCC will continue to be sceptical of arguments proposed by self-interested merging parties where those arguments defy commercial logic. Sims said ‘The ACCC will continue to argue that, overwhelmingly, company behaviour will most benefit consumers and the community if it occurs within a framework of those companies facing strong competition from a sufficient number of competitors.’


For example, in CK Consortium’s proposed acquisition of APA Group, divestiture undertakings were offered at the outset of the ACCC process in June 2018. See www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/ck-consortium-proposed-acquisition-of-apagroup.
In the vast majority of the mergers publicly reviewed by the ACCC in the past 12 months in which the ACCC published a statement of issues (i.e., Phase II) or accepted undertakings, 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).

For example, in its review of the proposed merger between TPG Telecom and Vodafone Hutchison Australia, the high level of concentration of the mobile services market and fixed broadband market, with only three competitors in the respective markets having an 87 per cent and 85 per cent market share, was a key factor in the ACCC’s decision to oppose the merger, even though the parties’ operations in these markets appeared largely complementary. This decision has been challenged by the parties in the Federal Court. A central issue will be the ACCC’s counterfactual that, in the absence of the merger, TPG would enter the market as a fourth mobile network operator. TPG has stated categorically that the banning of Huawei’s telecom equipment in Australia and the delay caused by the merger review mean that it will not construct its own mobile network.

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. The transaction was effectively a ‘four into three’, but involved combining the two largest competitors. Unfortunately, no public competition assessment (PCA) was published, so it is difficult to understand precisely the factors on which the ACCC relied in providing clearance for this transaction. Similarly, the ACCC cleared the payment hardware security module aspect of Thales SA’s acquisition of Gemalto NV without remedies relating to that part of the transaction, even though the parties supplied the ‘vast majority’ of payment hardware security modules to Australian customers. In that case, the ACCC took into account the small Australian market, global competition from homogenous products, declining barriers to entry and countervailing power of 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 because of 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, including

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20 1 May 2018 to 30 April 2019.
22 http://registers.accc.gov.au/content/index.phtml/itemId/1204628/fromItemId/751043.
its statement of issues and ultimate opposition to Pacific National’s proposed acquisition of intermodal assets from Aurizon. The ACCC expressed concerns that ownership of the Acacia Ridge Terminal would give Pacific National, the major user of that terminal, the ability and incentive to increase barriers to entry into intermodal rail linehaul markets in Queensland and interstate in the future by discriminating against or otherwise frustrating access at the Acacia Ridge Terminal. It was not satisfied that these issues were resolved by a proposed 87B (behavioural) undertaking offered by Pacific National regarding access to the Terminal. The case was decided by the Federal Court in May 2019, with the judge relying on the undertaking to dismiss the ACCC’s case. The ACCC lodged its appeal on 27 June 2019, and is seeking to argue that the court made an error in accepting the undertaking.

vi Conglomerate effects
In the past 12 months the ACCC has investigated conglomerate effects in a number of its public reviews, but in each case was satisfied that the potential conglomerate effects would not give rise to a substantial lessening of competition. For example, in Arrow Pharmaceuticals Pty Ltd’s proposed merger with Apotex Pharmaceuticals Pty Ltd, the ACCC considered whether the merged entity would have an enhanced ability to bundle generic prescription and over-the-counter pharmaceuticals, but found that pharmacies did not acquire these products in the one tender process. Similarly, in Nine Entertainment Co Holdings’ proposed acquisition of Fairfax Media Limited, the ACCC considered conglomerate effects when examining the effect of the proposed merger on supply of advertising opportunities to advertisers, but concluded it was unlikely that the merged entity would engage in anticompetitive bundling because advertisers did not consider Nine or Fairfax ‘must-haves’.

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.

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 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 and there is often a delay in issuing this if litigation is anticipated.27

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27 The ACCC 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. It has not always adhered to this practice, though the last 12 months it has improved its performance as compared to the previous year, releasing several PCAs shortly after its decision. See, for example, Saputo/Murray Goulburn, Transport Partners/WestConnex and CK Consortium/APA.
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.

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.\(^\text{28}\) 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, in this form, is a new power for the ACCC, coming into effect in November 2017. 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 because the initial decision-making power is now 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).

In May 2019, the ACCC announced that it had received its first application for authorisation since the new process was introduced.\(^\text{29}\) The application involves the two largest automotive retailers in Australia, with AP Eagers Limited seeking authorisation to acquire Automotive Holding Group Limited.

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\(^28\) 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.

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 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 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.30

The Merger Guidelines of November 2008 (updated 2017) provide some guidance on how the ACCC analyses acquisitions of partial shareholdings:

\[a\] 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

\[b\] 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.

The ACCC has publicly reviewed two minority shareholding acquisitions in the past 12 months. Both transactions raised horizontal issues from the acquisition of the minority stake. In March 2019, IPH Limited sought informal clearance from the ACCC of its proposed acquisition of a 19.9 per cent stake in Xenith IP Group Limited.31 IPH and Xenith were the largest and second-largest suppliers of patent services in Australia. The ACCC cleared the acquisition on the basis of the competitive constraint that would continue to be imposed post-acquisition by the other suppliers of patent services, including QANTM. The ACCC is also currently investigating the completed acquisition by Qantas Airways Limited of a 19.9 per cent interest in Alliance Aviation Services Limited.32 In this case, the parties did not seek prior informal clearance from the ACCC and the ACCC initiated its own review.

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30 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.
iii Merger remedies
The ACCC has a strong preference for ‘fix-it-first’ remedies. In its Merger Guidelines of November 2008 (updated 2017), 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.

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).

A recent example of a case in which the ACCC accepted post-closing divestitures is CK Consortium’s proposed acquisition of APA Group Limited. In that case, the ACCC required that the divestment (of the Parmelia Gas Pipeline, the Goldfields Gas Pipeline, the Kalgoorlie to Kambalda Pipeline and the Mondarra gas storage facility) be completed within

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33 Recent examples of these requirements are found in CK Consortium’s proposed acquisition of APA Group. See: www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/ck-consortium-proposed-acquisition-of-apa-group.

a prescribed time frame to a purchaser approved by the ACCC. CK Consortium 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 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.35

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 had been used only once before the application in May 2019 by Vodafone Hutchison Australia for a declaration that its merger with TPG would not contravene the CCA.36 The ACCC’s preferred 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 four merger cases that have been commenced in the Federal Court, this was the ACCC’s approach.37

Court adjudication of mergers and acquisitions in Australia has been rare. There has been a total of five proceedings brought before the Federal Court and three before the

35 Another example of a behavioural undertaking accepted by the ACCC is in the proposed acquisition by Sydney Transport Partners Consortium of a majority interest in WestConnex in August 2018. In that case, the behavioural undertaking required TransUrban to publish traffic data that would assist all bidders to compete for future tollroad concessions. See: www.accc.gov.au/public-registers/undertakings-registers/transurban-limited.


Tribunal (under the previous authorisation process that no longer exists). The ACCC’s track record of (litigation) opposing mergers has been described by the ACCC’s Chairman as ‘not good’, and its latest case against Pacific National and Aurizon is no exception, with the Court dismissing the ACCC’s case.

V OUTLOOK AND CONCLUSIONS

In recent years, the ACCC has repeatedly stated that it will approach mergers in already concentrated industries with a substantial amount of scepticism and a belief that competition benefits from a sufficient number of competitors. Parties contemplating acquisitions in concentrated markets will need to devote significant resources to moving the ACCC from this increasingly firmly held position. Where this is not successful, the ACCC has shown its willingness to oppose such acquisitions, including by commencing legal proceedings that (to date) it has found difficult to win.

In light of its most recent loss in the Pacific National/Aurizon case, we expect the ACCC to increase its lobbying for legislative change in relation to merger litigation in Australia. The likely form of that change is as yet unknown.


39 The ACCC appealed the decision on 27 June 2019, stating that its appeal will focus on the Court’s ability to accept access undertakings to alleviate competition concerns in merger cases: www.accc.gov.au/media-release/accc-appeal-in-pn-aurizon-case.
Chapter 8

AUSTRIA

Dieter Zandler, Linda Marterer and Vanessa Horaceck

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.

1 Dieter Zandler is a partner, Linda Marterer and Vanessa Horaceck are associates 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).
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.\(^5\) 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.\(^6\)

Although the Official Parties (based on their headcount)\(^7\) 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 2018, 481 merger cases were notified to the FCA in total (an increase of 42 cases compared to 2017).\(^8\) The large majority of notifications (451) was cleared in Phase I after expiry of the initial four-week review period.\(^9\) In 27 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 two cases the notifying party or parties have withdrawn the filing in Phase I.\(^10\)

Only one case notified in 2018 was subject to an in-depth (Phase II) review by the Cartel Court\(^11\) and was cleared subject to commitments (some of the major Austrian merger control cases are described below in more detail).

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5 Pursuant to the FCA's annual report of 2018, 99.8 per cent of the merger cases notified with the Official Parties in 2018 were cleared in Phase I (see www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00296/index.shtml, last accessed 2 July 2019).

6 A German version of the filing form/Austrian Form CO is available at www.bwb.gv.at/fileadmin/user_upload/Downloads/formulare/Formular%20-%20Formblatt%20%3Fr%20Zusammenschl%3Fsse.doc (last accessed 27 May 2019).

7 In 2018, the FCA counted 41 employees, including 32 case handlers (for more information see the FCA's annual report of 2018, page 13, available at www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00296/index.shtml, last accessed 27 May 2019). 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 (for more information see www.justiz.gv.at/web2013/home/justiz/justizbehoerden/der-bundeskartellanwalt-8ab4a8a422985de30122a92c3e896377.de.html, last accessed 29 May 2019).


9 In one case, BWB/Z-3817, the notification was cleared subject to commitment in Phase I.


11 BWB/Z-4180, see table in Section II.i. – Phase II cases from 2018, footnote 1. The merger notification in the case BWB/Z-3633 (clearance subject to commitment) was already notified in 2017 (4 September).
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. Also, a violation of commitments imposed by the Cartel Court as a condition for merger clearance or proposed by the notifying party or parties to the Official Parties constitutes a violation of the standstill obligation and may be subject to fines imposed by the Cartel Court. The following table lists the fine decisions of the Cartel Court so far rendered in 2018/2019 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>14 December 2018</td>
<td>Book retailing</td>
<td>Lagardère Travel Retail Austria GmbH, Schmitt &amp; Trunk Buch und Presse GmbH &amp; Co. KG</td>
<td>€17,500 (jointly and severally)*</td>
</tr>
<tr>
<td>20 November 2018</td>
<td>Food retailing</td>
<td>REWE International AG</td>
<td>€212,000†</td>
</tr>
<tr>
<td>12 September 2018</td>
<td>Automotive suppliers</td>
<td>TCH s.r.l.</td>
<td>€55,000‡</td>
</tr>
<tr>
<td>24 April 2018</td>
<td>Production, trade and rental of office, crew and sanitary containers</td>
<td>Containex Container-Handelgesellschaft mbH; Česko-slezská výrobní a.s.</td>
<td>€100,000§</td>
</tr>
<tr>
<td>28 March 2018</td>
<td>Textiles</td>
<td>Luxembourg Holdings 70 S.a.r.l.; Textbond S.p.A.</td>
<td>€40,000¶</td>
</tr>
</tbody>
</table>

* Cartel Court 14 December 2018, 27 Kt 4/18t.† Cartel Court 20 November 2018, 24 Kt 8/18h.‡ Cartel Court 12 September 2018, 25 Kt 6/18x.§ Cartel Court 24 April 2018, 25 Kt 1/18m.¶ Cartel Court 28 March 2018, 24 Kt 1/18d.

In one case, fines were imposed on the grounds of a violation of commitments (incorrect or misleading information in connection with the closure of a branch to avoid an increase of market share) and a violation of reporting obligations.

Overview of major Austrian merger control cases in 2018

Phase II cases from 2018

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification: 12 November 2018, clearance: 5 March 2019 (request for in-depth review on 10 December 2018, withdrawal of request for in-depth review on 25 February 2019)</td>
<td>Dialysis technology</td>
<td>Fresenius Medical Care AG &amp; Co. KGaA; D.Med Consulting GmbH</td>
<td>Clearance subject to commitments after request for an in-depth review.*</td>
</tr>
</tbody>
</table>

* and decided on 28 March 2018 (see also the German merger control proceedings before the Federal Cartel Office (FCO): Bundeskartellamt, decision dated 21 March 2018, B 9 – 124/17 and the table in Section II.i – Phase II cases from 2018, footnotes 2 and 3).

12 Section 17(2) KartG in conjunction with Section 29 No. 1a KartG.
13 See on the FCA’s website under www.bwb.gv.at/zusammenschluesse/verbotene_durchfuehrungen/ (last accessed on 27 May 2019).
14 Cartel Court 20 November 2018, 24 Kt 8/18h (REWE International AG, see table in Section II.i – Fines for violation of the standstill obligation, footnote 2).
### Phase I cases from 2018 subject to commitments

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification: 12 February 2018, clearance: 26 March 2018 (following a request for extension of initial four-week Phase I review period to six weeks)</td>
<td>Development, production and distribution of office and seating furniture</td>
<td>BGO Holding GmbH; hali gmbh; Svoboda Büromöbel GmbH</td>
<td>Clearance subject to commitments proposed by the notifying parties after pre-notification negotiations with the Official Parties, a market test and information requests to competitors at national and international level.*</td>
</tr>
</tbody>
</table>

* BWB/Z-3817; for more detailed information on the commitments see https://www.bwb.gv.at/fileadmin/user_upload/Downloads/PDFs/Verpflichtungserklaerung_final.pdf (last accessed on 27 May 2019).

### 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 thresholds 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).

#### ii Concept of concentration

Unlike many other European jurisdictions, the Austrian merger control regime is not limited to ‘acquisitions of control’ and full-function joint ventures (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:

- 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;

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15 Section 9(1) KartG (with the exemption in Section 9(2) KartG not being applicable).
16 Section 24(2) KartG.
17 Section 7(1) and (2) KartG.
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); any other connection between undertakings directly or indirectly conferring one undertaking a decisive influence over another undertaking; or
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 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.18

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:19

a  combined worldwide turnover of all undertakings concerned exceeded €300 million;  
b  combined Austrian turnover of all undertakings concerned exceeded €30 million; and  
c  the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.

iv  Exemptions
Even if the above thresholds are met, no notification has to be made if, in the last financial year:20

a  only one undertaking concerned achieved a domestic turnover of more than €5 million;  
and  
b  the combined aggregate worldwide turnover of the other undertakings concerned was less than €30 million.

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.21 A comparable transaction value threshold has also been introduced in Germany (with a transaction value of €400 million; see the Germany chapter) with the

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18  Section 7(1) KartG.  
19  Section 9(1) KartG.  
20  Section 9(2) KartG.  
21  ErlRV 1522 BlgNR 25. GP 3.
Austria

Austrian provision closely following the German one. Both the Austrian and the German transaction value thresholds in particular were 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.22

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.

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, in 2018 the FCA and the FCO have published a draft of a joint guidance paper on the application of the new transaction value threshold (Guidance).23

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.24 In the view of the FCA and the FCO, the inclusion of liabilities, however, only applies for interest-bearing liabilities.25 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.26

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).27 According to the Guidance, also the Austrian turnover may be used as a benchmark.28

22 Commission, decision dated 3 October 2014, case COMP/M.7217, Paragraphs 9–12.
24 According to the Guidance (Paragraph 50), this also applies to liabilities of the target company that 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.
25 See Guidance, Paragraph 50 et seq.
26 See Guidance, Paragraph 13.
27 ErlRV 1522 BlgNR 25. GP 3.
28 See Guidance, Paragraphs 77 et seqq.
vi Media concentrations

A concentration qualifies as media concentration if at least two undertakings concerned can be qualified as:

a media undertakings or media service companies,

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),

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.

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 (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).

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

29 Section 8(1) and (3) KartG.
30 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.
31 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.
32 Section 8(2) KartG.
33 Section 9(3) KartG in conjunction with Section 9(1) No. 1 and 2 and (2) No. 2 KartG.
34 See, for example, Comcast Corporation’s (contemplated) acquisition of Sky, which was notified under the EUMR with the European Commission (and not opposed by the European Commission: Commission, decision dated 6 June 2018, case M.8861 – Comcast/Sky) and – as media concentration – with the FCA (and approved in Phase I: case number BWB/Z-3915); Reidlinger/Hartung, Das österreichische Kartellrecht³ (2014), page 173 et seq; Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Vor Section 7 KartG Paragraph 41.
35 Section 13 KartG.
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.36

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);37

b declare that a concentration was implemented contrary to the standstill obligation (in case clearance has subsequently been obtained);38

c 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.39

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).40

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.41 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 FCA42 (i.e., not only the acquirer but also the target undertaking43 and (based on the case law) even the seller44). 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

36 Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Section 17 KartG Paragraph 31.
37 Section 26 KartG.
38 Section 28 KartG; this requires a legitimate interest of the party requesting the declaration.
39 Section 26 KartG.
40 Cf Section 37b No. 1 KartG.
41 OGH 23 June 1997, 16 Ok 4/97.
42 Section 10(1) first sentence KartG.
43 OGH 12 October 2016, 16 Ok 9/16h.
44 Cf OGH 23 June 1997, 16 Ok 6, 7, 8/97; Cartel Court 24 November 2008, 26 Kt 10/08, 26 Kt 11/08. 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.
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.

**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) and the merger filing fee has been credited to the FCA’s account. 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. This publication triggers a two-week period allowing interested third parties to provide comments to the Official Parties with respect to the proposed transaction.

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 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.

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.\(^{53}\)

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:

\(a\) Expiry of the two-week period allowing an interested third party to provide comments with respect to the notified transaction;

\(b\) 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

\(c\) the notifying party has provided legitimate grounds why an expedited clearance is required (e.g., in the case of financial difficulties of the target company requiring a quick completion or refinancing).\(^{54}\)

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.\(^{55}\)

**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.\(^{56}\) 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 proceedings\(^{57}\) (with the termination decision effecting a clearance of the transaction\(^{58}\)).

The Cartel Court may adopt a clearance decision subject to commitments if the transaction otherwise would not fulfil the clearance requirements.\(^{59}\) 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.\(^{60}\) 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.\(^{61}\)

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53 Section 11(4) KartG.
55 Section 17(2) second sentence first alternative KartG.
56 Section 14(1) second sentence KartG.
57 Section 14(1) third sentence KartG.
58 Section 17(1) third case KartG.
59 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).
60 Section 17(2) first case KartG.
61 Section 16 KartG.
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.\(^{62}\)

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).\(^{63}\)

A final decision of the Cartel Court can be appealed with the OGH. The deadline for lodging an appeal is four weeks.\(^{64}\) The OGH has to render its decision within two months of the receipt of the files from the Cartel Court.\(^{65}\) 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.\(^{66}\) 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.

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.\(^{67}\)

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.\(^{68}\) 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.\(^{69}\)

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.

\(^{62}\) 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 (OGH 21 December 2016, 16 Ok 11/16b).

\(^{63}\) Section 12(1) No. 1 KartG; see also footnote 56 on the treatment of merger filings that do not contain the information required by law.

\(^{64}\) Section 49(2) KartG.

\(^{65}\) Section 14(2) KartG.

\(^{66}\) OGH 17 December 2001, 16 Ok 9/01 (please note that this decision was still made under the old Austrian Cartel Act 1988).

\(^{67}\) Section 13 KartG.

\(^{68}\) Section 4(1) KartG.

\(^{69}\) Section 4(1a) KartG.
Please note that the KartG contains rebuttable presumptions of (single or collective) dominance in case certain market share thresholds are exceeded.\(^70\)

**IV OTHER STRATEGIC CONSIDERATIONS**

The FCA is a member of the European Competition Network and the International Competition Network. On 13 May 2019, the FCA also became a founding member of the ‘Framework on Competition Agency Procedures of the International Competition Network’ (ICN CAP). The Official Parties cooperate closely with other competition authorities, particularly with the German FCO.\(^71\) If a transaction has to be filed in multiple jurisdictions, the concerned undertakings should ensure to provide consistent information in their respective filings.

Under Austrian merger control law, pre-notification negotiations with the Official Parties are not mandatory and, although possible, not very common.\(^72\) 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 AND 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. With the number of merger control filings in Austria increasing year after year,\(^73\) the introduction of the additional (transaction-value-based) threshold for merger notifications is likely to continue this trend.\(^74\)

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\(^{70}\) 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.

\(^{71}\) For example, in connection with the commitments imposed in the VTB/CIT transaction (see table in Section II.ii – Phase II cases from 2018, footnotes 2 and 3).

\(^{72}\) In 2016, 26 pre-notification negotiations were held (see the FCA’s annual report of 2018, page 42 et seqq., available at www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00296/index.shtml (last accessed 2 July 2019). 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 the acquisition of all shares in hali gmbh and Svoboda Büromöbel GmbH by BGO Holding GmbH in case BWB/Z-3817 (see table in Section II.ii – Phase I cases from 2018, footnote 1).


\(^{74}\) In 2018, 17 notifications were submitted to the FCA based on the new transaction value threshold; see the FCA’s annual report of 2018, page 40, available at www.parlament.gv.at/PAKT/VHG/XXVI/III/
Notwithstanding the Guidance published in 2018,\textsuperscript{75} 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.

\textsuperscript{75} See footnote 28.
Chapter 9

BELGIUM

Carmen Verdonck and Nina Methens

I 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 structure of the Belgian Competition Authority (BCA). 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 BCA’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 BCA, 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 Nina Methens is an associate at Altius.
3 Despite the Competition College formally holding the BCA’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 Articles IV.16 of 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, but it was decided not to change the thresholds.
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.

Finally, on 25 April 2019, a legislative proposal was adopted to amend Belgian competition law. The two most notable changes concern the introduction of a stop-the-clock mechanism as well as a calculation of fines based on the worldwide annual turnover of the infringing party. The amendments came into effect on 3 June 2019.

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 2018, 36 final decisions were issued. Out of these final decisions, 28 were issued under the simplified procedure and eight under the non-simplified procedure. None of the notified concentrations required a Phase II investigation in 2018.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of notifications</th>
<th>Number of final decisions</th>
<th>Number of non-simplified procedures</th>
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<tbody>
<tr>
<td>2003</td>
<td>59</td>
<td>61</td>
<td>29</td>
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<td>2004</td>
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<tr>
<td>2018</td>
<td>36</td>
<td>36</td>
<td>9</td>
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</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

7 This mechanism allows the Prosecutor to extend a given deadline to give parties more time to provide information or offer commitments. Such decision suspends the term within which the Prosecutor has to render his decision proposal as well as the final term in which the College shall take its decision. Article IV.40 Section 1, Code of Economic Law.
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 11 January 2018, the BCA approved the acquisition by D’Ieteren SA of exclusive
control of the operating companies of Rietje’s Group (Rietje).8 D’Ieteren imports and
distributes vehicles of various brands of the Volkswagen group in Belgium, and imports
and distributes spare parts and accessories. D’Ieteren is also active in body shop services as
well as repair and replacement of vehicle windows. The target companies were the Rietje
garages in Kapellen (in the Antwerp area) and Zwijndrecht, which sell new vehicles and
provide maintenance, repair services and body shop services for the vehicles of the following
brands: Audi, Volkswagen, Volkswagen CV and Skoda, as well as another garage in Kapellen,
a multi-brand car body repairer.

The Prosecutor identified three relevant markets for the transaction’s competitive
assessment: (1) the market for the retail sale of motor vehicles; (2) the market for the sale
of spare parts for motor vehicles; and (3) the market for the after-sales service only for Audi
and Volkswagen brands for certain catchment areas. The markets in points (1) and (2) are
upstream markets of the after-sales service markets in point (3).

For these markets, the Prosecutor argued that although after the transaction the
combined market shares of the parties would not exceed 25 per cent, the market could
be affected given the vertical integration of the parties and their market shares in the
downstream market for after-sales services. The Prosecutor found that there was enough
inter-brand and intra-brand competition in those markets because customers would still
have access to competitors’ after-sales services, including independent service providers
and garages approved by D’Ieteren but not controlled by it. In view of the market position of
those alternative independent providers, the Competition College therefore decided that the
concentration did not cause a significant restriction of competition.

On 31 January 2018, the BCA conditionally authorised the acquisition of Kant’s Group
(Kant) garages by Volvo Group Belgium (Volvo).9 Kant is an independent distributor of
Volvo vehicles. Volvo wished to acquire Kant’s garages for Volvo trucks and buses in Belgium
(Antwerp, Beerse, Olen and Sint-Niklaas), and Volvo and Renault trucks and buses in the
Netherlands (Hulst). The acquisition also comprised the commercial activities of Volvo Penta
engines (boat engines, industrial engines and power engines (Antwerp)). Volvo’s reason for
acquiring Kant lay in the strategic location of Kant’s business premises. One of the important
points of discussion was whether a system market exists – i.e., one single market for the
combination of the primary product (the trucks) and the secondary products (spare parts and
repair and maintenance services), or whether the market for trucks, the market for the provision
of maintenance and repair services for trucks and the market for spare parts constitute separate
markets. To assess this point, the Prosecutor considered whether buyers take into account the
trucks’ total cost of ownership at the moment they buy their truck. As opposed to the view
of the notifying party, the Prosecutor concluded that there is no such system market, but that
there are only separate markets for the sale of trucks, maintenance and repair, and sale of spare
parts. Having said so, the Prosecutor assessed the proposed concentration with regard to the

8 Decision No. ABC-2018-C/C-02 of 11 January 2018 in case No. CONC-C/C-17/0034, the acquisition
by D’Ieteren SA of exclusive control of the operating companies of Rietje’s Group.
9 Decision No. BMA-2018-C/C-04 of 31 January 2018 in case No. MEDE-C/C-17/0035, Volvo Group
Belgium NV’s acquisition of garages of the group Kant NV.
Belgium

markets for the maintenance and repair of Volvo trucks. It concluded that the acquisition of the Kant garages by Volvo would lead to the reduction of intra-brand competition between the existing authorised Volvo repairers, especially in Mechelen, which could lead to increases in prices and quality reduction. This could significantly impede competition in that market because customers would not have enough alternatives if prices increased or quality was reduced as a result of the concentration. The Prosecutor requested the opening of a Phase II investigation. The notifying party offered commitments that were mainly concerned with limiting Kant’s competitive power and increasing competitive forces by helping new entrants enter the market. First, Volvo offered to stop all car maintenance and repair services for Volvo trucks in Kant’s garage in Sint-Niklaas. Second, it committed to recognising an additional authorised repairer in the Mechelen catchment area in order for clients to maintain enough options in the area where the concentration effect was the highest (and in bordering areas). The College considered that these commitments allowed the notified concentration to be cleared in the first stage proceedings, because they restored sufficient competitiveness in the market. It is notable that in this case the BCA did not appoint a monitoring trustee to review the offered commitments.

On 6 March 2018, the Competition College authorised joint control over the Belgian group Mediafin by Roularta Media Group (Roularta) and Groupe Rossel & Cie NV. The concentration was part of a transaction in which Roularta was selling its shares in Medialaan NV (50 per cent) to De Persgroep NV, and De Persgroep NV was selling its shares in Mediafin (50 per cent) to Roularta. Therefore, Roularta and Rossel would jointly hold Mediafin after the transaction. Roularta is active in the supply of magazines, free papers and door-to-door papers, radio, television, printing and online services. Mediafin is a company active in the media sector. It publishes business papers such as De Tijd and L’Echo, as well as specialised magazines. As a result of the concentration, Roularta wishes to further expand its digital activities and wants to broaden its portfolio of top media brands. The Prosecutor assessed the concentration for two types of markets: the consumer markets and the advertising markets. For the consumer markets, it concluded that there were no horizontal or vertical markets concerned, nor a risk of conglomerate effects post-transaction. For the advertising market, the prosecutor assessed in particular the Belgian market for advertising spaces for commercial advertising in Dutch and French language magazines. After analysing possible uncoordinated vertical effects and coordinated effects, the Prosecutor argued that there would still be enough competition in these markets after the transaction. First, because the transaction would not modify the market as such. Second, because the merged entities would not have incentives to restrict competition, and third, because the parties are essentially active on different markets. The College followed the Prosecutor’s analysis that the concentration would not risk causing a significant restriction of competition in the concerned markets and authorised the concentration.

On 26 April, the BCA decided to partially lift the conditions imposed on Kinepolis. This is the most recent decision in the Kinepolis saga that started in 1997, when the former

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10 Decision No. BMA-2018-C/C-07 of 6 March 2018 in case No. MEDE-C/C-18/0002, the acquisition of joint control over Mediafin NV by Roularta Media Group NV and Rossel & Cie NV.
Belgian Competition Council cleared a merger to establish the Kinepolis group, conditional on several commitments. The commitments were imposed for renewable 10-year periods. One of the commitments included the obligation for Kinepolis to obtain prior approval from the BCA for any form of growth, through acquisitions or organic growth. In 2010, after several years of legal battle, the Court of Appeal partially lifted this condition. On 31 March 2017, it filed a request with the BCA to remove the remaining commitments. On 31 May 2017, the BCA decided to lift the restriction on organic growth after a two-year transition period. The other commitment (growing through acquisitions without prior approval of the BCA; agreeing on exclusive or priority rights to distribute films or programming agreements with independent cinema owners) were left in place. This decision was appealed by competing cinema operators and annulled by the Brussels Court of Appeal mainly for insufficient reasoning by the BCA of its decision on 28 February 2018. Also the new decision of the BCA of 26 April 2018 was again appealed and annulled by the Court of Appeal on procedural grounds on 21 November 2018. On 28 January 2019, Kinepolis again requested the BCA to lift the remaining conditions. In its latest decision of 25 March 2019, the BCA decided, after an ab initio examination of Kinepolis’ request to partially lift the commitment preventing Kinepolis to grow organically through the establishment of new cinema complexes without the prior approval of the BCA. The competition college lifted this obligation of a prior notification to the BCA for new cinema complexes with a maximum of seven movie theatre halls and 1,125 seats. The BCA also prevented Kinepolis from establishing any new cinema complexes within a range of 10 km of its existing cinema complexes or from expanding such new cinema complexes above the thresholds mentioned above, without the prior approval of the BCA. The legal saga will continue, as Kinepolis and two competing cinema operators already appealed this latest decision of the BCA to the Brussels’ Court of Appeal.

In its decision of 22 May 2018, the BCA approved the merger of Telenet Group BVBA (Telenet) and Telelinq and its subsidiaries Nextel NV, Nextel Telecom Solutions NV and Telelinq Distribution & Finance NV (Nextel). Telenet is a Belgian cable operator active in the provision of fixed internet, fixed telephone services and cable television in some parts of Belgium, and in the provision of mobile services throughout Belgium. Telelinq offers global network and telecommunications solutions to SMEs, large companies, care facilities, non-profit organisations and administrations in Belgium (called ‘integrator’ services). Through this operation, Telenet sought to develop one-stop-shop solutions for business customers who are in need of a single point of contact for both telephony and network services. Given the limited post-transaction market shares of the parties on both the horizontal and vertical relevant markets, the Prosecutor did not raise concerns about possible uncoordinated horizontal or vertical effects, nor for coordinated effects. However, the Prosecutor identified three markets in which there could be a risk of conglomerate effects: (1) the Belgian retail market for IT services; (2) the Belgian retail market for private exchanges (PBX) and related services; and (3) the Belgian retail market for security solutions. It argued that in those markets there was a risk that the merged entity would bundle fixed internet access services with its separate or bundled global solutions (e.g., IT services, business connectivity services, PBX and related services, and security solutions); for example, by making the conditions for a bundled service more interesting than the conditions for each of the services taken separately (volume discounts or better service). However, given the parties’ limited shares in

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12 Decision No. BMA-2018-C/C-14 of 22 May 2018 in case No. MEDE-C/C-18/0011, Telenet Group BVBA/Telelinq NV.
those markets both before and after the transaction, the Competition College confirmed the
Prosecutor’s view that the concentration did not cause a significant restriction of competition
because of conglomerate effects, and authorised the concentration.

On 29 June 2018, the BCA approved the acquisition of the residential care centres
and service flats of Senior Assist NV (SA) by Senior Living Group NV (SLG).13 SLG’s and
SA’s main activity is the provision of residential care services for the elderly through
the operation of residential care centres and service flats. To expand its offering in Wallonia,
SLG sought to acquire shares in legal entities active in the services of care centres and service
flats held by SA. The Prosecutor defined two types of relevant markets: (1) the local markets
for the operation of care centres; and (2) the local markets for the operation of service flats.
The Prosecutor then identified the markets in which the parties would have a combined
market share above 25 per cent after the transaction. It analysed the concentration of those
markets before and after the transaction to determine if competition would be significantly
impeded regardless of market shares higher than 25 per cent. In that regard, the Prosecutor
took the market shares of existing competitors into consideration to demonstrate that even
if SLG/SA would have high market shares after the transaction, there would still be enough
alternatives for consumers (enough competitors; both public and commercial). In particular,
it argued that in the markets in which SLG/AS is the entity with the highest market shares,
competition would not be significantly impeded if there were multiple competitors and if
the second-ranked competitor has a market share of at least half of SLG/AS’s market share.
Finally, the Prosecutor ruled out the risk for uncoordinated effects related to price increases
and quality reduction, because (1) the price regulations imposed by law and the obligation to
request a price increase severely restrict the free price setting by the operator; and (2) approval
standards stand in the way of a significant decrease in quality. The Competition College left
the geographical market definition open (instead of defining local markets as the Prosecutor
did) and reached the conclusion that the merger did not significantly impede competition in
the relevant markets.

On 29 June 2018, the Competition College gave approval to Roularta to acquire a
portfolio of titles from Sanoma Media Belgium NV and Sanoma Regional Belgium NV
(Sanoma).14 Roularta operates on the market for newspapers, magazines, free papers, radio,
television, printing and online services (i.e., e-commerce), while Sanoma focuses on two
main media activities. With this operation, Roularta sought to acquire the sole control over
a series of Sanoma’s brands. After the implementation of the notified concentration, Sanoma
will only have a limited activity left on the Belgian market. The Prosecutor identified three
relevant markets, divided into a French side and a Dutch side: (1) the Belgian market for the
publication of Dutch and French magazines, (2) the Belgian market for the sale of advertising
space in Dutch and French magazines and (3) the Belgian market for heatset-offset printing
techniques. On the first two markets, Roularta would become the market leader with market
shares between 20 per cent and 60 per cent. On the latter market, Roularta and Sanoma are
vertically integrated, which is why it is a relevant market. Despite the high market shares, the
Prosecutor concluded that there was no risk of uncoordinated or coordinated effects in those

13 Decision No. BMA-2018-C/C-20 of 20 June 2018 in case No. MEDE-C/C-18/0013, the takeover by
Senior Living Group NV of residential care centres, service flats etc. of Senior Assist NV.
14 Decision No. BMA-2018-C/C-21 of 29 June 2018 in case No. MEDE-C/C-18/0016, the takeover
by Roularta Media Group NV of a portfolio of brands from Sanoma Media Belgium NV and Sanoma
Regional Belgium NV.
markets in light of the special dynamic attached to the markets in question. For example, the readers’ market and the advertising market are part of a two-sided market in which content is sold to readers, and advertising space is sold to advertisers. Since the number of readers influences the demand for advertising space (if there were fewer readers, fewer advertisers would be interested in buying advertising space), there is little risk of price increases in one of those markets because the effect on the other market would be negative. The Prosecutor also took into account the counterfactual. Given the declining income from advertising and the number of magazines sold, it was claimed by the parties that the transfer was the only option to ensure the continuity of the magazines. Following the Prosecutor’s proposal, the College authorised the concentration because it did not cause a significant restriction of the competition in the concerned market.

On 10 July 2018, the BCA authorised the takeover by Intergamma Holding BV (Intergamma) of 20 VNG Bouwmarkten stores operated by CRH in Belgium.15 Intergamma is a franchise organisation for distributors of products for the renovation and furnishing of houses by consumers and small contractors (do-it-yourself (DIY) products) and operates the ‘Gamma’ franchise formula. The 20 shops it sought to acquire already operated under the Gamma franchise formula, but at that time were independent franchisees. The transaction was part of a larger transaction, which the ACM had already approved in the Netherlands. The Prosecutor analysed the operation for two relevant markets: (1) the retail markets and (2) the supply markets for DIY products. A point of contention was the definition of the relevant geographic retail market. The Prosecutor found that the answer to that question depended on whether the franchisee’s market shares should or should not be attributed to the franchisor. The answer to the latter question depends on the extent to which the franchisees are free to determine their own commercial policy and if franchisees effectively compete with each other based on parameters other than their location. If the franchisee’s market shares were to be attributed to the franchisor, then the market would be national. If not, then the market would be local. The Competition College decided that in this case the question could be left open, as there would be no concerned market in either scenario. If the market was defined as national, the parties’ shares on it would not exceed 25 per cent after the transaction; while if the market was defined as local, then there would be seven markets in which the shares would exceed 25 per cent but, as none of them would overlap horizontally, those markets would not be concerned markets either. Finally, the Prosecutor ruled out horizontal and vertical uncoordinated effects because the structure of both the retail and supply market would remain the same after the transaction. The College therefore decided that there was no significant restriction of competition and approved the transaction.

On 12 December 2018, the BCA authorised electricity and gas distribution system operator (DSO) Iveg to absorb DSOs Imea and Integan to become a new entity named Fluvius Antwerpen.16 Iveg is a DSO responsible for the management of electricity, natural gas, sewage and heat networks in 17 municipalities. Imea is responsible for the management of electricity, natural gas and heat networks in six municipalities, while Integan is the network operator for cable communication in 14 municipalities. Each municipality chooses a DSO to operate its electricity and gas networks, and those DSOs rely upon an operating company

15 Decision No. BMA-2018-C/C-23 of 10 July 2018 in case No. MEDE-C/C-18/0017, Intergamma Holding BV/the VNG Bouwmarkten of CRH Nederland BV.
named Fluvius to manage the networks on a day-to-day basis. After the transaction, the newly created Fluvius Antwerpen would be managing all electricity and gas networks, which means that DSOs will only compete based on their respective investment and dividend policies. The sector for electricity and gas networks is strongly regulated by the VREG (the Flemish regulator for energy and gas) regarding price determination and quality standards. When defining the relevant market, the Prosecutor took into consideration competition for the market; the Prosecutor thus assessed the concentration regarding the local markets for the entry on the regulated market for the management of electricity and gas networks in a number of municipalities falling within the current scope of Iveg and IMEA, as well as all neighbouring municipalities. The College decided that these markets were affected, as the municipalities have a limited opportunity to choose a DSO, but the available choice is nevertheless very limited by the current and expected regulations. The College noted that first, the important VREG (the Flemish regulator for energy and gas) benchmarking regarding prices and quality reduces the parameters upon which DSOs can compete. Second, the limited competition that could result from differences in investment and dividend policy is limited by the fact that the municipalities are also the shareholders of the DSO that they designate. Given all of these reasons, the College has decided that DSOs do not compete sufficiently with each other for selection by a municipality to be able to speak of a restriction of competition created by the merger that would prevent approval.

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, 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’ 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. The parties must obtain approval for the proposed concentration before it can be implemented. 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.

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 recommended.

17 Article IV.7, Section 1 of the Code of Economic Law.
18 Article IV.11 Code of Economic Law.
19 Article IV.8 Code of Economic Law.
20 Article IV.10, Section 4 of the Code of Economic Law.
21 Article IV.66, Section 2, 2 of the Code of Economic Law.
22 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.
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:

- 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);
- reducing the risk of the Prosecutor finding the notification to be incomplete (which has a significant impact on the notification's timing);
- the Prosecutor can, at the parties’ request, exempt the notifying parties from providing certain information, which can make the notification less onerous; and
- 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.

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 BCA 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 BCA website. At the same time, an electronic copy of the notification and its annexes must be sent by email to the Secretariat of the BCA for the attention of the Prosecutor-General, using the email address indicated on the BCA website.32

As is the case in European merger control, the parties must suspend the implementation of the merger until it has been cleared.33 Failure to respect this standstill obligation can result in fines of up to 10 per cent of the notifying parties’ annual turnover.34 While the Code of Economic Law of 2013 took into account only the Belgian turnover for the calculation of the fine, the new law provides that the maximum fines will now be capped at 10 per cent of the worldwide turnover of the infringing undertaking.35

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.36 If incorrect or incomplete information is provided in a notification or a request for information, the information is not provided on time, or the notifying parties hinder or prevent the investigation, the notifying parties can be sanctioned with fines of up to 1 per cent of their respective annual turnovers.37 The same fines may apply in case of failure to notify a merger.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 (up to 80 per cent) of notifications are made using this procedure.

32 Article 3, Section 2 of the Royal Decree on the notification of concentrations.
33 Article IV.10, Section 4 Code of Economic Law.
34 Article IV.79, Section 1 and Article IV.80 Code of Economic Law.
35 This new maximum will apply only for infringements committed after the entry into force of the new Act on 3 June 2019. Infringements that have taken place and ended before the entry into force of the new law will be fined under the previous rules.
36 Article IV.10, Section 6 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.82, 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.
38 In the April 2019 modification of Book IV of the Economic Law, the relevant provision was by mistake omitted in the new Book IV. It is, however, expected that this mistake will be corrected within a short time (probably the relevant provision will be inserted also in Article IV.82, Section 1 Code of Economic Law).
39 Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations on 8 June 2007.
Belgium

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:

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 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.

As mentioned above, the Prosecutor has only 15 working days from the notification to decide whether the conditions for the simplified merger procedure apply and whether the concentration raises any objections or doubts as to its permissibility. If the Prosecutor fails to come to a decision before the deadline, the merger is deemed to have been approved. 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

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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 Cordeel Group NV Cordeel, ‘gun-jumping’ was also considered to be a special circumstance to set aside the simplified procedure.

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.70, Section 6 Code of Economic Law.

43 Article IV.70, Section 6 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.70, 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.70, Section 6 Code of Economic Law.
be rejected and a full notification under the regular procedure must be made.\textsuperscript{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.\textsuperscript{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’ 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.

\section{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 decision proposal 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 decision proposal to the Competition College within 25 working days of the day after the notification.\textsuperscript{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.\textsuperscript{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 10 working days.

No less than 10 working days after the communication of the Prosecutor’s reasoned decision proposal, the Competition College organises a hearing during which the parties and any interested third parties are heard.\textsuperscript{50} From the moment the Prosecutor’s decision proposal is

\textsuperscript{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.

\textsuperscript{47} Article IV.70, Sections 3 and 4 Code of Economic Law.

\textsuperscript{48} Article IV.64, Section 1 and 2 Code of Economic Law.

\textsuperscript{49} Article IV.64, Section 3 Code of Economic Law.

\textsuperscript{50} Article IV.65, Sections 3 and 4 Code of Economic Law.
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. 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. 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. The new Act provides that the Prosecutor can extend that deadline by another 20 days. Furthermore, the Prosecutor must submit its revised decision proposal within 30 working days of the decision. The parties may submit their written observations within 10 working days of the submission of the revised decision proposal. If the parties submit written observations, the Prosecutor may submit an additional decision proposal within five working days. A hearing must be held no less than 10 working days 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 BCA 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

51 Article IV.66, Section 3 Code of Economic Law.
52 Article IV.66, Section 3, 1 and 2 Code of Economic Law.
53 Article IV.67, Section 1 Code of Economic Law.
54 Article IV.67, 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.68, Sections 1 and 2 Code of Economic Law.
56 Article IV.68, Section 4 and Article IV.65 Code of Economic Law.
57 Article IV.69, 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.
58 Article IV.68, Section 1 and Article IV.65 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.
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 BCA, 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 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 contacts 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 BCA that the simplified procedure’s conditions indeed apply.

V OUTLOOK AND CONCLUSIONS

Since 2015, the number of notifications filed and the notification decisions issued has significantly increased when compared to previous years. In 2018, the number of concentrations filed under the regular merger control procedure remained as high as in 2017. 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 BCA expects the parties to a concentration to act diligently 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.

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 BCA 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 BCA 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. In 2018, 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 advocated 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. After a stakeholder consultation on the existing thresholds and the need to modify them, the BCA decided not to modify the thresholds for the time being. Finally, as was noted in the introduction, a new act was adopted on 25 April 2019 amending Belgian competition law. In particular, the Act introduces the worldwide turnover for the calculation of fines, and a stop-the-clock mechanism suspending the term within which the Prosecutor has to render a decision proposal, the term within which the College shall take its decision in regular proceedings and the term within which the Prosecutor has to render its decision in simplified procedures, with the time required for the parties to provide additional information requested or to offer commitments. The timing of the merger procedure will therefore become more uncertain. It remains to be seen how often the BCA will make use of its new powers to use this stop-the-clock mechanism.
Chapter 10

BRAZIL

Cecilia Vidigal M de Barros, Paula Beeby M de Barros Bellotti and António José D R da Rocha Frota

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, as provided in the Guidelines for Antitrust Remedies (published in October 2018). 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.

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.

**Twenty-First Century Fox/The Walt Disney Company**

The Walt Disney Company intended to acquire the totality of Twenty-First Century Fox’s capital. Given the antitrust concerns in the market of pay-TV sports channels, owing to the lack of competition and the fact that ESPN (one of the few competitors) is already owned by Disney, CADE conditioned the approval of the transaction on the sale of Fox Sports, among other measures negotiated in the Merger Control Agreement (ACC).

The divestiture of Fox Sports in Brazil aimed not only to avoid potential reductions of quality and diversity of available sports content, but also to avoid the potential increase of costs that could be passed on to customers.

**Monsanto Company/Bayer Aktiengesellschaft**

Bayer intended to acquire Monsanto’s unitary control. In Brazil, Monsanto operated through its subsidiaries, and CADE found that a merger would likely result in competition problems related to, among others, horizontal overlaps, and reinforcement of vertical integrations in the markets of soybean seeds and transgenic cotton.

To ensure the approval of the merger, the parties proposed: (1) the structural remedy of divestment of all Bayer’s current assets related to soybean seeds and cotton business, as well as the unit of non-selective herbicides based on ammonium glufosinate, on behalf of BASF for approximately €5.9 billion; and (2) a behavioural remedy involving the transparency of commercial policies, the prohibition of exclusivity requirements on the sales channels, tie-in sales and bundling, as well as requiring a wide and non-discriminatory licensing practice of its products. A trustee was assigned to support the monitoring of the commitments set forth under the ACC.

**Notifiable transactions**

The Brazilian 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

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4 Merger Case No. 08700.001097/2017-49 – decision by CADE’s tribunal dated 7 February 2018.
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.

In respect of transactions that have met the double turnover threshold requirement and relate to an acquisition of equity participation that 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; or

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 No. 17/2016 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

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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 Dampfschifffahrts-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.
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).

If a merger does not fall below the notification thresholds, the transaction is not subject to analysis by CADE. However, it is worth mentioning that CADE, pursuant to Article 88, Paragraph 7 of the Brazilian Competition Law, has discretionary powers to request the mandatory notification of any transaction that does not meet the turnover thresholds (based on complaints made by competitors or third parties) within one year of its closing. As a result, on 5 September 2018, CADE decided that a merger between two pharmaceutical companies had to be submitted for review, although the transaction did not fall below the criteria for mandatory notification (Administrative Proceeding No. 08700.006355/2017-83).

**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 Competition 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’:

a 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);

b establishment of contractual clauses that regulate the relationship between the parties; and

c 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 research and development (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:

a. classical or cooperative joint ventures;
b. 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;
c. 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;
d. 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;
e. 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
f. 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, owing 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

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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.

In 2018, CADE approved certain transactions that were conditioned to behavioural and structural remedies, such as the above-mentioned Twenty-First Century Fox/The Walt Disney Company and Monsanto Company/Bayer Aktiengesellschaft, and other transactions such as Praxair/Linde and Banco Itaú/XP Investimentos. Accordingly, in 2017 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. For this reason, CADE issued in October 2018 the guidelines on antitrust remedies, so as to establish a pattern on remedies to be applied in complex merger cases. In 2018, only one merger transaction was rejected (Companhia Ultragaz/Liquigas Distribuidora).

III YEAR IN REVIEW

Although no material changes to the law and rules related to merger control have occurred since 2016, it is noteworthy that the Guidelines for Antitrust Remedies (published in October 2018) have clarified CADE’s understanding concerning remedies to be applied in merger cases, and also provided information regarding:

a. the definition of behavioural and structural remedies;

b. the principles and legal basis related to each type of remedy;

c. the definition of ‘trustee’ and when to use it;

d. monitoring, revision and compliance of the ACC, such as penalties in case of noncompliance; and

e. aspects of regulated sectors and international cooperation related to merger cases that involve other jurisdictions.

Moreover, 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 December 2018, these two authorities executed a Normative Act 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, and to provide that transactions involving financial institutions are notifiable to both BACEN and CADE.

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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 www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf.


11 Merger Case No. 08700.00777/2017-76, approved on 15 June 2018.

12 Merger Case No. 08700.004431/2017-16, approved on 14 March 2018.

13 Merger Case No. 08700/002155/2017-51.
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 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. Owing to such conflict, certain companies were notifying transactions involving financial institutions solely to one of the competent authorities, which resulted in judicial discussions.

Although the relevant bill of law is pending approval by the House of Representatives, transactions involving financial institutions are notifiable to both BACEN and CADE, as set forth in the above-mentioned Normative Act executed between CADE and BACEN. 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.

### Significant cases of merger filings

On 28 June 2017, CADE rejected, by majority, the acquisition of Estácio Participações SA by Kroton Educacional SA. 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 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. 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 7 February 2018, CADE approved, with restrictions, the acquisition of Votorantim Siderurgia SA by its competitor ArcelorMittal Brasil SA. 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 eventual abuse of dominance, the merger was conditional on the execution of an ACC. In

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14 Merger Case No. 08700.006185/2016-56.
15 Merger Case No. 08700.006444/2016-49.
16 Merger Case No. 08700.002165/2017-97.
17 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
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.

On 5 June 2018, CADE approved, with restrictions, the merger between Praxair Inc and Linde Aktiengesellschaft in a recently incorporated Irish company. From a global perspective, the merger would impact every activity performed by the companies in the market of industrial and special gases. The Reporting Commissioner of the case stated that the evidentiary stage of the proceeding confirmed a general perception that this market is highly concentrated in Brazil, and the interested parties act as its main players. For this reason, and in order to mitigate potential competition concerns, the merger was conditional on the execution of an ACC that provides, among other remedies, the divestiture of several businesses and the prohibition of acquisition, by the company resulting from the merger, of any assets that integrate divested business.

On 11 October 2018, CADE approved, without restrictions, the merger between operations and shareholding bases of Suzano Papel e Celulose SA and Fibria Celulose Ltda, upon a corporate restructuring that resulted in the conversion of Fibria as Suzano's wholly owned subsidiary. Although the companies are vertically and horizontally related in many activities, such as wood commercialisation, manufacturing and commercialisation of cellulose and forestry activity, the authority concluded that other factors specifically related to this market (such as the fact that short fibre pulp is a commodity and, therefore, its prices are internationally established) would not trigger any competition concern.

On 7 November 2018, CADE approved, without restrictions, an associative agreement to be executed between Oi SA and TIM Participações, two of the largest telecommunication companies in Brazil. This associative agreement provides the network (2G and 3G) sharing between the companies in towns with a population of under 30,000.

### iii Gun-jumping cases

On 9 August 2018, CADE’s tribunal imposed a fine on GGSH Participações SA for executing an investment agreement with Rede D’Or São Luiz SA, by which the latter acquired 21.23 per cent of GGSH’s capital stock without submitting the transaction for CADE’s approval. After the investigation conducted by CADE, the authority decided that the relevant transaction should have been notified, which was why it was considered gun-jumping. The total fine imposed in this case was 700,000 reais.

Although this proceeding relates to 2016 and not the past year, it is still worth noting that CADE’s tribunal imposed a fine on Cisco Systems Inc and Technicolor SA18 for closing a transaction without CADE’s final approval, which was considered gun-jumping – this is the only case in which the parties executed a carve-out agreement to prevent effects in a determined jurisdiction where the transaction was not yet approved. However, CADE did not consider such agreement as effective compliance with the parties’ obligation not to consummate merger acts before competition clearance. The imposed fine was 30 million

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reais, representing the higher fine amount in relation to other gun-jumping cases analysed by CADE.\textsuperscript{19} After this transaction, no other proceedings based on carve-out agreements were analysed by CADE.

There are no provisions under Brazilian law that allow carve-out agreements as a means of avoiding gun-jumping. Based on the current understandings of foreign antitrust authorities,\textsuperscript{20} 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.

\textbf{iv Preliminary authorisation to close a transaction}

The last known case in which CADE authorised the closing of a transaction before its approval occurred on 13 December 2017, with regard to the transaction between Excelence BV and Odebrecht.\textsuperscript{21} In this case, 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 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 before 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.

\textbf{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.

\textsuperscript{19} 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); Aurizônea Petróleo and UTC Óleo e Gás (Merger Case No. 08700.008289/2013-52); and Potíóleo SA and UTC Óleo e Gás SA (Merger Case No. 08700.008292/2013-76).

\textsuperscript{20} Such as from the European Union, Canada, the United States and Germany.

\textsuperscript{21} Merger Case No. 08700.007756/2017-51.
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.22

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:

- A description of the transaction of up to 500 words;
- All the applicants’ information (corporate and financial data);
- The relevant information about the transaction;
- A copy of the documents in respect of the applicants and the transaction (agreements, MOU, companies’ annual reports, the direction chart, shareholders’ agreement, etc.);
- A definition of the relevant market;
- A description of the business and products offered by the companies;
- Structure of the demand;
- Assessment of monopoly in purchase power;
- Assessment of entry and rivalry conditions;
- Assessment of coordinated power; and
- Comments or information considered relevant.

### Confidential information

As a rule, the case records are public. CADE may treat certain parts of the transaction act as confidential such as:

- Commercial bookkeeping;
- The economic and financial situation of the company;
- Tax or banking secrets;
- The production process and industry secrets, notably industrial processes and formulas for the manufacturing of products;
- Revenues of the interested person;
- Date, amount and method of transaction payments;
- Documents that formalise a merger;
- Annual reports to shareholders or quotaholders, except when such document has a public aspect;
- Value and volume of sales and financial statements;
- Clients and suppliers; and
- Costs and expenses with research and development of new products or services.

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22 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.
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.

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: transactions that were filed with CADE, but that produced effects prior to CADE’s clearance; transactions that were not submitted to CADE and produced effects without CADE’s analysis and decision; and transactions that were not caught by the filing criteria but whose submission is requested by CADE.

The SG is in charge of the initiation of an administrative proceeding for assessment of a concentration act (APAC) 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.

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
Multi-jurisdictional cases and cooperation with foreign authorities
Although it is not possible to assess the exact number of transactions submitted to CADE in 2018 that had effects in multiple jurisdictions, it is clear that multi-jurisdictional cases have increased in recent years, and the cooperation between CADE and foreign authorities has strengthened. Since 2016, CADE has increased the enforcement of multilateral and bilateral agreements executed with foreign authorities (e.g., US Department of Justice, European Commission, Japan Fair Trade Board, China’s State Administration for Market Regulation) by actively cooperating with them not only in respect of merger cases, but also in investigations related to cartel conducts.

The main multi-jurisdictional cases notified in 2018 were the following: Siemens/Alstom (which was blocked by the European Commission on 6 February 2019, with the notifying parties thereafter requesting the termination of the proceeding in Brazil before the authority’s analysis); Bayer/Monsanto; and Praxair/Linde.
VI OUTLOOK AND CONCLUSIONS

In 2018, the number of mergers assessed by CADE’s Administrative Tribunal increased, by which six were approved upon the execution of the ACC and only one was rejected, as mentioned above. This indicates that the Brazilian authority is constantly 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, because of 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 that 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, whose guidelines were issued by CADE on October 2018.
I INTRODUCTION

Over the course of 2018 and the first half of 2019, 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.

II YEAR IN REVIEW

In 2018–2019, the Bureau opened 197 merger reviews – a 14 per cent drop in total reviews from 2017–2018, and the lowest number since 2004–2005. From April 2018 to September 2018, 114 merger reviews were concluded (including those carried over from the 2017–2018 year), 111 of which had no enforcement action taken. In the first term of 2018–2019, 49 merger reviews concluded with the issuance of an Advance Ruling Certificate (ARC) and 57 concluded with the issuance of a No Action Letter (NAL).

Although the Bureau initially anticipated issuing SIRs only in the case of ‘those very few mergers that raise significant potential issues’, in 2018–2019, 10 SIRs were issued, the same number as in 2017–2018. A 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 information requests to the parties where no SIR is forthcoming. The Bureau reported that it clears 100 per cent of its non-complex reviews and 91 per cent of its complex reviews within its target time frame according to the complexity of the review (called a ‘service standard’). The Bureau has reported that the average response time in 2018–2019 for SIRs was 78 days, and the average time to resolve matters after the date of SIR compliance was 131 days (but, in our experience, the time period to resolve after SIR compliance is typically much shorter – often one to three months after compliance –

1 Julie A Soloway and Cassandra Brown are partners and Peter Flynn is an associate in the Competition, Antitrust and Foreign Investment Group at Blake, Cassels & Graydon LLP. The authors also thank summer student Kevin Dowse for his research assistance.
meaning the average is skewed upwards by a limited number of complex files). The Bureau’s statistics also do not account for transactions where the parties and the Commissioner have entered into a timing agreement.

The issuance of a SIR does not signal that the Bureau will require a remedy. In 2018–2019, of the 10 SIRs issued, the Bureau estimated zero to two would reach the Competition Tribunal (the Tribunal) or result in a consent agreement. The Bureau further stated that it aims to engage in earlier and more substantive pre-SIR-issuance dialogue where possible. This effort aligns with the Bureau’s stated goal of increased transparency during the information-gathering process.³

At the Canadian Bar Association Competition Law Section Mergers Roundtable on 22 May 2019, the Bureau stated it planned to increase its focus on evidence presented with respect to efficiency claims under Section 96 of the Act. Currently, many parties submit conversations with executives as evidence of efficiency claims. The Bureau announced that it will now examine and test such evidence as rigorously as it tests for anticompetitive effects. The evidence will necessarily be case-specific, but the Bureau may generally include analysis and planning documents related to implementation of the merger; analysis of merger efficiencies and claims being made; and the impact of similar efficiency claims on past mergers.⁴

In March 2018, the Bureau published a draft of a guideline on merger efficiencies.⁵ It is intended to inform businesses and their advisers of the Bureau’s most recent experience conducting trade-off analysis under Section 96 of the Act, and the circumstances in which the Commissioner may exercise his discretion not to challenge an otherwise anticompetitive merger. The guideline on merger efficiencies is intended to apply to cases subject to a SIR and an analysis of efficiency claims.

The Bureau also continues to issue position statements describing its analysis in complex mergers and key transactions. Major transactions reviewed from June 2018 to February 2019 include the following.

1 **First Air/Canadian North**

On 26 February 2019, the Bureau announced that, following a thorough review, it determined that the proposed merger of First Air and Canadian North was likely to result in a substantial lessening of competition in the provision of passenger travel and cargo services. First Air and Canadian North are airlines that primarily serve the Northwest Territories, Nunavut, and Nunavik, as well as the cities of Edmonton, Ottawa and Montreal. Many communities in northern Canada rely on air services because of the large distances between communities and limited road infrastructure in certain areas. On 13 November 2018, the Minister of Transport directed Transport Canada to examine the transaction with respect to public interest under Section 53.1(5) of the Canada Transportation Act. When such a referral is made, the Commissioner is required to provide a report to the Minister of Transport regarding any potential prevention or lessening of competition that may occur as a result of the transaction – this is the first time under the current legislative regime that the

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³ Canadian Bar Association Competition Law Section, ‘Mergers and Reviewable Matters/Unilateral Conduct Committees Joint Roundtable’ (22 May 2019).
⁴ Canadian Bar Association Competition Law Section, ‘Mergers and Reviewable Matters/Unilateral Conduct Committees Joint Roundtable’ (22 May 2019).
⁵ Competition Bureau, ‘A practical guide to efficiencies analysis in merger reviews’ (20 March 2019); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04350.html.
Commissioner has provided such a report. The Bureau’s review focused on services offered by both airlines to communities in Nunavut and the Northwest Territories, and found that the transaction would likely result in significant competition concerns on almost all of the parties’ overlapping routes. The Bureau found that the merged entity would likely have the ability and incentive to materially raise prices and lower the quality of service to passengers and cargo customers.6 The final decision of the proposed merger will be made by the Governor in Council (Cabinet) based on advice from the Minister of Transport.7

ii Metro Inc/Familiprix/McKesson

On 18 February 2019, as part of its April 2018 consent agreement with Metro Inc (Metro) regarding the acquisition of the Jean Coutu Group (PJC) Inc (Jean Coutu), the Bureau announced it had approved Familiprix Inc and Corporation Groupe Pharmessor (Familiprix) and its affiliate McKesson Canada Corporation (McKesson), as the purchasers of Metro Inc’s (Metro) interests relating to 10 retail pharmacies in Quebec. Familiprix is a Canadian group of independent pharmacist owners that operates a network covering all of Quebec and parts of New Brunswick. McKesson is the largest wholesaler of pharmaceutical products in Canada. Metro provides distribution and franchise services to independent pharmacists, operating in Quebec under the Brunet, Clini Plus and Jean Coutu banners. Metro transferred property rights for five pharmacies each to Familiprix and McKesson in eight affected markets in Quebec.8

iii Postmedia/Torstar

On 4 December 2018, the Bureau obtained a court order to advance its ongoing investigation into a deal between Postmedia Network Canada Corp (Postmedia) and Torstar Corporation (Torstar) involving the transfer and closure of newspapers in Ontario. Postmedia and Torstar are Canadian newsmedia companies that operate across multiple print, online and mobile platforms.9 On 27 November 2017, Postmedia and Torstar announced the completion of a swap transaction involving the transfer of 41 community and daily newspapers in eastern and southern Ontario. On the same day, Postmedia and Torstar announced that 36 of the 41 newspapers would be closed following the deal. On 12 March 2018, the Bureau confirmed that, in addition to a normal course review under the merger provisions of the Act, it was investigating the transaction under the conspiracy provisions of the Act. The

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6 Competition Bureau, ‘Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act’ (25 February 2019); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04419.html.
Ontario Superior Court of Justice order requires one former and five current employees of Torstar to be interviewed under oath by Bureau investigators. There has been no conclusion of wrongdoing and no charges have been laid.\textsuperscript{10}

\textbf{iv} \hspace{1cm} \textbf{La Coop fédérée/Cargill}

On 23 November 2018, the Bureau announced that it had reached a consent agreement with La Coop fédérée (LCF) and Cargill Limited (Cargill) related to LCF’s proposed acquisition of Cargill’s Ontario grain business, retail crop inputs business and Cargill’s 50 per cent equity interest in South West Ag Partners Inc (South West). LCF is the largest agri-food enterprise in Quebec, providing growers with goods and services to support crop and animal production operations. Cargill is one of Canada’s largest agricultural input retailers and grain handlers. The Bureau concluded that the proposed transaction was unlikely to result in a substantial lessening of competition with respect to grain handling due to LCF’s limited pre-existing grain handling infrastructure in Ontario and the existence of effective remaining competition from well-established grain-handling entities. However, the Bureau concluded that the proposed transaction would be likely to substantially lessen competition in the retailing of crop inputs – specifically fertilisers and crop protection products – in certain local areas of southwestern and central Ontario. The Bureau found that the relevant geographic markets for crop input retailing were narrow because of the scarcity of on-farm storage in Ontario caused by smaller-scale agricultural production. Despite the fact that barriers to entry are generally thought to be low in the retailing space, the Bureau believed that new entry would be unlikely. As such, the Bureau concluded that the parties were close rivals with combined high market shares in some local areas, and the proposed transaction would result in the closure of one or more of the parties’ sites. To resolve the Bureau’s concerns, LCF has agreed to divest four Cargill retail locations in Ontario.\textsuperscript{11}

\textbf{v} \hspace{1cm} \textbf{Linde AG/Praxair}

On 26 October 2018, the Bureau announced that it had reached a consent agreement with Linde AG (Linde) and Praxair Inc (Praxair) that resolved competition concerns in Canada related to their proposed merger. Linde and Praxair are global industrial gas companies who operate production facilities and a network of filling stations and retail branches across Canada, through which they distribute industrial gases to customers across a wide range of industries. The Bureau found that a local or regional presence is often critical to a supplier’s ability to deliver industrial gases to customers in a reliable and timely manner. The Bureau identified Linde, Praxair and Air Liquide Canada Inc as the three major suppliers of industrial gases to customers across Canada and determined that the proposed merger between Linde and Praxair would likely result in a substantial lessening of competition in markets for the supply of specific industrial gases. To resolve the Bureau’s concerns, the parties agreed to divest Linde’s Canadian business, including production facilities, filling stations, retail sites, customer and


\textsuperscript{11} Competition Bureau, ‘Competition Bureau statement regarding La Coop fédérée’s proposed acquisition of Cargill Limited’s grain and retail crop inputs business in Ontario’ (14 November 2018); available online at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04403.html.

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supply contracts, and certain intellectual property. The Bureau approved Messer Canada Inc as an acceptable purchaser of Linde’s Canadian business. Messer is a major supplier of industrial gases in Europe and Asia. Given that Linde and Praxair’s businesses operate in many countries, the Bureau coordinated its review with other jurisdictions, including the United States Federal Trade Commission and the European Commission.\textsuperscript{12}

\textbf{vi United Technologies Corporation/Rockwell Collins}

On 1 October 2018, the Bureau issued an NAL concerning the proposed acquisition of Rockwell Collins Inc (Rockwell Collins) by United Technologies Corporation (UTC), indicating that the Commissioner did not intend to make an application under Section 92 of the Act at that time. The terms of the NAL are subject to the implementation of a settlement agreement between the United States Department of Justice (US DOJ) and the merging parties. Rockwell Collins and UTC are global aerospace systems suppliers that develop and manufacture aircraft systems and components, as well as other industrial products. The Bureau determined that the transaction likely would have lessened competition substantially in the markets for pneumatic ice protection systems and trimmable horizontal stabiliser actuators in Canada. However, the Interim Commissioner (who has since been appointed to a five-year term as the Commissioner) was satisfied that the implementation of the settlement agreement between the US DOJ and the merging parties would adequately resolve Canadian competition concerns stemming from the transaction. The Bureau worked closely with the US DOJ Antitrust Division and the European Commission Directorate-General for Competition in conducting its review.\textsuperscript{13}

\textbf{vii Pembina/Veresen}

On 2 October 2017, Pembina Pipeline Corporation (Pembina) acquired Veresen Inc (Veresen). The Bureau continued to review the transaction, as the Act permits the Bureau up to one year to review completed transactions. On 26 September 2018, the Bureau confirmed it had concluded its review of the acquisition and would not challenge the transaction. Pembina and Veresen are publicly traded pipeline transportation and midstream service providers operating in Western Canada and the Northwestern United States. Before the merger, Pembina and Veresen both provided pipeline processing and transportation of natural gas liquids in the Western Canadian Sedimentary Basin. The Bureau conducted an extensive review to assess whether the merger would likely result in a substantial lessening or prevention of competition with respect to ethane transportation in Western Canada. The Interim Commissioner determined that the evidence available was insufficient to support challenging the transaction before the Competition Tribunal (the Tribunal).\textsuperscript{14}

\begin{footnotes}
\item[12] Competition Bureau, ‘Competition Bureau statement regarding the proposed merger between Linde AG and Praxair, Inc.’ (26 October 2018); available online at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04400.html.
\end{footnotes}
viii Tervita/Newalta

On 20 July 2018, the Bureau announced that it would continue to review competition concerns related to Tervita Corporation’s (Tervita) merger with Newalta Corporation (Newalta) despite the parties’ announcement that the transaction had closed. Tervita and Newalta provide energy-focused waste disposal and environmental services in the Western Canadian Sedimentary Basin. The Act allows for a one-year period following the completion of a transaction during which the Commissioner may challenge a transaction. The Bureau is continuing to review the merger to determine whether it is likely to result in a substantial lessening or prevention of competition in the energy-focused waste disposal sector within the Western Canadian Sedimentary Basin.15

ix Stewart/Fidelity

On 20 August 2018, the Bureau issued an NAL with respect to the proposed merger between Stewart Information Services Corporation (Stewart) and Fidelity National Financial Inc (Fidelity). Stewart and Fidelity are insurance providers in Canada and the United States. The Bureau’s investigation related primarily to title insurance policies, which protect retail or commercial property owners and their lenders against losses related to the property’s title or ownership. The Bureau concluded that the likely geographic market for title insurance is provincial, as title insurance is priced and sold differently in each province. The Bureau also concluded that title insurance products constitute product markets distinct from other forms of title assurance, particularly title opinions. On this point, the Bureau considered evidence regarding the degree of substitution between title insurance and title opinions and concluded that the two products likely form a single product market on most commercial real estate transactions. The Bureau concluded that for at least a subset of real estate transactions a title opinion is not a close substitute for title insurance, but that even if the product market were to be defined as narrowly as title insurance alone, the proposed transaction would be unlikely to result in a substantial lessening of competition.16

x BASF/Bayer/Monsanto

On 27 June 2018, the Bureau announced that it had reached a consent agreement with BASF SE (BASF) in connection with its proposed purchase of assets that Bayer AG (Bayer) must sell following its recent acquisition of Monsanto Company (Monsanto). BASF is a publicly traded company engaged in the production and sale of chemicals and agricultural solutions for crop protection. Bayer is a global pharmaceutical, consumer health, animal health and crop protection science company. BASF’s Clearfield Production System for Canola (Clearfield) is a non-genetically modified weed control system used by leading canola seed growers in Canada. Nearly all canola varieties sold in Canada contain one of three herbicide tolerance traits: Bayer’s LibertyLink, which is contained in all canola varieties sold by Bayer; Monsanto’s Roundup Ready trait, which Monsanto uses in all its own canola varieties and broadly licenses to competitors; and BASF’s Clearfield trait, which is contained in certain canola varieties


16 Competition Bureau, ‘Competition Bureau statement regarding proposed merger between Stewart and Fidelity National Financial’ (4 September 2018); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04386.html.
of a number of seed companies. The Commissioner concluded that BASF’s acquisition of the Bayer assets would likely have substantially lessened or prevented competition in the supply of canola seeds and traits in Canada. To address the Commissioner’s concerns, on 28 February 2019, BASF agreed to sell its Clearfield trait and supporting assets to Corteva Agriscience.

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. 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.

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$96 million. 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).

Certain classes of transactions are exempted from notification, including transactions where all parties are affiliates of each other, an acquisition of real property or goods in the ordinary course of business, acquisitions of share interests in a combination for the sole

17 Competition Bureau, ‘Competition Bureau statement regarding BASF’s purchase of assets from Bayer AG following its acquisition of Monsanto Company’ (27 June 2018); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04378.html.
18 The Western Producer, ‘BASF sells Clearfield to Corteva Agriscience’ (28 February 2019); available online at www.producer.com/2019/02/basf-sells-clearfield-to-corteva-agriscience/.
19 Section 65(2) of the Act.
20 Section 123.1 of the Act.
21 This threshold is subject to adjustment for inflation, and annual adjustments are published in the Canada Gazette. C$96 million is the applicable threshold as of 2019.
22 Section 110(3)(b) of the Act.
23 Section 113(a) of the Act.
24 Section 111(a) of the Act.
purpose of underwriting the share or interest,\textsuperscript{25} acquisitions of collateral or receivables made by a creditor pursuant to a good faith credit transaction in the ordinary course of business,\textsuperscript{26} certain joint ventures,\textsuperscript{27} and where the Commissioner has issued an ARC.\textsuperscript{28}

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),\textsuperscript{29} 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 a SIR if it determines that further information is required to complete its review.\textsuperscript{30} This power is discretionary and not subject to oversight by the Tribunal or courts.

The issuance of a 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).\textsuperscript{31}

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.\textsuperscript{32}

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

\textsuperscript{25} Section 111(b) of the Act.
\textsuperscript{26} Section 111(d) of the Act.
\textsuperscript{27} Section 112 of the Act.
\textsuperscript{28} Section 113(b) of the Act.
\textsuperscript{29} 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.
\textsuperscript{30} Section 114(2) of the Act.
\textsuperscript{31} 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.
\textsuperscript{32} 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.33

Compliance with these requests may reduce the scope of, or potentially even the need for, a 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 a 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 a 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 a 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 a SIR at a maximum of 30 individuals.34 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 a SIR. If a party objects to the scope of a 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 who, after


34 ibid., at Section 3.4.2.
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 court\(^\text{35}\) 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.\(^\text{36}\) 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 a SIR is issued, the time frame is extended to 30 days from the date of compliance with the SIR.

**IV OTHER STRATEGIC CONSIDERATIONS**

Effective 5 March 2019, former Assistant Crown Attorney and Interim Commissioner of Competition Matthew Boswell was appointed as Commissioner of Competition for a five-year term. Mr Boswell joined the 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 2018.

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\(^{35}\) Subsection 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.

\(^{36}\) See, for example, *Pembina/Veresen* and *Tervital/Newalta*. 
Commissioner Boswell has recently outlined a more vigorous approach to enforcement regarding non-notifiable mergers, including the expansion of the Merger Intelligence and Notification Unit to increase its focus on detecting non-notifiable mergers.37 As such, we expect to see an increased number of post-closing investigations initiated by the Bureau.

V OUTLOOK AND 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.38 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.

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.


38 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).
I INTRODUCTION

The State Administration of Market Regulation (SAMR) is in charge of merger review in China. SAMR was established in April 2018 and is currently the exclusive enforcement authority of Chinese antitrust laws. Before the establishment of SAMR, the enforcement responsibilities of Chinese antitrust laws were shared by three separate agencies, namely the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM). MOFCOM was in charge of merger review before SAMR was founded.

In China, pre-merger notification is mandatory when a merger constitutes a ‘concentration’ and the entities participating in a merger meet a certain turnover threshold, which requires that during the previous fiscal year to the merger:

- the total global turnover of all the business operators participating in the concentration exceeds 10 billion yuan, and at least two of these business operators each has a turnover of more than 400 million yuan within China; or
- the total turnover within China of all the business operators exceeds 2 billion yuan, and at least two of these operators each has a turnover of more than 400 million yuan within China.

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 related to merger control have been promulgated, including:

- the Remedy Trustee Agreement Template for Merger Review (Merger Remedy Trustee Template), which was released on 27 November 2015;
Most recently, SAMR published a revised version of the Guiding Opinions for the Declaration of Concentration of Undertakings on 29 September 2018 (the 2018 version), which was last revised by MOFCOM on 6 June 2014 (the 2014 version). The revision primarily reflected the reshuffling of antitrust enforcement agencies and did not introduce substantive changes about merger review procedures to the 2014 version.

ii Enforcement

Administrative clearances of merger control filings

In 2018, SAMR and MOFCOM (before August 2018) approved 444 notified transactions unconditionally. Of the 444 unconditional approvals, 365 were cleared under the simplified review procedure. Four transactions were given conditions. Ninety-nine per cent of the transactions under the simplified review procedure were cleared within Phase I. In addition, penalties were announced in 14 cases for failure to notify in 2018, compared with six cases in 2017. Below is a brief description of a merger that faced longest review by SAMR and was ultimately cleared with conditions in 2018.

Linde and Praxair

On 30 September 2018, SAMR issued a conditional clearance decision on the merger between Linde AG (Linde) and Praxair Inc (Praxair). As two of the largest industrial gas providers in the world, SAMR was concerned that the merger between Linde and Praxair would hinder the competition in the market of industrial gas in China. To reduce the negative impact of the merger on market competition, SAMR required a complex package of remedies, including assets divestiture and behaviour monitoring.

Administrative penalty decisions

In 2018, SAMR published 15 administrative penalty decisions in relation to merger review:

a SAMR fined Thermo Fisher Scientific 150,000 yuan for breaching an obligation under the remedies in relation to Thermo Fisher Scientific’s acquisition of Lifei Technology Co Ltd.

b SAMR fined Grand Baoxin Auto Group Limited and Beijing Yanbao Auto Service Limited 300,000 yuan each for failure to notify in relation to their acquisition of Sichuan Ganghong Automobile Sales Co Ltd.

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3 The Guiding Opinions set forth the rules for titles of cases that undertakings shall adopt in declaration materials.

4 The Provisions on Imposing Restrictive Conditions set forth the rules for the determination, implementation and supervision in relation to restrictive conditions.
SAMR fined Wilmar International and CJ Corporation 150,000 yuan each for failure to notify in relation to their establishment of a joint venture that makes baking powder and similar products.

d  SAMR fined Shandong Sun Holdings Group 300,000 yuan for failure to notify in relation to its acquisition of three other companies.

e  SAMR fined China Merchants International Container Terminal (Qingdao) Co Ltd and Qingdao Port (Group) Co Ltd 200,000 yuan each for failure to notify in relation to their establishment of a joint venture.

f  SAMR fined China Merchants International Container Terminal (Qingdao) Co Ltd and Qingdao Qianwan United Container Marina Co Ltd 200,000 yuan each for failure to notify in relation to their establishment of a joint venture.

g  SAMR fined YunNan Metropolitan Real Estate Development Co 150,000 yuan for failure to notify in relation to its acquisition of shares of eight other companies.

h  SAMR fined Tianjin Haiguang Information Technology Ltd and Advanced Micro Devices Inc 150,000 each for failure to notify in relation to their establishment of a joint venture.

i  SAMR fined Paper Excellence BV 300,000 yuan for failure to notify in relation to its acquisition of Eldorado.

j  SAMR fined Yunnan Metropolitan Construction Investment Group 300,000 yuan for failure to notify in relation to its acquisition of Chengdu Global Century Exhibition & Travel Group.

k  SAMR fined GEM Co Ltd 300,000 yuan for failure to notify in relation to its acquisition of Wuhan GHM Auto Parts Remanufacturing Co Ltd.

l  SAMR fined Linde HKO and Dahua Group 300,000 yuan each for failure to notify in relation to their establishment of a joint venture.

m  SAMR fined China Duty Free Group Co Ltd 300,000 yuan for failure to notify in relation to its acquisition of Sunrise Duty Free Ltd.

n  SAMR fined Linde HKO and Guangzhou Iron & Steel Enterprises Group Co Ltd 300,000 each for failure to notify in relation to their establishment of a joint venture.

o  SAMR fined Gaoji Health Ltd 400,000 yuan for failure to notify in relation to its acquisition of Henan Haoyisheng Ltd.

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 simple cases. For example, for a merger between undertakings who compete in overlapping markets (horizontal merger), the market share requirement for a simple case is that the combined market share of the undertakings in any of the overlapping markets is less than 15 per cent. For a merger between undertakings who are either in an upstream-downstream relationship (vertical merger) or compete in adjacent markets, the market share requirement is that the market share of undertakings in each of the identified relevant markets is less than 25 per cent. In addition, notifications that concern establishment of joint ventures outside of PRC territory or acquisition of target companies located outside of PRC territory are qualified for the simplified procedure if the joint ventures or acquisition targets do not conduct business operations within PRC territories.
Despite meeting the above criteria, notifications may still be ineligible for the simplified procedure for reasons such as difficulties of defining relevant market or likelihood of potential adverse effects of the transactions on market entry, technology development, consumers, or national economic development. It is also worth noting that SAMR may revoke a simple case designation if (1) the notifying party has concealed any important information or provided any false materials or misleading information, (2) a third party has claimed that the concentration of undertakings has or may have the effects of eliminating or restricting competition, and has provided supporting evidence, or (3) SAMR has uncovered any material change in the circumstances of the concentration of undertakings or the competition condition in the relevant markets.

Pursuant to the Guidelines for the Notification of Simple Cases, after the official acceptance of a case filed under the simplified procedure, SAMR must publish an announcement of the simple case on its website for a period of 10 days. Any entity or individual (third parties) may lodge an objection with SAMR concerning its decision to classify the notification as a simple case, and provide any relevant evidence during the announcement period. Where SAMR finds that a case should not be qualified for the simplified procedure, it will require notifying parties to withdraw the case and refile under the normal procedure.

Waiting periods and time frames
There are broadly two review phases that a merger filing would have to go through with SAMR: the pre-acceptance phase and the formal review phase.

Pre-acceptance phase
When entities submit a merger filing to SAMR, a case handler will determine whether SAMR is able to formally accept the filing. This case handler will review the filing material for completeness, and may also seek clarification or more details if certain aspects of the filing are unclear or need to be supplemented. This pre-acceptance period generally takes six to eight weeks. From our experiences, the more thorough the initial filing material is, the more quickly SAMR will formally accept the filing.

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 from the date of official acceptance of the filing. During this phase, SAMR will review the merger filing and make a decision as to whether the merger should be cleared.

Phase II lasts 90 calendar days from the date of the notification of the further view. If SAMR 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, SAMR may extend the Phase II period by another 60 calendar days at the most when any of the following conditions is met: (1) the merging parties agree to extend the time limit for the review; (2) the documents submitted by the parties are inaccurate and require further verification; or (3) the circumstances relating to the filing have significantly changed after the notification by the parties.

If SAMR 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 sums up 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>Attachment of restrictive conditions Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>No restrictive conditions 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>Attachment restrictive conditions Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>No restrictive conditions Obtained</td>
</tr>
</tbody>
</table>

**iii  Parties’ ability to accelerate the review procedure**

Most mergers are time-sensitive. As a result, notifying entities usually hope for the merger review to proceed as swiftly as possible. To assist SAMR in making clearance decisions expeditiously on behalf of clients, we have adopted the following approaches in previous cases: first, we articulate why a merger is time-sensitive (e.g., one entity is a failing firm); second, we ensure that the filing material is meticulously prepared so that it meets SAMR’s acceptance requirements; and third, we respond to SAMR’s supplementary questions swiftly.

**iv  Third-party access to the file and rights to challenge mergers**

Third parties do not possess any statutory rights to access merger filing material, but they do possess a right to challenge mergers during the review process.

During its review process, SAMR may seek opinions from third parties (including government agencies, industry associations and other entities) with respect to the proposed merger, 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 (effectively on 1 January 2010), third parties may be involved in the merger review process if the merger review agency 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 through these hearings.

**v  Resolution of authorities’ competition concerns, administrative reconsiderations and judicial review**

Pursuant to Article 29 of the AML, SAMR has the right to impose conditions on mergers to alleviate their negative impacts on competition. Article 29 gives SAMR wide discretion to impose a variety of both structural and behaviour conditions, including divesture of assets, commitment to sell in fair, reasonable and non-discriminatory terms, and commitment not to compete with buyers of divested assets for specific customers.

Further, according to the Provisions on Imposing Restrictive Conditions (effective on 5 January 2015), notifying parties can propose restrictive conditions either before or after
competition concerns are raised by SAMR. SAMR will then consult with the notifying parties in respect of such restrictive conditions, seek relevant opinions and conduct an evaluation before making a decision.

Pursuant to Article 53 of the AML, if notifying parties are not satisfied with SAMR’s decisions, they may seek administrative review of the decisions by Department of Regulations of SAMR.

Entities who are dissatisfied with the appeal decisions of Department of Regulations of SAMR may then seek further review of its decisions by the State Council of the People’s Republic of China or judicial review of administrative decisions by the courts. In the former case, the administrative decision of the State Council is final.

Entities can only seek a review of SAMR’s decisions for an error of law that may include, for example, unlawful application of administrative procedures or abuse of administrative discretion.

vi Effect of regulatory review

SAMR is the exclusive authority in charge of merger review. Therefore, there is no concurrent review of mergers in China.

During the review process, SAMR regularly consults with other government agencies about certain mergers. For instance, SAMR may consult with the State Administration of Radio, Film and Television (SARFT) and seek SARFT’s opinions on a merger in the broadcasting industry; for mergers in the semiconductor industry, SAMR may consult with the Ministry of Industry and Information Technology for its opinions. Because such consultation can be time-consuming, entities should take into account the length of cross-agency consultation when timing a merger filing. Practically, a merger filing may lapse into Phase II while SAMR awaits opinions from other government agencies.

Furthermore, pursuant to Article 26 of the AML, business operators shall refrain from implementing the mergers during the review phase.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions

In recent years, SAMR has enhanced its cooperation with antitrust authorities in other jurisdictions.

On 27 July 2011, MOFCOM (now SAMR) signed a memorandum of understanding (MoU) with its US counterparts (i.e., the US Federal Trade Commission and the Department of Justice). The MoU listed several specific areas for cooperation, including sharing experiences on competition law enforcement and exchanging information regarding specific mergers.

Since the enactment of the AML in 2008, SAMR has signed MoUs with competition authorities in 13 countries and regions, including Brazil, Spain, Russia, Austria, Canada, Kenya, Portugal, South Korea, India, Australia, South Africa, the United States and the EU.

In the context of multi-jurisdictional merger review, SAMR monitors the progress of merger control reviews in other jurisdictions closely. SAMR may also ask the entities involved in the proposed transaction to provide information on the status of their filings in other jurisdictions. In 2018, SAMR cooperated with competition authorities of foreign jurisdictions, such as the United States or the EU, in several cross-border mergers and acquisition cases, including the merger between Linde and Praxair.
ii  Special situations

Financial distress and insolvency

Under Article 54(2) of the now-repealed Acquisition of Domestic Enterprises by Foreign Investors Provisions, foreign entities that hoped to purchase domestic entities under the financial distress or insolvency could apply to SAMR for an exemption of notification or review. Currently, although there are no statutory exemptions of merger review concerning acquisition of entities in financial distress or insolvency pursuant to the AML or related regulations and rules, SAMR will take this factor into consideration during the review by, for example, expediting the review. In addition, pursuant to 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 a concentration.

Hostile transactions

Although neither the AML nor other antitrust regulations unambiguously state that hostile transactions are reviewed differently from non-hostile transactions, the acquiring party to a hostile transaction may face some practical difficulties in the review process. In a hostile transaction, the acquired target may not be cooperative in providing proprietary information, such as the market data of the acquired target, which is necessary for the filing. Even though Article 13 of the Guiding Opinions for the Declaration of Concentration of Undertakings has provided that the acquired target shall assist the acquirer’s filing, there are no specific rules about the legal liabilities of breaching the obligation to assist. Based on our experiences, a possible solution is that the acquiring party can apply for pre-notification consultation to inform SAMR of potential difficulties and try to request SAMR to accept alternative solutions.

Minority ownership interests

Acquisition of minority ownership interests may give rise to a notifiable transaction if such acquisition confers ‘control’ of the target company on the acquirer, although there are no specific provisions under the AML or related regulations and rules that address the acquisition of minority ownership interests.

In practice, SAMR may 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. 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 AND CONCLUSIONS

i Pending legislation
The following measures in relation to merger review are still in draft form:

a Tentative Measures for Investigation and Handling of Concentration of Business Operators Not Satisfying Notification Thresholds But Involving Alleged Monopoly Acts (released on 19 January 2009 by MOFCOM);
b Tentative Measures for Collection of Evidences on Concentration of Business Operators Not Satisfying Notification Thresholds But Involving Alleged Monopoly Acts (released on 6 February 2009 by MOFCOM); and

c Merger Review Procedure (revision in process).

ii Unresolved issues
It would be useful if the SAMR clarified matters pertaining to companies with variable interest entities (VIE) structure. Because the legality of the VIE structure is still unclear under Chinese law, normally SAMR would not accept notifications of concentrations involving companies with VIE structures. It remains unclear how SAMR will deal with this issue in the future.

In addition, it would be helpful if SAMR issued more detailed merger clearance decisions, such as proposed market definition or summary of competition analysis. Currently, SAMR publishes its decisions only for mergers that it has approved with conditions or prohibited, and brief summaries of cases under the simplified procedure for the purposes of public announcement. For mergers it has approved unconditionally, which account for a large proportion of reviewed cases each year, it only publishes the name of the transactions without providing any substantive details. If SAMR can disclose more details about its decisions in relation to unconditionally approved mergers, not only is it useful for the notifying parties to understand SAMR's thinking, but it also helps to improve the transparency of the merger clearance process.
Chapter 13

COSTA RICA

Edgar Odio

I INTRODUCTION

The Law for the Promotion of Competition and Consumer Protection No. 7492 (the Competition Law) was enacted in Costa Rica in 1994 and came into effect in January 1995. The Competition 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: the Competition Promotion Commission (COPROCOM) and the National Consumer Commission, respectively. 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 Competition 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 Competition 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 Competition 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 before issuing its final decision. COPROCOM’s opinion is not binding for SUTEL. The same applies to SUGEVAL 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 before 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.

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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 most significant case reviewed by COPROCOM in the past year was the proposed acquisition by Walmart of the fourth-largest retail chain in the country, Gessa, which owns 52 stores in three different formats. Walmart is the largest supermarket chain, with 250 stores (divided into four different formats). Several things made this case very special. In its resolution 93-2018, COPROCOM rejected for the first time ever a concentration, and confirmed the opinion after both parties filed an appeal for reconsideration.

Even though in Costa Rica filing can be made pre-closing or within five days after closing, the parties filed before closing. As usual, the parties signed the transaction subject to COPROCOM’s approval and started preparing for closing. Despite this, COPROCOM issued a preemptive measure ordering the parties to stop all preparations for closing, including contacts between the parties. COPROCOM issued this order based on a simple statement by one party saying they were preparing for closing. There was no indication of any anticompetitive exchange of information, and no indication of implementation of the acquisition, or any other valid reason.

Walmart and Gessa filed the notification on 19 July 2018. The substance of the filing was based on an economic study prepared by an independent economist. This study contained a geographic and product market definition, and an analysis of such markets in terms of market shares, prices, barriers to entry, direct competitors and consumers’ preferences, among others. The study contained economic evidence for all aspects of the case.

The study clearly showed that Gessa was not a direct competitor of Walmart because the differences in the prices charged to their customers was very significant, up to 12 per cent in many cases. So, Gessa represented a very small, if any, competitive pressure for Walmart. The study also showed that even though there was some overlap, in most geographic markets there were enough competitors to restrain Walmart, and 11 of Gessa’s stores are located in a region of the country where Walmart is not present.

As part of the notification, Gessa argued that its financial situation had been deteriorating for more than two years, during which 11 stores had been closed and 300 employees’ contracts had been terminated. Gessa specified this allegation in a separate and confidential document addressed to COPROCOM. Employees and consumers will be impacted if Gessa continued closing stores, particularly in those areas where Walmart is not present. Suppliers’ sales will also decline as more shops go out of business.

In spite of all the economic evidence and the appeals filed by the parties, COPROCOM rejected the acquisition. The most relevant points of the resolution are the following.

i Market definition

Contrary to the evidence presented in the economic study, and with no evidence to support the finding, the product market was defined as the supermarket chain at a national level (product and geographic dimension). In this market there are five players: Automercado, Megasuper, Perimercado, Pricesmart and Walmart. So, independent supermarkets, convenient stores, minishops and small supermarkets were left outside the relevant market, because they do not do business at a national level and cannot achieve the volume, costs and economies of scale of the supermarket chains. Chain supermarkets usually offer parking spaces, a larger number of stock-keeping units and supplementary services, which independent and small shops cannot offer. The downstream market was also defined on similar basis. COPROCOM rejected the market definition offered in the economic study filed with the petition and narrowed the product definition to supermarket chains. The geographic market was also defined at the
national level, which is contrary to any logic, as people only travel a certain distance to buy their groceries, and would not shop in a supermarket on the other side of the country just because it has the lowest prices.

This resulted in higher concentration ratios in both the upstream and downstream markets.

ii Market power

Based on that market definition, COPROCOM concluded that Walmart already has market power and the deal will enhance such power. Market share is 69 per cent on the downstream market and 67 per cent in the upstream market and will increase to 74 per cent post-merger. Entry barriers include large economies of scale, sunk costs (publicity, trademarks) and large purchase volumes. Therefore, the market structure is already very concentrated and there are few competitive pressures. This conclusion ignored the dynamics introduced in the market by convenience stores and neighbourhood supermarkets, which are mainly owned by Chinese entrepreneurs.

iii Anticompetitive effects

According to COPROCOM, Walmart is already too big and has market power that is used to buy large volumes and push suppliers’ prices down. Taking away one large competitor would only increase such market power. The merger would: (1) increase Walmart’s market power; (2) increase the risk of coordinate effects; and (3) increase Walmart’s ability to increase prices for consumers. But again, no evidence was presented to support this conclusion.

COPROCOM concluded that because the market structure is already too concentrated, and the authority cannot ask the parties to improve market conditions existing before the merger, there are no structural or behavioural remedies that can be used to reduce or balance the anticompetitive effects of the proposed merger. Therefore, the authorisation to the merger was denied without pointing to the specific anticompetitive effects and without giving the parties the opportunity to propose remedies. This was probably a big mistake by COPROCOM because Walmart had announced even before the notification a plan to double the number of stores in the country. So following COPROCOM’s reasoning, Walmart’s market power will increase regardless of the transaction. And if that is the case, COPROCOM may have missed the opportunity to approve the transaction subject to conditions that could have addressed the alleged increase in market power.

The parties argued that according to the evidence file the concentration would have benefited consumers because prices in Walmart’s stores are much lower than prices in Gessa’s stores. This was particularly important for consumers located in the 11 areas where Walmart was not present and would have taken over Gessa’s stores.

In the upstream market, Walmart’s logistics would have introduced efficiencies in the operation of Gessa’s stores, in particular by increasing the volume of the distribution centre from 50 per cent to 85 per cent, allowing suppliers to reduce their distribution costs. Walmart’s support programmes would have also benefited Gessa’s suppliers, particularly SMEs, and would have opened opportunities for them to increase their sales to a national or regional level.

Although some suppliers and suppliers’ associations filed comments with concerns about Walmart’s increase in bargaining power, the Commission did not gather any quantitative evidence to explain how suppliers would recover sales lost as a result of Gessa’s deteriorating condition.
Surprisingly enough, COPROCOM requested and gathered information from only 24 suppliers, but not from consumers or consumers’ associations. So, it seems that more importance was given to large suppliers than to consumers.

On a separate matter, it is important to mention that the owner of an independent drugstore filed a constitutional appeal against the sections of the law that regulate merger control, based on the allegation that the law did not allow him to actively participate in the review process of an acquisition of a drugstore chain by one of the largest distributors, which is vertically integrated and owns a large drugstore chain. This acquisition was approved subject to conditions. The constitutional appeal is under review and it may take about a year until the court issues its opinion.

III THE MERGER CONTROL REGIME

The Competition 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 increasing 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 preceding 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:

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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 Competition Law.
a detailed description of the transaction;

b a description of the entities involved;

c audited financial statements of the past three years; and

d 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.

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:

a 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, before the concentration, efforts have been made to seek other purchasers or alternatives to the concentration.

iii 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;
limiting the sale of products or services;

an obligation to provide or sell certain products or services;

introduction, amendment or elimination of certain contractual provisions; and

any other condition that may be required to prevent, reduce or counterbalance the anticompetitive effects.

Conditions and remedies must have a maximum term of 10 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.

iv 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 before 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 Competition 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 a 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 10-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 10 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
The Merger 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 before the amendment of the Competition 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 before closing was a concern in local trade associations when the bid was being discussed in Congress. Many felt that notifying before 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 AND CONCLUSIONS

COPROCOM seems to have taken a more political rather than technical approach in some of the cases. This brings more attention to the UNCTAD’s and OECD’s peer reviews that called for more independence.

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 conducted a peer review in 2014.³

To comply with the OECD standards, the government has presented a new bid to Congress. This bid covers all aspects pointed to by the peer reviews. With regard to merger control, a whole new chapter is added to the law to simplify the procedure. The possibility to notify after closing is eliminated and the system will become an ex ante notification system. The thresholds are increased, and the authority is authorised to modify them within certain

parameters. The proceeding is divided in two phases, including a fast-track phase. The bid is subject to modifications by congressmen, but it is almost certain that it will be passed this year.

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.
Chapter 14

CROATIA

Goran Durmiš, Ivana Ostojić, Tea Ivančić and Izabela Beber

I 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. 47/2009).

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.

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With regard to merger control, specific requirements may need to be fulfilled 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:
- a merger of undertakings;
- an acquisition of undertakings; or
- 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:
- 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
- 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 before 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

Following the marking of 20 years of the Croatian Competition Agency, the Agency continued to actively promote the importance of competition law policies. In their report for 2017, published in September 2018, the Agency actively participated in preparing amendments to the existing competition law regulatory framework. As a part of these activities, the Agency proposed amendments to the existing Competition Act, but the amendment are yet to be enacted by the Croatian parliament. The Agency was also active in participating the meetings of ECN and the preparations for the proposal of the Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.4

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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 significantly ease 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. In the course of 2017 the Croatian government issued an amended Decision on the criteria for the release from or the decrease of the administrative penal fine (Official Gazette No. 96/2017) – through this amendment Croatia has now fully implemented the EU regulatory framework associated with the Damages Directive.

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 2018, it should be noted that throughout 2018 the Agency continued to deal 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. originally approved in 2014, and the Agency continued with the monitoring of this transaction throughout 2017, as the Agency only approved these concentrations conditionally. All the parties concerned have committed to implement 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 2018 and the report of the trustee found that Agrokor complied with all divestment and other structural requirements, with the concentration having on 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 an 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.

In 2017, the Croatian Competition Agency handled 645 cases, with 18 cases continuing in 2018. Below is a brief outline of the most notable merger control cases in 2018.

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i  **ADRIS Grupa/Expertus**

The Agency approved the acquisition of the direct control over Expertus with respect to the 77.78 per cent of the share capital in that undertaking by Adris Grupa. With the implementation of this concentration, Adris Grupa would also acquire indirect control over the undertakings HUP-ZAGREB, Hotel Dubrovačka rivijera and Astoria. Through the acquisition of the market leader, Adris Grupa would strengthen its position in the Dubrovnik-Neretva County and enter the regional market of the City of Zagreb. With the implementation of this concentration, Adris Grupa takes second position in the national market, following Valamar Riviera.

The Agency concluded that this might have a beneficial market effect as it would increase the competition between three major players, creating an overall positive effect for the consumers.

No reactions were received by the Agency upon their public invitation for interested parties to deliver their comments, and in the assessment of the Agency the acquisition would overall have positive effects on market competition and contribute to market diversification.

ii  **WKB 3 and Hystead/Manta**

In March 2018 the Agency approved the acquisition of the indirect control over the construction, planning and real estate company Manta by Hystead Limited and WKB 3 GmbH.

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 acquisition would have overall positive effects on market competition.

iii  **Teramedia/Televizija Dalmacija**

The Agency cleared in the first phase the concentration between the undertakings Teramedia and Televizija Dalmacija in the form of the acquisition, from Split, of a direct controlling interest over the undertaking Televizija Dalmacija d.o.o. (film, video, television) by Teramedia d.o.o. (production and broadcasting of television and radio programmes) on a permanent basis, in the form of acquisition of the majority interest within the meaning of Article 15(1)(2) of the Competition Act (Official Gazette, 79/09 and 80/13).

The Agency concluded that the concentration in question would produce no anticompetitive effects in the relevant market.

iv  **Daruno CEE Holding Ivan Parać/PAN-PEK, PAN PEK Đakovo**

The Agency cleared the acquisition of joint control over the undertakings PAN-PEK Zagreb and PAN-PEK Đakovo by FARUNO from Luxemburg and Ivan Parać, Zagreb in the first phase of the proceedings.

The combined undertakings PAN-PEK Zagreb and PAN-PEK Đakovo are one of the most important bread producers in Croatia, and their fresh, frozen and packed bakery products are produced in Zagreb and Đakovo and distributed to final consumers in other retail chains, as well as in their own specialised store network.

After the assessment analysis of the relevant markets concerned, it was established that there would be no changes to their structure in the post-merger period.
v Slovenia Broadband/Nova TV
The Agency approved the acquisition of the direct control over the undertaking Nova TV Ltd from Zagreb by the undertaking Slovenia Broadband S.a r.l. with its seat in Luxembourg.

After the assessment of the structure of the relevant markets for (1) the wholesale and retail supply of TV channels, (2) the acquisition and use of individual audiovisual content, and (3) TV advertising, as well as the market power and the market shares of the participants to the concentration in these relevant markets, the Agency cleared this concentration in the first phase as it was assessed that the transaction at issue would not have significant effects on competition in the provision of the above-mentioned services and, even more importantly, that it would not create or strengthen a dominant market position.

The CCA took its decision only after the Electronic Media Agency on 26 March 2018 assessed the merger between Slovenia Broadband as ‘admissible’ in the sense of the special provisions of the Electronic Media Act.

vi Extra FM/HIT FM
The Agency approved the acquisition of direct control of HIT FM by Extra FM. The new undertaking has since changed its name to Extra FM Zagreb.

The Agency found that the concentration in question does not have significant effect on competition given the fact that it does not create or strengthen a dominant position of the parties to the concentration in the market concerned.

The Agency decision followed the decision of the Agency for Electronic Media of 19 April 2018, which cleared the concentration in question within the context of the Electronic Media Act.

vii TRIGLAV INT/Raiffeisen MOD
The Agency approved the acquisition of direct control over Raiffeisen MOD by the undertaking TRIGLAV INT.

The concentration between the undertakings concerned will produce effects in the pension insurance market. Namely, Raiffeisen MOD is currently the only pension insurance company that ensures payments from the mandatory and voluntary pension funds. Its activities have been regulated by a separate law – the Pension Insurance Companies Act – whereas its operation is under the supervision of the Croatian Financial Services Supervisory Agency.

In accordance with the data from the notification in question, significant changes in the pension insurance market are expected to occur after 2019, when the first generation of the members of the mandatory pension funds, who were born in 1962 or later, and cannot move back to the I Pillar,6 will have the right to early retirement pension. Therefore, there will be more users of the pensions from the mandatory pension insurance in the coming years, since more members of the mandatory pension funds will have the right to pension payments from the combined system.

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6 The pension insurance system in Croatia is based on three pillars of insurance – the first two are mandatory and the employer’s contributions are deducted from the employee’s salary and the third is voluntary. The first pillar of pension insurance is also the responsibility of the Croatian Pension Insurance Institute (HZMO). The employer calculates 15 per cent of the gross amount from a worker’s salary and pays it to the State Treasury.
The notification also reveals that from 2020 there will be more new entrants to the market in question. Potential competitors are presumably going to be the ones already active in the Croatian pension system market. For the members entitled to pensions it will mean more options for selecting a pension insurance company.

The Croatian Competition Agency cleared the concentration given the fact that it would not produce anticompetitive effects, or create or strengthen a dominant position in the market of any of the parties to the concentration.

RWE Hrvatska/i-energija

The Agency approved the concentration of the undertaking RWE Hrvatska, through its connected undertaking RWE Energija’s takeover of i-energija, a special purpose entity founded by Hrvatski telekom (HT). Both RWE Energija and i-energija were present in the Croatian energy supply market.

The participants to the concentration were present in both the relevant product and relevant geographic markets. In 2017, RWE held a market share of 5–10 per cent, whereas HT’s market share was zero to 5 per cent. Consequently, the post-merger market share of RWE Hrvatska would be some 5 to 10 per cent.

The implementation of this concentration will enable RWE Hrvatska to raise the existing RWE’s Energija portfolio of electricity end users and offer better service and access to new value-added products and services under better terms.

Given the defined structure of the market and the market power and market shares of the participants to the concentration in the relevant market, the Agency approved the concentration concerned, noting that it will have no anticompetitive effects as it does not create or strengthen a dominant position in the market of its participants.

ARH CEE HOLDING/Studenac

Here the Agency approved the concentration of the two companies. It found that the concentration would produce effects in the groceries retail market in the territories of Split-Dalmatia County, Dubrovnik-Neretva County, Zadar County, Šibenik-Knin County and Lika-Senj County.

With the target company, Studenac, already present in the market, ARH CEE, the acquiring company, would enter the market causing no changes to the market structure.

In 2017, Studenac held a market share of between 0–5 per cent and 10–20 per cent, depending on the county. Its most important competitors were Konzum, Tommy, Plodine and Lidl, as well as other regional retailers. In the whole territory of Croatia its market share ranges from 0–5 per cent.

The groceries retail market is very dynamic, with a rising trend, so there are many competing undertakings at the national, regional and local levels.

Taking into account the market structure, the market power and the market shares of the undertakings, participants in the concentration the CCA found that the concentration concerned will not produce any anticompetitive effects as it does not create or strengthen a dominant position in the market.
The Agency approved the acquisition of Petrokemija by INA and PPD, through their Terra mineral fertiliser company (TMG).

Given the aggregate turnover worldwide and the EU dimension, the proposed concentration was subject to obligatory notification to the European Commission.

The European Commission complied with the request of the participants to the concentration for case referral and transmitted the submission to the Agency as the best-placed national competition authority to investigate the matter concerned.

The Agency decided to agree with the referral respecting the argument of the notifying party that in this concrete case the territory of Croatia presents all the characteristics of a distinct market.

In the course of the investigation procedure, the Agency found that the transaction involved joint investment of INA and PPD in the recapitalisation of Petrokemija through a SPV, in which each of the shareholders (INA and PPD) holds a 50 per cent share. After the implementation of the proposed transaction TMG will hold a minimum 50 per cent plus one share in Petrokemija, thereby ensuring the notification parties to jointly confer indirect control over Petrokemija.

At the same time, INA and PPD (through TMG) will not operate in the gas supply market to any big industrial customers buying natural gas in Croatia.

As acquirers and suppliers of Petrokemija, INA and PPD are vertically integrated undertakings that are engaged in several activities in the energy sector. Apart from that, they are important gas suppliers in both the aggregate gas supply retail market and the gas supply retail market for big industrial customers in Croatia.

On the other hand, the mineral fertiliser production market expands the national borders given that there are also manufacturers from other Member States who compete in this market and buy natural gas from different international suppliers.

Petrokemija is the biggest industrial gas buyer in Croatia. At the same time, the undertaking is the only Croatian manufacturer of mineral fertiliser. It sells approximately 30 per cent of the produced volume in Croatia and exports the rest. There is no other fertiliser manufacturer that would be excluded from the market after the implementation of the concentration concerned.

In this concrete case the proposed implementation of the vertical concentration internalises the existing relationship between the supplier and the buyer between the participants to the concentration.

In a broader sense, the gas market in Croatia is liberalised and open, and therefore there are no entry barriers. This is confirmed by the Croatian Energy Regulatory Agency (HERA) as the specific regulator in this sector that the CCA closely cooperated with in the course of the procedure in question. According to the data obtained from the HERA there are 54 gas suppliers that have been licensed to carry out the activities in the gas market.

The gas supply market is fragmented and dynamic. There are new competitors entering this market and there has been a significant number of buyers who have switched to other suppliers. This indicates that the market is still not mature, however, the effects of developing competition in this market is present.

The exit of Petrokemija from the market because of long-lasting financial difficulties could have adverse effects on consumers through the likely increase in the price of agricultural
products and potential rise in the price of gas attributable to the increase in transportation tariffs that directly affect the final price of gas (as a result of the decrease in the total volumes of gas traded in the market).

Therefore, it can be reasonably assumed that the capital injection in Petrokemija would lower the price of products, improve production, shorten the trading and distribution process and enhance the performance of Petrokemija.

In the assessment of possible effects of the implementation of the concentration concerned the Agency took into account the economic analysis of potential effects of the concentration worked out by KPMG. The Agency concluded that the implementation of the concentration will not limit supply, in other words, it will not lead to the risk of vertical restriction in natural gas supply in Croatia. This was also confirmed by the finding of the HERA indicating the presence of other competitors in the market concerned and the absence of any formal barriers for other suppliers to take over the gas supply for big industrial buyers that are directly connected to the transmission system from the existing suppliers of these buyers.

There are no indicators that the concentration concerned would limit demand given the fact that in 2017 there was a total of 20 big industrial buyers that are directly connected to the transmission system. The market in gas supply to big industrial buyers rose in 2017 by 25 per cent, whereas the purchase of gas by Petrokemija made some 20 per cent in the total consumption of natural gas in Croatia in 2017.

Taking everything into account, it can be concluded that by the implementation of the concentration concerned the structure of all relevant markets will remain de facto the same; in other words, by the implementation of the concentration, the market position and the market shares of INA and PPD will not change in the gas supply markets in Croatia. They will continue to operate independently as competitors and will be encouraged to supply with gas other industrial buyers as they used to do it before the implementation of the concentration concerned.

There will also be no structural changes in the downstream market. This is because Petrokemija has no competitors in fertiliser production in Croatia, meaning that there is no competitor to Petrokemija that would be denied gas supply by INA and PPD. Petrokemija with its products will continue to participate in the international fertiliser production market.

INA and PPD replied that they intended to continue the trading with Petrokemija under market conditions and that Petrokemija would continue to publish invitation to tender for the supply of natural gas. All interested third-party natural gas suppliers could take part in the competitive bidding.

No replies to the request for information that was published on the website of the Agency with respect to the concentration concerned and its possible effects on competition have been received.

In adopting its decision, the Agency concluded that the concentration concerned will not have any anticompetitive effects given the fact that its implementation will not create or strengthen a dominant position of the participants to the concentration in the relevant market.
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, they publish 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 additional 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.\textsuperscript{7}

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.

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.

\textsuperscript{7} 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 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.\(^8\)

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).\(^9\)

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 AND 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 and new developments in the region and the European Union. The 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.


\(^9\) Ibid., p. 337.
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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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, a new Superintendent, Danilo Silva Pazmiño, was appointed in November 2018.

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, with an impact on the structure of the market, 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 (positive or negative control).
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.

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 2019 is US$394.
† 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

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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:

- 0.25 per cent of the income tax paid in the previous fiscal year in Ecuador;
- 0.005 per cent of sales obtained in the previous fiscal year from the undertakings’ activities in Ecuador;
- 0.01 per cent of the assets in Ecuador; or
- 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;

b. 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;

c. 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);

d. 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

e. 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.

In 2018, the regulator processed 24 merger control cases, the most recent clearances being the acquisition of Agip Oil Ecuador BV by the Pluspetrol Group and the acquisition of the Fybeca Group (a local pharmacy store chain) by the Mexican FEMSA Group. In a drastic turn of the tide since the last administration, the clearance of both transactions was publicly announced by the agency, and the resolutions of the Commission were published along with press releases.

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 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. These amounts have been moderated by Regulation 012, which mandates that the fines should be calculated only taking into account turnover in the relevant market, along with other aggravating or mitigating factors. The Regulation has been interpreted as an effort to moderate fines and respect the constitutional guarantee of proportionality after several courts annulled large fines related to abuse of dominance. However, the Regulation may have gone too far and several commentators argue that the fines have now lost their deterrent effect.

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 fines, in especially serious cases 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 and impose personal fines over the directors or legal representatives of the company. 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.

The first gun-jumping investigation began in 2018, resulting in a decision in 2019. The infringing undertaking was Unión Cementera Nacional UCEM, an Ecuadorian subsidiary of the Peruvian-based Gloria group. After identifying the potential gun-jumping, UCEM tried to reach a commitment with the agency, which stated that commitments are not applicable for gun-jumping cases, since the only way to cease the conduct would require unwinding the transaction. After setting aside the commitment request, the regulator proceeded with its investigation, which resulted in a fine of US$123,494.21 calculated over a turnover of US$13.9 million in the relevant market. The relatively small fine resulted from the aforementioned Regulation.

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.

i 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:

a. 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

b. 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 AND 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. More importantly, this bill contradicts global efforts of eliminating market-share thresholds, which tend to be much more subjective than monetary thresholds. Recently, members of the Intendency have written academic papers suggesting that a better way to move forward requires eliminating the market share threshold and leaving the turnover threshold in place.
I INTRODUCTION

i Merger control authority

Since a major overhaul of the French merger control regime (the 2008 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 decisions 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 Decree No. 2019-339 of 20 April 2019, which slightly amended the model notification form).

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. The FCA is currently reviewing such guidelines and has committed to publishing a new version in 2019.

iii Transactions that require prior approval

Notification to the FCA is required when the envisaged transaction qualifies as a concentration and, provided the EU 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:

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1 Hugues Calvet and Olivier Billard are partners, and Guillaume Fabre is an associate at Bredin Prat.
France

a two or more formerly independent undertakings merge; or
b 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
c 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:

a ownership rights or possession of all or part of the assets of an undertaking; or
b 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:

a all the undertakings that are party to the concentration have a worldwide aggregate pre-tax turnover in excess of €150 million;
b at least two of the parties concerned each have a pre-tax turnover in France exceeding €50 million; and
c 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:

a the combined worldwide pre-tax turnover of the parties exceeds €75 million;
b at least two of the parties concerned each have a pre-tax turnover in France exceeding €15 million in the retail sector; and
c 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:

a 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

c 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,

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3 Judgment of the Supreme Administrative Court dated 15 April 2016, appeal No. 375658.
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 in the EU.

II YEAR IN REVIEW

In 2018, 235 concentrations were reviewed and cleared by the FCA, five of which were cleared conditionally (that is, with remedies). So far in 2019, the FCA has adopted 108 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 FCA decisions in 2018 and early 2019.

i Fnac Darty

On 27 July 2018, the FCA adopted its first decision imposing a fine on the notifying party for failure to implement commitments. In July 2016, Fnac had been authorised, at the end of a Phase II investigation, to acquire exclusive control over its competitor Darty, on the condition that Fnac Darty would divest six points of sales. Fnac Darty divested three points of sales, but was unable to divest the three remaining points of sales within the time frame imposed by the commitments. Although Fnac Darty found a buyer for these three points of sales, the FCA considered that this buyer was not an adequate buyer, inasmuch as it could not, according to the FCA, exert sufficient competitive pressure on Fnac Darty (it may be noted that the independent trustee overseeing the implementation of the remedies in the name of the FCA had considered that buyer to be adequate). Fnac Darty was therefore left without a buyer a few days before the deadline for divesting the points of sales. The FCA accordingly opened infringement proceedings against Fnac Darty for failure to fully implement the commitments. In the course of these proceedings, Fnac Darty continued its efforts to remedy all the FCA’s concerns on the market. In particular, it spontaneously offered to divest two point of sales in lieu of the three points of sales it had failed to divest in time.

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(these two alternative divestitures being able to remedy the concerns the FCA had set out in its authorising decision). However, on 28 July 2018, the FCA adopted a decision finding that Fnac Darty did breach its commitments, imposing a fine of €20 million, and requesting Fnac Darty to divest the two alternative points of sales that Fnac Darty had offered to divest. The FCA also published a press release on the importance for companies to implement the divestiture commitments they make.

ii Dr Oetker/Alsa France

On 21 January 2019, the FCA cleared the acquisition of Alsa France by Dr Oetker, subject to conditions. In essence, both companies were involved in the manufacture and supply of ready-made desserts, baking powder, etc. According to the FCA, and in a nutshell, the parties’ combined market shares were significant (up to 70–80 per cent in some market segments), the parties were close competitors, retailers would not have sufficient buying power to prevent the risk of a significant impediment to competition and there was no credible potential competition that could discipline the merged entity. Accordingly, the notifying party offered commitments, consisting of, essentially, granting an exclusive licence over a trademark to a third party, for five years (extendable by a further five years). The notable point is that the parties offered a ‘fix-it-first’ remedy, meaning that the licensee of the parties is already identified and approved as an acceptable licensee in the FCA’s decision. To our knowledge, this is only the second time that the FCA has requested the parties to provide a fix-it-first remedy (the first case was in 2015). It cannot be excluded that the parties had already found a licensee, so that they were able to spontaneously offer a fix-it-first. It may also be that the FCA had doubts about the ability for the parties to implement the remedies and that, in the light of the Fnac Darty decision mentioned above, it did not wish to take the risk that the parties would fail to implement the commitments.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Filing has a suspensive effect, which means that in principle 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 formal notification. Where the FCA considers that the file is incomplete it may send a letter stating that such and such information is missing, therefore 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). The
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, 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 but ordered the parties to divest a brand and an industrial plant (when the parties do not offer remedies that are acceptable to the FCA, the FCA has the power to order divestitures). The Minister for the Economy adopted a decision on 19 July 2018, approving the concentration and waiving the orders that the FCA had imposed to the parties. According to the Minister for the Economy, the divestitures imposed by the FCA would have jeopardised the parties’ restructuring plan and their viability on a short-term basis, and would have increased unemployment in a region where unemployment was already high. Accordingly, the Minister for the Economy merely imposed on the parties an order to maintain their level of employment for two years.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).

Also, 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 rights attached to the securities at issue (this is thus similar to the rules of Article 7, Paragraph 2 of the EU Merger Regulation).

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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 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 share holdings 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,6 whereas in the remaining case, structural and behavioural remedies were accepted.7 In 2017, out of eight cases, the FCA accepted behavioural commitments four times,8 and a mixture of behavioural and structural remedies for the other four.9

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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 Scavyl with Sicarev, 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 Ecofolio 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 Équipement 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.
It is also interesting to note that the FCA used to have a well-established practice of requesting alternative or crown-jewel remedies (with some exceptions). Such commitments did 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 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. However, the disclosure of the existence of the crown-jewel commitments hinders the implementation of the by-default commitments, as competitors may refuse to buy the assets to be divested by default and get their hands on the crown jewels. Accordingly, the FCA has now stopped requesting crown-jewel commitments. It may nevertheless request the parties submit alternative remedies, in particular where it has doubts as to the possibility of the parties divesting the by-default assets. Such alternative remedies are published but leave it up to the parties to decide which assets to divest.

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

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10 Judgment of the Administrative Supreme Court dated 15 April 2016, appeal No. 390457.
11 Case No. 16-D-07.
commitment relating to the proper performance of a contract for the creation of an optic fibre network. As mentioned above, in July 2018, the FCA imposed a €20 million fine on Fnac Darty for failure to divest three out of six points of sales in the required time frame.

**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 divesture 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 refuse to approve a buyer alone, given the adverse consequences such decision might entail for the notifying party (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, 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.

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12 Case No. 17-D-04.
13 Judgment of the Administrative Supreme Court dated 30 October 2017, appeal No. 414655.
In the end, on 28 July 2018, the Administrative Supreme Court found that the FCA had erred in law because it had refused to consider Dray to be an adequate buyer by applying a methodology that tested the competitive pressure exerted by competitors on the points of sales to be divested (i.e., on Dray after it acquired the divested assets) and not on Fnac Darty. However, it also considered that, in any event, Dray was not an adequate buyer as there was sufficient doubt that it could exert competitive pressure on Fnac Darty. The Supreme Court accordingly dismissed Fnac Darty’s appeal.

A case is now pending before the Administrative Supreme Court, as Fnac Darty is challenging the legality of the FCA decision that imposed a €20 million fine for failure to implement the remedies.

### 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).

### OTHER STRATEGIC CONSIDERATIONS

#### 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, 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

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14 EU Member States and the Commission, Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority.
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 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 joint venture (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.15

**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.16 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

15 Case No. 16-DCC-34.
16 Case No. 09-DCC-06.
even for holding one preference share. In another case\textsuperscript{17} 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.

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.\textsuperscript{18}

**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.

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\textsuperscript{17} Case No. 09-DCC-064.

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 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 AND 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 decade of enforcement that it will not hesitate to explore its own methods of reviewing mergers. It 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 and structural commitments that it accepts in merger control proceedings.

On 20 October 2017, the FCA launched 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; and (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. It is currently engaged in the process of creating an online platform to allow the notifying party to notify transactions via the internet. The FCA also 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 therefore 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 when such cases 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, a new version of which should be published in 2019.
I INTRODUCTION

i Authorities

The national competition authority dealing in principle with mergers in Greece is the Hellenic Competition Commission (HCC). The HCC is an administratively and financially independent authority with a separate legal personality. The HCC consists of eight regular members with a five-year term and is under the supervision of the Minister of Economy, Competitiveness and Shipping. The HCC is assisted in its tasks by the Directorate General for Competition (DGC), which is headed by the Director General and is comprised of four Directorates and one Department.

In addition, the Hellenic Telecommunications and Post Commission (EETT) is competent for the enforcement of the Greek Competition Act, including merger control provisions, in the electronic communications sector. To date, the EETT has provided its clearance in two merger control cases in the electronic communications market (namely, the acquisitions of Hellas Online2 and Cyta Hellas3 by Vodafone).

All other economic sectors fall within the competence of the HCC.

ii Statutes, regulations and guidelines

The main piece of legislation relating to merger control in Greece is Law 3959/2011 ‘on the protection of free competition’ (Official Gazette A 93/20 April 2011), as amended and in force (the Greek Competition Act) (in principle, Articles 5-10). The Greek Competition Act abolished and replaced the former Greek Competition Act (Law 703/1977), under which a post-merger notification requirement applied. The Greek Competition Act mirrors, in essence, the provisions under the EU merger control regime.4

In addition, the HCC has rendered a number of decisions and notices covering the merger control field, such as (1) Decision 588/2014 ‘on the terms, conditions and procedure for the acceptance of commitments’, (2) Decision 558/VII/2013 ‘determining the specific content of merger notifications pursuant to the Greek Competition Act’ and (3) Notice ‘on the notification of concentrations with a community dimension (of 22 October 2009)’.

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1 Tania Patsalia is an associate at Bernitsas Law Firm. The author would like to thank Vangelis Kalogiannis for his valuable contribution to this article.
2 EETT Decision 733/047 of 18 September 2014.
3 EETT Decision 857/7 of 28 June 2018.
The HCC also takes into account the relevant EU principles, guidelines and case law as guidance on substantive assessment in merger review.

Finally, concentrations in the media sector (TV, radio, newspapers and magazines) are governed by both the Greek Competition Act and Law 3592/2007, as amended and in force (the Greek Media Law).

iii Pre-merger notification or approval

Under the current merger control regime, a mandatory notification system applies to certain categories of transactions (referred to as ‘concentrations’ under the Greek Competition Act) before their implementation, provided that a change of control on a lasting basis arises and specific jurisdictional thresholds are met.

In particular, under the Greek Competition Act, a change of control is deemed to arise where (1) two or more previously independent undertakings (or parts thereof) merge; or (2) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control of the whole or parts of one or more other undertakings.

In addition, full-function joint ventures (i.e., joint ventures performing on a lasting basis all the functions of an autonomous economic entity) are also considered as concentrations, therefore falling within the ambit of Greek merger control rules. To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of companies that remain independent, such coordination is examined under Paragraphs 1 and 3 of Article 1 of the Greek Competition Act (equivalent to Paragraphs 1 and 3 of Article 101 TFEU). For this purpose, the HCC shall take into account in particular (1) whether the parent companies retain, to a significant extent, activities in the same market or in a downstream, upstream market or closely related market; and (2) whether the coordination, which is the direct consequence of the joint venture, eliminates competition in a substantial part of the relevant market.

Concentrations shall be notified to the HCC (and not be put into effect pending the HCC’s outcome) where (1) the aggregate worldwide turnover of the undertakings concerned amounts to at least €150 million, and (2) at least two of the undertakings concerned realise, separately, an aggregate turnover in Greece of at least €15 million.

Guidance on the turnover calculations is provided under the Greek Competition Act (Article 10), whereas special rules apply with regard to the calculation of turnover of credit institutions, financial institutions and insurance companies.

Lower jurisdictional thresholds apply in the media sector. In particular, under Greek Media Law, a concentration must be notified to the HCC where (1) the parties involved have achieved an aggregate worldwide turnover of at least €50 million, and (2) each of at least two of the undertakings concerned generate an aggregate turnover of at least €5 million in Greece.

Where the above thresholds are met, the notification of the transaction before the HCC is compulsory and subject to the authority’s prior clearance, even if it is implemented outside Greece or the undertakings involved are established outside Greece (foreign-to-foreign transactions).
II YEAR IN REVIEW

i Statistics

According to publicly available information, the total number of notifications and cases examined by the HCC during 2000–2017 was 373.5 The number of decisions issued by the HCC, however, differs per year (usually between 10 and 20).

In 2018, the HCC issued 13 merger control decisions. Of those:

a eight cases were cleared by the HCC following a Phase I review (one of which also involved imposition of a fine for failure to notify and early implementation);

b four cases were led to an in-depth review (Phase II), of which two were unconditionally cleared and the remaining two were resolved with remedies; and

c one case involved the amendment of remedies that were undertaken under a former HCC conditional clearance decision.6

So far in 2019, the HCC has given its unconditional clearance to eight notified concentrations, and one was resolved with remedies.

ii Recent key cases

Below we set out some recent key merger control cases.

Dimera/Pigasos (acquisition of sole control, failure to notify, gun-jumping)

On 30 March 2018, the HCC assessed the belated notified acquisition of control over assets (trademarks) of the publishing entity Pigasos Ekdotiki Anonymi Eteria by the media entity Dimera Media Investments Ltd (Dimera) and simultaneously decided upon the ex officio investigation over the alleged wilful failure to notify and infringement of the standstill obligation by Dimera. It is worth noting that the matter arose during the HCC’s review over another notified concentration by the same company in 2017.8

The case at hand evidences the interrelation between merger control criteria under both the Greek Competition Act and the Greek Media Law, in the sense that the notified transaction was assessed against the relevant provisions of both sets of rules. In particular, the HCC provided its unconditional clearance (Phase I review) as it found that the belated notified transaction did not raise any serious doubts regarding its compatibility with competition rules on the markets concerned because it did not reach the dominance thresholds (i.e., 35 per cent in the relevant markets of TV and press and 32 per cent in total in both markets) provided by Paragraph 3, Article 3 of Greek Media Law. As such, concentration of control was not anticipated to occur in the said markets.

With regard to the failure to notify aspect, the HCC found that DIMERA – being an active company – was reasonably expected to be aware of and be diligent in complying with merger control legislation. The fact that another notification of concentration had already occurred by the same company back in 2017, which was cleared by virtue of HCC Decision 652/2017, was found to constitute proof of the fact that DIMERA was in complete knowledge of its notification obligation. As such, the HCC imposed a fine of €50,000 against

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6 HCC Decision 637/2017.
7 HCC Decision 655/2018.
8 HCC Decision 652/2017.
Dimera. In reaching this outcome, the HCC took into account (1) the lack of intent on the side of Dimera to conceal the transaction, (2) the duration of the infringement, (3) the good cooperation between the DGC and Dimera, and (4) the low market shares and group turnover generated in the Greek market.

With regard to the standstill obligation, the HCC ruled that Dimera had been engaged in certain implementing acts and exercise of control over the trademarks. In particular, following finalisation of the acquisition of the trademarks, Dimera proceeded with the notification of acquisition and registration of said trademarks to the competent trademark office or registry. In addition, Dimera granted to its subsidiary an exclusivity licence for the use of said assets before receiving the HCC’s clearance. The above acts were treated as acts of exercise of control over said trademarks by Dimera in violation of the standstill obligation, resulting in the imposition of a fine of €30,000 against the company. It is interesting to note that in this case the HCC decided to deviate from its previous rulings on the matter of presumption of lack of liability.

**Attica/Hellenic Seaways (acquisition of sole control, Phase II, remedies)**

By means of Decision 658/2018, the HCC granted its unanimous clearance to the notified concentration regarding the acquisition of sole control over Hellenic Seaways by Attica Group on the basis of remedies offered by the notifying entity.

The transaction was cleared following an in-depth investigation (Phase II review) for having raised serious concerns as to its compatibility with the requirements of the functioning of competition, especially by creating or strengthening a dominant position in the relevant ferry market of passengers, vehicles and heavy vehicles, both at a national level and at a port pairs level (definition of the relevant market on the basis of the origin-destination method). In this respect, Attica Group offered certain appropriate commitments, with the objective of releasing space for the entrance of new competitors in the port pairs where the acquiring entity would hold a dominant position and to maintain the frequency of the itineraries and level of fares at the same levels.

In particular, and as per the commitments undertaken, Attica Group would limit the frequency of its approaches to certain island destinations (Cyclades and North Aegean), provided that its competitors would cover these destinations with suitable vessels offering adequate service and at the same time add itineraries connecting islands in Greece, which were either not serviced at the time or were serviced sporadically.

**Masoutis/Promitheutiki (acquisition of sole control, divestments, gun-jumping)**

In another recent case, involving a merger in the supermarkets sector, and in particular, the acquisition of sole control over Promitheftiki Trofimon Anonymi Eteria by the company Diamantis Masoutis Anonymi Eteria – Supermarket (Masoutis), the HCC granted its conditional clearance following a Phase II review.

In particular, the HCC found that although Masoutis was not expected to significantly increase its market share at a national level in the relevant market (i.e., retail sale of supermarket products market), the combined market share of the new entity would significantly increase at a specific region (i.e., in the mainland of the island of Andros), raising serious concerns as

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9 Article 9 of Greek Competition Act.
11 HCC Press release of 26 April 2018 (decision not published yet).
12 HCC Decision 665/2018.
to its compatibility with the requirements of the functioning of competition. In this specific area of the island (mainland), the undertakings concerned operated three supermarkets, while their combined market share post-merger was expected to range between 85 per cent and 95 per cent based on turnover, and between 75 per cent and 85 per cent based on square metres. The HCC took into account that there were only three competing (mini) markets in the area, that did not have the power to effectively compete with the new entity. It is noted that the supermarkets sector constitutes a market that has been very narrowly delimited geographically on a radius basis (which makes concentration findings more likely) in accordance with relevant EU precedents. It is also interesting that, in this case, store size was also considered.

In light of such concerns, Masoutis undertook the obligation to sell one of the target’s stores located in the mainland of the island of Andros within an overall nine months’ period from issuance of the HCC decision and not buy-back same for a period of 10 years.

It is also interesting that in assessing whether a gun-jumping infringement had occurred, the HCC invoked the recent European paradigm and investigated whether an exchange of information between the two entities or other acts of exercise of control had occurred before clearance of the proposed transaction. According to the HCC, for the finding of a (prior) implementation of concentration the possibility of control over the acquired entity by the acquiring entity would suffice. In the case at hand, the HCC found, in majority, that no gun-jumping had occurred owing to the inclusion of an explicit clause, according to which the fulfilment of the transaction would be subject to the competition authority’s prior approval in the memorandum of understanding and the supplementary agreement, which was signed a day following the signature of the SpA. According to the authority, there was doubt as to whether Masoutis had obtained the possibility of control, considering that the company did not exercise in practice any managerial acts or voting rights in the Shareholders’ Meetings of the acquired entity, and as such, the early implementation of the concentration would not be considered likely. However, two HCC members dissented (including the chairman). In their view, certain acts (e.g., failure to include a ‘subject to’ clause in the SpA, and the acquiring entity’s access to the target’s management through the submission to Masoutis of the target’s BoD members’ resignations and access to the target’s financial and other information) were deemed as acts of transfer of management and property rights to Masoutis, conferring to the latter the possibility of control over the acquired entity.

**TRAINOSE/EESSTY (acquisition of sole control, super-dominant position)**

By virtue of a unanimous decision, the HCC recently approved the proposed acquisition of sole control over EESSTY SA (the Greek railway rolling stock maintenance entity) by TRAINOSE SA (Greek railway operator and subsidiary of the Ferrovie Dello Stato Italiane Group). According to the HCC’s press release, the competition on the relevant market will not be restricted significantly through the creation or strengthening of a dominant position as a result of the proposed merger, and the merger will not have a vertical effect on the affected markets, such as foreclosure of competitors’ access to the market of freight rail transport or customers, through the rolling stock maintenance services of the new entity, even though both companies hold a super-dominant position (TRAINOSE in the passenger and freight rail transport market and EESSTY in the repair and maintenance of railway rolling stock market).

14 HCC Press Release of 28 February 2019 (decision not published yet).
According to the HCC, this finding is based on the fact that the current regulatory framework and the competent regulatory authority (i.e., the Regulatory Authority for Railways) safeguard equal access for all railway undertakings to rolling stock maintenance services from EESSTY, with transparency and non-discrimination obligations for all existing or potential TRAINOSE competitors.

### III MERGER CONTROL REGIME

#### i Waiting periods and time frames

Specific deadlines apply under the Greek Competition Act with regard to pre-merger notifications of qualifying transactions and HCC scrutiny of the notified concentrations.

In particular, pre-merger filings must be submitted to the HCC within 30 calendar days from the conclusion of the agreement or the announcement of the bid to buy or exchange, or the assumption of an obligation to acquire a controlling interest in an undertaking. According to previous HCC case law, the above deadline may be also triggered by the execution of a preliminary document of a binding nature (e.g., memorandum of understanding). Such assessment is made by the HCC on a per case basis.

Where a wilful failure to observe the above statutory deadline occurs, the HCC may impose on the undertakings concerned a fine from €30,000 up to 10 per cent of their aggregate group turnover. Apart from HCC’s recent relevant decision in the Dimera/Pigasos case mentioned above, the HCC imposed one of its highest fines in the Minoan Flying Dolphins case for realisation and notification failure of 21 concentrations in the domestic maritime sector (i.e., approximately €6.3 million).

In addition, a mandatory suspensory effect of the notified transaction is also provided for under the Greek Competition Act. This means that the consummation of the transaction is suspended until the HCC decides to clear or prohibit the notified concentration. Derogation may be granted upon request for the reason of prevention of serious damage to one or more undertakings concerned or to a third party (full derogation).

The duty to suspend a concentration will not prevent the implementation of a public bid to buy or exchange, or the acquisition through the stock market of a controlling interest, when such transaction is notified to the HCC and provided that the acquirer does not exercise the voting rights attached to the securities or does so in order to protect the investment value and on the basis of a derogation granted by the HCC (partial derogation).

In the case of gun-jumping (violation of suspensory effect), the HCC may impose the same sanctions as above. In addition, if the concentration is realised contrary to a prohibitive provision or decision, the HCC may order (1) the separation of the undertakings concerned, through the dissolution of the merger or the sale of the shares or assets acquired, and (2) any other measure appropriate for the dissolution of the concentration or any other restorative measures.

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As regards review of the notified concentration, the HCC may examine it in one or two phases as follows:

a) If the notified concentration does not meet the statutory thresholds and, therefore, does not fall within the ambit of the Greek Competition Act, the chairman of the HCC will issue a decision to that effect within one month from notification.

b) If the notified concentration, although meeting the statutory thresholds, does not raise serious doubts as to the possibility of significantly restricting competition in the relevant markets, the HCC will decide to approve the transaction within one month from notification (Phase I clearance).

c) If the notified concentration meets the statutory thresholds and raises serious doubts as to its compatibility with competition conditions in the relevant markets, the HCC’s chairman will decide, within one month from notification, to initiate proceedings for the full examination of the transaction and will inform, without delay, the undertakings concerned (initiation of Phase II proceedings). In this case, the matter will be introduced before the HCC within 45 days. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or suggest commitments in order to remove any serious doubts as to the compatibility of the transaction with the competition rules in the relevant markets, and notify these to the HCC (within 20 days from the introduction of the case before the HCC). In this case, the matter will be introduced before the HCC within 45 days. Upon being informed that proceedings will be initiated, the undertakings concerned may jointly proceed to adjust the concentration or suggest commitments in order to remove any serious doubts as to the compatibility of the transaction with the competition rules in the relevant markets, and notify these to the HCC (within 20 days from the introduction of the case before the HCC). A decision prohibiting the notified concentration must be issued within a deadline of 90 days from commencement of the Phase II proceedings. If such negative ruling has not been issued upon expiry of the above deadline, the concentration will be deemed to have been approved and the HCC will have to issue an act to that effect. The HCC may attach conditions to the decision approving the merger.

The above statutory deadlines for the issuance of a decision by the HCC may be extended when (1) this is agreed by the notifying parties; (2) the notification form is incomplete; or (3) the notification is erroneous or misleading so that the HCC is not able to assess the notified concentration. Regarding points (2) and (3), the HCC is obliged to request from the notifying parties within seven business days from the date of notification of the correction of the initial notification. The deadlines for the issuance of a Phase I clearance or for the institution of Phase II proceedings are deemed to commence only upon submission of complete and accurate data.

In exceptional cases, the deadlines under bullet points (b), (c) and (d) are suspended if the undertakings concerned fail to comply with their obligation to provide information in accordance with the Greek Competition Act, and under the condition that they are advised accordingly within two days from the expiry of the time limit determined by the HCC for the provision of such information.

It is noted finally that ancillary restrictions that are directly connected to and necessary for the implementation of a concentration are also covered by HCC clearance decisions (although the HCC may require the restriction of any such ancillary restrictions in terms of scope or time, if deemed appropriate, in accordance with the relevant EU guidelines).

ii Parties’ ability to accelerate the review procedure, tender offers and hostile transactions

The Greek Competition Act does not provide for the notifying parties’ ability to accelerate the review procedure. In practice, the more complete and accurate information is submitted, the less time the review period will last.
Greece

With regard to the possibility for partial derogation in case of public bids, see Section III.i.

In terms of hostile transactions, it is noted that these are rarely dealt with by the HCC. One of the most published hostile transactions that has undergone HCC scrutiny extends back to 2010 (Vivartia/Mevgal case), whereas the acquisition of sole control over Mevgal was fulfilled only in 2014, by virtue of the HCC’s conditional clearance decision.\(^\text{17}\) Currently, control over Mevgal has been converted from sole to joint following the granting of the HCC’s conditional clearance.\(^\text{18}\) It should be also noted that the HCC, in its Decision 558/VII/2013 ‘determining the specific content of merger notifications pursuant to the Greek Competition Act’, explicitly provides that:

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\text{the parties obliged to notify may submit a written request to the HCC for the acceptance of their notification, even if they do not submit all the required information, if such information is not wholly or partially at their disposal (e.g., in case of an undertaking forming a hostile acquisition target).}
\]

iii Third-party access to the file and rights to challenge mergers

In general, third parties are not granted access to pending case files, including merger control cases.\(^\text{19}\) However, the HCC may invite third parties to act as witnesses in the hearing of a pending case, where their involvement is considered to contribute to the case review. In addition, third parties may also submit a memorandum to the HCC in the context of a pending case, including merger control, which is made available to the notifying parties. In limited cases, the HCC may allow third parties to obtain access to the non-confidential version of parties’ memoranda and records of the proceedings.

In essence, third parties obtain official knowledge of the proposed concentration by means of the publication of the notified concentration to a daily financial newspaper with nationwide coverage, following which they may comment or provide relevant information to the HCC within a period of 15 days.

iv Resolution of authorities’ competition concerns, appeals and judicial review

The HCC may clear the notified transaction subject to conditions so that the concentration may be rendered compatible with the applicable substantive test for assessing the legality of the merger (i.e., whether the notified transaction is likely to significantly restrict competition on the national market or in a substantial part thereof, taking into account the involved products’ services characteristics, particularly by creating or strengthening a dominant position). Therefore, the notifying parties may offer remedies to alleviate any concerns of the HCC, which are to be negotiated between the notifying parties and the authority. In particular, remedies are offered within 20 days as of the date of introduction of the case before the HCC, and only in exceptional cases after the lapse of this period. Parties wishing to propose remedies must file the relevant form (which also includes a model text for divestitures and for trustee mandates), which is available on the HCC’s website. In practice, remedies that are structural in nature are preferable as they are deemed to prevent over the longer term the competition concerns that would be raised by the merger as notified, in accordance with European legislation and case law.

\(^\text{17}\) HCC Decision 598/2014.
\(^\text{18}\) HCC Decision 650/2017.
\(^\text{19}\) Article 15 Paragraph 9 of HCC’s Rules of Internal Procedure and Management.
HCC decisions may be appealed against before the Athens Administrative Court of Appeals and, ultimately, the Council of State. The right to appeal lies with the notifying parties, the Greek state and any third party with a legitimate interest.

If an HCC decision is partially or wholly annulled by the administrative courts, the HCC shall re-examine the concentration in light of existing market conditions. To this end, the notifying parties shall submit a revised or supplemental version of the notification if there is a change of conditions.

v Effect of regulatory review
Concurrent review of mergers by more than one body is not possible under Greek merger control rules. This would be the same for transactions that also touch upon the electronic communications sector (see Section I.i). For example, in a recent acquisition of control case (Vodafone/CYTA), the HCC provided significant input regarding its interrelation in terms of competence with other national authorities, authorised by law to implement the Greek Competition Act (i.e., EETT).20 In this case, the HCC cleared the transaction only with respect to the media aspect of the concentration (i.e., pay-TV services), whereas it decided to abstain from the assessment of the aspect of the concentration for which the EETT had already initiated a relevant review (multiple play services). In turn, the EETT cleared the transaction later in the year.21

As regards limitation suspensory effect of review and periods for completion of the review, see Section III.i.

IV OTHER STRATEGIC CONSIDERATIONS
i How to coordinate with other jurisdictions
Under the Greek Competition Act, the HCC, being the national competition authority, is responsible for cooperation with: (1) the competition authorities of the Commission of the EU, rendering any necessary assistance to their designated bodies for the conduct of investigations provided under EU law; and (2) the competition authorities of other EU Member States.22

In practice, the HCC cooperates closely with the competition authorities of other EU Member States, as well as with the competition authorities of third countries, through the European Competition Network and the International Competition Network. The HCC also participates actively in the Organisation for Economic Cooperation and Development (OECD).

ii How to deal with special situations
If a party to the notified concentration faces financial distress or insolvency, the failing firm defence may be raised before the HCC as part of the merger review process. Although the HCC has not dealt per se with this defence, in the sense that it has not rendered any clearance decision on this basis to date, it could be reasonably expected to follow relevant EU precedents in similar future cases.

20 HCC Decision 656/2018.
22 Article 28.
It should also be noted that the HCC may take into account the financial situation of the undertakings concerned when calculating the applicable fine in case of violation of the standstill obligation. This aspect was, for example, looked into in the Dimera/Radioteleoptiki case, in which the HCC took into account for the calculation of the fine (1) the acquiring entity’s low market shares in the relevant markets, (2) the limited economic capacity of participating in the concentration undertakings and (3) the absence of any affected horizontal and vertical markets.

With regard to minority ownership interests, the HCC takes the stance that these may also confer the possibility of control. In particular, the definition of control under the Greek Competition Act remains identical to that of the EUMR, and the HCC heavily follows the EU paradigm. Essentially, control is associated with the possibility of exercising decisive influence over an undertaking’s activities. Accordingly, a finding of acquisition of control is possible even in relation to the acquisition of a minority interest, if the surrounding circumstances are such as to confer actual control in the sense of being able to block actions relating to the strategic commercial policy of an undertaking. This has been ruled by the HCC in the Follie-Follie/Duty Free Shops case, where although Follie-Follie held a minority stake in the acquired entity, it was deemed to be exercising control as it was the only entity in a position to veto strategic decisions of the acquired entity. Exercise of joint control by minority shareholders was recently touched upon by the HCC in the GEK TERNA/Nea Odos case, in which it was stated that joint control may also occur in case of inequality in votes:

where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. . . . The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders’ meeting or by the board of directors to the extent that the parent companies are represented on this board.

V OUTLOOK AND CONCLUSIONS

There are currently no pending changes in merger control legislation. In recent years, the HCC has proved to be active in ensuring compliance with the Greek merger control regime. The authority’s vigilance is undoubtedly evidenced by its recent gun-jumping investigations (see the Dimera and Masoutis cases discussed above).

In addition, practitioners’ discussions appear to be focusing on the possibility of offering remedies during the Phase I review period, considering that under the wording of the Greek Competition Act, such possibility appears not to be applicable.

Another issue that has proved to form the basis of discussions in the Greek merger control field would be whether the 30-day deadline for filing of a notification should be relaxed to be in line with the OECD Merger Recommendation of 2005.

Finally, and as a matter of ongoing concern, it also remains to be seen whether a change in the current notification criteria (jurisdictional thresholds) will be introduced, in order to deal with the low number of merger notifications filed with the HCC per year and as a response to the tendency discussions identified in other EU Member States.

23 Article 9 of the Greek Competition Act.
24 HCC Decision 652/2017.
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.

The merger control regime under the Competition Ordinance

The entry into force of the Competition Ordinance in December 2015 led to 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) replaced the previous regime established under the Telecommunications Ordinance. These new rules represent more of an evolution than a revolution when compared to those they have replaced. As was the case under the previous regime, merger control remains predominantly relevant to operators with activities in the telecommunications sector. Both the Competition Commission and the Communications Authority have concurrent jurisdiction to review matters in the telecommunications sector, albeit that, pursuant to the memorandum of understanding between the two agencies, the Communications Authority will usually be the lead agency on merger matters. The Guidelines on the Merger Rule (the Merger Rule Guidelines), as with the other six guidelines (not dealing with merger control), are published jointly by the agencies.

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 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). The question of whether the Merger Rule applies to transactions where the affected markets are not in the telecommunications sector, but where one of the parties happens to have an entity holding a carrier licence within their corporate groups has yet to be addressed by the courts, and is not addressed in the Merger Rule Guidelines. Although the legislation could arguably be read as bringing such transactions within the scope of the Merger Rule, this would appear to us to be contrary to the legislative intent.

1 Stephen Crosswell is a partner, Tom Jenkins is a special counsel and Donald Pan is a senior associate at Baker & McKenzie.
When the Competition Ordinance was enacted, the government undertook to review its scope and operation after three years. In January 2019, the Secretary for Commerce and Economic Development (SCED) (the government ministry responsible for competition law and policy in Hong Kong) confirmed that it was preparing for this review. Senior Competition Commission officials, including both the chief executive and chairperson, have publicly expressed support for extending the Merger Rule to all sectors of the economy. We think it quite likely that the SCED will propose the extension of the Merger Rule to other sectors of Hong Kong’s economy as part of this review. It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.

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 having 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 (i.e., a ‘full function joint venture’). 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.

In line with most other regimes (including the EU), 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:
  
  (i) any merger leading to a post-merger HHI of less than 1,000 on the relevant markets;
  (ii) 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;
  (iii) 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 United Kingdom), 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.
Mergers in the telecommunications sector

The Communications Authority reviewed only one transaction in 2018: HKBN’s acquisition of WTT Holdings. The parties announced this deal on 7 August 2018. On 17 April 2019, the Authority announced its decision to accept behavioural commitments from the parties in lieu of commencing an investigation under the Competition Ordinance.2

The main overlap of HKBN and WTT’s businesses is in the provision of fixed telecommunications services to businesses. According to the Communications Authority’s preliminary assessment, the merged entity will become the second-largest player in the commercial segment of the market for the provision of fixed broadband services and fixed voice services post-merger. The Authority identified two potential competition concerns:

a Difficulties in accessing buildings that are not exclusively for residential use, and where HKBN and WTT both provide access. The HKBN/WTT merger would lead to a reduction in the number of competitors providing fixed line services to these buildings. This would be a problem only to the extent that other fixed network operators would have difficulty in obtaining access.

b Foreclosure of downstream operators: both HKBN and WTT offered wholesale access to their networks to downstream competitors (i.e., providers of voice and broadband services). The authority identified a risk that the merged entity could refuse to supply wholesale access, raise prices for access substantially or lower service quality post-merger.3

The parties proposed two behavioural commitments to address these concerns: (1) in-building interconnection commitments to facilitate access to a building for installation of block-wiring circuits by new competitors to enable them to compete with the merged entity; and (2) a two-year wholesale access commitment was also made to enable downstream rivals that had existing agreements with HKBN or WTT on wholesale services to continue to obtain supply of wholesale inputs on existing or no less favourable terms. Following a public consultation that the Authority launched on 10 February 2019, it decided to accept these commitments and not investigate the deal further.

Other developments

On 10 January 2019, the Competition Commission announced it was investigating a commercial alliance between three of Hong Kong’s five container terminal operators (Hongkong International Terminals Limited, Modern Terminals Limited, COSCO-HIT Terminals (Hong Kong) Limited, and Asia Container Terminals Limited). Interestingly, this investigation is being conducted under the First Conduct Rule, which implies that the alliance does not constitute a full function joint venture. As the chief executive of the

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2 Notice of Acceptance by the Communications Authority (CA) of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited and WTT HK Limited under Section 60 of the Competition Ordinance (CO) in relation to the Proposed Acquisition of WTT Holding Corp. by HKBN Ltd (with commitments accepted enclosed).

3 Notice to Seek Representations regarding the CA’s Proposed Acceptance of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited and WTT HK Limited under Section 60 of the CO in relation to the Proposed Acquisition of WTT Holding Corp by HKBN Ltd (13 February 2019).
Competition Commission has stated publicly (in support of his view that the Merger Rule should be extended), were this alliance to have been structured in such a way, the Authority would have had no jurisdiction to investigate.

At the start of 2019, it was reported that the Competition Commission was consulting businesses about the competition impact of past mergers, ostensibly to assess recommendations to make to the government about revisions to the Merger Rule.

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 that 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.4

4 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.
IV OUTLOOK AND 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. The SCED is currently reviewing the scope and operation of the law. Senior Competition Commission officials are on the record as saying they will support the extension of the Merger Rule. The SCED may well propose the extension of the Merger Rule to other sectors of Hong Kong’s economy as part of this review process. It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.
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 1 May 2019, the CCI had cleared approximately 600 combinations, with a vast majority within the 30-working-day Phase I period. To date, the CCI has cleared eight combinations subject to remedies after a detailed Phase II investigation, but is yet to outright block a combination.2

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.

1 Hemangini Dadwal is a partner, and Rajshree Sharma and Shreya Singh are associates, at AZB & Partners.
2 The CCI has passed orders directing structural modifications in combinations relating to diverse sectors. These are: (1) Linde/Praxair, C-2018/01/545, dated 6 September 2018, in the gas and energy sector; (2) Bayer/Monsanto, C-2017/08/523, dated 14 June 2018, Agrium/Potash, C-2016/10/443, dated 27 October 2017, Dow/DuPont, C-2016/05/400, dated 8 June 2017 and ChinaChem/Syngenta, C-2016/08/424, dated 16 May 2017, in the agro-chemical sector; (3) PVR/DT Cinemas, C-2015/07/288, dated 4 May 2016 in the film exhibition and distribution sector; (4) Holcim/Lafarge, C-2014/07/190, dated 30 March 2016, in the cement sector; and (5) Sun/Ranbaxy, C-2014/05/170, dated 5 December 2014, in the pharmaceutical sector.
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 1 May 2019, the CCI cleared approximately 600 combinations in various industries such as e-commerce, consumer goods, healthcare, steel, cement, telecommunications, agro-chemicals, pharmaceuticals, aviation, manufacturing, information technology, financial services, banking and broadcasting.

The landscape of the Indian merger control regime is shifting rapidly, owing to the frequent amendments to the Combination Regulations. On 27 March 2017,\(^3\) 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, including at least two merger control cases.\(^4\)

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 that require 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.

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\(^3\) Government of India Notification dated 27 March 2017, S.O. 988(E). These are effective from 29 March 2017.

\(^4\) (1) Eli Lilly & Company’s appeal to the (erstwhile) COMPAT against the penalty imposed by the CCI for belated filing is now before the NCLAT (Transfer Appeal (AT) (Competition) No. 3 Of 2017 (Old Appeal No. 44 Of 2016), and (2) ITC Limited’s appeal (Competition Appeal (AT) No. 11 of 2018) to the NCLAT is against the CCI’s decision to impose penalty on ITC for a failure to notify its acquisition of ‘Savlon’ and ‘Shower to Shower’ trademarks from the Johnson & Johnson Group.
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 for ‘gun-jumping’ under Section 43A of the Competition Act. However, removal of a 30-calendar 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 account of the anticipated reduction in the CCI’s case load due to the revised de minimis thresholds, 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.5 Further, on 30 September 2018, the MCA constituted the Competition Law Review Committee (CLRC) to review the Competition Act. The CLRC’s mandate includes (1) review of the Competition Act and its subordinate rules and regulations, (2) assessment of international competition best practices, especially in relation to antitrust, merger control and cross-border issue management, and (3) study of other regulators, government policies and institutional mechanisms that overlap with the Competition Act.6

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:

d combined assets in India of 20 billion rupees;
e a combined turnover in India of 60 billion rupees;
f combined global assets of US$1 billion including combined assets in India of 10 billion rupees; or
g combined global turnover of US$3 billion including combined turnover in India of 30 billion rupees.7

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

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7 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.
Every combination must mandatorily be notified to the CCI, unless the parties are able to benefit from the exemptions provided in the Competition Act, the Combination Regulations or the Notification 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:

a) acquisition of shares or voting rights made solely as an investment or in the ordinary course of business, that entitles the acquirer to less than 25 per cent of the total shares or voting rights of the target enterprise, and there is no acquisition of control of the target enterprise;

b) acquisition of additional shares or voting rights of an enterprise, where the acquirer or its group, prior to the acquisition, already holds 25 per cent, but not 50 per cent, and there is no acquisition of joint or sole control over the target enterprise by the acquirer or its group;

c) acquisition of shares or voting rights by an acquirer who has 50 per cent or more of the shares or voting rights of the enterprise prior to the acquisition, except where the transaction results in a transfer from joint to sole control;

8 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.
10 As defined under Regulation 2(f) of the SEBI (Foreign Portfolio Investors) Regulations, 2014 introduced under the Securities and Exchange Board of India Act, 1992 (SEBI Act).
11 As defined in Regulation 2(m) of the Securities and Exchange Board Of India (Venture Capital Funds) Regulations, 1996 introduced under the SEBI Act.
12 As defined in Section 2(72) of the Companies Act, 2013.
13 As defined in Section 6(4) of the Competition Act.
14 Explanation to Schedule 1(I):

The acquisition of less than 10 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.
acquisition of assets not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of an enterprise, and not resulting in acquisition of substantial business operations in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity;

amended or renewed tender offer, where a notice has been filed with the CCI prior to such amendment or renewal;

acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;

acquisition of shares or voting rights pursuant to a bonus issue, stock split, consolidation, buy back or rights issue, not leading to acquisition of control;

acquisition of shares or voting rights by a securities underwriter or a stockbroker on behalf of a client in the ordinary course of its business and in the process of underwriting or stockbroking;

acquisition of control, shares, voting rights or assets by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group; and

a merger or amalgamation involving two enterprises where one of the enterprises has more than 50 per cent of the shares or voting rights of the other enterprise, or a merger or amalgamation of enterprises in which more than 50 per cent of the shares or voting rights in each of such enterprises are held by enterprises within the same group, provided that the transaction does not result in a transfer from joint control to sole control; and

acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI pursuant to and in accordance with its order under Section 31 of the Competition Act (i.e., divestment-related acquisitions).

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. 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. Given that the CCI has previously penalised parties for failing to make a notification as parties had calculated assets

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by accounting the value of assets to be contributed, the March 2017 notification provides a welcome clarification. 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’ is defined to include ‘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, 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, 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, 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.

As a general matter, the CCI precedent seems to suggest that where there are a number of veto rights, they should not be evaluated in isolation, and whether control exists is based upon an assessment of these rights as a whole.

Interestingly, in the Jet/Etihad case, the CCI concluded that the acquisition by Etihad Airways (Etihad) of 24 per cent of the equity share capital of Jet Airways (Jet) allowed Etihad to exercise joint control over Jet’s assets and operations, on account of the terms of the agreements entered into between Jet and Etihad, and Etihad’s ability to appoint two of the six directors on Jet’s board of directors. Notably, the Indian capital markets regulator, the Securities and Exchange Board of India (SEBI), differed on this issue, clarifying that under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Code), the definition of ‘control’ is narrower than under the Competition Act to conclude that the acquisition does not grant ‘joint control’ of Jet to Etihad under the Takeover Code. In a recent decision involving a notification to the CCI for the acquisition of shares of Telewings Communications Services Private Limited (Telenor India) by Lakshdeep

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16 See the CCI’s decisions in ITC Limited (C-2017/02/485, dated 11 December 2019) and SRF-DuPont (C-2015/12/347, dated 16 August 2016).
17 C-2012/06/63, dated 9 August 2012.
18 C-2012/09/78, dated 4 October 2012.
19 C-2015/01/243, dated 5 March 2015.
20 C-2012/06/63, dated 9 August 2012.
21 C-2013/05/122, dated 12 November 2013.

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Investments & Finance Private Limited\(^2\) (Telenor order), the CCI conclusively held that a shareholding of 26 per cent constitutes joint control under the Competition Act. The CCI found that regardless of affirmative voting rights, with a 26 per cent shareholding, a shareholder has the ability to block special resolutions under the (Indian) Companies Act, 2013 that is sufficient to constitute negative control.

Significantly, in another recent decision,\(^2\) the CCI penalised UltraTech Cement Limited (UltraTech) for omitting to disclose material information\(^2\) (the UltraTech order) in relation to its acquisition of the cement manufacturing plants of Jaiprakash Associates Limited (JAL). The CCI held that UltraTech was required to furnish details of the shareholding of Kumar Mangalam Birla (and his family members) (KMB/KMB Family) and the companies owned and controlled by them in Century Textiles and Industries (Century) and Kesoram Industries (Kesoram), as both these companies compete with JAL. While UltraTech contended that there was no requirement to disclose these details as Century and Kesoram did not qualify as group entities and were not controlled by a common shareholder, the CCI held that control included ‘material influence’ in addition to \textit{de facto} and \textit{de jure} control. The CCI interpreted material influence as the ‘presence of factors that enable an entity to influence the affairs and management of another enterprise. These factors include: shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc.’ Therefore, to the extent that KMB (1) had seats on both Century and UltraTech’s boards of directors, and (2) had chaired four of Century’s 20 board meetings, he had the ability to exercise ‘material influence’ over Century’s affairs and may further distort competition on account of having access to competitively sensitive information. The CCI also noted that KMB and KMB Family had strategic shareholding in Kesoram and Century, which conferred them with negative control over both the companies. The test of material influence has expanded the scope of what the CCI considers as control from the globally recognised standard of decisive influence. This expanded definition of control may separately implicate what constitutes ‘group’ companies, including for determining whether asset and turnover group thresholds are satisfied for notifying the CCI, as the control test is a factor for determining whether two or more entities qualify as a ‘group’.

Investors therefore need to keep in mind that even minority investments may be, and in certain instances have been, viewed as an acquisition of control requiring notification to the CCI.\(^2\) 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

\(^2\) Order under Section 43A of the Competition Act, dated 3 July 2018.
\(^2\) UltraTech Cement Limited (C-2015/02/246, dated 12 March 2018).
\(^2\) Under Section 44(b) of the Competition Act.
\(^2\) See, for example, Piramal Enterprises Limited/Shriram Transport Finance Company/Shriram Capital Limited/Shriram City Union Finance Limited (C-2015/02/249, dated 2 May 2016), and Cairnhill CIPEF Limited/Mankind Pharma Limited (C-2015/05/276 dated 13 April 2017).
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, and treat such a structure as the relevant structure for the purpose of merger control.

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.26

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.

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26 Section 6(1) of the Competition Act.
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.\(^\text{27}\)

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.\(^\text{28}\) Notably, the CCI is only required to consider products or services that are interchangeable or substitutable by consumers. However, while the relevant product market has been defined from a consumer perspective, Section 19(7) of the Competition Act identifies supply-side factors (such as exclusion of in-house production and presence of specialised producers) that the CCI may also consider in defining 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.\(^\text{29}\) The Competition Act provides the factors that the CCI needs to assess for determining the relevant geographic market.\(^\text{30}\) These are, regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences, and need for secure or regular supplies or rapid aftersales services.

The CCI has also used economic tools such as the Elzinga-Hogarty test, the Herfindahl-Hirschman Index and chains of substitution in certain cases\(^\text{31}\) to determine the scope of the relevant market and market concentration, but this is more the exception than the rule.

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;

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\(^{27}\) Section 2(r) of the Competition Act.
\(^{28}\) Section 2(t) of the Competition Act.
\(^{29}\) Section 2(s) of the Competition Act.
\(^{30}\) Section 19(6) of the Competition Act.
\(^{31}\) *Holcim/Lafarge, Linde/Praxair and Bayer/Monsanto.*
relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC; and

whether the benefits of the combination outweigh the adverse impact of the combination, if any.

In the approximately 600 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. In the past, 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.\(^{32}\) However, recently, in Bayer/Monsanto, the CCI identified harm to future innovation efforts, input foreclosures, and portfolio effects such as exclusion of competitors arising out of the transaction, before approving the transaction with modifications.

The CCI’s analysis 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 compliance with the provisions of the Competition Act. The provisions relating to combinations came into force on 1 June 2011. Since then, the CCI has formally approved 15 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.\(^{33}\) In Mumbai International Airport Private Limited/Oil PSUs\(^{34}\) the parties offered various behavioural remedies voluntarily, on the basis of which approval was granted by the CCI. Typically, the CCI scrutinises non-compete provisions closely and where it believes the duration or scope of the restriction is ‘excessive’ directs parties to undertake to modify the non-compete. For example, in Elder Pharmaceutical/Torrent Pharmaceuticals,\(^{35}\) the CCI approved the transaction after the parties

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\(^{32}\) C-2016/07/414, dated 9 August 2016.

\(^{33}\) Regulation 19(3) of the Combination Regulations.

\(^{34}\) C-2014/04/164, dated 29 September 2014.

\(^{35}\) C-2014/01/148, dated 26 March 2014.
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. In 2017, the CCI issued a Guidance Note on Non-Compete Restrictions that sets out non-compete restrictions that the CCI is likely to consider ‘ancillary’ to a proposed transaction and therefore unlikely to be viewed as problematic. More recently, where the CCI believes that a given non-compete is not ‘ancillary’ to the proposed transaction, it simply records so in its approval decision. This is a departure from its previous practice where it would direct parties to modify the non-compete restriction in order to approve the proposed transaction. The likely objective of recording this restriction is to empower the CCI to examine the impact of such ‘non-ancillary’ non-competes under the post facto behavioural provisions of the Competition Act.

In addition to non-compete clauses, the CCI has also accepted voluntary commitments and approved transactions in Phase I review. For instance, 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 after it accepted voluntary commitments offered by the parties that included bearing the cost of (1) realigning and re-configuring antennae installed by customers to make it compatible with the transponders; and (2) the antenna and set-top box, which may be required to be changed as a result of the transaction. Similarly, in *JFDHL/Den Networks* and *JCDHPL/Hathway* that, like *Dish TV/Videocon*, also concerned the cable market, the CCI granted approval after accepting similar undertakings. These undertakings include (1) bearing the cost of realignment or change in customer premises equipment, in case of technical realignment as well as customers retaining the liberty to bundle any of broadband, cable TV and telephone without a ‘pre-fixed’ set, and (2) providing

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36 C-2013/04/116, dated 20 June 2013.
37 C-2015/06/286, dated 29 July 2015.
38 C-2016/02/373, dated 11 May 2016.
39 C-2015/05/270 dated 12 June 2015.
43 C-2016/08/418, dated 13 December 2016.
45 C-2016/12/463, dated 4 May 2017.
compliance reports to the CCI for five years. Northern TK Venture/Fortis Healthcare\(^{48}\) involved an investment by Northern TK Venture (Northern TK) in Fortis Healthcare Hospital and Fortis Malar Hospital. Norther TK/IHH had existing investments in a competing hospital, Apollo Gleneagles Hospital. The CCI approved the transaction after accepting voluntary commitments to ensure that the competing hospitals operated independently and did not have common directors, and that the commercially sensitive information relating to pricing data and day-to-day operations was not exchanged or disclosed, including through directors and the enforcement of disciplinary action. Northern TK was also directed to submit a compliance certificate, along with supporting affidavits by the respective directors, confirming compliance of the voluntary commitments, to be supplied annually.

**Modifications directed by the CCI pursuant to Phase II investigations**

In almost a decade of merger control enforcement, the CCI has directed eight modification orders following Phase II investigations, of which, save one, directed structural modifications. In *Sun/Ranbaxy*, *Holcim/Lafarge* and *PVR Cinemas/DT*, 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. In *Dow/DuPont*, CCI approved the transaction, subject to the 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*, the CCI directed the 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. More recently, the CCI approved *Linde/Praxair*, subject to divestment of: (1) Linde India Limited’s entire shareholding in Bellary Oxygen Company Private Limited, a joint venture between Linde India Ltd and Inox Air Products Limited; (2) Praxair’s three on-site plants in the east region of India, located at Jamshedpur, and two cylinder filing stations located at Asansol and Kolkata; and (3) Linde’s one on-site plant in the South Region of India, located at Bellary, Karnataka and two cylinder filling stations located at Hyderabad and Chennai. CCI also recently approved the *Bayer/Monsanto* transaction subject to a detailed modification plan that included divestments and voluntary commitments by Bayer. The CCI directed the divestment of two businesses of Bayer – its global glufosinate ammonium business and global broad acre crop seeds and traits business – to an approved purchaser and accepted the following voluntary commitments: (1) exercise broad licensing policies in India; and (2) not to offer clients bundled products. As with other divestments, the CCI appointed a Divestiture and Monitoring Agency to oversee the implementation of the modifications and directed Bayer to undertake to submit regular compliance reports to the Monitoring Agency every six months for the duration of the commitments. According to public reports,\(^{49}\) the CCI has also recently approved Schneider Electric India Pvt Ltd’s acquisition of Larsen and Toubro’s electrical and automation business after accepting behavioural commitments.\(^{50}\)

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50 C-2018/05/573, the detailed order is not public yet.
**Merger filing time frames**

As stated above, the June 2017 notification\(^{51}\) 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 in a publicly listed enterprise. The PA was introduced as a ‘trigger’ by way of an amendment to the Combination Regulations in January 2016. The Combination Regulations now state that where a public announcement has been made in terms of the Takeover Code, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the ‘other document’.\(^{52}\) Over time, the CCI also appears to have expanded the scope of trigger events to include:

- binding term sheets;\(^{53}\)
- non-binding term sheets;\(^{54}\)
- contract notes and collaboration agreements;\(^{55}\)
- settlement agreements or agreed structures;\(^{56}\) and
- implementation agreements.\(^{57}\)

While the 30-day filing deadline has been done away with the trigger event still marks the time from which parties’ suspensory obligations kick in.

The CCI has also made it mandatory for parties to file a single notification for interconnected transactions, one or more of which qualify as a notifiable combination. While what constitutes ‘interconnected’ is somewhat indeterminate, and is essentially determined by the CCI on a case-by-case basis, transactions do not need to have any causal link or interdependence. The CCI’s decisional practice identifies the following parameters for determining whether two or more transactions are interconnected:

- commonality of business and parties involved;
- simultaneity in negotiation, execution and consummation of transaction documents;
- commercial feasibility of isolating the two transactions – i.e., whether one would happen without the other; and

\(^{51}\) Government of India Notification dated 29 June 2017, S.O. 2039(E).

\(^{52}\) Regulation 5(8) of the Combination Regulations.

\(^{53}\) Caladium Investment Pte Ltd/Bandhan Financial Services Limited (C-2015/01/243), dated 5 March 2015.

\(^{54}\) NBCC (India) Limited/Hindustan Steel Works Construction Limited (C-2017/03/491), dated 31 March 2017.


\(^{56}\) Public Sector Pension Investment Board/ Grupo Isolux Corsán SA (C-2015/10/330), 3 December 2015.

\(^{57}\) Ultratech Cement Limited/Jaypee Cement Corporation Limited (C-2013/10/135) dated 20 December 2013.
Moreover, there is no time limit under the Competition Act or the Combination Regulations within which the CCI would consider transactions to be interconnected (unlike in the EU), though the CCI does not consider transactions before 1 June 2011 notifiable, as this was the date on which the Indian merger control provisions came into force. One of the most notable implications of two transactions being viewed as interconnected is the extension of CCI’s review jurisdiction and standstill obligations to such transactions that may have otherwise been exempt from notification requirements.

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 – although more recently, where combined market shares exceed 15 per cent, the CCI requires parties to file in the longer Form II. In a recent round of amendments to the Combination Regulations, the CCI 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’), therefore 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:

a. if it is not in accordance with the Combination Regulations;
b. if there is any change in the information submitted in the notification, which affects the competitive assessment of the CCI; and
c. 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, 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
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. Recently, the CCI directed parties to re-file the Bandhan/Gruh merger primarily because in some narrower segments the (indirect) combined market shares was greater than 15 per cent, although there was a miniscule incremental increase in market shares.

**Gun-jumping (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 or gun-jumping risks empowers 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. Typically, proceedings initiated by the CCI to examine gun-jumping concerns are initiated in parallel and do not hold up the substantive review of the notified combination. In Chhatwal Group Trust/Shrem Roadways Private Limited, the CCI levied a penalty of 1 million rupees on Chhatwal Group Trust, finding that the payment of ‘token money’ in advance of signing definitive transaction documents amounts to implementation of the proposed transaction and resulted in gun-jumping. While passing this order, the CCI considered its recent orders in In Re: UltraTech Cement Limited and In Re: Adani Transmission Limited, where penalty was levied on the acquirers for pre-payment of consideration, in part or full, which was construed as steps towards consummating the transactions, acting as gun-jumping.

In a recent gun-jumping decision passed by the CCI, a penalty of 1 million rupees was imposed on the acquirer for simply including an anteriority clause relating to certain conduct that identified a notional date falling before receipt of the CCI’s approval (Bharti Airtel Ltd/Tata Teleservices Limited). Although the relevant conduct took place only after the CCI’s approval, the CCI found that the act of identifying a notional date that was before the CCI approval was likely to reduce the target’s incentive to compete with the acquirer from such a notional date. In the Telenor order, the CCI levied a penalty of 500,000 rupees on

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60 C-2015/01/241, dated 5 May 2015.
61 C-2019/03/651, approved on 15 April 2019 (detailed order not available yet).
62 C-2019/03/651, approved on 15 April 2019 (detailed order not available yet).
63 Under Regulation 8 of the Combination Regulations where the parties to the combination fail to file notice under Section 6(2) of the Competition Act, the CCI may, either upon its own knowledge or Information Inquire into whether such a combination has caused AAEC on competition within India and accordingly direct the parties to file a notice under either Form I or Form II. Section 43A of the Competition Act provides for penalty leviable for failure to comply with directions of Commission and Director General, including failure to file notice.
64 C-2015/02/249, penalty order dated 26 May 2015.
66 C-2018/01/544, penalty order dated 8 August 2018.
67 C-2015/02/246, penalty order passed on 12 March 2018.
68 C-2018/01/547, penalty order passed on 30 July 2018.
69 C-2017/10/531, penalty order passed on 27 August 2018.
Telenor ASA for implementing certain transaction steps, which were not explicitly notified to the CCI for approval but were nevertheless disclosed to the CCI by way of another filing. As these decisions indicate, the CCI appears to be taking a strict and somewhat narrow interpretation of gun-jumping that may not require actual conduct towards implementing the transaction, but does involve scrutinising transaction documents to ascertain if any conduct reduces competitiveness in the market.

**Penalty for making false statements and non-disclosure of material information**

The CCI levied penalties for omission to disclose material information\(^70\) in the *UltraTech* order. The CCI held that UltraTech was required to furnish details of the shareholding of KMB/KMB Family and the companies owned or controlled by them, since they had the ability to exercise ‘material influence’ and negative control over competitors of JAL, namely, Century and Kesoram.

**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.\(^71\)

Other COMPAT decisions in the context of merger reviews include the challenge in the case of the CCI’s order in *Jet/Etihad*,\(^72\) which allowed Etihad to acquire a certain percentage of the equity share capital of Jet. The complainant alleged that the CCI allowed

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\(^70\) Under Section 44(b) of the Competition Act.

\(^71\) Appeal No. 26 of 2016, order dated 13 April 2016.

\(^72\) C-2013/05/122, dated 12 November 2013.
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.73 Similarly, in Piyush Joshi v. CCI,74 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.75

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.76 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.77 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.78 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 consider, 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 sectors,79 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

73 Appeal No. 44 of 2013, dated 27 March 2014.
75 TA (AT)(Competition) No. 32 of 2017 (Old Appeal No. 43/2016).
77 Civil Appeal No. 13578 of 2015, dated 17 April 2018.
78 Transfer Appeal (AT) (Competition) No. 3 Of 2017 (Old Appeal No. 44 Of 2016).
to attain the CCI’s approval. For example, the Linde/Praxair merger was filed three times with the CCI (the parties’ notification was withdrawn once and invalidated subsequently) before it was finally approved.

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. Transactions approved by the CCI pursuant to the IBC process so far, primarily involve the steel and cement sectors. Further, the CCI has in the past year approved about 11 transactions filed pursuant to a resolution plan filed under the IBC Code to the Committee of Creditors (CoC), including, Tata Steel Ltd/Bhushan Steel Ltd, AION Investments Pvt II Ltd/JSW Steel Ltd, JSW Steel Limited/Bhushan Power and Steel Ltd, Arcelor Mittal/Essar Steel India Ltd, Ultratech Cement Ltd/Binani Cement Ltd, Rajputana Properties Pvt Ltd/Binani Cement Ltd, JSW Steel Limited/Bhushan Power and Steel Ltd, Patanjali Ayurved Limited/Ruchi Soya Industries Limited, and UV Asset Reconstruction Company Limited/Aircel Limited, among others. 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, having taken one month on an average in deciding such complex transactions.

V OUTLOOK AND 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. Further, with the objective of easing business and to address regulatory challenges arising from the digital economy, the government of India constituted the CLRC on 30 September 2018 to review and update the Competition Act and its subordinate rules and legislations. To do this, the CLRC Committee is carrying out an assessment of international competition best practices, especially in relation to antitrust, merger control and cross-border issue management, and studying other regulators, government policies and institutional mechanisms that overlap with the Competition Act.

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

82 C-2018/07/581, dated 6 August 2018.
84 C-2018/08/593, dated 18 September 2018.
85 C-2018/02/558, dated 27 March 2018.
86 C-2018/02/557, dated 7 March 2018.
87 C-2018/06/580, dated 10 August 2018.
89 C-2019/02/642, dated 7 March 2019.
control regime remains relatively new, the CCI’s evolution over the past few years 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.
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’ (the Act). The Act was drafted on the basis of the ‘reciprocal exclusivity’ or ‘single barrier’ principles. Therefore, it applied only to agreements, abuses of dominant position and concentrations that did not fall within the application of the Treaties establishing the European Communities, EC Regulations or other Acts of the EC having equivalent legal effect. Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions has introduced some changes. Section 1(1) of the Act now provides that the provisions of the Act apply to ‘any agreements, abuses of dominant position and concentrations’, while Section 1(2) specifies that the Italian Competition and Market Authority (the Authority) may also apply Articles 101 and 102 of the Treaty on the Functioning of the European Union and Sections 2 and 3 of the Act concerning agreements restricting competition and abuses of dominant position to the same cases, even in parallel. With specific reference to concentrations, even if the current version of Section 1 of the Act does not provide such a specification, we may conclude that the Act still applies to concentrations (exceeding the statutory thresholds set forth in the Act as described below) that fall outside the scope of EU Merger Regulation No. 139/2004 (the EU Merger Regulation), and that therefore do not have to be notified to the European Commission. In this respect, reference is made to the combined effect of Section 1(4) of the Act, which specifies that its provisions shall be interpreted in accordance with the principles of European Community competition law, and the provision of Considerandum 18 of the EU Merger Regulation, which specifies that Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension.

In July 1996, the Authority issued guidelines providing the general conditions of applicability of the merger control laws, as well as regulating certain procedural aspects (the 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

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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.

The new regime prescribes that concentrations must be notified to the Authority when the aggregate gross turnover in Italy of the undertakings involved exceeds €498 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 concentative, 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.

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2 These figures apply for 2019.
The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration. 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.

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 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).

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:

- the range of choice available to suppliers and consumers;
- the market shares of the parties involved in the concentration and their access to sources of supply or market outlets;
- the structure of the relevant markets;
- the competitive situation of the national industry;
- barriers to entry into the relevant market; and
- 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

\(^5\) 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.
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 made during the past year were two proceedings concerning mergers authorised subject to the adoption of corrective measures.

In decision No. 29657 of 25 January 2018, the Authority authorised with conditions the concentration concerning the acquisition by 2i Rete Gas S.p.a. of the control of Nedgia S.p.a., both companies operating in the natural gas distribution market.

The Authority found that the transaction was likely to create or strengthen a dominant position in the future tender markets for the awarding of natural gas distribution concessions, with specific regard to some minimum territorial districts (ATEMs) located in areas of central and southern Italy (specifically, Frosinone 2, Isernia, Salerno 3, Catania 1, Catania 2, Agrigento, Foggia 1 and Bari 2). Given the position of the parties in the ATEMs involved, the merger could have altered the dynamics of future tenders in each ATEM and therefore restricted the competition. Indeed, Nedgia and 2i Rete Gas would have been among the few companies – and in some cases the only ones – able to compete in the gas distribution tenders in the aforementioned geographical areas. After a market investigation that also made use of extensive market consultation, the Authority authorised the transaction by imposing some structural and behavioural remedies. The parties, in fact, committed not only to divest significant assets in two of the relevant local markets where the transaction would have essentially led to a three-to-two effect of the market structure (ATEMs of Foggia 1 and Bari 2), but also undertook widespread behavioural commitments, such as the reduction of financial and information barriers to guarantee the widest third-party participation in the future tenders. Such additional commitments concern six other local markets and are essentially aimed at rebalancing the incentives of third-party potential bidders for the relevant gas distribution concessions, against the disincentives, brought about by the deal, connected with having to compete with the former incumbents.

In decision No. 27413 of 19 November 2018, the Authority authorised with conditions the acquisition by Luxottica Group of the exclusive control of Barberini S.p.a. As a result of the merger, Barberini – active in the production of high-quality plano glass lenses for sunglasses and glass blanks, the raw material for producing lenses – became part of the EssilorLuxottica Group, global leader in the eyewear sector and active in all the main segments of the production chain.

After a detailed analysis of the structure and functioning of the markets concerned, the Authority concluded that the merger was likely to create or strengthen a dominant position of Luxottica in the markets of: (1) the production of glass blanks for plano lenses; (2) the production of plano glass lenses; and (3) the production and distribution of sunglasses. The transaction was therefore likely to affect and produce lasting negative effects on the

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6 Decision No. 29657 of 25 January 2018, 2i Rete Gas/Nedgia.
7 Decision No. 27413 of 19 November 2018, Luxottica Group/Barberini.
competitive dynamics in these markets. In its assessment, in addition to post-merger market shares, the Authority took into account the lack of actual and potential competitors of Barberini in the production of high-quality glass plano lenses (who were able to meet the requests of the major players in the market); the essential role played by Barberini in research and development and innovation; the high market power on the demand side; and the strong vertical integration of Luxottica. Also, the recurring technical and financial barriers to entry to the markets for the production of glass blanks and plano lenses, and the production and distribution of sunglasses, were taken into consideration.

The Authority therefore authorised the transaction subject to the imposition of some corrective measures. Specifically, Luxottica is now forced to enter into contracts for the supply of glass blanks and plano lenses with all market operators, with no minimum purchase requirements for these companies. In addition, the contracts must allow Barberini customers to be provided, where requested, with products resulting from the innovation and technological developments of Barberini S.p.A. and Barberini GmbH, even where such products are covered by intellectual property rights.

Finally, Luxottica must appoint a trustee in charge of monitoring compliance with the agreements signed pursuant to the aforementioned measures and of submitting to the Authority, every six months, a report on the full and effective implementation of the measures prescribed.

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 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
行政法院已认识到竞争公司有资格反对当局的决定，因为这些决定可能直接影响其活动。因此，如果当局授权一项合并，违反了竞争对手的权利，竞争对手可能会在行政法官之前上诉该决定。8

当局也可能在批准提议的合并时提出条件。这些条件可以由当局直接施加，也可以通过谈判的结果施加。该法案并未授权当局与各方进行任何谈判，尽管实践中这种可能性可能很大。

一般来说，如果当局认为一个集中是法律所禁止的，可以授予授权，前提是各方履行一些具体义务，这些义务可以分为结构性和行为性补救。考虑到当局处理的案件，以下补救措施可以考虑：

a  结构性补救措施：
• 制裁业务部门或部门：这可能会被用来减少由集中产生的市场份额，或者更窄地与某些地理区域重叠的集中，这些区域被视为与法案不兼容。一般而言，当局要求将业务分拆给与各方无结构、财务或个人关系的第三方，且具有在相关市场中财务资源和专业知识的实体。转售分拆的业务可能被永久禁止或在有限的时间内。

b  行为性补救措施：
• 授予竞争对手访问必要设施和知识的使用权；

当局可以明确保留撤销其决定以批准集中，并对未能遵守规定的义务处以罚款的权利。

最后，如前所述，当局必须禁止任何创建或加强支配地位的集中，这种集中会消除或减少市场竞争。

8  如意大利最高行政法院在2005年2月3日的第280号决定中所述，未直接参与反垄断程序的各方也可能合法地对当局的决定提出上诉，只要他们对程序有不同且有资格的兴趣，并且能够证明该兴趣已因决定而受损。在这方面，参见拉齐奥地区行政法院的第10757号决定2006年10月20日和最高行政法院的第1113号判决2005年3月21日。
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.

Appeals from the judgments of the Regional Administrative Court of Lazio may be filed with the State Council.

IV OTHER STRATEGIC CONSIDERATIONS

Under Section 1 of the Act as recently amended, the Authority is no longer required to suspend its own proceedings in cases where the European Commission has already commenced an investigation. Such an obligation was, in fact, provided by Section 1(3) of the Act, which has been repealed. We deem that such an amendment specifically refers just to the proceedings concerning cartels and abuses of dominant position (in relation to which the Act now provides the application, even in parallel, of Articles 101 and 102 of the Treaty and Articles 2 and 3 of the Act). With specific regard to concentrations, and considering the combined effect of Section 1(4) of the Act and Considerandum 18 of the EU Merger Regulation (as explained above), we may conclude that the old regime still applies. In other words, the Authority's jurisdiction is still limited to concentrations that fall outside the scope of the EU Merger Regulation.

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, 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 AND CONCLUSIONS

On 10 February 2014, the Authority published a proposal to amend the merger control regime. The first amendment refers to the reduction of the notification threshold concerning targets from €48 million (2014 turnover threshold) 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, of 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). 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, so they have also proposed that the Authority should modify the threshold concerning the overall turnover of the companies involved in an acquisition. Such a proposal aims to submit to the procedure of authorisation mergers concerning small to medium-sized enterprises that could produce restrictive effects in regional and local markets.

The second amendment to the merger control regime provided by the Authority’s 2014 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. In this respect, the second proposal of the Authority provides that concentrations shall be notified when the turnover of at least two of the undertakings involved exceeds €10 million, with the understanding that the aggregate turnover of all the undertakings involved is higher than €489 million (the 2014 turnover threshold).

The Authority, having taken into account these two proposals, resolved to continue the monitoring of the merger regime at least until the end of 2014. No final resolution has yet been adopted in this 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 already been 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. In the absence of any further specification by the Authority, we may assume that the first proposal (concerning the notification threshold of the targets) is still under scrutiny.
Chapter 21

JAPAN

Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami

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

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1 Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami are partners 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 for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting
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. sales amount derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business);

b. 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. 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

In accordance with the conclusion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) in March 2018, the Japanese legislator adopted new Commitment Procedures that would allow the JFTC and any company undergoing investigation to resolve an alleged violation of the AMA by mutual consent. Before the introduction of the new procedures, it would have taken a while for the JFTC to finally issue an order, mainly because of the substantial amount of evidence required. Commitment Procedures, effective as of December 2018, may incentivise an early resolution of matters being investigated. From a merger control perspective, as suggested in the new Policies for

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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.
Commitment Procedures, a company undergoing investigation (outside the notification procedure) for proposing a merger that would substantially restrain competition may propose concluding the investigation through the Commitment Procedure by adopting certain remedies, such as transferring part of the target business or shares of the target company to a third party.

II YEAR IN REVIEW

During the 2018 fiscal year (from 1 April 2018 to 31 March 2019, hereafter FY 2018), the JFTC brought to close three Phase II cases. Fukuoka Financial Group and The Eighteenth Bank and Nippon Steel & Sumitomo Metal and Sanyo Special Steel were resolved subject to certain conditions. The third, the Oji Holdings Corporation and Mitsubishi Paper Mills case, was cleared with no conditions being imposed.

i Share acquisition by Fukuoka Financial Group of The Eighteenth Bank

In June 2016, Fukuoka Financial Group Ltd (FFG) filed a notification with the JFTC of its intention to acquire shares of The Eighteenth Bank Ltd (Eighteenth Bank), resulting in it holding, post-acquisition, more than 50 per cent of the latter’s stock.

Under the merger control regime in Japan, no special rule applies to the review of mergers that involve financial institutions. In the recent The Daishi Bank and The Hokuetsu Bank case in 2017, the JFTC clarified its position that it would apply the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination Merger Guidelines (the Merger Guidelines) to review the impact of mergers involving financial institutions. The case at hand is notable because the JFTC demonstrated how the ‘restraints of trade’ were assessed in a merger between regional banks.

In defining geographic markets, the JFTC conducted a survey using consumer questionnaires to assess the scope and distance enterprises located in the Nagasaki prefecture would cover in search of lenders. Concerning commercial loan trades for small- and mid-size enterprises, FFG and Eighteenth Bank would have held, post-merger, a combined market share as high as 75 per cent in certain geographic areas. The JFTC was concerned that the contemplated acquisition would limit consumers’ choices in connection with commercial loans, especially as competitive pressure in the same as well as adjacent markets was limited and there was no pressure from new entrants. The parties then proposed the following remedies:

a assign their account receivables of commercial loans, with an aggregated amount of approximately ¥100 billion, to competitors before the acquisition;

b establish a monitoring mechanism to properly monitor and control the lending rates of the parties; and

c submit periodic reports to the JFTC to ensure that the parties adhere to the above remedies.

In August 2018, following an in-depth Phase II review and on the premise that the parties would adhere to the proposed remedies, the JFTC concluded that the notified concentration would not substantially restrain competition in any of the relevant markets.

**ii Share Acquisition by Oji Holdings Corporation of Mitsubishi Paper Mills Limited**

Oji Holdings Corporation (Oji) and Mitsubishi Paper Mills Limited (MPM) are both domestic large paper manufacturers. In July 2018, Oji filed a notification with the JFTC of its intent to acquire shares of MPM, whereby Oji would hold, post-acquisition, 33 per cent of MPM’s voting rights.

Among the relevant markets in which both parties are active, the JFTC identified the following three as potential causes for concern: (1) art paper used for catalogues and labels for drink containers; (2) adhesive base paper for wallpaper (wallpaper-base); and (3) pressboard paper used for electrical insulation by manufacturers of heavy electrical equipment. The combined market share of the parties for each of these markets would be as high as 90 per cent, 65 per cent and 95 per cent respectively.

Following an in-depth Phase II review, the JFTC concluded that, although market concentration post-acquisition would be high, strong competitive pressure from import and adjacent markets and consumers are likely to prevent a substantial restraint of competition and cleared the case without imposing any conditions. Specific reasoning for each of the relevant markets was as follows:

*Art paper:* as the customers’ demand for high-quality, domestically produced art paper is high, there is no competitive pressure from import markets. However, art paper is substitutable with high-quality coated paper to some extent, and art paper producers are faced with strong competitive pressure from major consumers who procure high-quality coated paper as well, whereby there is intensive competition among major paper manufacturers.

*Wallpaper-base:* Although there is not much competitive pressure from imports, new entrants or adjacent markets, such pressure is derived from a competitor with a 30 per cent market share. In addition, the downstream market of customers of wallpaper-base is basically occupied by three major brand makers who actively negotiate with paper manufacturers, and there is competitive pressure from such brand makers.

*Pressboard paper:* Oji and MPM are the only two manufacturers of pressboard paper in Japan with a combined market share of 95 per cent. The remaining 5 per cent are taken by imported products, hence competitive pressure from such import markets does exist to some extent. In addition, there is competitive pressure from customers who tend to negotiate the price of pressboard paper for electric transformer for domestic use based on the price of the same for overseas use.

Having established the above factual basis, the JFTC concluded that the notified transaction would not substantially restrain competition in any of the relevant markets – neither by unilateral nor cooperative conduct.

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iii Share acquisition by Nippon Steel & Sumitomo Metal of Sanyo Special Steel

Both Nippon Steel & Sumitomo Metal Corporation (NSSMC) and Sanyo Special Steel Co Ltd (SSS) manufacture and sell steel products. In July 2018, NSSMC filed a notification with the JFTC of its intent to acquire shares of SSS, whereby NSSMC would obtain 51.5 per cent of SSS’s voting rights.

In the course of its review, the JFTC pointed out that, among 10 relevant markets in which the parties compete with each other or have transactions with one another, the seamless bearing steel tubes’ market would be the one monopolised post-transaction. The JFTC further expressed its concern that there would be no or limited competitive pressure from imports, new entrants, or adjacent or downstream markets. Subsequently, to address the JFTC’s concerns the parties proposed the following remedies:

1. Transfer a part of the ownership of SSS’s rolling mill facilities to Kobe Steel, enabling it to manufacture up to 15,000 metric tons of seamless bearing steel tubes per year;
2. Transfer part of SSS’s trading rights to Kobe Steel, enabling it to sell approximately 14,000 metric tons of seamless bearing steel tubes to bearing makers;
3. Take appropriate measures to segregate competition-sensitive information regarding Kobe Steel from the sales department of both parties; and
4. Submit periodic reports to the JFTC, ensuring that the parties adhere to the above remedies for a period of five years (in principle) post-transaction.

The JFTC determined that the proposed remedies would effectively create a new competitor holding up to a 25 per cent share in the relevant market, thereby maintaining competition therein. In January 2019, following an in-depth Phase II review and on the premise that the parties would adhere to the proposed remedies, the JFTC concluded that the notified concentration would not substantially restrain competition in the relevant market.

iv Statistics of the JFTC’s activity

According to the JFTC, the total number of merger notifications filed in FY 2018 was 321. 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>295</td>
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<td>321</td>
</tr>
<tr>
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<td>4</td>
<td>3</td>
<td>5</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

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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. 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; 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 held if deemed necessary, but they have been extremely

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23 Article 45, Paragraph 1 of the AMA.
24 Article 42 of the AMA.
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 Fukuoka Financial Group and The Eighteenth Bank case (see Section II).

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.25 With the Commitment Procedures having been introduced, a company under the JFTC’s investigation may request the JFTC to close the investigation without issuing any orders by making a proposal to put in place adequate remedies (see Section I.ii).

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court 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). It is also suggested in the Merger Guidelines that, both before and after 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 indicate that the

geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business. 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:

a horizontal transactions:
- the HHI after the notified transaction is not more than 1,500;
- 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
- the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150; and

b vertical and conglomerate transactions:
- the merging parties’ market share after the notified transaction is not more than 10 per cent; or
- 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.

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 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 before the JFTC’s clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In 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.

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26 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.
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. 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, including TPP-11. Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda with various competition authorities. It has also propounded the establishment of an international cooperative framework for merger review at the 11th ICN Annual Conference in 2012, which has since been in effect. 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, the European Union and Chile, for example, in the recent review of the Broadcom and Brocade case in 2017 and the merger of the container shipping business of Nippon Yusen, Kawasaki Kisen Kaisha and Mitsui O.S.K. Lines in 2017.

Coordination among attorneys from various jurisdictions

As explained in Section IV.ii, below, because the JFTC abolished the voluntary consultation procedure (prior consultation procedure) in 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.

ii Pre-filing consultation with the JFTC

Upon the abolition of the prior consultation procedure in 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

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27 Article 43-2 of the AMA.
28 A list of all international agreements and memoranda concerning competition law is available at: www.jftc.go.jp/en/int_relations/agreements.html.
In practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials before the formal filings. Interestingly, in almost all of the recent cases that the JFTC has cleared after Phase II review, including Fukuoka Financial Group and The Eighteenth Bank, Oji Holdings Corporation and Mitsubishi Paper Mills and Nippon Steel & Sumitomo Metal and Sanyo Special Steel, the JFTC made specific notes in its announcements that the parties had submitted supporting documents and opinions to the JFTC on a voluntary basis before 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 is 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.i). In addition, under certain circumstances even minority acquisition may be subject to a Phase II review, such as in Oji Holdings Corporation and Mitsubishi Paper Mills. Moreover, 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 Idemitsu and Showa Shell in 2016, the JFTC made clear that its review assumed that these parties would be completely integrated as one group after the acquisition, although, at the time, Idemitsu only intended to have a minority shareholding in Showa Shell. 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 in the past, including foreign-to-foreign transactions. To mitigate the risk of an investigation, even parties to a concentration that is below the threshold level may opt to consult with the JFTC and file notification on a voluntary basis. In practice, The JFTC applies the same rules and guidelines to review such voluntary notifications.
V OUTLOOK AND CONCLUSIONS

The Merger Review Rules and the Policies for Merger Review (both amended in 2011) primarily concern the procedural aspects of merger reviews by the JFTC, while some clarifications were 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 JXHD and TG and Idemitsu and Showa Shell in 2016, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. Although these disclosures have generally been 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 for multi-sided platforms). 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.
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:

- interlocking directorate;
- merger;
- share acquisition;
- business transfer (i.e., asset acquisition); and
- 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:

- 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.

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1 Sai Ree Yun is the honorary managing partner, Kyoung Yeon Kim and Kyu Hyun Kim are partners and Seuk Joon Lee and Cecil Saehoon Chung are senior foreign counsel at Yulchon LLC. The authors would like to thank Keon Woong Kim, Young Lan Yea and Hee Jin Yun, associates, and Geary Choe, foreign associate, at Yulchon LLC, for their valuable assistance in preparing this chapter.

2 The mergers and acquisitions division of the KFTC is in charge of merger control matters.
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. In share acquisitions, formation of a new company, and mergers, 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. On the other hand, in business transfer transactions, the seller or transferor’s size is calculated on a standalone basis (i.e., the worldwide assets or turnover of the specific entity whose business is being transferred without regard to its affiliates’ assets or turnover). 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, intra-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 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.

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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.
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 (KFTC Merger Notification Guidelines);
- the Guidelines on Standards of Business Combination Examination (KFTC Merger Review Guidelines);
- 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 2018, the KFTC reviewed a total of 702 transactions, which represents a 5.1 per cent increase from 2017. (However, the total transaction value decreased by 4.5 per cent from 509.4 trillion won in 2017 to 486.6 trillion won in 2018.) Of these transactions, 570 (approximately 81.1 per cent) were Korean entities’ acquisitions of Korean or foreign entities, while the remaining 132 transactions involved foreign entities’ acquisitions of Korean or foreign entities. Of these 132 transactions, 37 were foreign companies’ acquisitions of Korean entities, while the remaining 95 were foreign-to-foreign transactions that affected the Korean market, thus requiring merger filing in Korea.4

In October 2018, the KFTC granted conditional clearance in connection with the proposed merger of equals between two global industrial gas producers – Praxair Inc of the United States and Linde AG of Germany. After defining the relevant market as various separate industrial gas markets, the KFTC required the merging parties to divest all of the assets relating to the tonnage and bulk oxygen, nitrogen and argon supply business owned either by Linde or Praxair in Korea. The KFTC further required the merging parties to divest all of the assets relating to excimer laser gases owned either by Linde in New Jersey in the

United States or by Praxair in Korea. Finally, the KFTC required the merging parties to divest a certain part of the helium assets owned by Linde and Praxair relating to the helium wholesale business.\footnote{KFTC press release (2 October 2018), available in Korean at www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=7942.}

In January 2018, the KFTC 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 transaction. Qualcomm and NXP are global semiconductor manufacturers headquartered in the United States and the Netherlands respectively. Qualcomm, a leader in mobile semiconductor sector, sought to expand into new sectors such as smart cars and internet of things 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 26 July 2018, however, Qualcomm and NXP Semiconductors NV terminated the proposed transaction, and Qualcomm withdrew its merger filing. Subsequently, in November 2018, the KFTC rescinded as moot its previously granted conditional clearance.

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 2018, the KFTC imposed fines amounting to 327 million won with respect to 23 transactions that were not reported or that were reported late, and two additional transactions that were properly reported but the parties implemented the reported transaction without observing mandatory applicable waiting period or clearance requirements. The figures represent a 10.7 per cent decrease in the number of such ‘failure to file’ cases as compared with 2017, when the KFTC imposed 577 million won in fines with respect to 28 transactions that were not reported or that were reported late.

Other noteworthy merger transactions that the KFTC reviewed in 2018 include the following transactions: Disney/Twenty-First Century Fox; Takeda/Shire; UTC/Rockwell Collins; King (Cayman) Holdings/Thompson Reuters; AXA/XL Group; Starfruit Finco/Akzo Nobel Chemicals; Safal/Zodiac Aerospace; Sumitomo Corporation Global Metals/Sumitomo Corporation; and Renesas Electronics/Integrated Device Technology.
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 KFTC Merger Review Guidelines provide a 15-day waiting period, in principle, for the following types of transactions that may qualify for the simplified review process:

- transactions between affiliates;
- transactions that do not form any controlling relationship (within the target);
- 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);
- a conglomerate merger where no product or service substitutability or complementarity exists between the parties due to the particular nature of the relevant market; or
- participation in the establishment of a private equity fund or transaction involving an asset-backed securitisation company.

In addition, under the recently revised KFTC Merger Review 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 Merger Review Guidelines. Following the amendment, the KFTC is now required to complete within 15 calendar days of the filing date its review of foreign joint ventures with no effects in the Korean market, but that technically meet the jurisdictional thresholds, including the 30 billion Korean sales (or local Korean nexus sales) requirement. However, except for in very obvious cases, 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 in the Korean market) itself may require a substantial amount of substantive analysis and review. In addition, the KFTC tends to grant clearance sooner if a given transaction has no conceivable effect in the Korean market in any event regardless of the transaction type and whether it is nominally marked as a fast-track case or normal process case.

Furthermore, on 31 May 2018, the KFTC further amended its Merger Notification Guidelines under which a company that has consolidated worldwide assets or sales of at least 2 trillion won would be required submit a post-merger filing only, and not a pre-merger filing if it acquires shares in another company by way of conversion of investment under the Debtor Rehabilitation and Bankruptcy Act. This was done in an effort to ease the burden on companies in transactions when the target is in bankruptcy proceedings under the supervision of the bankruptcy court.

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6 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.
The KFTC also revised its substantive merger review and competitive effects analysis modes. Specifically, effective 27 February 2019, the revised KFTC Merger Review Guidelines also include two new important concepts: innovation markets and information assets. First, defining ‘innovation markets’ as markets where companies rely heavily on their research efforts to stay ahead of competition, the KFTC seeks to apply a whole new set of criteria when assessing such innovation mergers. According to the KFTC’s revised Merger Review Guidelines, the KFTC may define an innovation market if the industry requires research and development and if one of the merging companies is a competitive innovator in the sector. Further, deeming it difficult to calculate market share in the innovation market purely based on sales, the KFTC seeks to assess market concentration levels based on a number of additional factors, such as research and development expenditure, number of patents and number of competitors. Lastly, the KFTC will assess a proposed merger as harmful for innovation based on the following criteria: whether merging companies have the ability to restrict innovation and have the incentive to do so after the merger; whether there is a sufficient number of innovative competitors after the merger, and whether merging companies are significantly more capable of innovation than competitors.

Second, the revised KFTC Merger Review Guidelines attempt to assess anticompetitive effects arising out of companies’ use of ‘information assets’, which have the same definition as ‘Big Data’. After an extensive consultation period, the KFTC decided not to adopt a separate analytical standard to review such mergers, but instead decided to recognise simply that, in certain mergers, information assets can be a unique and critical factor. In such cases, the KFTC will carefully review factors such as: whether the merging companies would have an advantage in systematically collecting, managing, analysing, and using data for various purposes; whether the merging companies would be able to limit competitors from accessing such data or information assets; whether the merging companies would be able to lower the quality of service related to data protection and security; and whether the merging companies would be able to increase entry barriers by the size of the dataset or the network effect.

Meanwhile, the KFTC Merger Notification Guidelines 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:

\begin{itemize}
  \item \textit{a} prohibit the relevant transaction altogether;
  \item \textit{b} order the total or partial disposal of assets, shares or both;
  \item \textit{c} restrict the scope or method of operation of the relevant entity;
  \item \textit{d} order the resignation of relevant directors;
  \item \textit{e} order the transfer of business;
\end{itemize}
order the relevant parties to disclose the fact that they have received the corrective order; and

any other necessary measures.\textsuperscript{8}

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 transaction amount per day\textsuperscript{9} 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. 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. The relevant 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.\textsuperscript{10} 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.

\textsuperscript{8} 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.

\textsuperscript{9} 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.

\textsuperscript{10} 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.’
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 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 seek provisional clearance by filing a provisional merger notification before the execution of the relevant agreement, as long as they submit a signed letter of intent, MOU or other equivalent documents with 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 KFTC Merger Review Guidelines 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.
OUTLOOK AND 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 fine-tuning 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. Thus, as part of the most far-reaching statutory reform initiative since the MRFTTA was initially enacted in 1980, pending before the National Assembly is a proposal to add an alternative merger filing threshold based on the value of the transaction at issue, similar to the revised merger notification rule recently adopted in Germany and Austria. Citing the Facebook/WhatsApp transaction as a prime example of how its current asset/turnover size-based merger-filing thresholds may fail to subject certain global transactions with potentially significant effects on Korean commerce to its mandatory merger notification regime, the KFTC hopes to fill what it sees as a loophole and strengthen its ability to review large global mergers before they are consummated.

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.11 The KFTC also recently cooperated with foreign competition authorities with respect to essentially all of the major global transactions, including the Praxair/Linde transaction where the KFTC imposed substantial divestiture obligations similar to the EC and US FTC’s signification divestiture requirements in that transaction. This kind of close coordination with foreign competition authorities, especially those in the European Union and United States, is expected to grow even more and play an exceedingly important role in the future.

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.

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Chapter 23

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.

In May 2019, YTL Cement Bhd (YTL) acquired a controlling stake in Lafarge Malaysia Bhd (Lafarge). This would make YTL a dominant cement producer in Malaysia with around 60 per cent market share in terms of production capacity for cement and ready-mixed concrete. MyCC clarified that it is not in a position to stop such mergers and acquisitions from taking place. MyCC will only act if the merged entity starts abusing its dominant position.

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. The provisions on competition and in particular merger control, are set out in Part VII Division 1 of the MACA. Section 54 of the MACA prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market.

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1 Shanthi Kandiah is the founding partner at SK Chambers. She was assisted by Henin Tong, Denishia Rajendran and Nimraat Kaur (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).
MAVCOM has also published the following guidelines on mergers:

- the Guidelines on Substantive Assessment of Mergers (SAM Guidelines), 20 April 2018;
- 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:

- 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;
- the provision in Malaysia of any of the ground handling services as specified in the Second Schedule;
- 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
- any other service determined by MAVCOM to be necessary or expedient for the carriage of passengers, mail or cargo referred to in point (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), air service permits for non-scheduled services, aerodrome operator licences and ground handling licences.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.

MAVCOM has a wide range of ex ante regulatory tools to achieve its outcomes for the aviation 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:

- 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;
- 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
- 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.

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3 See www.mavcom.my/en/industry.
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;

c. 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 of the MACA 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:

a. commitment of resources by the parent enterprises for the carrying out of the joint venture’s functions as an autonomous economic entity;

b. 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;

c. 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

d. 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 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:

a. 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 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 *ex ante* powers and *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). The 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. These three main prohibitions that relate to anticompetitive conduct are:

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, before 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.

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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.
On 17 May 2019, the MCMC issued the final versions of the following guidelines:

- Guideline on Mergers and Acquisitions (M&A Guidelines); and
- Guideline on Authorisation of Conduct (AC Guidelines).

The M&A and AC 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.

On 6 May 2019, Axiata Group Bhd (Axiata), owner of Celcom Axiata Bhd, and Norwegian Telenor Group (Telenor), owner of DiGi.com Bhd, announced the proposed merger of their business operations in Asia. If the proposed merger materialises, it will create Malaysia’s largest cellular operator. It is unclear whether the parties have notified the merger for assessment or whether they are pursuing an application for authorisation.

**Definition of a merger**

Paragraph 4.40 of the 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.

A merger or acquisition may raise competition concerns only 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 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 and involves changes in the shareholding structure of the firm’ occurs.

**Foreign-to-foreign mergers**

The CMA and its subsidiary legislation apply 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.\(^5\)

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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.
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 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>

The MCMC may also initiate investigations into a merger where there is allegation of anticompetitive conduct.

**II YEAR IN REVIEW**

**i Aviation services sector**

Apart from guidelines issued by MAVCOM (detailed in Section I.i), MAVCOM has also issued the Notification and Application Form for an anticipated merger or a merger. The information and supporting documents required by MAVCOM consist of, among others:

- **a** details of the parties to the merger;
- **b** information on the merger including description of the turnover of the merger parties, the structure of the merger and the change of the ownership structure of the merged entity;
- **c** description of the relevant aviation service market, including the relevant service market, the geographic market and the temporal market, where applicable;
- **d** competitive effects of the merger, including unilateral and coordinated effects of the merger, barriers to entry, and countervailing buyer power;
- **e** economic efficiencies (if any), including description of significant economic efficiencies and the nature of the economic efficiencies; and
- **f** social benefits (if any), including description of significant social benefits and the nature of the social benefits.

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

As mentioned, on 17 May 2019, the MCMC has issued the final versions of the M&A and AC Guidelines.

Axiata and Telenor’s proposed merger will be scrutinised by the MCMC. The deal has prompted concerns of a monopoly in Malaysia’s telecommunication sector. If allowed, the merged entity will have 267 million customers in nine countries. The MCMC has announced that it is currently evaluating the deal and will only approve after a thorough review, although no definitive timeline has been set for the review.

III THE MERGER CONTROL REGIME

i Aviation services sector

Voluntary regime

The 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 under the MACA.

A decision by MAVCOM is in the form of a finding of infringement under Section 59(1) of the MACA or non-infringement under Section 58 of the MACA. 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 anticipated merger from being carried into effect;
b ordering a merger to be dissolved or modified;
c requiring parties to enter into agreements designed to lessen or prevent the anticompetitive effects arising from a merger or an anticipated merger;
d requiring a merger party to dispose its businesses, assets, shares or rights in a specified manner; or
e 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 of the MACA sets out MAVCOM’s power to issue interim measures. This power only arises upon commencement of an investigation that has not been completed (i.e., 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 sets 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 and desist from acting in accordance with any agreement;
b. desist from any conduct which is suspected to infringe a prohibition; or
c. 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:

a. merger parties have a bona fide intention to proceed with the anticipated merger;
b. details of the anticipated merger are available; and
c. the anticipated merger has been or may be 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.

Rights of appeal to the High Court also exist 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, the 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). The MCMC will consider the extent to which competitors remaining in the market post-merger will constrain the level of competition in the market.

\(^6\) For information on the notification of an anticipated merger or a merger, MAVCOM asks parties to email them at competition@mavcom.my.
Malaysia

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, the 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:

a recent sales figures (by volume and by value) of each competitor in the market, so as to allow the MCMC to calculate market shares;

b information relating to the size of investment required for a potential competitor to enter the market;

c 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;

d data relating to current pricing and profit margins of the parties, and projected prices and profit margins after the merger or acquisition;

e data relating to the market’s size, growth prospects; and

f level of innovation, to assess the level of dynamic competition in the market.
Voluntary regime

Section 140(1) of the CMA provides that a licensee may apply to the MCMC for authorisation of the conduct where a merger will promote national interest. It is essentially a voluntary regime. Given the MCMC’s regulatory leverage, licensees tend to err on the side of caution and consult the MCMC, particularly since the MCMC has expressed an interest in monitoring mergers in the sector.

Section 143 of the CMA provides for criminal penalties for contravention of any prohibition of Chapter 2 Part VI, which includes a fine of up to 500,000 ringgit or imprisonment for up to five years, or both. A person may further be liable to a fine of 1,000 ringgit for every day or part of a day during which the offence continues after conviction.

Further administrative actions available to the MCMC under the CMA include the following:

a  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.

b  Section 33 – the Minister may modify, vary, revoke or impose further special or additional conditions to an existing licence.

c  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 M&A Guidelines, however, provide for a voluntary regime for notification and assessment, separate from an authorisation under Section 140 of the CMA.

Interim measures

The MCMC or any person may seek an interim or interlocutory injunction against any prohibited conduct through the courts.

Timing for notification

Section 140(1) of the CMA provides that a licensee may apply to the MCMC, before engaging in conduct that 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 the 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 M&A Guidelines, parties should submit their transactions before completion. It is recommended under the same guidelines that merger parties include as a condition precedent to the completion of their merger transactional documents requiring the approval of the MCMC in circumstances that would indicate that

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.
the merger has the potential to raise anticompetitive concerns. In recognition of the fact that mergers may have proceeded before the introduction of the voluntary assessment process via the guidelines, the MCMC will also assess these types of completed mergers.

**Time frame for review**
The 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**
Before authorising any conduct, the MCMC may require the licensee to submit an undertaking regarding the conduct in any matter relevant to the authorisation.

The 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 the CMA.

The 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, for example, the carriage of passengers as an aviation service, whether or not the service is provided by a licensee.

With respect to the communications industry, the M&A Guidelines of the MCMC in defining a merger (Paragraph 3.10) does not reference the licensee. However, as the MCMC’s powers are limited by the scope of Sections 133 and 139 of the CMA (which relate to the conduct of a licensee), the definition of a merger for the purposes of the M&A Guidelines may be similarly limited.
V OUTLOOK AND 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. Based on news reports, MyCC has begun the process of seeking legislative amendments to introduce new provisions on mergers and acquisitions into law. MyCC aims to implement a merger control regime by the end of 2019. It will be important to ensure that the agency is appropriately funded and resourced to take this mandate on.

The aviation services and communications and multimedia sectors are exceptions in this regard. MAVCOM has introduced the SAM Guidelines and NAP Guidelines, and intends to introduce further guidelines in future, while the MCMC has issued the M&A and AC Guidelines, thus providing clarity on the 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.
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 (COFECE) 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 COFECE 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 2019, pre-merger notification is required when:

- the transaction’s value exceeds 1,520.82 million pesos in Mexico;\(^1\)
- 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 1,520.82 million pesos; or
- the acquired assets or capital stock amount to more than 709.61 million pesos,\(^3\) and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 4,055.52 million pesos.\(^4\)

The assets and sales that must be taken into account when assessing the thresholds are the ones located or originating in Mexico.

Failure to file can result in a fine of between 422,455 pesos\(^5\) and 5 per cent of the parties’ annual sales.

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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 COFECE 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 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:

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6 It is noted that the Competition Law provides eight exemptions. Also, please bear in mind that some specific requirements need to be met to fall into each of the exemptions.

7 Transactions that do not meet the thresholds can still be illegal. An illegal merger is defined in the Competition Law as any merger that has the purpose or effect of hindering, diminishing, damaging or preventing free competition or economic competition. This type of merger is penalised with a fine up to the equivalent of 8 per cent of the infringing parties' annual sales.

8 Effective as of 13 August 2014.

9 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.

10 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, issued and amended by the COFECE on 30 October 2014, 21 January 2016 and 25 January 2018. These regulations complement the merger control provisions established in the Competition Law;

Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued by the IFT on 7 January 2015 and amended 12 December 2018. 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 COFECE 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 COFECE 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, non-compete clauses, among other issues;

Guidelines for the Notification of Concentrations for the telecommunications and broadcasting sectors, issued by the IFT on 28 June 2017. These guidelines provide further details regarding application of thresholds, information and documents required for the filing, and non-compete clauses, among other issues;

Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers, issued by the COFECE 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 COFECE 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 COFECE, issued by such authority on 2 November 2017. These regulations establish the rules for the operation of the Electronic System of Filings of the COFECE (including merger control filing); and

Rules for the Notification of Concentrations via electronic systems, issued by the COFECE 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. Under proposed amendments to these rules published by the COFECE on 9 May 2019, the submission of a concentration filing via the electronic system will become mandatory in January 2020.
II YEAR IN REVIEW

In 2018, the COFECE concluded reviews of 183 pre-merger notifications with the following outcomes: 172 transactions were authorised, one transaction was conditioned to comply with undertakings, three transactions were objected and seven did not finish their review. Also, in the first quarter of 2019, the COFECE reviewed 42 pre-merger notifications with the following outcomes: 40 transactions were authorised and two did not finish the process. Also, COFECE imposed fines in four cases: three for failing to notify a transaction when it was legally required and one for failing to comply with previously imposed undertakings. Information for mergers reviewed by the IFT is not published, but public information suggests that two transactions were conditioned to comply with undertakings.

Of the past year’s cases, two are worth mentioning. First, the Disney/Fox transaction, which required concurrent review by both agencies. In this case, COFECE decided to clear the transaction after its structure was modified. In mid 2018, the transaction was notified as a global acquisition, which included the cinema and television studios, entertainment and regional sports channels, and international businesses related to television. However, in January 2019, in order to eliminate risks to competition in the distribution of movies for the cinemas market, the parties modified the transaction to include the transfer, on behalf of Sony Pictures, of the participation of Disney in the company that participated in this market in Mexico. After this, COFECE proceeded to clear the transaction.11

After reviewing 10 markets related to telecommunications and broadcasting, the IFT found that the transaction would harm competition in two markets: provision and licensing of restricted channels to cable TV providers in the categories ‘factual’ (which includes culture programmes, documentaries and reality TV) and ‘sports’. Therefore, after asking the parties to propose undertakings, the IFT decided to clear the transaction with the condition to comply with the following undertakings: (1) for the factual category, several measures were imposed to avoid coordination between the new agent (Disney/Fox) and Discovery (main competitor); and (2) for the sports category, the divestiture of Fox Sports and its related assets was ordered.

The second relevant case is the Nestlé/Lala transaction, which was not notified before COFECE. After an investigation procedure for an illegal merger, the authority imposed fines of approximately 8 million pesos to the parties for failing to notify a transaction that took place in August 2013. The total sum of the fine was calculated taking into consideration the risks that were generated for not notifying.

11 The other markets that were analysed by COFECE were: (1) licensing of audiovisual content for entertainment in physical and digital formats, both for direct acquisition and direct download; (2) licensing of music for entertainment in physical and digital formats, both for direct acquisition and direct download; (3) licensing of music in non-digital media; (4) live entertainment; and (5) licensing of intellectual property rights for books and magazines, and for consumer goods and development of interactive media and gaming.
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 COFECE. As of 1 January 2019, the mandatory filing fee is 184,539 pesos.

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 COFECE 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 COFECE 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.

The COFECE 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 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 COFECE 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 COFECE with documents evidencing the transaction formalisation within 30 business days after closing.

If, during the notification process, the concentration raises competition concerns, the COFECE 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

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12 Unless specified, the acronym COFECE will be used to refer to both competition authorities in this section.
13 The payment of a new filing fee would be required.
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 COFECE 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 COFECE 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 COFECE when issuing its decision.

During the notification process, access to the file is restricted to the notifying parties. Once the process concludes, the COFECE 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 courts to determine which agency holds jurisdiction. Finally, when a transaction affects markets in which both agencies have jurisdiction, the transaction may be reviewed by both agencies. However, the decision may only be issued with regard to the markets in which each agency has 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 COFECE 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.

COFECE or IFT decisions may be challenged before federal courts via amparo, which is a trial aimed to revoke unconstitutional or illegal 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 COFECE decision before federal courts.

Finally, there is one very important aspect of the COFECE Guidelines for Notification of Concentrations regarding collaboration agreements (which are not regulated in the Competition Law). These Guidelines mention that such agreements may be reviewed under the merger control procedure whenever the 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 COFECE 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 and absence of substantial market power, for the authorisation of the agreement.

V OUTLOOK AND CONCLUSIONS

As previously mentioned, in 2013 the Mexican Constitution was amended to improve the enforcement of competition law and policy. Another one consisted of improving the telecommunications and broadcasting law, and enhancing its enforcement. Some of the most important changes are as follows:

a the Federal Competition Commission and Federal Telecommunications Commission (both agencies within the executive branch) were replaced by the new autonomous constitutional entities COFECE and IFT, respectively;

b the five former commissioners were replaced by seven commissioners for each entity;

c the power to enforce the Competition Law in the telecommunications and broadcasting industries was transferred to the IFT;

d the COFECE and IFT were empowered to issue Competition Law regulations (before the constitutional reform, the Competition Law regulations were issued by the president);

e new federal courts specialised in competition, telecommunications and broadcasting were created; and

f the reconsideration appeal was eliminated, so the COFECE 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:

a concentrations surpassing the monetary thresholds require approval from the COFECE 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;
...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 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.

In December 2018, a new President started his mandate and an austerity policy was implemented. This meant that the federal budget for 2019 was reduced for all public entities. In the case of COFECE, the reduction was 5 per cent of the previous year’s budget. Also, a new Federal Remunerations Law was enacted, which provides that public officials, no matter how specialised, cannot receive a higher salary than that of the President. This law is currently under review by the Judicial Power via *amparo* trials that several officials of the public administration started against such determination. Some of the officials that initiated these trials are officials at both COFECE and the IFT. Notwithstanding, it is too early to foresee the effects of both the new austerity policy and the Federal Remunerations Law, and there have not yet been significant losses of talent from the competition authorities (in other regulatory entities, several commissioners have resigned).
Chapter 25

MOROCCO

Corinne Khayat and Maija 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 have only been applicable since December 2018, when the new president and members of the Competition Council were appointed, and the Competition Council was not operational between 2014 and 2018.

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.

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.

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4 Dahir No. 1-14-117.
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:

- 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.

As regards the notification thresholds, 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:

- 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;
- 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
- 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:

- 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 officially confirm the alternative nature of these criteria now it is 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 to this day, insofar as the Competition Council has already examined concentrations where the acquirer was not present in the same sector as the target company in Morocco (e.g., 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 (for example, 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 was not operational from 2013 to 2018. As a result, no opinion, decision or annual report has been published by the Competition Council in recent years.

While waiting for the appointment of the Competition Council’s members and the entry into effect of the new legal framework, the transactions were 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.

Many transactions have been notified to the Competition Council since its reactivation in December 2018 and its first decisions were delivered in the first semester of 2019.

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 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 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:

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
- 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.
Third-party involvement and access to files

Under the new legal framework, upon receipt of a notification file, a press release is 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 market test is carried out by the instruction services and 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 are, in principle, published in the Official Bulletin and available on their websites (however, business secrets are in principle reserved for the Competition Council and the government commissioner).

Appeals and judicial review

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 was concluded in 2017 with the competition authority of People’s Republic of China.

e The Moroccan Competition Council announced in 2019 its will to strengthen its bilateral cooperations with the Portuguese Competition Authority and the Chilean National Economic Prosecutor.

Therefore, the Competition Council, now that it is 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 AND CONCLUSIONS**

The nominations of the Moroccan Competition Council’s members has triggered 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 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 officially clarified by the Competition Council now that it is operational.

The purpose of the new law legal framework is to generally strengthen the role and powers of the Competition Council and it can therefore be expected that the control of merger operations will be strengthened.
Chapter 26

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 107 notifications and reached 93 decisions in Phase I in 2018, which is comparable to the workload in 2017 (102 notifications and 103 decisions). The majority of notifications resulted in one-page short decisions. Only seven Phase I decisions were made.

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1 Gerrit Oosterhuis is an associate partner and Weyer VerLoren van Themaat is a partner at Houthoff.
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, down from 14 in 2017 and nine in 2016). In addition, the ACM received one request for a decision in Phase II and issued one decision in Phase II, which is the same score as in 2017.6

Of the eight decisions in Phase I and Phase II, four concerned the healthcare (home care, elderly care, rehabilitation care and specialised clinics)7 and pharmacy sectors. Two of the decisions concerned the food sector, with one merger concerning producers of spices and cold sauces8 and one involving flour mills.9 Of the two remaining cases, there was one merger of ship chandlers10 and one acquisition in the supermarket sector.11

The ACM granted one request to adapt a remedy that was agreed upon in a Phase II decision from 2016.12

An exemption from the mandatory waiting period has been granted three times.13

The ACM did not impose any fines for a failure to notify a concentration in 2018.

ii Infringements of formal obligations and legal proceedings

Two merger decisions were appealed in 2018. In both cases, the Rotterdam District Court (the Court) and the Trade and Industry Appeals Tribunal (CBb) respectively ruled in favour of ACM.

In 2017, the ACM had cleared the acquisition of a part of Heineken’s non-alcoholic wholesale activities by the wholesale food supplier Sligro.14 The ACM had 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 exert competitive pressure. A number of competitors of Sligro appealed this decision to the Court, claiming that the ACM should have assessed the acquisition on the narrower market for the supply of food products to the hotel and catering industry. The Court held that the ACM was right to decide that the market for the supply of food and food-related products does not need to be divided into several sub-markets depending on the type of customers, referring to recent case law of the EC, as well as the outcome of the market investigation of the ACM.

Sligro and Heineken had, in the context of the transaction, also agreed that Sligro would provide all logistical services for the distribution of Heineken’s beers and ciders –

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6 Decision ACM 17 December 2017 (Bergman Clinics/NL Healthcare Clinics) Case ACM/18/033727.
8 Decision ACM 22 January 2018 (Euroma Holding BV/Clearwood Investment BV) Case ACM/17/024889.
9 Decision ACM 14 February 2018 (Dossche Mills Nederland BV/Meneba Holding BV) Case ACM/17/019799.
10 Decision ACM 10 July 2018 (Wrist Holding NL BV/Klevenberg Shipping Center BV) Case ACM/18/033205.
11 Decision ACM 26 June 2018 (Jumbo/Emté) Case ACM/18/032654.
12 Decision ACM 30 July 2018 (Brocacef/Mediq) Case ACM/16/029865.
13 Decision ACM 18 May 2018 (Ledeboer Investments BV/Stichting Bestuur Vérian) Case ACM/18/033021; Decision ACM 20 July 2018 (Blueprint/ECR) Case ACM/18/033613; and Decision ACM 31 December 2018 (Stichting OLVG/Slotervaartziekenhuis BV), Case ACM/18/034722.
14 Decision ACM 12 September 2017 (Sligro/Heineken) Case 17.0611.22.
which it could combine with the delivery of its own products. The appellants submitted that this allowed Sligro to offer a one-stop-shop solution that would be irresistible to customers in the hotel and catering industry and that the ACM had not sufficiently investigated this aspect. The ACM had notably relied on the internal upsell model of Sligro, which predicted that the effects of the logistical agreement on sales by Sligro would be limited, owing to the nature of Sligro’s customers and the fact that Heineken (because of commitments to the ACM) is prohibited from entering into exclusive supply agreements for beer. The Court held that the ACM’s investigation had been sufficiently thorough and upheld the clearance decision.

The other litigated case can be traced back to 2008, when the ACM had allowed a joint venture for laying fibre cables between Reggefiber and telecom incumbent KPN, while imposing conditions such as non-discriminatory access and a prohibition of tariffs that could lead to a price squeeze. When KPN acquired sole control over the joint venture, the ACM did not re-impose these conditions, on the basis that new sector regulation regarding maximum prices would impose the same restraints on KPN. The District Court agreed in 2016. Vodafone appealed. It pointed out that Reggefiber’s previous prices were around 10 per cent below the regulated maximum prices and that it would have an incentive to raise its prices to the new regulatory maximum. This price raise would in itself constitute a significant impediment to competition, according to Vodafone. The CBb held that the regulatory maximum prices were intended to prevent excessive prices and margin squeezes. Hence, the ACM had been correct to refer to the sector regulation and to conclude that a price hike up to the regulatory ceiling would not constitute a significant impediment to competition.

iii Phase I decisions

Two providers of geriatric revalidation care with a joint market share of 30 to 40 per cent in the city of Rotterdam were allowed to merge their activities. The ACM relied notably on the opinion of health insurers that they would continue to have access to a sufficient number of alternative suppliers on the local market.

The acquisition by ZorgSaam of Warande would result in combined market shares of above 70 per cent on several local healthcare markets, but it was allowed on the basis of the failing firm defence. Warande was expected to soon go bankrupt, meaning that its assets would end up with ZorgSaam anyway. Finally, the market investigation showed that there were no other buyers for Warande, to the effect that all criteria of the failing firm defence, as defined in the EC’s Guidelines for Horizontal Mergers, were fulfilled. The ACM attached great importance to the opinion of stakeholders that they did not want to contract with Warande anymore and that ZorgSaam was the only viable buyer of Warande.

The ACM allowed the acquisition by food retailer Jumbo of 79 shops of competing retail chain EMTÉ, but required the divestment of three shops to remedy market shares above 50 per cent on local markets for the sales of daily consumer goods through supermarkets.

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17 The ACM equals this to the situation that the assets would leave the market, as the demand for care would remain and the health insurers are legally obliged to continue to serve this demand for care.
18 Decision ACM 21 June 2018 (Stichting ZorgSaam Zorggroep Zeeuws-Vlaanderen/Stichting Warande).
Interestingly, the ACM aligned itself with the Belgian Competition Authority by defining the size of the local market as smaller than it had previously done, relying on a radius of 10 minutes of travelling time by car around a shop rather than the 15-minute radius used in earlier cases.\(^{19}\)

Flour mill Dossche was allowed to acquire its competitor Meneba without remedies, despite a joint market share of 40 to 50 per cent on the Dutch market. As imports from Germany and Belgium were increasing, the ACM expected that mills from those countries would provide sufficient competitive pressure.\(^{20}\)

The acquisition of Clearwood by Euroma concerned the markets for cold sauces, spices and seasonings. The markets were considered competitive owing to the availability of spare production capacity and the use of short-term contracts.\(^{21}\) Likewise, the ACM considered the market for ship chandlers in the Port of Rotterdam and the ARA region\(^{22}\) – which it had not discussed earlier – to be competitive owing to, inter alia, the absence of long-term contracts.\(^{23}\)

The ACM issued a detailed decision regarding the acquisition of pharmaceutical wholesaler Apotex by its competitor Aurobindo, discussing various product market definitions (molecular level versus Anatomical Therapeutic Chemical Classification; prescription versus over the counter) as well as related markets such as pipeline products and contract manufacturing. The acquisition was allowed under the condition that Apotex’s diazepam enema business was divested, as the parties would have a 100 per cent share of this market.\(^{24}\)

### iv Phase II cases

The only Phase II decision of 2018 concerned a merger of two operators of specialised commercial clinics (also called independent treatment centres) for dermatology, eye care and orthopaedics.\(^{25}\) In Phase I, the ACM had expressed a concern regarding the market for the supply of care\(^{26}\) in a vaguely defined area around the town of Amersfoort where the parties would have 30 to 40 per cent market share. In Phase II, the ACM accepted that the parties were no (close) competitors in this area based on diversion ratios. On the national market for the purchase of care,\(^{27}\) the ACM investigated whether the parties would have significant bargaining power – despite their moderate market share of less than 20 per cent – owing to the preference of some patients for specialised clinics over hospitals. The market investigation did not show any such leverage, as, for example, very few people would switch between health insurers depending on whether or not the insurers had contracted care from specialised treatment centres. The ACM allowed the transaction without remedies.

In 2016, the ACM granted a Phase II licence under conditions for the acquisition of Mediq by its competitor Brocacef.\(^{28}\) Both parties operate a chain of pharmacies in the

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\(^{19}\) Decision ACM 26 June 2018 (Jumbo/Emté) Case ACM/18/032654.

\(^{20}\) Decision ACM 14 February 2018 (Dossche Mills Nederland BV/Meneba Holding BV) Case ACM/17/019799.

\(^{21}\) Decision ACM 22 January 2018 (Euroma Holding BV/Clearwood Investment BV) Case ACM/17/024889.

\(^{22}\) The ports along the North Sea cost between Antwerp, Rotterdam and Amsterdam.

\(^{23}\) Decision ACM 10 July 2018 (Wrist Holding NL BV/Klevenberg Shipping Center BV) Case ACM/18/033205.

\(^{24}\) Decision ACM 21 December 2018 (Aurobindo/Apotex) Case ACM/18/033946.

\(^{25}\) Decision ACM 17 December 2017 (Bergman Clinics/NL Healthcare Clinics) Case ACM/18/033727.

\(^{26}\) Meaning the market on which patients demand care.

\(^{27}\) Being the market on which health insurers purchase care from suppliers on behalf of their insured.

\(^{28}\) Decision ACM 13 June 2016 (Brocacef/Mediq), Case 15.0849.24.
Netherlands, and are active in the field of wholesale in the pharmaceutical sector. Brocacef was obliged to sell 89 local pharmacies, including one called De Witte Pauw in the town of Ermelo to remove overlap with the three other local pharmacies that were originally Mediq franchisees. In January 2018, those three pharmacies terminated their relationship with Brocacef. As this removed the original overlap in Ermelo, the ACM changed the conditions imposed on Brocacef, allowing it to re-contract De Witte Pauw. The prohibition to have a wholesale relationship during a cooling off period was switched from De Witte Pauw to the three pharmacies that left the Brocacef franchise.  

v Exemptions from the standstill period

The ACM granted three exemptions from the standstill period in 2018, all in the healthcare sector and all resulting from the target being bankrupt or running an immediate risk of going bankrupt. In all cases, the ACM seems to have acted quickly and in a rather pragmatic way.

vi Reports and position papers

In 2017, the ACM published an arguably biased report that suggested that hospital mergers lead to price increases but not to better care. The ACM refers to this conclusion in a new position paper regarding hospital mergers and in which it also argues that it may be necessary to implement a care-specific merger test that includes non-competition parameters such as size and complexity of the resulting hospitals.

The ACM published its new best practices regarding the analysis of product markets in healthcare sectors. In this document, the ACM announces a new product market definition for basic care, being ‘diagnosis treatment combinations carried out in at least 20 general hospitals’. Importantly, the ACM will no longer start its analysis from a supply-side perspective (i.e., which hospitals offer a certain treatment) but from the demand perspective (i.e., what alternatives exist for specific patient groups). This will lead to hugely more detailed and more complicated reviews.

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29 Decision ACM 30 July 2018 (Brocacef/Mediq) Case ACM/16/029865 to change the decision of 13 June 2016 in Case 15.0849.24. As discussed in the 9th edition of this publication, the original licence was challenged by competitors and insurance companies but upheld in first instance (Rotterdam District Court 7 September 2017 (Mosadex ea/ACM) ECLI:NL:RBROT:2017:6833). Appeal is pending.

30 Decision ACM 18 May 2018 (Ledeboer Investments BV/Stichting Bestuur Verian) Case ACM/18/033021; Decision ACM 20 July 2018 (Blueprint/ECR) Case ACM/18/033613; and Decision ACM 31 December 2018 (Stichting OLVG/Slotervaartziekenhuis BV), Case ACM/18/034722.


III THE MERGER CONTROL REGIME

Merger control thresholds

Article 29 DCA provides that a concentration must be notified if:

- the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration; and
- 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.34

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).35 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:

- the combined turnover of all undertakings concerned exceeds €55 million in the calendar year preceding the concentration; and
- of this turnover, at least two of the undertakings concerned each achieved at least €10 million in the Netherlands.36

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.37

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34 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.

35 The relevant amendment to the Health Care (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014.

36 These thresholds will continue to apply until at least 1 January 2023.

37 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).
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 ACM 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 ACM 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.

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 possibility of requesting the Minister of Economic Affairs, Agriculture and Innovation to grant a licence for serious reasons of general interest. This possibility will probably be tested in the near future in PostNL/Sandd. In this case, the intended acquisition by postal incumbent PostNL of its largest competitor, Sandd, would create a near monopoly, but it is claimed to be necessary, at least in the medium term, to maintain a postal system with national coverage.

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 ACM asks formal questions requiring additional information on the concentration. Because of 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 Coöperatie Vlietland/Vlietland Ziekenhuis.38 There are no requirements for pre-notification.

38 Decision NMa 18 February 2010 (Coöperatie Vlietland/Vlietland Ziekenhuis), Case No. 6669.
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 EUMR. 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. If the intended concentration does not pose any problems, the ACM may prefer to take a final clearance decision within a couple of days instead of granting an exemption.

In case of exemptions, 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 ACM also actively gathers information by sending out questionnaires or by interviewing third parties. The ACM is aware that competitors may have strategic reasons to be critical of a contemplated concentration, but it attaches more weight to the comments of customers – especially the comments of health insurers in cases concerning healthcare suppliers.

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.\(^\text{39}\)

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.\(^\text{40}\) 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,\(^\text{41}\) but does require, inter alia:

- the proposal to be in writing;
- a detailed description of the nature and size of the remedy;

39 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).
40 Remedies guidelines 2007. This section is based on these guidelines.
41 In its guidelines, the authority does refer to model texts from the European Commission.
a note on how all indicated competition concerns will be eliminated;

if applicable, the steps required to divest a part of the undertaking and the timeline for such;

a non-confidential version of the proposal; and

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 before 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.42

**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. This fine may be doubled in case of recidivism.

**Appeals and judicial review**

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.

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42 For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.

43 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).
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 ACM. The ACM 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/Bakkersland, 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 AND CONCLUSIONS
In recent years, the ACM has placed more priority on consumer protection than on the competitive structure of the market. This may change with the appointment of the new chairman of the ACM, Martijn Snoep, who has announced that the ACM will be more aggressively enforcing competition law through cartel investigations. This is, so far, of small consequence in the field of merger control, where the ACM generally remains quite realistic in its analyses.

However, 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 2018.

A 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

44 Decision ACM of 31 October 2016 (Borgesius/Bakkersland) Case 16.0592.22.
45 Decision ACM of 7 September 2016 (Sonova/AudioNova) Case 16.0721.22.
46 Article 49 of the Health Care (Market Regulation) Act of 1 October 2006.
47 Proposal of law of 8 April 2016, 34445.
will continue to pose a heavy administrative burden on the parties involved. At the time of finalising this chapter in 2019 the legislative proposal had not been adopted by the Dutch parliament.48

An even bigger challenge, at least for hospital mergers, may be posed by the new best practices discussed in Section II.iv regarding hospital mergers, as they will greatly increase the burden on the parties to a concentration. Moreover, the ACM has suggested to the Ministry of Health, Welfare and Sport that all acquisitions by care institutions with significant market power as well as concentrations above a certain scale be prohibited unless the concentration would result in significant efficiencies.49 It is a matter of concern that the ACM may be swayed by a certain populist sentiment against healthcare mergers. The Phase II decision regarding specialised commercial clinics discussed in Section II.iv does not bode well, as the ACM seemed to display a certain eagerness to find objections to the concentration.

In line with the general trend in the EU to be more cautious about foreign direct investment, 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.50 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.51

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.52

50 See: www.internetconsultatie.nl/telecommunicatie.
51 See: https://fd.nl/Print/krant/Pagina/Voorpagina/1199825/kamp-dreigt-metzwaardere-wapens-tegen-overnames.
52 See the NPCF and Reggefiber cases discussed in Section II.ii.
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. However, the NZCC will investigate non-notified mergers that raise potential competition issues and has recently established a public register of these merger investigations.

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.

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1 Ross Patterson and Oliver Meech are partners and Kristel McMeekin is a senior associate at MinterEllisonRuddWatts.
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.

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).

iii Application to overseas entities

Overseas acquisitions that lessen competition in New Zealand markets are dealt with by 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-2018 to mid-2019
Over the past financial year, 11 applications for clearance were made to the NZCC.3 Of those applications, as at the time of writing, the NZCC had cleared nine applications (including one cleared subject to a divestment undertaking), had not declined any applications and was still processing one. One application was withdrawn by the applicant.

At the time of writing, the NZCC had received one application for authorisation, for which authorisation was granted.

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 67 working days. This is slightly quicker than in previous years, where the average number of working days to reach a decision was 77 in the 2017–2018 financial year and 82 in the 2016–2017 financial year. The sole authorisation application was determined in 67 working days.

iii  Merger clearance decisions of interest
Merger clearance decisions of interest, published in the past 12 months, are described below.

*Ingenico Group SA/Paymark Limited*4

In November 2018, following a seven-month review, the NZCC granted clearance for Ingenico Group SA (Ingenico) to acquire 100 per cent of the shares in Paymark Limited (Paymark). Ingenico and Paymark provide services that allow merchants to accept electronic payments.

Ingenico supplies physical payment terminals (which allow merchants to accept payments instore) and digital payment services (which allow merchants to accept payments online). Paymark’s primary business is to provide a ‘switch’ that routes transactions from terminals or online payments to the relevant financial institution. It is the leading supplier of

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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.
switching services in New Zealand. Ingencio competes against other suppliers of terminals and digital payment services. The vertical merger with Paymark would make Ingenico a supplier of switching services to those suppliers.

The NZCC’s main focus was assessing whether the vertical merger of Paymark’s switch with Ingenico’s terminal business would be likely to give the merged entity the ability and incentive to inhibit rivals that supply terminals from competing by raising the cost of switching services to those suppliers.

The payment systems market is complex and includes the introduction of new payment systems technology. The NZCC described balancing the potential benefits and risks of the merged entity adopting a foreclosure strategy as a ‘complex exercise’ requiring consideration of how rivals, merchants, terminals and banks would react if terminals became less attractive. The NZCC ultimately concluded that the cumulative impact of the constraints that the merged entity would face meant that it was unlikely to engage in foreclosure to the point where it would result in a substantial lessening of competition.

First Gas Limited/GasNet Limited

A notable recent penalty for breach of the merger provisions of the Act was in relation to First Gas Limited’s (First Gas) acquisition of certain assets from its competitor GasNet Limited (GasNet). The NZCC issued proceedings against First Gas after a nearly two-year investigation.

The NZCC alleged that First Gas engaged in anticompetitive conduct in acquiring the Bay of Plenty assets of GasNet. First Gas, which was a significantly larger gas distribution business than GasNet, allegedly took steps to retrofit gas pipelines where GasNet had already laid down its own pipes, acquired GasNet assets without clearance from the NZCC, and restrained GasNet from re-entering the Bay of Plenty region for five years. First Gas’s actions resulted in a long-term structural change in the market, removing competition between First Gas and GasNet for new development contracts.

First Gas pleaded guilty and was fined NZ$3.4 million for breaches of the Act arising from the acquisition and related anticompetitive conduct. NZCC chair Dr Mark Berry said:

> The penalty handed down by the High Court reflects the seriousness of this conduct and is sufficient to ensure that First Gas will not profit from the acquisition. It is also a reminder to businesses that anti-competitive acquisitions are a priority area for the Commission and if there is any doubt about the competition effects of a merger, they should seek clearance from us first.

### Recent legislative changes

In the past 12 months there have been two significant changes to the Commerce Act. The Commerce (Criminalisation of Cartels) Amendment Act introduced a criminal offence for cartel conduct and the Commerce Amendment Act introduced a market studies regime.

The Commerce (Criminalisation of Cartels) Amendment Act was passed in April 2019. The Amendment Act amended the Commerce Act by introducing a new criminal offence for cartel conduct.

Following a two-year transition period, from 4 April 2021, an individual convicted for intentionally engaging in cartel conduct in breach of Section 30 of the Commerce Act will

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face a penalty of imprisonment for up to seven years, a criminal fine of up to NZ$500,000 (the same as the current maximum civil pecuniary penalty for an individual under the civil enforcement regime) or both.

Cartel conduct is entering into a contract or arrangement, or arriving at an understanding, with a competitor that has the purpose, effect or likely effect of price-fixing, restricting output or market allocation.

The new criminal offence requires that the individual intended to engage in cartel conduct, and it will not suffice that the individual's conduct had that effect or likely had that effect. Inadvertent behaviour will not give rise to criminal liability, but may still fall foul of the civil prohibitions.

The Commerce Amendment Act was passed in October 2018. The Amendment Act amended the Commerce Act to empower the NZCC to conduct market studies (referred to as 'competition studies' in the Amendment Act), either on its own initiative or at the direction of the Minister of Commerce and Consumer Affairs. The introduction of a market studies regime has brought New Zealand into better alignment with competition regimes internationally, particularly those in Australia, the United Kingdom and Canada, where the national competition authorities also have the ability to conduct market studies. The NZCC is currently conducting its first market study into retail fuel.

There have not been any changes to the merger control provisions of the Commerce Act during this period.

III THE MERGER CONTROL REGIME

i Overview

The NZCC can either grant:

a 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 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.

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);
conditions of market entry and expansion;
the countervailing power of buyers;
any enhancement in the ability of the remaining competitors to collude (either expressly or tacitly); and
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 statutory time frame for a clearance decision is 40 working days. The NZCC can agree an extension of time with the applicant, which typically occurs in more complex cases.

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 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 35 working days, and the longest was 138 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

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 NZCC’s processes leading up to the determination, may appeal.

NZME/Fairfax

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 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

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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.’

The applicants appealed to the Court of Appeal, which affirmed the High Court’s decision, noting that the detriments of the merger clearly outweighed the benefits, and not by a small margin. The Court of Appeal agreed with the High Court that non-economic, unquantified detriments are to be taken into account when applying the test for authorisation and supported the High Court’s reasoning that the loss of media plurality would very likely be irreparable.

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.

The NZCC has stated that the success of the voluntary clearance regime relies on the credible threat of enforcement proceedings for non-notified mergers that may substantially lessen competition. In the 12 months before and up to 31 March 2019, the NZCC opened four investigations into non-notified mergers. One of these investigations was closed after the purchaser agreed not to acquire certain assets of the target; the other three investigations were ongoing at the time of writing.

The NZCC established a public register of investigations into non-notified mergers in February 2018. The register contains investigations that were open at that time or have been opened subsequently, but does not include most investigations that were concluded prior. Accordingly, there is little historical data with which to compare the past 12 months.

V OUTLOOK AND CONCLUSIONS

i Proposed legislative changes

The NZCC is currently consulting on updates to its Mergers and Acquisitions Guidelines and the application form for merger clearance. Draft revised Mergers and Acquisition Guidelines and a draft revised clearance application form were published for consultation in January 2019, with feedback closing at the end of February 2019. At the time of writing, final revised guidelines had not been published.

    Notable proposed changes in the draft guidelines include:
    
    a an updated indicative clearance timeline;
    b guidelines on conferences held for clearance applications;
    c guidelines on non-notified merger investigations undertaken by the NZCC; and
    d updates to the NZCC’s approach to confidential information and access to information.

These proposed changes reflect that the NZCC is adopting a more transparent approach to merger control. The changes are also consistent with the NZCC’s Priorities for 2018/2019, which include investigating non-notified mergers, following an increase in such mergers over recent years.

ii Pending applications

As at the time of writing, the NZCC is considering one application for clearance, which was registered in March 2019.

Mainland Print Limited/Inkwise Limited

The NZCC registered an application for Mainland Print Limited (Mainland) to acquire the heatset and coldset web offset printing assets of Inkwise Limited (Inkwise).

Mainland is a recent joint venture owned by Blue Star Group (New Zealand) Limited (Blue Star) and Allied Press Limited (Allied Press). Blue Star provides a range of commercial printing services including heatset printing services to magazine publishers and retail catalogue customers through its division, Webstar, located in Masterton and Auckland. Allied Press is a South Island publisher of daily newspapers with interests in newspaper printing operations in Dunedin, Alexandra and Greymouth. Allied Press also provides coldset printing services to other newspaper publishers.
Inkwise, based in Rolleston, provides heatset printing services to magazine publishers and retail catalogue customers, and coldset printing services to newspaper publishers.

The merger involves the market for the supply of coldset web offset printing in the South Island; and the national market for heatset offset printing services.

The NZCC is considering whether the proposed acquisition will:

a reduce competition through reducing or eliminating the constraint that suppliers of heatset and coldset printing services impose upon one another;

b change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable; or

c give Mainland, or its shareholders, the ability and incentive to foreclose rivals and render them less able to complete.
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 were amended in 2018. 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.

The legal regime in the area of foreign investment, including its key concepts (e.g., foreign investor, aggregate control) and associated prohibitions, is still evolving. While foreign and strategic investment restrictions constitute a separate set of rules (different from merger control), the FAS is involved in the administration of these filings, monitors the implementation of the requirements by foreign investors and is officially entitled to give clarifications on the application of the Strategic Investments Law.

1 Maxim Boulba is a partner and Maria Ermolaeva is an associate at CMS Russia.
II YEAR IN REVIEW

i Key legislative developments

In general, 2018 was not marked by significant changes to the Competition Law: the market players and the FAS have adapted to the rules brought by the Fourth Anti-monopoly Package, the most recent set of amendments to the Competition Law, and are now awaiting further changes (the Fifth Anti-monopoly Package).

First, as part of the Fourth Anti-monopoly Package, 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. Thus, if the following thresholds are met, the joint activity requires mandatory clearance:

a. the aggregate worldwide value of assets of the groups involved exceeds 7 billion roubles;

b. 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, 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.
Most recently, the FAS Presidium has summarised the experience of the competition authority on the application of waivers of confidentiality in the context of merger control and issued its recommendations recognising the importance of waivers. The main idea underpinning this document is to allow for the uniform approach to waivers within the FAS in terms of communications with the parties involved in the transaction and competition authorities of other countries. By way of illustration, this mechanism was used in the review of the failed Siemens-Alstom deal, which included consultations with the competition authorities of the United States, Australia, Brazil, India, South Africa and European Commission.

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. Examples of the significant cases include 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. While preparing this decision, the FAS cooperated with foreign competition authorities using waivers: it consulted with the competition authorities of Brazil, India, China, South Africa and the European Commission. The FAS has looked into and cleared other big transactions, such as the Fortum-Uniper deal (clearance conditional on compliance with a number of behavioural remedies during the next five years) and the Barry Callebaut-Inforum deal (again, behavioural remedies have been prescribed by the FAS).

According to the FAS’s officials, 1,086 pre-transaction notifications (lower than in 2016, due to the reduced M&A activity) and 189 post-transaction notifications were reviewed in 2018. Overall, the pattern established in the past remains in place. In total, clearance was granted in respect of 1,245 notifications. As to conditional clearance, binding orders were issued in 67 cases (30 in 2017). 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 30 transactions (22 in 2017). The cases involving rejection of transactions usually relate to highly concentrated markets where the notified deals involve undertakings with significant market shares and the transaction could limit competition, including creating or strengthening a dominant position (e.g., transportation, construction). In practice, other grounds for rejection may be 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 cannot 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, 19 transactions were cleared by the government commission in 2018.
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;
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 owing 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 2018, for example, this in-depth review was initiated with regard to 171 notifications (144 in 2017). 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.
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.

**iv 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).

**v 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 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 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.
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). Naturally, broader commercial reputational risks are also to be considered.

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).

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.

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 O U T L O O K A N D C O N C L U S I O N S

The FAS considers the best global practices 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 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.

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 (i.e., transaction value, considering that traditional criteria do not always reflect the real impact of transactions in the digital world), as well as more detailed rules on the review of merger clearance notifications (the role of external experts taking part in the review of merger clearance notifications, as well as the requirement for the FAS to issue statements of objections and hold hearings when reviewing complex transactions) and extension of the review term. Still, for the time being, it is unclear when these initiatives are going to be enacted (and to what extent).
Chapter 29

SINGAPORE

Daren Shiau, Elsa Chen and Scott Clements

I  INTRODUCTION

Mergers that take place in Singapore, or that 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

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1  Daren Shiau, Elsa Chen and Scott Clements are partners at Allen & Gledhill LLP.
mergers with net economic efficiencies (e.g., lower costs, greater innovation, greater choice or higher quality).

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 that 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 April 2019, the CCCS has received 74 merger control notifications, of which, the CCCS proposed to move to a Phase II review for 16 transactions, and commitments were considered for no fewer than seven 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 an extended Phase I review for one transaction.

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<th>Statistics on merger filings with the CCCS: 1 July 2007 to 31 May 2017</th>
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<td>Merger filings lodged with the CCCS</td>
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<td>Merger filings that the CCCS had proposed to move to Phase II</td>
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<td>Merger investigations by the CCCS*</td>
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* 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 24 September 2018, the CCCS issued an infringement decision against Grab Inc (Grab) and Uber Technologies, Inc (Uber) in relation to the acquisition of Uber’s Southeast Asian business by Grab for a 27.5 per cent stake in return. The infringement decision involved remedies and financial penalties totalling S$13 million between both parties. The remedies involved removing exclusivity obligations for Grab drivers, removing Grab’s exclusivity arrangements with any taxi fleet in Singapore, maintaining Grab’s pre-merger pricing algorithm and driver commission rates, and requiring Uber to sell Lion City Rentals vehicles to any potential...
competitor. It is noteworthy that the CCCS commenced its investigation and issuance of the infringement decision 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 received a total of eight merger filings between 1 May 2018 and 30 April 2019, among which transactions notified in other jurisdictions include EQT/Widex, Siemens/Alstom, Nasdaq/Cinnober and Knauf/USG. Within the same period, the CCCS 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:

- following consistent complaints, or one or two substantiated complaints, from third parties;
- where there are preliminary indications that the CCCS’s indicative market share thresholds are likely to be crossed;
- where customers in Singapore appear, post-merger, to have limited choice; or
- 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:

- mergers by the same parties, or involving the same industry, had received clearances in other jurisdictions;
- 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
- 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:

- that raise a genuine issue relating to the competitive assessment in Singapore;
- where there is a good-faith intention to proceed with the transaction; and
- 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:
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>
<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. 400/001/17 – 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>
<th>CCCS’s competition concerns</th>
<th>Commitments accepted</th>
</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>

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In CCCS Case No. 500/001/18 – the proposed acquisition by Grab of Uber’s Southeast Asian business and Uber’s acquisition of a 27.5 per cent stake in Grab – the CCCS accepted the following behavioural 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>‘Lock-in’ of drivers in the ride-hailing platform market using exclusive agreements.</td>
<td>Grab will ensure Grab drivers are free to use any ride-hailing platform and are not required to use Grab exclusively.</td>
</tr>
<tr>
<td>‘Lock-in’ of taxis in Singapore using exclusive agreements, which may limit choices for taxi drivers and riders.</td>
<td>Grab will remove exclusivity arrangements with any taxi fleet in Singapore.</td>
</tr>
<tr>
<td>Grab has the ability and incentive to increase prices faced by riders and increase commission rates for drivers.</td>
<td>Grab will maintain its pre-merger pricing algorithm and driver commission rates.</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.

viii 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 30 April 2019, the CAB had received 18 appeals and issued 10 decisions. Out of the 18 appeals received, one has been in respect of a merger situation. On 20 October 2018, Uber appealed against an infringement decision relating to the acquisition of its Southeast Asian business by Grab. In the 10 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 seven 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

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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.
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.

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), 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 issued an infringement decision on Uber’s acquisition of a 27.5 per cent stake in Grab on 24 September 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.

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 AND 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, cases involving enforcement action and financial penalties being issued, and the initiation of *ex officio* investigations against non-notified mergers, indications are that there will be a stricter enforcement stance by the CCCS towards mergers in (or that have an effect in) Singapore.

A key development in the next 12 months will likely be the resolution of Uber’s pending appeal against the CCCS’s infringement decision relating to Grab’s acquisition of its Southeast Asian business.
Chapter 30

SOUTH AFRICA

Xolani Nyali and Shakti Wood

I INTRODUCTION

Competition law in South Africa is regulated by the Competition Act 89 of 1998 (as amended) (the Act) and the regulations promulgated in terms of the Act. The Act is enforced by the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC). The Constitutional Court (CC), as the apex court, also has jurisdiction in certain competition matters. The Commission is responsible for the investigation and evaluation of mergers, including being the decision-maker in relation to small and intermediate mergers. Large mergers are investigated by the Commission and referred to the Tribunal for a decision.

A transaction is required to be notified to the Commission if it: (1) constitutes a merger (as defined in the Act); (2) meets financial thresholds (of assets and turnover) set out in the Act; and (3) constitutes economic activity within, or having an effect within, South Africa. If a transaction meets these requirements, pre-merger notification is required and the transaction may not be implemented without competition approval.

In terms of the 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. The law provides for instances of legal control (a majority interest, or similar) as well as instances of control arising as a function of a person’s factual ability to control a firm.

The financial threshold test applied is two-fold: (1) the turnover or asset value (whichever is greater) of the target must meet the stipulated thresholds; and (2) the combined value of the assets or turnover (whichever is greater) of the target and the acquirer must meet the stipulated thresholds. In the case of intermediate mergers, the annual turnover or the asset value of the target firm or firms must be 100 million rand or more, and the combined value of the annual turnover or assets of the targets and acquirers must be at or above 600 million rand. A transaction will meet the thresholds for a large merger where the annual turnover or the asset value of the target firm or firms equals, or exceeds, 190 million rand and the combined value of the annual turnover or assets is at or above 6.6 billion rand. Turnover for purposes of the calculation includes all turnover in, into or from South Africa as reflected in the firms’ most recent audited financial statements.

For purposes of calculating thresholds, the Act defines an acquiring firm broadly, referring to the entire group of which the acquirer forms a part, while a target (or transferring) firm is defined narrowly, referring to the actual business (or assets) being acquired.
In the ordinary course, only intermediate and large mergers require pre-merger notification and approval from the competition authorities before their implementation. Small mergers are not ordinarily 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, which provides that it may require notification of small mergers where the merging parties are under investigation for prohibited practices by the competition authorities, or if the merging parties are respondents in pending proceedings referred by the Commission to the Tribunal in terms of the Chapter 2 of the Act (dealing with prohibited practices). Parties to a small merger may also voluntarily submit a merger notification, and in such circumstances, must await clearance before implementing the merger.

Failure to notify the Commission of a notifiable merger or implementing a notifiable merger before approval being obtained is a contravention of the Act, and exposes the parties to administrative penalties of up to 10 per cent of turnover derived in, into or from the Republic, as well as potential injunctions on implementation. The level of penalties applied has varied, depending on the circumstances. On 2 April 2019, the Commission published final Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Merger, which set out its approach to prosecuting parties for non-notification or the pre-approval implementation of mergers. The Commission uses a filing fee-based methodology for penalties for failure to notify mergers, unlike the turnover-based methodology for determining administrative penalties in cartel cases.

Once notified, the Commission must undertake both a competition and public interest assessment of the merger. In February 2019, the President signed the Competition Amendment Act 2018 (the Amendment Act) into law; however, the amendments are not yet in effect. The Amendment Act introduces additional considerations in the assessment of a merger, including the extent of common ownership and common directorship in competing firms, and recent mergers undertaken by the merging parties.

Of particular significance is the expansion of the public interest factors relevant for merger assessment. Relevant considerations will now include the ability of small or medium-sized enterprises (SMEs) or firms controlled or owned by historically disadvantaged persons ‘to effectively enter into, participate in or expand within the market’ and ‘the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market’. The Amendment Act has also introduced a new provision concerning acquisitions by foreign acquiring firms and their likely impact on national security. In this regard, the acquisition of a South African firm by a foreign acquiring firm is required to be notified to the Commission and a Government Committee (to be constituted) if the merger may impact national security interests of the Republic. The Committee must decide whether the transaction may have an adverse effect on national security interests. The competition authorities may not make any decision where the merger has been prohibited on national security grounds. As at the date of writing, there is no indication as to the composition of the Committee, the list of relevant national security interests, or the form or process to be followed for the submission of a notice in respect of national security.

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2 The original grounds include the impact of the merger on a particular industrial sector or region, employment, the ability of SMEs or firms controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets.
Finally, the Amendment Act allows for greater participation by the designated Minister in merger proceedings, through the ability to appeal merger decisions on the expanded public interest grounds. In relation to the latter, the Commission is specifically required to provide the Minister with a copy of a large merger notification to allow the Minister to decide whether to make representations on public interest grounds.

II YEAR IN REVIEW

According to its 2017/2018 annual report, the Commission considered 377 mergers, and finalised 338 of them.3 Of the 338 reviewed, 52 mergers were approved with conditions and 12 were prohibited. The property sector was the biggest sector that notified mergers, followed by manufacturing and wholesale.

i Prohibited transactions

In a press release dated 23 January 2019, the Commission advised that it has prohibited the intermediate merger between Ostrich Skins (Pty) Ltd (Ostrich Skins), Mosstrich (Pty) Ltd (Mosstrich) and Klein Karoo International (Pty) Ltd (KKI). KKI and Mosstrich are both active in the production of ostrich meat, leather and feathers. The Commission found that the proposed merger is likely to result in unilateral effects in the market for the production and supply of ostrich meat as the merged entity would have a post-merger combined market share in excess of 90 per cent in South Africa.

Notably, the Commission found that the notified transaction did not raise horizontal concerns in the production of ostrich leather, as ostrich leather is mainly exported. However, the Commission still identified vertical concerns in this market as the Commission found that the merged entity had the incentive and ability to foreclose downstream processors of feathers.

In a bulletin dated 16 May 2019, the Commission indicated that it has recommended that the Tribunal prohibit the proposed acquisition of WeBuyCars (Pty) Ltd (WeBuyCars) by MIH eCommerce Holdings (Pty) Ltd (MIH eCommerce), an entity of the Naspers Group. In terms of the notified transaction, MIH eCommerce, an investment holding company that does not supply or produce any products or services in South Africa, intends to acquire 60 per cent of WeBuyCars. MIH eCommerce has investments in OLX and the Naspers subsidiary Car Trader, which trades as AutoTrader. Although the Commission held that the proposed acquisition did not present any horizontal overlap in the Republic as Naspers is not actively in the business of the online buying and selling of used cars, it found that the Naspers Group, through Frontier Car Group, has been anticipating entering this market for the wholesale and online buying of used cars in competition with WeBuyCars. These entry plans were thwarted directly as a result of the proposed acquisition.

On the Commission’s assessment, the notified transaction therefore had the effect of removing a potential competition in South Africa. The Commission also noted potential vertical concerns in that Naspers owns and operates online classified automotive advertising platforms. The merged entity would, therefore, have the ability to leverage its significant

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3 Annual Report 2017-18 Competition Commission of South Africa.
AutoTrader position as well as the OLX platform to exclude rivals of WeBuyCars. According to the Commission, the notified transaction would result in the foreclosure of other traditional dealers – rivals of WeBuyCars on the sell side.

ii The concept of control

In *Competition Commission of South Africa v. Hosken Consolidated Investments (HCI) Limited & Another*, the Tribunal provided direction in respect of firms’ obligations to notify a transaction where the merger had been previously approved. In this case, HCI had in 2014 notified the Commission of an intended merger that was subsequently approved and confirmed by the Tribunal without conditions. Although HCI secured approval for legal control (over 50 per cent interest) in the target entity, it acquired an effective interest of below 50 per cent but was able to exercise *de facto* control. In 2017, HCI decided to consolidate the assets of its subsidiaries stemming from the 2014 unconditional approval. Although the restructuring would result in HCI’s interest in the target increasing to above 50 per cent, HCI did not believe that this restructuring constituted a merger and considered that it was therefore not notifiable. HCI sought an advisory opinion from the Commission, which regarded the intended 2017 transaction to be a notifiable merger as it entailed an acquisition of more than 50 per cent of the shares of Tsogo (one of HCI’s subsidiaries). HCI took the matter to the Tribunal, which held that it did not have jurisdiction to issue declaratory orders and dismissed the matter. HCI and Tsogo appealed the matter to the CAC, where it was successful. The Commission in turn appealed the matter to the CC.

The CC, among other things, had to decide whether it was appropriate for the Tribunal to grant a declaratory order and whether the 2017 transaction was notifiable in terms of the law. Regarding the former, the CC held that the Tribunal may make any ruling or order that is necessary or incidental to the performance of its functions in terms of the Act. Section 58 of the Act further grants the Tribunal the power to make an appropriate order in relation to a prohibited practice, including an order interdicting any such practice. Both of these sections are formulated widely enough to include the power to grant declaratory relief in respect of issues in dispute referred to it. The Tribunal has, in numerous instances, exercised its discretion and granted declaratory relief in a variety of cases. The CC noted that parties would ordinarily approach a High Court for declaratory relief, but since this jurisdiction is ousted for competition matters, this would unfairly leave parties without relief. Declaratory orders can bring clarity and finality to disputes that may, if unresolved, have far-reaching consequences for each party. Finally, the CC found that litigants have a constitutional right to have a remedy to resolve a dispute in an appropriate forum. The CC concluded that the Tribunal is competent to grant declaratory orders.

Regarding whether the 2017 transaction required notification to the competition authorities, the CC reiterated the two-step approach to merger control, namely (1) a transaction must meet the definition of a merger as set out in Section 12 of the Act, and (2) the financial thresholds for an intermediate or large merger must be met. To determine the definition of a merger, the CC critically analysed the meaning of control. Control can either be *de jure* control (e.g., acquisition of more than half of the issued share capital) or *de facto* control (the ability to materially influence). Central to this issue is the ‘bright line’ principle, which monitors instances of when control is assumed. The 2014 transaction

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resulted in HCI acquiring _de facto_ control of Tsogo. The effect of the 2017 transaction would be HCI’s acquisition of _de jure_ control within the meaning of Section 12(2)(a). The relevant consideration was whether notification obligations arose simply because the nature of control has changed. The CC held that once a firm has acquired control, it need not notify again simply because the nature of control has changed. If the statute required a new notification regime once the form of control has changed, it would have explicitly stated so. A change in the quality of control does not in itself constitute a merger. Obligating firms to notify in such instances is not only overly formalistic, but also burdensome. In the CC’s view, merger approval gives the merged entity immunity from any challenges as it necessarily involves a forward-looking assessment of the likelihood of competition harm, and effects on the public interest. Specifically, the CC also noted that the Commission was aware from the 2014 transaction that its approval would likely result in further changes down the line.

The true import of this judgment of the CC is still being debated, and it remains to be seen whether the fact of the notification of the 2014 transaction is interpreted by the Tribunal and CAC as being decisive in the CC’s reasoning.

### iii Public interest

The recent CAC case of _Association of Mineworkers and Construction Union (AMCU) and Another v. Competition Tribunal of South Africa and Others_ dealt with public interest concerns in the context of a proposed merger. Some 32,000 employees of the merged entity were at risk of losing their jobs and with this in mind, the Tribunal imposed certain public interest conditions on the merging parties to mitigate the potential job losses. Unsatisfied with the decision of the Tribunal, AMCU approached the CAC arguing that insufficient weight had been given to the public interest concerns it raised and asked that the merger be prohibited or alternatively, be approved subject to additional restrictions or an amendment of some of the existing conditions. It was common cause that there were substantial potential job losses but the key question was whether these were related to the merger or not. The CAC considered this question, as well as the relevant counterfactual. The merging parties submitted that the job losses were not related to the merger but, rather, were a direct consequence of the target firm’s precarious financial state and the need to strategically restructure to save the company from being placed in business rescue. Regarding the counterfactual, the CAC was convinced that the extent of job losses would be even greater if the merger was not approved.

Further, the Tribunal considered that the parties had undertaken a reasonable and rational process in assessing the number of retrenchments, whether merger specific or not. Notwithstanding this view, the CAC still amended the public interest conditions to better protect employees by requiring the parties to publish a notice of the conditions – presumably so that employees could rely on the condition in direct actions against the merging parties.

On 9 March 2018, the Tribunal approved a merger between Sinopec Corp (Sinopec) and Chevron South Africa (CSA), subject to a wide range of employment, investment and other public interest conditions. Among the conditions imposed by the Tribunal was that Sinopec would establish its head office in South Africa and invest 6 billion rand over and above its investment plans to develop a refinery in South Africa. Sinopec was required to

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make this investment within a five-year period of the merger. Sinopec is also required to use reasonable endeavours to promote the export of South African manufactured products for sale in China.

III \ THE MERGER CONTROL REGIME

i \ Review periods and time frames

The review process or periods for intermediate mergers comprises an initial waiting period of 20 business days. This period may be extended by a single period not exceeding 40 business days. The Act provides for a ‘default’ approval in cases where the Commission fails to extend the review period before the expiry of the initial waiting period, or fails to render a decision within the stipulated time frames.

In the case of large mergers, the Commission must, within 40 business days, forward to the Tribunal a written recommendation, with reasons, regarding the merger. This period is extendable with the consent of the Tribunal or the merging parties by periods of no more than 15 business days at a time. If upon the expiry of the period of 40 business days (or any extended period of time granted by the Tribunal) the Commission has neither applied for a further extension nor forwarded a recommendation to the Tribunal, any party to the merger may apply to the Tribunal to begin the consideration of the merger without a recommendation from the Commission.

When the Commission has forwarded a recommendation to the Tribunal, the registrar of the Tribunal must schedule a date within 10 business days for either the beginning of the hearing of the matter or for a pre-hearing conference in relation to the merger (should the circumstances require). This period of 10 business days may be extended for a further 10 business days by the chairperson of the Tribunal or for a further period by the chairperson with the consent of the parties. After completing its hearing in respect of a merger, the Tribunal must issue its decision within 10 business days after the end of the hearing, and within 20 business days thereafter, issue written reasons for its decision.

The Commission has published a medium-term performance plan that sets out the maximum number of business days within which the Commission aims to complete its review of notified transactions. The review period is calculated from the business day following the date on which a complete merger notification was filed. The 2018/2019 performance plan contemplates the following timelines.

\textbf{Phase I (non-complex)}

The Commission aims to review Phase I mergers 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.

\textbf{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).

ii Ability to accelerate the review procedure, tender offers, hostile transactions

If a merger is a hostile transaction and the target is unwilling to submit a joint merger notification to the Commission, the acquiring firm may make an application to the Commission in terms of Rule 28 of the Commission Rules for an order authorising the parties to submit separate filings and directing the target to prepare and submit its merger notification within a specified period of time. The acquiring firm may also, to the extent possible, apply to submit certain information or documents on behalf of the target firm. The target firm will have an opportunity to contest the acquiring firm’s application.

Mergers effected by way of tender offer are subject to competition review.

Once a merger notification is made and to the extent that there may be a need to accelerate the review periods, the Commission and Tribunal are prepared to consider expediting matters. However, neither the Commission nor the Tribunal have a formal ‘fast track’ procedure.

iii Third-party access to the file and rights to challenge mergers

The Minister of Economic Development (now Trade and Industry) has the power to intervene in merger proceedings on public interests grounds. Employee representatives and trade unions also have locus standi to intervene in respect of employment-related matters, as per Section 12A of the Act and Rule 37 of the Commission Rules.

Section 13B (3) allows any person, whether or not a party to or a participant in merger proceedings, to submit any information that could be relevant to the investigated merger proceedings. However, this provision does not confer rights on any person to access the Commission’s investigation file especially insofar as some material may be claimed as confidential by the parties or constitute ‘restricted information’. Rule 46 of the Tribunal Rules permits a person who has a ‘material interest’ in a matter to apply for intervention by filing the prescribed documents which should include a substantiation of that person’s interest in the matter. A material interest is a factual analysis to be analysed by the Tribunal that will also inform the extent of the intervention the Tribunal will allow. In Caxton and CTP Publishers and Printers Limited and Media 24 (Pty) Limited, Caxton, a competitor of Media24, was allowed to intervene and have rights, among others, to discover documents and attend pre-hearings in the merger involving Media24.

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6 Section 18.
iv Resolution of authorities’ competition concerns, appeals and judicial review

The Commission is empowered to investigate any merger activity. Upon investigating a notified small or intermediate merger, the Commission can unconditionally approve the merger, approve the merger with conditions or prohibit the merger. Large mergers are investigated by the Commission and decided on by the Tribunal. If the Commission or the Tribunal identify competition or public interest concerns during the merger assessment, they will typically invite the parties to offer remedies to address the concerns or to adduce further evidence to demonstrate that the concerns do not arise, or are not merger-specific. In cases where conditions are imposed, the merger parties are consulted beforehand and generally afforded an opportunity to make submissions in respect of the proposed conditions.

The Commission is empowered to revoke its own decision pertaining to an earlier merger approval of a small or intermediate merger. Revocation may be applicable if the approval was based on materially incorrect information provided by the parties to the merger, if the approval was obtained by deceit, or if the firm concerned has breached a condition attached to the approval.

Intermediate or small mergers considered by the Commission can be referred to the Tribunal for re-consideration by an aggrieved party. A party aggrieved by the Tribunal’s decision can approach the CAC for a review or appeal of the decision. The final court of appeal is the CC, which can also be approached by an aggrieved party where constitutional issues arise. The jurisdiction of an ordinary High Court has been ousted by competition legislation.

The Commission habitually publishes its decisions on proposed merger activity in the form of weekly bulletins found on its website.

v Effect of regulatory review

The Commission has exclusive jurisdiction under the Act in relation to the review of mergers having an effect within South Africa. There are, however, new provisions under the Amendment Act that introduce parallel consideration of the national security concerns that may arise from a merger involving a foreign acquiring firm. While national security concerns are distinct from the competition and public interest assessment undertaken by the Commission, there is potential scope for overlap in relation to considerations of public interest issues.

In cross-border mergers, foreign competition authorities may simultaneously review a merger as it relates to their jurisdiction, but cannot make determinations that are binding on the South African competition authorities.

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7 Section 13B(1).
8 Section 14(1)(i)-(iii).
9 Section 14A(1)(b).
10 Section 15(1).
11 Section 15(1)(b).
12 Section 15(1)(c).
13 Section 16.
IV OTHER STRATEGIC CONSIDERATIONS

i How to coordinate with other jurisdictions;

South Africa is a member of the Southern African Development Community (SADC) and BRICS, and the Commission is a member of the African Competition Forum, International Competition Network and regularly participates in activities of the Organisation for Economic Cooperation and Development. The competition authorities of the SADC countries signed a memorandum of understanding (MOU) in 2016 and the BRICS competition authorities similarly signed an MOU in May 2016. The Commission also has MOUs with the following entities and regulators: International Finance Corporation; eSwatini Competition Commission; Administrative Council for Economic Defense of Brazil; Competition Authority of Kenya; Competition Commission of Mauritius; Namibian Competition Commission; Federal Antimonopoly Service of the Russian Federation; and the Directorate-General for Competition of the European Commission. In the context of these MOUs, it is not unheard of for the Commission to reach out to these regulators in the course of its investigation of mergers. To expedite the Commission’s review in South Africa, parties may wish to seek to facilitate the speedy interaction of regulators and assist them in ironing out the issues being investigated by each regulator. Where an issue has already been resolved by a foreign regulator, it is often beneficial for this to be shared (if appropriate) with the Commission.

ii How to deal with special situations

There are no special rules dealing with financial distress and insolvency or minority ownership interests. These are dealt with in the ordinary course. However, the Commission has published a Practice Note on Risk Mitigation Transactions (the Practice Note). The Practice Note provides that where a bank or state-owned finance institution acquires an asset or controlling interest in a firm in the ordinary course of its business of providing finance based on security or collateral, the Commission would not require notification of the transaction at this point. Similarly, if upon default by the firm, the bank or state-owned finance institution takes control of the asset or controlling interest in that firm with the intention to safeguard its investment or onsell to another firm or person to recover its finance, a notification would not be required. However, if the bank or state-owned finance institution fails to dispose of the assets or the controlling interest within a period of 24 months (the disposal period under a previous version of the Practice Note was 12 months), notification would be required upon the expiry of the 24-month period.

The Tribunal case of Competition Commission of South Africa v. Standard Bank of South Africa (FTN228FEB16) [2016] ZACT 56 (5 July 2016) dealt with the application of the Practice Note. The Commission sought to impose an administrative penalty on Standard Bank for its failure to notify a merger and gun-jumping. Standard Bank acquired 100 per cent of the shares of Halberg, pursuant to Halberg defaulting on numerous loan agreements with Standard Bank. Standard Bank had intended to dispose of this acquisition of the shares immediately when it found a suitable buyer within a short period post-acquisition. The Tribunal held that it was necessary for an acquiring party to notify the acquisition in the event that it failed to dispose of its controlling interest after 12 months of it acquiring control of the firm.14 Put differently, the obligation to notify arises immediately upon the expiry of the ’grace period’.

14 The previous version of the Practice Note provided for a 12-month grace period but at the time of the hearing of the matter by the Tribunal, the extended 24-month grace period was in effect.
On the facts, Standard Bank had previously asked for but was denied an extension of the disposal period by the Commission. On denying the permission, the Commission indicated its intention to investigate Standard Bank for gun-jumping. The Commission and Standard Bank subsequently entered into settlement negotiations in which the Commission sought an administrative penalty of 1 million rand. Standard Bank contested this amount on the grounds that the transaction had no negative effects on competition or the public interest, there was no indication that Standard Bank received any financial gains from the transaction and the contravention was technical in nature and of a limited duration (lasting nine months). Standard Bank was also cooperative and helpful in providing the Commission with information during the investigation. Lastly, Standard Bank had never before been found to be in contravention of the Act. The Tribunal agreed with Standard Bank’s submissions and as in previous cases, held that the six-step penalty methodology typically used for calculating cartel penalties was not appropriate for imposing penalties for merger contraventions.15 It therefore used a filing fee-based methodology to calculate the appropriate penalty and imposed a penalty of 350,000 rand, which was the amount of the filing fee for large mergers at the time.

V OUTLOOK AND CONCLUSIONS

South African competition legislation has been pivotal in ensuring economic integration of previously disadvantaged persons who were prejudicially affected by apartheid. Merger activity is carefully regulated by the Commission and Tribunal to address the high levels of concentration and skewed patterns of ownership of the South African economy. From a merger control perspective, the regulations underpinning the national security provisions are still under review and it will be interesting to see how these provisions (including the expanded public interest provisions) will be tested by the enforcing authorities and the courts.

Chapter 31

SPAIN

Pedro Callol1

I INTRODUCTION

i Regulations

The merger control regime is regulated by the Competition Act2 and its implementing regulation3 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.

1 Pedro Callol is a partner at Callol, Coca & Asociados.
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 Pedro Callol, ‘Ever doubted the “convergence” of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof’ in the European Competition Law Review (September 2013 edition).
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. 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 €1,545,45.

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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, Dorf/Ketal, file SNC 0009/11).
II YEAR IN REVIEW

Although more active than in some of the prior years in terms of deal flow, 2018 has been a rather standard year in merger review terms, with only one transaction having been subjected 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 84 concentrations were subject to merger control in 2018 in all sectors including financial service activities, human health activities, retail sale of automotive fuel in specialised stores, sea and coastal passenger water transport and manufacture of railway locomotives and rolling stock. We set out below some significant merger cases.

i Acquisition of Compañía Transmediterránea SA by Naviera Armas

The NMCC authorised in Phase I with commitments the acquisition of Transmediterranea by the shipping group Naviera Armas (the parent company of which is Bahía de las Isletas SL).

The merged entity assumes the competitive position of Transmediterranea in the markets for maritime transport of cargo and passengers in two routes: (1) the Spanish peninsula–Balearics; and (2) between the Balearic islands, in which the buyer was not present, without generating any substantial change in the competitive structure of these markets.

However, the operation raised competitive concerns in three routes: (1) south Spanish peninsula–Melilla; (2) Spanish peninsula–Canary Islands; and (3) between the Canary Islands. For this reason, Naviera Armas submitted commitments, and as a result, Förde Reederei Seetouristik Iberia SLU (FRS) would start operating the Motril–Melilla route and the Huelva–Canary Islands circular route dedicated to passengers and cargo maritime transport services. The entry of FRS (involving some related obligations in connection with mooring and ticketing systems, among others) was deemed to solve the competition problems.

ii Acquisition of Duro Felguera Rail SAU by Talleres Alegria SA

The operation comprised the acquisition of exclusive control of Duro Felguera Rail, a company belonging the Duro Felguera Group, which designs, manufactures and supplies railway track equipment, crossings of manganese steel and other fixed-track materials.

Both parties overlap horizontally in the market for the manufacture and supply of railway crossings and switches, and in the market of minor components for the manufacture of exchangers and other track services. For this reason, Talleres Alegria submitted a commitment to supply its competitors the essential components for the production of railway exchangers and other track devices in market conditions and in line with the commercial terms and conditions that applied to such competitors prior to the merger.

The NMCC considers the commitment sufficient as it eliminates the competition problems, maintaining competitors’ access in commercial and market conditions similar to those present before the operation.

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7 At the moment of editing this chapter the CNMC had not yet published its memory of activities for 2018.
8 Decision of 22 May 2018, Naviera Armas/Transmediterranea, file C/0922/18.
iii  Phase II of Quirón/Clínica Santa Cristina

This notified transaction comprises the acquisition of Health Clinic Santa Cristina’s healthcare business in Albacete by Helios Healthcare Spai SLU (Quirón Group). There are only two private hospitals with in-patient care in Albacete: Quirónsalud Albacete, run by Quirón Group, and Health Clinic Santa Cristina, the target in this transaction.

As a result of the acquisition, the only private healthcare competitor in the province of Albacete would disappear. Consequently, Quirón Group would have an unbeatable competitive position, as already confirmed by the market tests applied by the NMCC during Phase I proceedings. Additionally, the market power acquired in the delivery of healthcare services with in-patient care could reinforce the position of the resulting operator in the delivery of outpatient services. This situation could arise from the fact that patients tend to prefer the whole medical process to be carried out in the same healthcare centre.

In this light, the NMCC has warned about the risks of unilateral conduct by the merged entity (e.g., significant price increases, decrease in quality), given its monopolist position in Albacete. Any buyer bargaining power could be limited considerably. This risk is increased owing to the existing economic, technical and legal barriers to enter into the market, which would hinder the deployment of new private hospitals in the province of Albacete, at least in the short term.

On the basis of the above, the NMCC considered that an in-depth analysis of the notified operation is necessary, in view of the possible obstacles to the maintenance of effective competition in the market under consideration. Consequently, the Competition Directorate referred the file for Phase II consideration. In Phase II, the concentration was approved subject to a remedy package to safeguard the clinical speciality treatment portfolio and guarantee the supply of healthcare services to all patients at stable prices and quality levels.

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.

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10 Decision of 4 October 2018, Quiron/Clínica Santa Cristina, file C/0966/18.
Acquisition of Petrocorner Retail SLU and Kingbook Inversiones Socimi SA by BP Oil España SAU

This transaction comprises the acquisition by BP Oil España (BP) of the share capital of Petrocorner Retail (Petrocorner) and Kingbook Inversiones Socimi, which entailed the purchase of 65 service stations.

In most areas where BP acquired Petrocorner service stations, there were no overlaps, nor was there sufficient competition. However, there are risks for competition in certain areas because of the high market share that BP will have post-transaction – specifically, in Osorno (Palencia), Villacastín (Segovia) and Almonte (Huelva).

In the case of Osorno, BP also acquired a ‘white label’ (or independent) service station, which had the best prices in the relevant area. Given the risk of price increases in the area, the NMCC has established that BP must comply with the following commitments: (1) BP must sell that particular station to Hostal Los Chopos SA within a period of six months from the merger clearance; (2) the company Hostal Los Chopos SA must assume the commitment to maintain the station under an independent flag or, in any case, a banner different from that of the main operators as classified annually by the NMCC; and (3) BP undertakes not to reacquire this station in a minimum term of 10 years.

Finally, BP is committed to not reaching any new flagging or supply contract with any service station in the Osorno, Villacastín and Almonte areas for five years from the merger clearance.

### 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 II CNMC decision or may authorise the merger, with or without conditions.

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All maximum periods can be interrupted by the CNMC in regulated events such as formal information requests.

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. An example of this is the Helios/Quiron merger, 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.  

iv  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.

v  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.

IV  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

14  For example, Decision of 29 July 2010, Bergé/Maritima Candina, file R/0006/10.
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 AND 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.
I INTRODUCTION

Merger control in Switzerland is governed by the Federal Act on Cartels and Other Restraints of Competition (CartA) 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 13 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 68 employees at the end of 2018 (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 CartA, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year before 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) CartA, 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)’.

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 before 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 CartA 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 CartA, 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 (or is capable of eliminating) 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

The year 2018 was marked by a transition in the leadership of the Competition Commission. After 12 years of service, the former president Vincent Martenet stepped down at the end of his mandate, leaving the wheel in the able hands of his former deputy, Andreas Heinemann.

The statistics in the Commission's recently released Annual Report for 2018 showed a continuous trend of stability in the Competition Commission's M&A activity (mirroring the stability of the overall M&A market in Switzerland). In 2018, the Commission received 34 merger notifications (compared with 32 the year before), granted – just as in 2017 – clearances at a preliminary stage (Phase I) to 27 of them and launched in-depth investigations (Phase II) in three cases, which are summarised below. In 2018, three of the 27 merger authorisations were granted with charges or conditions (compared with two in 2017).

In 2018, the media market was placed in the spotlight of the Competition Commission's M&A activity, with the following three notable mergers at the centerpiece: Goldbach/Tamedia, AZ Medien/NZZ and Basler Zeitung/Tamedia. After several months of close examination, the competition enforcer granted the go-ahead to all three of them.

In early May, the Commission announced its intention to take a deep look into the takeover of Goldbach by Tamedia as several elements had suggested that the two media companies might gain a dominant position on the Swiss market if the merger went through. With a portfolio of more than 50 media and digital platforms as well as its own printing facilities throughout Switzerland, Tamedia remains the country's largest media group. It has been listed on the Swiss Stock Exchange since 2000. By joining forces with Goldbach, a leader in the field of electronic media marketing, the media giant aimed at reaching the highest market penetration rate for distribution in the fields of TV, radio, printed and online media, as well as outdoor advertising.

The Commission decided to run a thorough review of the takeover's potential effects on competition as the preliminary inquiry it had launched showed that the takeover would generate economies of scale through different advertising channels (such as TV, radio, printed and online media, as well as outdoor advertising), which could place the two merging companies in a dominant market position.

In June, another merger in the media sector fell under the scrutiny of the competition authorities. The Commission had declared that the joint venture between AZ Medien, active in the north-west of Switzerland, and NZZ, whose network covers the entire Swiss territory, threatened to create or strengthen a dominant position for these two media groups on several regional media markets, as both companies own several newspapers, in addition to running their own online platforms, TV channels and radio stations. The outcome of the
Commission’s preliminary examination had suggested that the newly forged alliance could pave the way to a strong or even dominant position for the two partners affecting the market for daily newspapers in Solothurn and Aargau (including the newspaper advertising in the construction technology field) and on that of daily and Sunday newspapers in the Basel area. The Commission undertook to examine the potential impact of the joint venture on competition.

On 16 August, less than four months after their launch, both the Goldbach/Tamedia and the AZ Medien/NZZ investigations were concluded with the Commission’s consent to both deals on the grounds that there was not enough evidence to prove that either the takeover or the joint venture could effectively undermine competition or fundamentally impact the role of other major market players so as to require the intervention of the authorities.

With regard to the Goldbach/Tamedia case in particular, the Competition Commission underlined that only the competition aspects of the takeover fell under scrutiny while those related to media policies such as media diversity were excluded from the scope of the examination.

The third, and last, media merger in the Commission’s crosshair in 2018 was the takeover by Tamedia of Basler Zeitung AG, the owner of the daily newspaper Basler Zeitung, read in the Basel area. The takeover, second for Tamedia in 2018, aimed at increasing Tamedia’s share of the market in online and print media.

Tamedia’s acquisition of Basler Zeitung AG from Zeitungshaus AG was part of a more complex, two-way M&A transaction, in which Tamedia concurrently sold its interest in Tagblatt der Stadt Zürich AG and FZ Furttaler Zeitung AG to Zeitungshaus in return.

In August, the Competition Commission officially announced that it would investigate only the Basler Zeitung part of the deal as there were indications that the concentration could give Tamedia a dominant position on several markets, while weakening other major competitors, including the newly minted AZ Medien/NZZ joint venture, which had recently been approved by the Commission, and the Zurich-based Ringier AG. The concentration would potentially affect the markets for printed and online classified advertisements, printed corporate advertising, as well as the market for daily newspapers in the German-speaking cantons of Switzerland.

Later in October, the Competition Commission issued a press release announcing its decision to give the green light to the merger. In its statement, the enforcer stressed that the Swiss merger control regime features very high standards for assessment compared to other jurisdictions (the ‘dominance-plus test’). It further explained that, based on those standards, the Commission could find no evidence proving that the change of control in Basler Zeitung would hamper effective market competition, even if it resulted in a consolidated market position for Tamedia. The competition authority again underlined that it could not oppose the takeover even under cartel laws on the premises that concentration controls, in general, are only concerned with the economic (i.e., competition) aspects of mergers and had no say on media politics, such as media diversification.

In addition to the media deals, another M&A competition clearance is worth mentioning – this time in the sector of postal services, where, at Phase I (after a preliminary inquiry of the transaction), the Swiss competition enforcer gave the go-ahead to the merger between TNT Swiss Post and FedEx.

In 2018 there were also developments in the M&A area at court level.

In May 2018, the Federal Administrative Court rejected the appeal filed by Ticketcorner in the wake of the Competition Commission’s decision to block its merger with Starticket.
Ticketcorner is known as the Swiss market leader in ticket sales, including – in addition to events in entertainment, culture and sports – ski ticketing covering approximately 70 ski areas. The company sells tickets for more than 15,000 events per year via an extensive network including a website, a mobile app, a call centre and 1,300 ticket agencies throughout Switzerland. In addition, Ticketcorner runs media platforms on its own, including print magazines, digital channels, blogs and social media. Starticket is Tamedia’s arm for ticket brokerage, the second biggest in Switzerland by volume of sales.

The court ruled that Ticketcorner’s appeal of the Commission’s decision was not admissible on the grounds that Tamedia, Starticket’s own parent company, had chosen not to joint that appeal, and instead declared that it would develop Starticket on its own.

The Federal Administrative Court’s ruling has been challenged. The case should be monitored for further developments.

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 before the completion of the transaction. Under Swiss law, there are no deadlines for filing. A transaction can be notified before the signing of the final agreements. However, the parties must demonstrate a good faith intention to enter into a binding agreement and 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
Switzerland

(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 before the competition authorities’ clearance. However, in specific cases, the authorities may allow a closing before clearance if it is 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:

a) 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 before 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 (the 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 CartA 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 CartA 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 (i.e., 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:

a. constitution of a joint control during a transition period;

b. a shift from joint control to sole control concluded in a binding agreement; and

c. 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 strives to give a decision coherent with that of the European Commission in cases requiring parallel notifications in Brussels and Bern. Under the competition law cooperation agreement, which has been binding Switzerland and the EU since 2014, in merger procedures with parallel reporting in Switzerland and the EU (as may often be the case in cross-border M&A), the Secretariat no longer requires the prior consent of the parties to initiate exchanges with the staff of the Directorate-General for Competition on technical and substantive issues so as to ensure coordination and streamlining in the parallel proceedings.

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).

V OUTLOOK AND 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 CartA. Article 59a of the CartA 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 CartA 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 CartA 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). 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.

Over 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.
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. There have been several amendments following, and the amendment in 2016 that modified over 70 per cent of provisions set forth in the original Fair Trade Act was one of the most significant amendments to the Fair Trade Act since its first enactment in 1991. The Fair Trade Act was most recently amended in June 2017 (the 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 Taiwan Fair Trade Commission (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 and ICN Cartel Workshop in 2014, which were 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

*The Walt Disney Company and Twenty-First Century Fox Inc*

In 2018, The Walt Disney Company (Disney) intended to acquire all of the issued shares of Twenty-First Century Fox Inc (21CF), so Disney would directly or indirectly control the business operation, and the appointment or discharge of 21CF’s personnel. As the revenue of
Disney and 21CF in the previous fiscal year exceeded the threshold amount for pre-merger notification announced by the TFTC, Disney and 21CF filed pre-merger notification with the TFTC.

In the Taiwan film distribution market, the market share of Disney and 21CF together will remain the top market player after the proposed merger. However, as the major film distributors in the Taiwan market are companies from the United States, Disney and 21CF still face keen competition from Taiwan and foreign film distributors after the proposed transaction between Disney and 21CF. Further, there are many large-scale cinemas in Taiwan, and these cinemas can choose the trading counterparties (e.g., film distributors), the type of playing films and the time of projection. As for the film production companies, they still have opportunities to cooperate with film distributors other than Disney and 21CF. Moreover, 21CF would divide some broadcast channels to other companies before the completion of the proposed merger, which means the combined market share of the supply of the satellite broadcasting programmes of 21CF and Disney will decrease, and there are still many other players in such market. Thus, the TFTC concluded that the proposed acquisition would not pose a significant anticompetitive impact and the transaction was not prohibited.

**KKR & Co Inc, Carlton (Luxembourg) Holdings Sàrl, KKY Co Ltd, and LCY Chemical Corp**

In 2018, Carlton (Luxembourg) Holdings Sàrl (LuxCo), the subsidiary of KKR & Co Inc (KKR), intended to acquire all of the issued shares of LCY Chemical Corp (LCY), meaning that KKR would control LCY as the biggest shareholder of LCY. Therefore, LCY would be owned and operated by KKR and Karlton Investment Limited (which was not yet established at the time). Since the market share of LCY in thermoplastic elastomer, isopropanol, pentaerythritol and paraformaldehyde was over one-quarter, KKR and LCY filed a pre-merger notification with the TFTC.

As KKR was an investment company, and LCY was mainly focused on the petrochemical industry, the proposed merger was deemed as a conglomerate merger rather than a horizontal or vertical merger as determined by the TFTC. Further, there would not be any change to the original market structure or the competition after the proposed merger, and the restrictions of laws or regulations, capital requirement, tariff barrier or raw material resource do not apply to the products of KKR or LCY. Therefore, the TFTC decided that there would be no material restrictions on competition in the proposed transaction and determined that the proposed transaction will not be prohibited.

**ii Recent proposed mergers prohibited by the TFTC**

From the time the Fair Trade Act was promulgated in 1992 to March 2019, 6,987 applications were submitted for merger approval (for filings made before 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 11 of the proposed transactions have been refused or prohibited by the TFTC, representing much less than 0.1 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 balance between overall economic benefits and restraints on competitiveness. Some conditions may be very cumbersome for the parties, and in effect prohibit the completion of the deal.
In 2018, 67 merger notifications were filed with the TFTC; only one was prohibited. In 2019, 14 merger notifications were filed, and none had been prohibited as at March 2019, according to the most recently updated statistics from 17 April 2019. The previous prohibited merger notification was in 2010, which was the only one out of the 44 merger notifications filed with the TFTC that year. This was the acquisition contemplated by Uni-President Enterprise Corp (Uni-President) to acquire more than one-third of the shares of Wei Lih Food Industrial Co Ltd (Wei Lih) that had already been rejected once by the TFTC in 2008, and these companies were also the same parties of the prohibited merger in 2018.

**Uni-President and Wei Lih: instant noodles**

This prohibited transaction concerned a share acquisition between two entities that were the top two market-share leaders manufacturing instant noodles in Taiwan. As mentioned above, the proposed merger between Uni-President and Wei Lih had already been turned down by the TFTC in 2008 and 2010. Following the second prohibition in 2010, Uni-President initiated an administrative litigation against the TFTC that went all the way to the Supreme Administrative Court. However, Uni-President’s appeal was dismissed and the TFTC’s decision to prohibit the merger between Uni-President and Wei Lih was upheld in 2013. Uni-President’s second attempt to acquire over one-third of Wei Lih’s shares was further turned down by the TFTC in 2018. The published decision primarily discussed whether the product market was limited to instant noodles or whether a larger definition was permissible, which has been debated among Uni-President and the TFTC for almost 10 years.

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 all ready-to-eat food, including each of the following:

- cookies and snacks (including bread, potato chips, rice crackers and chocolate);
- fresh food (such as sandwiches from convenience store 7-ELEVEN, boxed food from convenience stores, braised food, fried chicken fillet, oden, etc.);
- canned sauce (barbecue sauce, XO sauce and meat sauce); 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 Lih would only be about 9.04 per cent.

The TFTC did not accept Uni-President’s proposed product market definition. The TFTC argued that there is no demand substitutability or cross-elasticity of demand among the products that Uni-President included in its extended definition of the relevant market. Even in the TFTC’s review of the relevant market in 2018, the TFTC still considers instant noodles as a single market. After carefully considering all of the facts, including the consumer group, manufacture procedure, cooking method, price and display method on the shelf, the TFTC even separates quick noodles that required to be cooked from the instant noodle market. Therefore, the TFTC determined that ‘instant noodles’ should be defined as one single market, and in which case, Uni-President and Wei Lih together may comprise of over 60 per cent of the market share.

Considering the detriment of competition restriction, the TFTC was of the opinion that the market concentration would be too high after the proposed merger, which may increase the possibility of price increase in instant noodles. Going a step further, Uni-President
brought up a new argument that instant noodles should be further divided into high-, medium- and low-priced categories. Among these three categories, Uni-President claimed that the major sales volume has shifted from low-priced to high-priced category and there have been many new competitors in the high-priced category. As such, Uni-President contended that its market power together with Wei Lih was not as high as the TFTC thought. With that, however, the TFTC insisted that a single market cannot be subdivided into smaller markets for the purpose of its evaluation. As a result, TFTC issued its third order in denying and prohibiting the merger between Uni-President and Wei Lih because of the high market power of Uni-President and Wei Lih after such merger.

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 had only announced that it will try to cooperate with Wei Lih within the permitted scope under Taiwan laws. It is definitely worth keeping an eye on whether fourth time's the charm for Uni-President.

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. 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\(^2\) 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

\(^2\) 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.
an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

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 exceeds 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 a 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 before 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 before 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 (as opposed to 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.

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.

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.

OTHER STRATEGIC CONSIDERATIONS

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. Recently, however, we note that the TFTC has been prone not to respond to such request for a waiver, as the TFTC appears to be less willing to bear the risks for such preliminary judgment before 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 owing 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 these are clearly denoted pursuant to applicable laws.

V OUTLOOK AND 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.

On 22 October 2018, the TFTC proposed a draft amendment that, if an enterprise fails to comply with the TFTC’s order to rectify acts violating the merger control regulations, the TFTC may have the discretion to order a further administrative fine from a minimum of NT$200,000 up to a maximum of NT$50 million. Additionally, the TFTC proposed in the same draft amendment to suspend the current five-year statute of limitations once the TFTC commences its investigation against such enterprise to determine the violation of the merger control regulations. Whether such amendments will come into force is worth monitoring.
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. 4054 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
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.

Before 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:

- the total turnover of the parties to a concentration in Turkey exceeds 100 million lira and the respective Turkish turnover of at least two of the parties individually exceed 30 million lira; or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 30 million lira, or the Turkish turnover of any of the parties in mergers exceeds 30 million lira; and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million lira.

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:

a 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;

b mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;

c intra-corporate transactions that do not lead to a change in control are not notifiable;

d acquisitions by inheritance are not subject to merger control;

e 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;

f 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 26,027 lira for 2019. 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 carve-out 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 carve-out 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 2018, the Board reviewed a total of 223 transactions in 2018; these transactions included 13 privatisations. This shows an increase of approximately 20 per cent compared to the previous years; this is also the highest ranking for the years of 2013 to 2018. It is important to note that none of these filings has resulted in a no-go decision; only three of them were conditionally cleared and only one transaction was subject to Phase II review.

The Board’s most important merger control decisions in 2018 were as follows.

A notable transaction concluded in 2018 was the Board’s *Lesaffre/Dosu* decision where it reinitiated the Phase II review of the transaction concerning the acquisition of Dosu Maya Mayacılık AŞ by Lesaffre et Compagnie (*Lesaffre* v. *Dosu*, 31 May 2018, 18-17/316-156) pursuant to the High State Court’s annulment decision. The Board cleared the transaction; only this time with more far-reaching remedies than the previous remedies, which were deemed to be inadequate by the Court. This strongly indicates that remedies and conditional clearances are becoming increasingly important under Turkish merger control enforcement both in the sense that the Competition Board takes into account the available remedies before issuing a no-go decision and the judiciary review on the adequacy of such remedies in preventing any restriction of competition.

In May 2018, the Competition Board granted an unconditional approval to the transaction concerning the acquisition by DFDS A/S of the sole control of UN Ro-Ro.²

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² DFDS A/S, 18-17/302-151, 31 May 2018.
DFDS (the buyer) is a firm listed in Kopenhag Nasdaq OMX and controlled by Lauritzen Foundation. UN Ro-Ro is a company controlled jointly by Esas Holding and Actera. It provides short distance Ro-Ro transportation services. In its decision, the Competition Board indicated that, in its assessment of the proposed transaction, even if the market shares of the acquired firm is considerably high, as the acquirer firm does not provide services in Turkey, an increase in the market concentration will not happen after the proposed transaction. This acquisition was worth US$1.2 billion.

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 counteracting 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 not a 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 because of 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 carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out 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 will also 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 AND 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. To reinitiate 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.

4 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.
Chapter 35

UKRAINE

Andriy Navrotskiy and Igor Dykunskyy

I INTRODUCTION

The Antimonopoly Committee of Ukraine (AMCU) is the state authority with special status focused on ensuring state protection to competition, including merger control rules compliance.

The main features of the AMCU’s special status, tasks, authority and role in the competition policy formation are determined by the Law of Ukraine on the Status of the Antimonopoly Committee of Ukraine and other legislative acts.

The AMCU acts pursuant to the economic competition protection legislation such as the Law on the Antimonopoly Committee of Ukraine, the Law on Protection against Unfair Competition and the Law on Protection of Economic Competition.

The Cabinet of Ministers of Ukraine (CMU) is the highest state body in the system of the executive power bodies in Ukraine, and is authorised to overrule the AMCU’s refusal to grant a permit on concentration.

In the area of issues of economic concentration, the AMCU has an internal system of distribution of responsibility. The decision regarding approval or prohibition of economic concentration is in the competence of either the AMCU as a collective body or the administrative committee of the AMCU, which comprises several governmental officials.

The competence of either body regarding a particular case is determined on a case-by-case basis and is not strictly regulated by the law. The following legislative acts are considered the main acts of Ukrainian competition law:

a The Law of Ukraine on Protection of Economic Competition as of 2001, known as the Competition Law, with its amendments;

b The Law of Ukraine on the Antimonopoly Committee of Ukraine as of 1993; and

c Regulation of the Antimonopoly Committee of Ukraine on Concentration as of 2002.

Concentrations require pre-merger clearance by the AMCU if the following thresholds are met:

a the combined worldwide value of the participants’ assets or turnover exceeds €30 million for the preceding fiscal year and the value of assets or turnover of at least two participants exceeds €4 million; and

b at least one of the participants had Ukrainian sales turnover exceeding €8 million for the preceding financial year, and the worldwide turnover of at least one other participant exceeds €150 million for the preceding fiscal year, in Ukraine and worldwide.

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Article 22 of the Law of Ukraine on protection of economic competition (the Competition Law) provides for the following types of concentration:

- **a** the merger of two or more previously independent undertakings, or the takeover of one undertaking by another;
- **b** acquisition, directly or through other entities, of control by one or several business entities over another business entity or entities, or parts thereof, inter alia, by means of:
  - direct or indirect acquisition, obtaining into ownership (by other means) of assets in the form of a single (integral) property complex or a structural unit of an undertaking; obtaining in management, rent, lease, concession or acquisition in another manner of the right to use the assets in the form of the single (integral) property complex or structural unit of an undertaking, including acquisition of assets of an undertaking being liquidated; or
  - appointment or election of a person as the head or deputy head of a supervisory board, executive board or other supervisory or executive bodies of an undertaking if that person already occupies one or several of the mentioned positions in other undertakings; or the creation of the situation, where more than half of the offices of the members of the supervisory board, executive board, other supervisory or executive bodies of two or more undertakings are occupied by the same persons;
- **c** establishment of an undertaking by two or more undertakings that will independently perform business activities for a long period of time, but at the same time, the establishment does not result in coordination of the competitive behaviour between the undertakings establishing the new undertaking, or between them and the newly established undertaking; and
- **d** direct or indirect acquisition, obtaining in ownership by other means or obtaining in management of shares (participation interests, shareholdings), ensuring achievement or exceeding 25 per cent or 50 per cent of votes in the highest governing body of the appropriate undertaking.

In November 2017, the Parliament of Ukraine amended the Competition Law to deal with notifications by the sanctioned (Russia-related) parties (in force from December 2017). Pursuant to the amended law, the AMCU will reject notifications or drop their review (if such notifications have already progressed into Phase I or II) if the concentration is prohibited by the Law on Sanctions. The AMCU also published guidelines on the issue: the new rules will apply if any of the parties to the concentration (or any individuals or entities connected to them by relations of control) is on the Ukrainian sanctions list; and a particular type of sanction applies to a given individual or entity (e.g., prohibition on disposal of assets, equity). Under adverse interpretation, the new rules may apply on a group-wide basis (unlike many of the sanctions themselves); that is, where a party is not on the list itself, but belongs to a group controlled by or controlling the sanctioned individuals or entities.

The thresholds and procedures established in the beginning of the 21st century are outdated and do not comply with the current demands in part of ensuring the effective balance between the necessity of merger control and monopolisation of the market, on the one hand, and expenses and administrative restrictions imposed on business under such procedures, on the other.

The need to change the current approaches to merger control was also envisaged under the Ukraine–European Union Association Agreement.
In 2017, the AMCU launched public consultations on the draft Non-Horizontal Merger Guidelines. The relevant document was adopted by the authority in early 2018. It is largely modelled on the EU Non-Horizontal Merger Guidelines and will complement the existing Guidelines on Horizontal Mergers.

The AMCU is also starting to apply its Guidelines on the Assessment of Horizontal Mergers, and has recently adopted the Guidelines on the Assessment of Non-Horizontal Mergers to analyse the possible unilateral or coordinated effects of the transaction, as well as countervailing factors (such as buyer power, market entry and the ‘failing firm’ defence).

II YEAR IN REVIEW

From the available statistics, it can be concluded that in most cases of economic entities’ claims for the cancellation and invalidation of the AMCU’s decision on anticompetition laws violations, including in the area of mergers and acquisitions, the courts reject the claims. The courts find it legitimate for the AMCU to declare actions of economic entities as a violation. For example, in one of the rulings of the Economic Court of Cassation dated back to 13 March 2018, the court disregarded the economic entity (individual entrepreneur) arguments, noting that for the actions of an economic entity to be classified as anticompetitive concerted actions, they should not necessarily have negative consequences in the form of damages or violations of rights and legal interests of other economic entities or consumers. Even if there are no signs of concentration in the classical sense (setting up a joint venture as a separate entity for the purpose of carrying out independent business activities), it is sufficient to establish the very fact of coordinating competitive behaviour, which may have a negative effect on competition.

Moreover, the economic entities’ failure to achieve the purpose for which they originally coordinated their competitive behaviour shall not be grounds for establishing the absence of a violation, if it was for reasons and circumstances beyond their control.

Therefore, for the AMCU to recognise violations of the laws that protect economic competition, it is sufficient to establish and prove the economic entities’ intentions to coordinate their competitive behaviour or to carry out a concentration without obtaining the AMCU’s approval.

In another Resolution dated 7 August 2018, the Supreme Court, when abolishing the previous instances’ decisions based on a substantive law violation, noted that while resolving the disputes related to recognising the AMCU decisions as invalid, the courts must investigate and evaluate only the evidence provided directly in the AMCU decision.

At the same time, the Supreme Court, in its Resolution dated 24 April 2018 on another case, ruled to reject the cassation appeal and upheld the previous instances’ decisions, declaring the AMCU decision invalid.

The statistics of the AMCU decisions for the first quarter of 2019 in the field of granting approval for economic concentration are as follows. The AMCU received 81 applications, 66 of which were considered by the AMCU. Therefore, it is apparent that the remaining 15 applications were left without consideration owing to non-compliance with the requirements for submitting applications and supporting documents. Out of the reviewed applications, 40 concerned concentrations with the participation of foreign companies; 65 applications were granted approval for concentration. There were no refusals to grant approval for concentration. We can assume that the AMCU opened a concentration case as a result of considering one application, scheduling a more detailed study of concentration than during the standard
procedure, and this investigation is ongoing. According to the AMCU annual report, in 2018 the AMCU considered 453 applications for approval for concentration filed by economic entities. In 447 cases the economic entities were granted approval for concentration; in six cases the consideration was closed without making a decision on the merits.

The statistical absence of refusals to grant approval for concentration confirms the fact that the economic concentration per se is allowed. The need to file an application for approval of concentration with the AMCU is not a permitting process, but rather a process of notifying the AMCU of potential changes in the competition situation in the commodity market concerned.

As one of the recent (though rather controversial) instances, the AMCU granted DTEK Group a permission to acquire majority shares of Kyivoblenenergo and Odessaoblenergo (regional power providing companies), even though this results in the group’s share on the electricity supply market to exceed 35 per cent (under the competition protection law, the entity holding 35 per cent in the Ukrainian market is considered to have a monopoly position on that market).

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Normally, the AMCU’s approval is granted within one to two months following the relevant application submission. Granting such an approval includes preparation of all supporting documents, which itself can be a lengthy process.

As long as the AMCU State Commissioner does not reject the application because of a failure to meet the requirements specified by the AMCU, the application for concentration approval shall be accepted for consideration by the AMCU within 15 days following the date of its receipt.

The AMCU or its administrative board shall consider the application for concentration approval within 30 days following its acceptance for consideration. Therefore, the AMCU will usually have 45 days to review an application and come to a decision.

If the AMCU fails to launch its application consideration process within the 45-day period specified above, a decision to grant consent for concentration shall be deemed to have been rendered. The last day of the consideration period specified above shall be the date of such rendered decision granting permission for concentration.

Notwithstanding the above, if any grounds prohibiting the concentration come to light, or if a more thorough investigation or an expert appraisal is required, the AMCU may initiate a more detailed review of the application called a ‘concentration case’. If this occurs, the applicant will be notified.

The AMCU will send the applicant a separate notice that the concentration case was initiated, along with a list of information, which the applicant needs to provide to aid the making of the decision. The AMCU may request additional information from the applicant or other parties if the lack of such information impedes the case consideration. The AMCU may also request an expert opinion according to the procedure specified by the law.

The period for consideration of the concentration case shall not exceed three months. Such a consideration period starts on the date when the applicant submitted required information in full and obtained an expert opinion. The law does not limit the amount of time for additional documents or information collection. Therefore, there can be delays
between the opening of a case by the AMCU, the resulting request for additional documents, information or expert opinions and the actual start of the procedure of the concentration case consideration.

If the AMCU fails to make a decision within the specified three-month period for consideration of a concentration case, a decision to grant consent for concentration shall be deemed to have been rendered. The last day of the three-month period shall be the date of such rendered decision granting permission for concentration.

Under some limited circumstances, which make consideration of the case very difficult or impossible, the concentration case consideration may be suspended until resolution of another related concentration case or issues related to it. If this occurs, the AMCU will notify the applicant that consideration of the case has been suspended or resumed.

The AMCU will resume the concentration case consideration only following elimination or resolution of the circumstances, having resulted in suspension of such a consideration. During suspension of the concentration case consideration, the period for review is also suspended so that the time for the case consideration shall continue as of the date when the consideration is resumed.

Based on the above, the usual period for consideration of a concentration application should not exceed 45 days. However, in certain circumstances, this period may be extended to three months plus the time for the requested information or documentation collection.

ii Parties’ ability to accelerate the review procedure

The accelerated 25-day review procedure is only applicable to a fraction of merger transactions. In particular, it can be applied if only one party to the transaction under consideration is active in Ukraine, the parties’ aggregate market shares do not exceed 15 per cent or the parties’ aggregate shares on the vertical markets do not exceed 20 per cent. The decision on the accelerated merger review is taken by the State Commissioner (a member of the AMCU) supervising the application consideration.

In some cases, the regular merger clearance procedure can be sped up. An informal way of accelerating the process is to submit the appropriate grounding and additional explanations regarding the necessity to obtain the clearance as soon as possible for the AMCU.

The time required to review a merger application largely depends on the AMCU’s workload at the time of consideration, the accuracy and completeness of the merger application, the complexity of the transaction, the absence or not of competition concerns, and the merger’s potential positive effect on the market or national economy.

If any grounds prohibiting the concentration come to light, the AMCU may initiate a more detailed review of the application called a concentration ‘case’. If this occurs, the applicant will be notified.

iii Grounds for concentration approval

As a general rule, an economic concentration is not, in its essence, an anticompetition action and, therefore, it is not illegal per se. In other words, the competition protection law of Ukraine does not automatically consider an economic concentration as a prohibited activity or as a factor negatively affecting competition in the commodities market.

Therefore, business entities applying to the AMCU for economic concentration authorisation do not ask for the concentration to be approved as an exception to the general rule, but simply follow the lawful authorisation procedure for completing business transactions of certain commercial magnitude.
The Competition Law requires approval of a competition protection organisation or agency confirming that a business transaction of a significant economic magnitude is permissible for a particular market structure, developmental progress of particular branches of economy, and for types of competition on relative markets.

Economic concentration itself is not a violation of the Competition Law. Furthermore, the merger is often necessary not only to increase a competitive ability of a business entity at global markets or to develop a particular branch of the economy, but for the mere survival of a company in harsh competitive circumstances. However, the law is violated when the concentration occurs without approval of the AMCU or the Cabinet of Ministers (if the AMCU denies the application).

The main purpose of the concentration regulation is prevention and eradication of unrestrained market changes leading to increase of market power of certain companies, decrease of competition and establishment of additional barriers for business entities’ market entry.

Granting of approval for concentration to business entities confirms the principle that, although the concentration may be of a substantial magnitude, it may not threaten adequate market competition because of particular levels of economic capitalisation or owing to the aggregate resources of the concentration participants.

Therefore, an authorisation for economic concentration is a regular occurrence, while its prohibition is an exception, and an infringement upon business entities’ ability to conduct business transactions aim to increase their competitive power.

The AMCU approves transactions that do not:

- result in the emergence of a monopoly on the affected market; or
- substantially restrict competition in, or on a substantial part of, the affected market.

In the case of overlapping markets, the emergence of a monopoly is assessed by the expected aggregate market shares after the concentration.

iv Main criteria for the AMCU’s assessment

Within the scope of its authority, the AMCU assesses concentrations to decide whether they should be authorised or denied. Part 1 of Article 25 of the Competition Law provides that authorisation or denial depends on whether the relevant agreement would:

- lead to monopolisation of the entire associated market or its substantial part; or
- cause substantial restraint of competition on the relevant market.

v Monopolisation

Part 1 of Article 25 of the Competition Law specifies the primary principles for the market monopolisation assessment as to whether concentration can be permitted.

Article 1 of the Competition Law defines the term ‘monopolisation’ as a business entity’s attainment, maintenance and escalation of a monopoly (dominant position); that is, where a business entity does not have any competitors in a relevant market (subsection 1 of Part 1 Article 12 of the Competition Law).

Although this type of monopoly is easy to detect and classify, it is very rare in a contemporary market setting.

Another type of monopolisation relates to market domination in which one or more business entities ‘do(es) not experience substantial competition’ in a particular market. This occurs, for example, in the case of joint domination of oligopoly participants if the combined
market share of the three largest business entities is greater than 50 per cent (subsection 5 of Part 1 Article 12 of the Competition Law), or the combined market share of the five largest business entities is greater than 70 per cent (subsection 5 of Part 2 Article 12 of the Competition Law). If the applicable 'market share threshold' is exceeded, the AMCU can apply the above-mentioned presumptions, and the respondent (business entity) has to rebut them by submitting proof that it experiences substantial competition in the existing market conditions. If the applicable threshold is not exceeded, the AMCU has the burden of proof with regard to the entity's dominant market position.

vi Substantial restraint of competition

Assessment of the possible extent of a concentration agreement's impact on competition requires comparison of a market situation before and after the agreement execution or evaluation of conditions, which would have existed if the concentration had never happened. Although distribution of individual and combined market shares is a useful and obvious indicator of the market structure, it is only part of the general criteria used to evaluate the concentration's impact on the market competition.

Resolution of the following issues encounters additional difficulties: whether the conglomerate consequences of concentration can lead to achievement, maintenance and reinforcement of the business entity's dominant market position or otherwise create a negative impact upon competition, and also whether there are sufficient grounds for the state’s intrusion into particulars of a business transaction. There are several examples that may be reviewed in this context: because of concentration, a participant may broaden and diversify the goods assortment, increase its ability to offer clients a combination of its own and supplemental goods, and increase its ability to balance its market power at one of the markets through parallel influence upon other markets.

The extent of harm caused to competition must be adequately high for concentration assessment to be based on the 'substantial restraint of competition' criterion.

Therefore, the AMCU holistically evaluates the influence of a transaction on competition in the market with consideration of factors that may affect not only the market where the concentration is taking place, but also the adjacent markets and the economy as a whole.

vii What substantive test will the authority apply in reviewing the transaction?

There are several noteworthy examples of economic concentrations having a negative impact on the market, and that would possibly lead to a ban by the AMCU. They are as follows:

a. possible disappearance of potential competition or an important market factor for competition that existed before the concentration;
b. concentrated business entities’ ability to control the market trade channels and change conditions of access to resources and infrastructure;
c. change in advertising, product promotion and market entry capacity, and change in access to patents or other forms of intellectual property rights (for example, trademark and brand use);
d. high financial power achieved by the concentration participants in comparison with their competitors;
e. the impossibility of a third party having market access as a result of vertical concentration; and
f. third-party access to the file and rights to challenge mergers.
Third parties have no access to the filing; however, the decision of the AMCU on a merger clearance may be appealed to the commercial court by third parties if the decision violates their rights.

viii Resolution of authorities’ competition concerns, appeals and judicial review

The AMCU’s decisions can be challenged in commercial courts. The relevant statement of claim indicating the grounds for the AMCU’s decision invalidation should be filed to a commercial court within two months from the date of the decision receipt.

Courts’ decisions may be further appealed to the competent appellate instance within a 20-day period. Further, if the appeal is unsuccessful, the claimant may go to the higher cassation court – the Supreme Court of Ukraine (the cassation commercial court).

As there have been very few AMCU prohibition decisions, and in each of these cases the authority has thoroughly and deliberately assessed the facts and the potential impact of the transaction on the relevant markets, there have been no instances of successful appeals in merger cases (although not all court decisions are publicly available). What is more, there is no public record of successful appeals against the AMCU’s clearance decisions.

ix Effect of regulatory review

If the AMCU prohibits a concentration, the Cabinet of Ministers may still grant a clearance if its positive effects for the public interest outweigh the negative impact of the competition restriction, unless that restriction is not necessary for achieving the purpose of the concentration or jeopardises the market economy system. If an AMCU decision is appealed to the Cabinet of Ministers, the latter creates a special commission, which includes a number of independent experts from different industries and authorities as well as the AMCU’s senior officers.

The commission analyses the positive and negative effects of implementing the concentration using the same substantive test employed by the AMCU. The Cabinet of Ministers then prohibits or approves the reviewed concentration.

IV OTHER STRATEGIC CONSIDERATIONS

How to coordinate with other jurisdictions

The AMCU cooperates with competition authorities in other jurisdictions through bilateral treaties either between Ukraine and other countries or between the AMCU and other competition authorities. The AMCU cooperates with the competition authorities of certain CIS countries – members of the Agreement on Conducting Coordinated Antimonopoly Policy as of 2000 through the Interstate Council on Antimonopoly Policy established pursuant to the requirements of the Agreement.

The AMCU also collaborates with international organisations such as the Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development and the International Competition Network. Particularly, the OECD provides the AMCU with specific recommendations as to the improvement of diverse aspects of the AMCU-authorised activity.
V OUTLOOK AND CONCLUSIONS

One of the expected amendments to the merger control legislation in 2019 is the suggested definition of ‘state aid’ as a criterion for the impact of trade between Ukrainian and EU enterprises, especially with regard to setting up government-powered enterprises in the energy sector. Such a change will provide for the definition of state aid in line with the Association Agreement, defining examples of state aid measures whose influence is limited to the local level and do not require the AMCU’s notification.

Another proposition is introducing a new concept of a ‘business entity’ to be determined depending on the activities it conducts. In the EU, unlike in Ukraine, an entity is determined according to the principle of its activities’ division into economic and non-economic categories. That is, in the understanding of the law, a business entity carries out economic activity, consisting of goods sale on the market. Accordingly, the state support for non-economic activities will not fall under the rules of the state aid control, since the Competition Law applies exclusively to the state aid for economic entities.

In February 2019, the Competition Law was supplemented by Article 52-2, which renews and provides new content to the principle of ‘notification about violation’ including notification in merger cases (not notified merger), introduced by the AMCU more than 18 years ago. This principle did not receive a proper response in Ukraine and failed to gain popularity; however, the introduced changes are expected to alter the situation. The new rules regulate: (1) the AMCU detailing actions when it receives a statement of violation; and (2) the procedure for exemption from liability and the scale of liability reduction, even if the person declaring the violation was not the first applicant in the case. In particular, the first applicant receives a total exemption from liability; the fine for the second applicant is reduced by 50 per cent; for the third one, by 30 per cent; and for other applicants, by 20 per cent. However, it should be emphasised that neither the first or the second, nor any other applicant can be exempted from the obligation to compensate for the damage. This, in our opinion, is fair, as without this norm, there is the possibility of gaining illegal advantages or unlawful profit, while at the same time damaging the competitors.
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. In June 2018, the UK government introduced alternative turnover and share of supply tests for certain sectors on national security grounds (see Section II.v).

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.1

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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 May 2018, a public interest intervention notice in Trinity Mirror plc’s acquisition of the publishing assets of Northern & Shell Media Group Limited on media plurality grounds (the Secretary of State decided not to refer the merger to
The CMA has published detailed non-binding guidelines on jurisdictional issues and its procedures for the review of mergers.\(^3\)

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 2018–2019 financial year (56) was slightly down from the 62 decisions taken in the preceding financial year, and significantly down from the peak of 210 merger decisions made by the Office of Fair Trading (OFT) in the 2005–2006 financial year.\(^4\)

Of the 56 cases decided during the year, 41 were cleared unconditionally, representing around 73 per cent of cases, up from 66 per cent in the preceding year (including cases cleared under the \textit{de minimis} exception – see Section III.vii). Eleven cases were referred for Phase II review, which is around 20 per cent of cases, up from 15 per cent in the preceding year. Undertakings in lieu of a reference were accepted in two cases, down significantly from 12 in the preceding year.

In the 2018–2019 financial year, one of the 11 transactions referred to Phase II was prohibited, three were cleared unconditionally, four were cleared with remedies and three were cancelled or abandoned.

A total of eight Phase II decisions were published by the CMA in the 2018–2019 financial year, down from six published by the CMA in the previous year. Three were unconditional clearances and four were granted clearance subject to divestiture remedies. The CMA prohibited one merger during the 2018–2019 financial year, whereas it prohibited none in the preceding year.\(^5\)

Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 13 per cent of cases in the 2018–2019 financial year, which is around two 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.

\(^3\) See, for example Mergers: Guidance on the CMA’s jurisdiction and procedure (January 2014) CMA2.

\(^4\) For the CMA case directory, see www.gov.uk/cma-cases.

\(^5\) JLA/Washstation. Note also that at the time of writing (but beyond the 2018–2019 financial year) the CMA has just prohibited the Sainsbury’s/ASDA merger.
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). 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 29 Phase I cases in the 2018–2019 financial year. Interim orders were imposed in two Phase II cases in the financial year. The CMA granted a total of 67 derogations from initial enforcement orders in the financial year, a slight increase from the 51 derogations granted in the previous year.

In a year of firsts, the CMA imposed its first fine for breach of an interim order against Electro Rent Corporation in June 2018 (and this decision was subsequently upheld by the CAT) before imposing another fine on the same entity in February 2019. Both of these fines were levied following the breach of an interim order issued during Phase II of the CMA's investigation. On 28 February 2019, the CMA issued an unwinding order for the first time in its history in relation to the completed acquisition by Tobii AB of Smartbox Assistive Technology Limited and Sensory Software International Ltd. This step followed the breach of an interim order issued by the CMA to prevent pre-emptive integration during in the course of the Phase II investigation. The investigation is ongoing at the time of writing.

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 33 working days in the 2018–2019 financial year, up from 28 working days in the previous year. 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.

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). The CMA suspended the statutory timetable in two Phase I cases during the 2018–2019 financial year.

6 Rentokil Initial/Cannon Hygiene, Tobii AB/Smartbox.
7 Mergers updates, Law Society Competition Section seminar, 12 March 2019. FY 2018-2019 figures taken from this seminar do not include data for March 2019.
8 ibid.
9 ibid.
During the 2018–2019 financial year, the average length of Phase I was 36 working days, compared to 34 working days in the preceding year.\textsuperscript{10}

\textbf{iv \hspace{1em} Local market analysis}

When examining retail mergers, the CMA tends to assess the impact on competition at both a national level and a local level. This approach often results in the merging parties offering to divest a number of businesses in local areas to secure clearance for the overall transaction. This trend has continued during the past year. In CD&\textsuperscript{R} Fund IX/MRH (GB) Limited, where both parties operated petrol stations across the United Kingdom, the CMA identified 29 localised areas in which the parties were close competitors and consumers could face price increases. The CMA accepted CD&\textsuperscript{R}'s divestment offers in relation to the sites identified. The CMA accepted these offers as undertakings in lieu of a Phase II investigation. In this case, the CMA did not raise competition concerns at the national level.

In \textit{Sainsbury's}/Asda, Sainsbury's was proposing to buy Asda from Walmart, thereby creating the UK's largest supermarket business by market share. The CMA's final report prohibiting the deal in April 2019 detailed its reasoning at both the national and the local level. For instance, the CMA found 537 local areas in which the merger may have been expected to result in a substantial lessening of competition in the retail supply of groceries in supermarkets. The CMA also concluded that there would be a substantial lessening of competition in the same market on a national basis.

The CMA has published a commentary on the assessment of retail mergers,\textsuperscript{11} which explains the principles applied in past retail mergers and the issues frequently involved. In addition to covering catchment areas, effects on local and national competition and upward price pressure indices, the 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.

\textbf{v \hspace{1em} First case under the new thresholds}

On 11 June 2018, new jurisdictional thresholds came into force 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.\textsuperscript{12}

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 supply of the target is 25 per cent or more (irrespective of whether that share is increased).

The first case to establish jurisdiction under the new thresholds was \textit{Gardner Aerospace}/\textit{Northern Aerospace}, a merger between two manufacturers of structural assemblies and parts for aerospace industry, The Secretary of State for Business, Energy and Industrial Strategy issued a public interest intervention notice on national security grounds, which obliged the CMA to prepare a report on whether the merger would lead to a substantial lessening

\footnotesize{\textsuperscript{10} ibid.} \\
\footnotesize{\textsuperscript{11} Retail mergers commentary: CMA62 (April 2017).} \\
\footnotesize{\textsuperscript{12} The changes were brought into effect by the Enterprise Act 2002 (Share of Supply Test) Amendment Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018. See also 'Guidance on changes to the jurisdictional thresholds for UK merger control' (June 2018) CMA90.
of competition. Having considered the report and the representations of the Ministry of Defence, the Secretary of State gave notice to the CMA to deal with the matter as normal under the Enterprise Act. The CMA subsequently cleared the merger at Phase I.

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.\(^\text{13}\)

A merger situation will qualify for review if it meets the turnover test or the share of supply test (see Sections I and II). 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 (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

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\(^\text{13}\) Material influence also formed the jurisdictional basis for the investigations by the OFT and the Competition Commission (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.
(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 published revised guidance in May 2018 on the design and presentation of customer survey evidence in merger cases. The CMA has also published commentary on the assessment of retail mergers (see Section II.iv).

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 has pointed out in recent guidance that internal documents may be required to substantiate a failing firm scenario. The CMA does not, however, go far to suggest that internal documents are the only source of compelling evidence for these purposes. The CMA considered the failing firm test in seven cases in the 2018–2019 financial year. In five of these cases the failing firm defence was rejected. In Aer Lingus/Cityjet the failing firm defence was accepted as the CMA was satisfied that: (1) CityJet had taken the decision to exit the market; (2) there was no alternative counterparty to Aer Lingus that would have led to a less anticompetitive outcome; and (3) following CityJet’s exit from the market there would have been no competitive constraint exerted on the remaining player in the relevant market. In Baxter/Hospira, the CMA chose on a cautious basis not to assess the merger on a failing firm counterfactual, though noted that it was not necessary to conclude on the point given that the transaction did not raise competition concerns.
iv  The notification procedure

An application for clearance is made using the formal merger notice.19 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, 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 guidance on the use of initial enforcement orders in September 2017, providing further clarification on: the circumstances in which an initial enforcement order will typically be imposed; the form that an initial enforcement order will typically take;

19 The CMA has made a number of changes to the merger notice form, reflecting comments received in a consultation in 2017, which are intended to reduce the overall amount of information that businesses need to provide.
the type of derogations that the CMA is likely to grant; and the timing for imposing and revoking initial enforcement orders and granting derogation.\textsuperscript{20} 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.

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. Of the 25 interim enforcement orders imposed in the 2018–2019 financial year, only five were imposed in the context of anticipated mergers.\textsuperscript{21}

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.

The CMA has published for consultation draft new guidance on the use of interim measures in merger investigations. The new guidance is intended to replace the September 2017 guidance on initial enforcement orders (CMA60) and update the relevant parts of the CMA’s existing guidance on jurisdiction and procedure (CMA2) that deal with interim measures. According to the CMA, the draft guidance aims to give further clarification on the circumstances in which interim measures will typically be required, the form interim measures will typically take, the types of derogations the CMA is likely (or unlikely) to grant and the timing for imposing and revoking interim measures and granting derogations.

\textsuperscript{20} Guidance on initial enforcement orders and derogations in merger investigations (September 2017), CMA60.

\textsuperscript{21} Mergers updates, Law Society Competition Section seminar, 12 March 2019.
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 or may be expected to result in a substantial lessening of competition in a UK market. The CMA has published revised guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase II investigation. The CMA has also recently published updated guidance on remedies.22

The remedies guidance sets out the criteria for accepting undertakings that may be offered by the merging parties in lieu of a reference. The objective of these undertakings is to ensure that competition following implementation of the remedy is as effective as pre-merger competition. To discharge the CMA’s duty to refer, any undertakings offered by the parties should be clear cut and capable of ready implementation. ‘Clear cut’ is stated in the remedies guidance to mean that there are no material doubts about the overall effectiveness of the remedy and that it achievable in the constraints of the Phase I timetable. It is most common for undertakings to relate to the sale of a part of the merged assets; the CMA has stated a preference for structural remedies and is generally reluctant to accept behavioural remedies. The CMA has nonetheless in the past accepted a number of ‘quasi-structural’ remedies with behavioural features.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 (de minimis mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced. In relation to 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 (though this is not to be considered a ‘safe harbour’). For markets with an aggregate turnover

22 Mergers: Exceptions to the duty to refer (December 2018) CMA64, Merger remedies (December 2018) CMA87.

23 For example, in 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.
of between £5 million and £15 million, the CMA 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’s general policy is also not to apply the *de minimis* exception where clear-cut undertakings in lieu are available. The CMA did not apply the *de minimis* exception in any cases during the 2018–2019 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 January 2019, the CAT ruled against the CMA in relation to the dates and times by which Sainsbury’s and Asda were required to respond to CMA working papers and the timing of the ‘main party hearing’ during the Phase II review of their transaction. The deal was subsequently blocked by the CMA in April 2019.²⁴ In February 2019, the CAT dismissed an appeal by Electro Rent Corporation against a £100,000 fine imposed by the CMA for the breach of an interim order in a merger investigation. Electro Rent breached the terms of the interim order by exercising a break option to terminate a lease for Electro Rent’s premises in

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the United Kingdom. The CAT affirmed the CMA’s view that Electro Rent had no reasonable excuse for failing to comply with the terms of the interim order and also confirmed that the level of the fine imposed by the CMA was not excessive.25

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 updated its guidance on its mergers intelligence function in September 2017. This guidance explains 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.

As of 1 March 2019, the Committee has reviewed over 600 transactions during the 2018–2019 financial year, showing a broadly similar rate of review since 2015. Fourteen Phase I investigations were launched during the financial year as a result of the Committee’s review of those transactions. Three of these cases resulted in a Phase II.

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.

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26 CMA’s mergers intelligence function: CMA56 (September 2017).
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 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 one occasion in the 2018–2019 financial year.

As regards post-notification referrals, in the 2018–2019 financial year, the CMA did not make any Article 9 requests for cases to be referred from the European Commission, but did in February 2019 make one Article 22 request for a case 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 AND CONCLUSIONS**

As a result of the Brexit vote, it is expected that the United Kingdom will withdraw from both the European Union and European Economic Area (EEA) in the near future, 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 emphasised once again in its Annual Plan 2019/20 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. Even though the CMA expects to have completed three-quarters of the recruitment necessary to handle this extra work and has robust plans in place, it expects that increased time diverted to mergers may in some cases come at the cost of other priority (but discretionary) areas such as market studies and investigations. In addition, this will affect the CMA’s role in global mergers and its relationships with foreign regulators.

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27 This request in relation to Iconex/Hansol was, however, withdrawn in March 2019.
28 Mergers updates, Law Society Competition Section seminar, 13 March 2018.
arrangements would also need to be put in place as soon as possible to clarify how cases currently in train would be handled. The CMA’s plan does, however, note the opportunity to have oversight of all mergers affecting UK markets, including the biggest and most important transactions that would typically have come under the European Commission’s jurisdiction in a pre-Brexit world.

Such considerations have, in part, added to the current reformist mood among policymakers and the CMA. Lord Tyrie, the Chair of the CMA, outlined proposals for significant reform of UK competition policy in February 2019. With regard to merger control, Lord Tyrie’s proposals include mandatory notification in the case of larger mergers that are likely to be the subject of review by multiple competition agencies globally while maintaining the voluntary system for smaller mergers.

This was followed in March 2019 by further recommendations published by the Digital Competition Expert Panel, which also proposed the introduction of a ‘balance of harms’ approach to the UK regime, thereby broadening the substantive test for assessing mergers in the UK. This approach would involve an assessment of both the likelihood and magnitude of the positive or negative impact of a merger before considering whether the harmful effects outweighed the benefits (or vice versa). The CMA has since stated that it would not support such an approach, citing in particular the risk of unintended consequences if such a test were adopted. Such a shift in the burden of proof to merging parties would undoubtedly contradict long-established economic theories regarding the market efficiency of mergers.

The Department for Business, Energy and Industrial Strategy is set to finish its statutory five-year review of aspects of the UK competition regime is the coming months. The review will include, among other things, a review of the CMA’s proposals as outlined above. Balancing a desire for fundamental reform with increased workload as a result of Brexit will likely be the key theme of the year ahead.

The CMA also aims to continue the ‘tidy up’ of its existing guidance in the year ahead, with a focus on ongoing consolidation and refreshing its guidance to reflect current practice (a consultation on interim measures has at the time of writing just been reissued as discussed in Section III.vi). The CMA has stated its intention to consider further revision of its jurisdictional and procedural guidance and merger assessment guidelines depending on the status of the United Kingdom’s exit from the European Union following the vote to leave on 23 June 2016.
Chapter 37

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 2019, 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 $90 million. Transactions in which holdings post-acquisition will be valued between $90 million and $359.9 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 $180 million, and at least one other person must have total assets or annual net sales of $18 million. Transactions valued over $359.9 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 2018. 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 2018, the FTC continued to have an impressive track record in its federal court activities. The FTC won both of its preliminary injunction cases. The parties abandoned two

7 Polypore Intl, Inc v. FTC, 688 F3d 1208 (11th Cir 2012).
8 Polypore Intl, Inc v. FTC, 12-1016, cert denied (24 June 2013).
other transactions pre-trial. In addition, the FTC challenged in administrative court Otto Bock’s consummated acquisition of rival microprocessor prosthetic knee manufacturer FIH Group Holdings d/b/a Freedom Innovations.

The FTC entered into 10 consents involving proposed mergers in 2018. In addition, the parties abandoned one transaction when the FTC issued a second request.

At the beginning of 2018, the DOJ had one merger case pending in district court, its challenge of AT&T’s proposed acquisition of Time Warner.

Although the agencies had raised antitrust concerns in vertical mergers before, these concerns were 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. The DOJ appealed the case to the DC Circuit; on 26 February 2019, the DC Circuit affirmed the district court’s decision.

The DOJ also entered into five consents involving proposed transactions in 2018. In addition, transaction parties abandoned one transaction because of antitrust concerns raised by the DOJ.

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.

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(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 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’ willingness 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. The 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.  

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 parens patriae of citizens. Private parties can bring challenges, although, in most jurisdictions, the standing requirements may be difficult to meet.

IV 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. 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).

V OUTLOOK AND CONCLUSIONS

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.\textsuperscript{14} 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'.\textsuperscript{15} 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.

US antitrust enforcement continues unabated as at the time of writing. US antitrust agencies’ leadership changes have been in place sufficiently long to see a pattern of continued aggressive enforcement, with an increased focus on vertical mergers and a resistance to behavioural and post-transaction divestiture remedies. In addition, both in Congress and the federal antitrust agencies, there is increased reflection on the adequacy and usage of the antitrust laws and enforcement to address broader industrial and societal policy objectives. Antitrust will also likely be part of the political debate in the 2020 presidential elections.

\textsuperscript{14} 15 USC Section 53(b).
\textsuperscript{15} id.
Chapter 38

VIETNAM

John Hickin and Hannah Ha

I INTRODUCTION

The 2018 Law on Competition (Law No. 23/2018/QH14) governs mergers that have or may have a competition-restraining impact on the market of Vietnam. The law came into effect on 1 July 2019, replacing an old set of merger control provisions under the 2004 Law on Competition. A draft decree issued in October 2018 (the Draft Decree) sets out detailed provisions guiding the implementation of the 2018 Law on Competition, but a finalised version of the decree has yet to be issued at the time of writing. Additional decrees are in the process of being formulated, for example, in relation to the handling of competition law violations, and regulating the functions, tasks and organisational structure of the regulator.

The National Competition Commission (NCC), which sits within the Ministry of Industry and Trade, is the authority tasked with enforcing the merger control rules, and is responsible for reviewing and deciding whether mergers should be prohibited, cleared or cleared with conditions.

II YEAR IN REVIEW

i Increasingly robust enforcement

In the past, compliance with the merger control provisions in the 2004 Law on Competition had been described by commentators as being ‘very poor’. Several significant mergers were carried out without interference by the authorities despite apparently having ignored the merger control requirements. However, in more recent years, there appears to have been increasing levels of enforcement.

In December 2018, for example, the Vietnam regulator announced that Grab’s acquisition of Uber in Vietnam raised potential concerns under Vietnam’s Law on Competition. The transaction involved Grab’s purchase of Uber’s Southeast Asian business in consideration of Uber having a 27.5 per cent share in Grab. Under the 2004 Law on Competition, transactions that lead to a post-transaction market share of between 30 per cent and 50 per cent would need to be notified, and those that resulted in a post-transaction market share of over 50 per cent would generally be prohibited. Following investigations, the regulator found that parties may have infringed the 2004 Law on Competition by completing the transaction without notifying the regulator of the same. The regulator found in its earlier

1 John Hickin and Hannah Ha are partners at Mayer Brown.
3 Luu Huong Ly, ‘Competition Law in Vietnam’ (August 2015) 1 CPI Antitrust Chronicle.
preliminary investigation that Grab could have a post-acquisition market share of more than 50 per cent in Vietnam, although this was contested by Grab, which took the view that its post-acquisition market share was less than 30 per cent. While the Vietnam Competition Council ruled in June 2019 that the transaction did not constitute an economic concentration that was notifiable under the 2004 Law on Competition, this decision is currently being appealed by the regulator. Importantly, the Vietnam regulator has never prohibited a merger since the Vietnam 2004 Law on Competition was passed, and this in-depth scrutiny of the Grab/Uber transaction represents a more assertive approach.

From 2013 to 2016, the regulator received an average of four to five notification dossiers annually. In contrast, in 2018, the regulator has reviewed five merger cases, commenced an investigation into one merger (the Grab/Uber case), and provided pre-filing consultation to three cases. On top of that, it has received and processed four additional merger notification applications. Coupled with statements in recent years that merger control enforcement was going to be a priority, the NCC is expected to become more active in enforcing the merger control provisions.

**ii Change to the 2018 Law on Competition**

The new 2018 Law on Competition that came into force on 1 July 2019 represents a big change to merger control in Vietnam.

To begin with, the change in notification criteria calls for a significant shift to the way that businesses comply with merger control rules. Under the 2004 Law on Competition, many businesses found it challenging to be sure of their notification obligations because of the uncertainties surrounding what the relevant market should be, and the difficulties in obtaining market share information. As a result, many transactions have simply not been notified. A shift to notification based on assets, revenue and value of transaction, which are more objective measures, is expected to provide greater certainty to businesses of when the notification thresholds are met. It also becomes easier for the NCC to enforce the new notification requirements: instead of being involved in a protracted assessment of the correct relevant market to base market share calculations, it can simply point to the clearer and more objective indicia of assets, revenue and value of transaction to establish that the notification thresholds have been crossed.

Importantly, the current notification thresholds contained in the Draft Decree are set at a relatively low level (e.g., value of transaction exceeding 500 billion Vietnamese dong). Many more transactions are expected to require filing, given these low thresholds.

Further, while the 2004 Law on Competition prohibits mergers that result in the post-transaction entity holding more than 50 per cent market share, the 2018 Law on Competition represents a fundamental shift in its approach to assessing mergers. Instead of prohibiting mergers purely based on market shares, they will be assessed depending on whether they restrict or are capable of significantly restricting competition in the Vietnam

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6 DFDL, Focus on Merger Activity by the Vietnam Competition Authority (16 April 2014).
7 PaRR, Vietnam’s competition authority to remove market share threshold for merger reviews (17 July 2017).
8 APEC Economic Committee Report, Use of Economic Evidence Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam (March 2018) at 21, 22.
market. The move from a market share-based prohibition to an effects-based prohibition recognises that anticompetitive effects arising from mergers cannot be assessed on market shares alone – mergers that result in the post-merger entity having significant market share does not necessarily restrict competition if, for example, barriers to entry are low or countervailing buyer power is high. This change also opens the way for the NCC to consider other theories of harm (e.g., vertical, conglomerate) apart from horizontal theories of harm that comes from a narrow focus on combined market shares. Moving forward, a greater level of analysis and sophistication of review is expected, as the regulator moves from a purely market share-based approach to an effects-based approach to assessing mergers.

Additionally, while the 2004 Law on Competition does not expressly provide that the merger control provisions would apply to foreign mergers, the 2018 Law on Competition now clearly states that it applies to any acts by foreign individuals or entities that have or may have the effect of restricting competition in Vietnam’s markets.

Given the expanded criteria for notification, the relatively low notification thresholds, and the clear application of the rules to foreign-to-foreign mergers, the number of notifications is expected to increase under the new merger control regime.

III THE MERGER CONTROL REGIME

i Mandatory notification regime

Before a merger is carried out, it would first have to be notified to the NCC if: (1) it falls within the type of transactions that may be notifiable, and (2) the prescribed notification thresholds are crossed.

Regarding (1), the following types of transactions may be notifiable under the 2018 Law on Competition:

a merger of enterprises – the transfer by one or more enterprises of all assets, rights, obligations and interests to another enterprise and, at the same time, the termination of business activities or existence of the former enterprises;

b consolidation of enterprises – the transfer by two or more enterprises of all of their assets, rights, obligations and interests to form one new enterprise and, at the same time, the termination of the business activities or existence of the consolidating enterprises;

c acquisition of an enterprise – the purchase by one enterprise of all or part of the capital contribution or assets of another enterprise sufficient to control or govern the acquired enterprise or any of its trades or business lines; and

d joint venture between enterprises – two or more enterprises together contributing a portion of their assets, rights obligations and interests to form a new enterprise.

The above transactions are collectively referred to in this chapter as ‘mergers’. While the need for a change in control is an express requirement for acquisitions to be notifiable, it is arguably also an implied requirement in relation to mergers and consolidations, given the need for the consolidating or merging enterprises to terminate their business activity post-merger. Interestingly, there does not appear to be an express change of control requirement or a full functionality requirement before joint ventures are notifiable under the law.
Regarding (2), the notification thresholds under the 2018 Law on Competition are as follows:

- either party’s total assets in the Vietnam market exceeds 1,000 billion Vietnamese dong;
- either party’s total turnover exceeds 1,000 billion Vietnamese dong in the preceding fiscal year;
- the value of the transaction exceeds 500 billion Vietnamese dong (only applies to mergers in Vietnam); or
- the combined market share of the combining entities in the relevant market is 30 per cent or more.

These thresholds are set out in the Draft Decree and remain to be finalised.

ii Concept of ‘control’

The concept of obtaining control under the 2018 Law on Competition is specifically defined in the Draft Decree. An enterprise that obtains more than 36 per cent of the charter capital of an acquired enterprise, or such other holding that is sufficient to enable the acquirer with the right to make decisions on important matters regarding the financial policies, appointment and dismissal of members of management, and the operations of the acquired enterprise, would be considered to have obtained control. Such control can also be obtained by way of agreements between the acquirer and the acquired enterprise.

iii Prohibition against anticompetitive mergers

The 2018 Law on Competition prohibits mergers that cause or are capable of causing the effect of significantly restricting competition in the market of Vietnam.

Among others, the NCC will assess the merger’s impact by looking at:

- the combined market shares of the enterprises participating in the merger;
- the extent of mergers in the relevant market before and after the merger;
- competitive advantages brought by the merger in the relevant market;
- the ability of an enterprise to significantly increase prices or rate of returns on sale post-merger; and
- the ability of an enterprise to exclude or hinder other enterprises from entering or expanding in the market post-merger.

The NCC will also take into account positive impacts by looking at whether the merger:

- has a positive impact on the development of industries, sectors, and science and technology, in accordance with state strategies and master plans;
- has a positive impact on the development of small and medium-sized enterprises; and
- enhances the competitiveness of Vietnamese enterprises in the international market.

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9 Under the Enterprise Law, major decisions (such as re-organisation, winding-up/liquidation, disposal of assets whose value is 35 per cent or greater of the value of total assets, issuance of shares with respect to a joint stock company, appointment of board and executives, change of core business, amendments to charter) of a company be passed by 65 per cent of attending votes. Other decisions are passed by 51 per cent of attending votes.
Interestingly, the factors that may be taken into account in assessing the benefits of a merger appear to go beyond pure consumer welfare considerations, to also take into account industrial policy considerations such as support for Vietnamese enterprises and the development of pre-identified industry sectors.

iv Determination of market shares

The Draft Decree contains specific ways of determining the market share of an enterprise in a relevant market. The market share of an enterprise is determined on the basis of turnover from sales or purchases of goods or services in the relevant market on a monthly, quarterly or annual basis. Where it is not possible, or where there are insufficient grounds to determine the market share of an enterprise on the basis of turnover from sales or purchases, the market share of such enterprise would be determined on the basis of the percentage of units of goods or services sold or purchased on a monthly, quarterly or annual basis. The turnover used to determine market share is to be determined in accordance with Vietnamese accounting standards.

Market share information for the past two years immediately preceding the year of notification of the merger is required to be submitted to the NCC, as part of a notification application.

v Foreign-to-foreign mergers

The 2018 Law on Competition expressly states that it applies to any acts by foreign individuals or entities that have or may have the effect of restricting competition in Vietnam’s markets. In other words, foreign-to-foreign mergers that result in a restriction of competition in Vietnam could be caught under the 2018 Law on Competition.

vi Merger review timelines

Before filing a notification, it is important for parties to consider whether it would be helpful to have a pre-merger consultation with the regulator to clarify whether their transaction would need to be notified or if it would be prohibited. This tends to be an informal process that is not set out in any statutory instruments or governed by fixed timelines, but is an important first step in clarifying the merger control obligations.

Once parties have submitted a complete notification that has been accepted by the regulator, the statutory timelines start to run. Under the 2018 Law on Competition, the preliminary review would be completed within 30 days from notification. A merger qualifies for preliminary review if it satisfies any of the following criteria:

a the combined market share of the merging enterprises is less than 20 per cent in the relevant market;
b the combined market share of the enterprises participating in the merger is 20 per cent or more in the relevant market, and the Herfindahl-Hirschman Index (HHI) of the enterprises in the relevant market post-merger is less than 1,800;
c the combined market share of the enterprises participating in the merger is 20 per cent or more in the relevant market, the HHI of the enterprises in the relevant market post-merger is more than 1,800, and the rate of increase in the HHI from pre- to post-merger is less than 100;
d the post-merger enterprise does not fall within the group of five enterprises having a market share of 85 per cent or more in the relevant market; or
the enterprises participating in the merger that have interactive relations in the chain of production, distribution and supply of a certain type of goods or services, or business lines that are mutual inputs or complementary to each other, have market shares of less than 20 per cent in the relevant market.

At the end of 30 days, the NCC is required to issue a notice indicating that the merger may be carried out. If it does not, the merger is subject to official appraisal. If it fails to issue such notice upon expiry of time limit, the merger may be carried out.

If a more detailed official appraisal is required, the NCC is given a further 90 days from the date of issuance of the above notice to conduct the review. This can be further extended by 60 days in complex cases. The clock may also be stopped during the process if the NCC requests that parties provide additional information and documents as part of the review.

vii Effect of regulatory review

Following the official appraisal, the NCC must make a decision on whether the merger may be carried out, may be carried out subject to conditions, or is prohibited. If it fails to issue a decision within the stipulated time limit, thereby causing loss and damage to enterprise, it is required to pay compensation.

The NCC has a broad range of powers to impose conditions to address potential competition concerns. Among others, it is empowered to order the division, separation or sale of assets or capital contributions, and may also control the terms of sale and purchase of goods and services entered into by the post-merger entity.

viii Penalties

A failure to notify a notifiable transaction before implementation amounts to a breach of the 2018 Law on Competition. It is also a breach to implement a merger without incorporating all the conditions imposed by the NCC, or to implement a merger without obtaining the necessary clearance.

Among others, such a breach may result in fines (up to a maximum of 5 per cent of the total turnover of the enterprise in breach), an order for the division, separation or sale of the post-merger enterprises’ assets or capital contribution, and control over the terms of sale and purchase of goods and services entered into by the post-merger entity.

ix Third parties’ right to challenge mergers

Organisations and individuals who consider that their lawful rights and interests have been infringed as a result of a breach of the merger control provisions have the right to lodge a complaint with the NCC. There is a three-year limitation period (starting from the date on which the alleged breaching conduct occurred) within which the complaint must be made.

Such complaints will be investigated, and the NCC will take a decision to either stay the case or deal with the breaches of the merger control provisions. Organisations and individuals who disagree with this decision have the further option to lodge a complaint with the chairman of the NCC within 30 days of receiving the decision. The chairman will take a decision to uphold, amend or revoke the original decision. This latter decision may be further appealed to the court of relevant jurisdiction within 30 days of receiving such decision.

The 2018 Law on Competition does not expressly provide a right for third parties to have access to the NCC’s file.
OTHER STRATEGIC CONSIDERATIONS

Given the transition to the new merger control regime, there appears to be further clarifications that may be required, both in law and in practice. For example, whether a change in control or full functionality is a requirement before a joint venture is notifiable, whether there is a process for offering commitments to resolve the competition concerns raised by the regulator, and the possibility of running defences such as the failing firm defence. It would be important for parties, early in the transaction, to engage with the NCC in a pre-merger consultation to understand how the merger control provisions would specifically apply to their deal, and to identify any potential red flags early on.

OUTLOOK AND CONCLUSIONS

The transition to the 2018 Law on Competition is still developing, and further clarity is expected to be provided in the form of additional decrees and other guidance and decisions from the regulator.

In the meantime, following a transition period of more than one year, a more rigorous set of merger control rules are now in place in Vietnam. Given the expanded criteria for notification and the relatively low notification thresholds, coupled with more robust enforcement in recent years, it is increasingly likely that transactions would trigger notification requirements and attract liability for a breach of merger control rules.
Appendix 1

ABOUT THE AUTHORS

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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 retail, transport and logistics, 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, and Aurizon in its successful defence of the ACCC’s challenge to Aurizon’s sale of the Acacia Ridge Terminal to Pacific National. 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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Patrick Bock’s practice focuses on antitrust counselling and antitrust litigation. 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 starting in Cleary’s Washington, DC office following graduation from Harvard, he served in Cleary’s Brussels office for several years as an associate, before returning to Washington and being elevated to partner in 2013. After his elevation to partner, he spent five years in Cologne and returned to Brussels in 2018. 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_ recognised Mr Bock as a ‘future leader’ in its 2017 and 2018 global industry rankings for competition law.

Mr Bock is a member of the Illinois and Washington, DC Bars, and is also registered with the Cologne and Brussels Bars.

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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.

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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 PayPal/Hyperwallet, 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 2019 (Next Generation Lawyer, Competition and Antitrust) and Who’s Who Legal: Competition – Future Leaders 2019, which profiles the foremost practitioners in the competition community aged 45 and under.

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He has an extensive background in competition, regulated industries and EU law.

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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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Elsa was recognised by Who’s Who Legal Competition: Future Leaders in the economists section as ‘the top merger control practitioner in Singapore’, ‘a leading name in the Singaporean market’ and for her ‘analytical and practical approach’. She was also one of the only two most highly regarded economists in North America and the rest of the world by the publication. Elsa was featured in the 100 elite women globally by Global Competition Review (GCR) in multiple Women in Antitrust peer-nominated surveys. She was also named among 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 since assisted on the first abuse of dominance decision by the CCCS (SISTIC) and also close to 90 per cent of complex CCCS merger reviews, including mergers in the digital space (Grab/Uber, SEEK/JobStreet), transportation (Siemens/Alstom, China CNR/CSR), and also on transactions including publishing, fast-moving consumer goods, semiconductors, building materials, pharmaceuticals and healthcare.

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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
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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 was 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) CartA.

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He has practised law for almost 30 years. In his antitrust practice, he has handled numerous criminal grand jury investigations, civil class action cases, regulatory merger and non-merger investigation and litigation matters, and consumer protection matters in the US and numerous international cartel, abuse of dominance, unfair trade practice and global merger control matters in Korea.

Prior to joining Yulchon in 2012, he was an antitrust partner at two global law firms (Pillsbury Winthrop and Greenberg Traurig) in Washington, DC. From 1988 to 1995, he was a litigation attorney in the Bureau of Competition at the US Federal Trade Commission. He was a principal member of the FTC’s trial team that successfully challenged BAT’s acquisition of American Tobacco in the federal district court.

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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 enforcement.
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Hemangini graduated from Gujarat National Law University, Gandhinagar in 2010 with a BA LLB (Hons). She completed her LLM in law, science and technology from Stanford Law School in 2017 with honours in subjects such as advanced antitrust and network neutrality. Hemangini has also cleared the New York Bar Examination and is currently awaiting formal admission to the New York Bar.

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Pascal Favre achieved a doctor of laws degree, summa cum laude (Fribourg, 2005; awarded three prizes). He frequently writes on relevant topics and current issues affecting the competition climate in Switzerland, and contributes to renowned publications in the field of antitrust and competition laws. Dr Favre has co-authored 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’). He also 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). In addition, Dr Favre has 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 Favre is a well-established competition practitioner recognised both by clients and ranking publications. He was identified in Global Competition Review in 2018. The 18th edition of GCR 100 Global Elite highlighted the SNCF Mobilités deal with Dr Favre in the lead.

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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.

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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 has been an active leader of the American Bar Association for over 35 years, having served on the ABA’s Board of Governors from 2015 to 2018, 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 90 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 counselling 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 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 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.

**HANNAH HA**

*Mayer Brown*

Hannah Ha is a partner of Mayer Brown and co-heads the firm’s antitrust and competition practice in Asia. She has been practising competition/antitrust law for over 10 years.
Hannah has an active practice guiding clients through investigations conducted by the Commission, and also has broad experience advising companies on compliance with Hong Kong’s competition law. She is regularly engaged to deliver seminars on competition law compliance and preparation for dawn raids, review existing practices and contractual arrangements, develop competition compliance policy and codes of conducts, and design and roll out competition compliance programmes for various multinational and local companies.

She also regularly advises clients on merger control issues in China and make successful merger control filings with Chinese authorities. Hannah works closely with Mayer Brown’s global offices on the competition law and merger control front relating to the Asia component of large global transactions.

Hannah has been consistently recognised as a leading individual in antitrust and competition (Hong Kong and China) by Chambers Asia-Pacific (2009–2019) and IFLR1000 (2011–2019), who was also recognised in Expert Guides: Women in Business Law (2012, 2014 and 2016 editions) and won the Asia Women in Business Law Awards – Best in Competition and Antitrust award by Euromoney LMG (2013).

Hannah is a member of the executive committee of the Hong Kong Competition Association, a member of the competition law working group of the Association of China Appointed Attesting Officers and the Society of Notaries assisting the two professional associations in handling competition law compliance issues including making submission to and meeting with the Hong Kong Competition Commission, Department of Justice and Commerce & Economic Development Bureau (CEDB).

TED HASSI
Debevoise & Plimpton LLP

Ted Hassi, a litigation partner in the Washington, DC office of Debevoise & Plimpton, is engaged primarily in representing clients in antitrust investigations, complex antitrust litigation, merger review and counselling, and merger and acquisition litigation. He regularly represents clients in investigations by, and litigation with, the Federal Trade Commission and US Department of Justice.

Mr Hassi is a former FTC Chief Trial Counsel who from 2011–2014 led the agency’s work on matters that were or were likely to be tried, including high-profile challenges to several mergers and cases involving other anticompetitive practices.

Mr Hassi was named as Antitrust Litigator of the Year in the Benchmark Litigation US Awards 2019 and is recommended by Chambers USA (2019). He is a member of the Antitrust Section of the American Bar Association and serves on the advisory boards of several antitrust publications.

Mr Hassi joined Debevoise in 2018. He received his JD *cum laude* from Fordham University School of Law, where he was also selected to the Order of the Coif; and earned a BS from the United States Naval Academy.

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

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.

JOHN HICKIN
Mayer Brown

John has been a partner of Mayer Brown since 2005 and is one of the global co-heads of the firm’s litigation and dispute resolution practice. He has extensive experience of dispute resolution (including arbitration and mediation) in banking and commercial matters in Hong Kong. He advises banks and corporates on regulatory matters including Competition Commission and SFC investigations and ICAC investigations into corporate bribery offences. He also has experience of appearing before domestic tribunals and of handling administrative law remedies, including judicial review. John has been named a dispute resolution star by Benchmark Asia-Pacific (2018).

John is also co-head of the competition law group in Asia, which is consistently ranked by various directories as one of the top-tier international practice teams for China/Hong Kong antitrust. He has advised a large number of clients regarding compliance activities and investigations following the introduction of the laws in China (2008) and Hong Kong (2015). Chambers Asia, The Legal 500 Asia Pacific and IFLR1000 (2018) have recognised John as a leading individual in this practice area in their 2018 rankings for China/Hong Kong antitrust and competition lawyers.

VANESSA HORACECK
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz in Vienna. She specialises in European and Austrian competition law as well as public procurement law.
ARIEL HUANG
LCS & Partners

Ariel Huang 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 has extensive experience in the applications and notifications related to merger control, and resolving various complex antitrust-related issues.

MARGARET HUANG
LCS & Partners

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.

TEA IVANČIĆ
Law Firm Bekina, Škurla, Durmiš and Spajić Ltd

Tea Ivančić is a senior 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.

TOM JENKINS
Baker & McKenzie

Tom Jenkins is a special counsel in Baker McKenzie’s antitrust and competition practice in Hong Kong and China. He advises clients across a range of transactional, advisory and contentious competition matters and regularly speaks at leading antitrust events in the region. Before joining the Hong Kong office in 2015, Tom was based in Baker McKenzie’s Brussels office, where he advised clients on the full range of EU and UK competition law matters. Tom has been recognised as a Future Leader by Who’s Who Legal and a Next Generation Lawyer by The Legal 500. Tom is admitted as a solicitor in Hong Kong, and England and Wales.

SHANTHI KANDIAH
SK Chambers

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 antitrust litigation, cartels, sectoral competition regimes, including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, FMCG, construction, pharmaceuticals and other service
industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Recently, she acted as coordinating counsel in the largest enforcement action to date by the Malaysian Competition Commission involving fines exceeding 200 million ringgit. On mergers, recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. 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.

ESTHER KELLY

_Cleary Gottlieb Steen & Hamilton LLP_

Esther Kelly’s practice focuses on European competition law.

Ms Kelly has experience working in all aspects of European Competition law, including complex cartel, abuse of dominance, and merger control matters, and has worked extensively on cases related to a variety of industries including technology, pharmaceuticals, chemicals, transport, and financial services.

Ms Kelly joined Cleary Gottlieb in 2009. She is a graduate of Downing College, Cambridge University, L’Université Libre de Bruxelles, and the College of Europe.

Ms Kelly is a solicitor of the senior courts of England and Wales and a member of the Brussels Bar.

A MAYA KHAN

_Cravath, Swaine & Moore LLP_

Maya Khan is an associate in Cravath’s litigation department.

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

_Yulchon LLC_

Ms Kyoung Yeon Kim is a partner at Yulchon and practises primarily in the areas of antitrust, mergers and acquisitions, general corporate, and data privacy and security compliance 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.
Ms Kim has substantial knowledge and experience in advising and representing clients in most of the areas of competition law, including mergers, cartels, abuse of dominance, unfair trade practices (including special regulation of franchise, retail business and subcontract) as well as consumer protection law including e-commerce regulation.


KYU HYUN KIM

*Yulchon LLC*

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 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 Korean and New York Bars.

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 a core member 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 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, a solicitor of the senior courts of England and Wales, and a member of the Brussels Bar.
FRÉDÉRIC LOUIS
Wilmer Cutler Pickering Hale and Dorr LLP

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.

KRISTEL MCMEEKIN
MinterEllisonRuddWatts

Kristel is a competition law specialist, with extensive experience in both New Zealand and Australia advising large corporations and regulated network businesses on complex competition and regulatory issues. She is ranked as an associate to watch in competition law by Chambers Asia-Pacific (2017 and 2018) and a next generation competition lawyer by The Legal 500 Asia Pacific.

Kristel advises on the full suite of competition-related matters: clearances and authorisations of mergers and acquisitions; cartels; Commerce Commission investigations and market studies; Commerce Act implications of commercial arrangements and behaviour; and consumer protection.

Before joining MinterEllisonRuddWatts in 2015, Kristel was a senior associate in Minter Ellison’s competition and regulatory team in Australia. She recently advised Siemens AG on its successful application for NZCC clearance of the New Zealand aspects of a global rail mobility merger with Alstom SA (which was blocked by the EC and did not proceed), 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 and the New Zealand Refining Company in relation to the NZCC’s first-ever market study into retail fuel.

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.

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 2018 he advised GasNet in relation to the NZCC’s investigation of the non-notified acquisition by First Gas of GasNet’s assets, and subsequent proceedings brought by the NZCC against First Gas.

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”’.

NINA METHENS
ALTIUS

Nina Methens is an associate in the competition and commercial team at ALTIUS. She specialises in all aspects of competition law at the European and national levels, including cartel cases, distribution networks, abuse of dominance and merger control. Nina obtained her master of laws at the Université catholique of Louvain-la-Neuve. Afterwards she complemented her master of laws with an LLM in international law, international relations and foreign trade at the Instituto Superior de Derecho y Economia in Madrid (magna cum laude), during which she worked at a Spanish law firm for three months. During her studies, she also participated in an exchange programme at the Universidad Pontificia Comillas, Spain.
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, 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.

ANDRIY NAVROTSKIY
*DLF Attorneys-at-law*

Andriy Navrotskiy consults and represents clients worldwide for antitrust, labour and contract law. He specialises in legal due diligence, preparation of legal opinions, as well as the legal design and tax optimisation of transaction structures. Advice and support do not end after the closing phase or notification of the merger. Andriy also offers his clients competent and comprehensive post-merger consulting.

Having worked at the Antimonopoly Office of Ukraine, where Andriy contributed to the development of a number of ground-breaking laws and regulations, he possesses invaluable experience in consulting and supporting investors on diverse matters of antitrust and competition law. Andriy has managed numerous cross-border M&A transactions, focusing on mergers in particular.

In addition, Andriy represents clients before Ukrainian competition authorities, including cases involving the abuse of a dominant position, concerted practices and penalty proceedings.
Another practice area of Andriy Navrotskiy is advising and representing our customers’ interests in court proceedings and arbitration courts, with support in the subsequent enforcement of claims in enforcement proceedings.

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 authority, 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.

XOLANI NYALI  
*Bowmans*

Xolani Nyali is a Partner in our Cape Town office Corporate Department and a member of the Competition Practice.

Xolani advises clients on a variety of competition law matters, including merger notifications, behavioural matters and frequently assists clients in developing competition law compliance programmes. Xolani has experience across a broad range of business sectors and industries, including property, construction (cement), financial services, private equity, technology (including fintech), transport (air, road and sea) and the motor vehicle industry. Xolani has a keen interest in the competition law aspects of disruptive technologies and joint ventures.

Xolani also has experience in competition law in other African countries, advising clients in both merger and behavioral matters in diverse jurisdictions including Botswana, Kenya, Namibia, Tanzania and COMESA.

Xolani is a member of the Association of Competition Law Practitioners. He has also commented on the merger guidelines in COMESA and Kenya, and the rules of procedure in Kenya.

Xolani has B.Com and LLB degrees from Rhodes University and an LLM from the University of the Western Cape.

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 15 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/Tändberg, 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 an associate partner at Houthoff and heads the Brussels office of the firm. 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. He was recommend in Chambers Europe 2019: clients highlight his ‘technical knowledge and commercial awareness’ and describe him as ‘client-orientated, effective and pragmatic’.
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. 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.

DONALD PAN
Baker & McKenzie

Donald Pan is a senior associate in Baker McKenzie’s Greater China antitrust and competition team based in Hong Kong. He has considerable experience advising local and multinational clients on a broad range of Hong Kong and Chinese competition law issues, including competition audits, competition investigations, leniency applications, competition-related judicial review proceedings, competition litigation, merger control and general competition compliance. Donald advises clients from a broad range of sectors including financial services, real estate, luxury goods, pharmaceutical, construction, automotive, oil and gas, technology, and food and beverages.

TANIA PATSALIA
Bernitsas Law Firm

Tania is an associate at Bernitsas Law Firm, which she joined in 2010. Her practice is focused on EU, competition and antitrust law, advising on all aspects of antitrust, merger control and state aid rules. Tania regularly assists clients with antitrust and competition law issues arising from their commercial arrangements and has been involved in high-profile cartel and merger control cases before the Hellenic Competition Commission. She provides clients with on-site assistance in dealing with dawn raids, including running workshops and mock exercises. Tania also advises on the application of EU law in Greece and the regulatory requirements applicable to the telecoms, media and technology sectors, regularly liaising with regulators such as the National Telecommunications and Post Commission, the National Council for Radio and Television and the Hellenic Data Protection Authority. She provides guidance to telecoms operators on licensing requirements, compliance with their annual reporting obligations and telecoms issues relating to the use of new technologies and the launch of new products and services. Tania has broad experience in all aspects of EU and Greek data privacy rules and she routinely advises clients on the proactive identification, assessment and management of risks associated with their privacy practices. Tania assists clients in GDPR compliance steps, and advises extensively on how to identify compliance gaps and draft privacy policies, consent forms and data processing agreements. Prior to joining the firm, Tania worked as a lawyer with Ashurst LLP in Brussels as a member of their EU and competition law team and as a trainee at the European Commission, Directorate-General for Competition, cartels unit.
ROSS PATTERSON  
*MinterEllisonRuddWatts*

Ross heads the firm’s competition and economic regulation practice. He has more than 25 years of specialist experience, as a lawyer and regulator. He is recognised by *Chambers Asia-Pacific* (2017 and 2018) as a senior statesman in both competition and telecommunications, and as a leading individual by *The Legal 500 Asia Pacific*.

He was a partner at Rudd Watts and Stone (now MinterEllisonRuddWatts) 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 Siemens AG on its successful application for NZCC clearance of the New Zealand aspects of a global rail mobility merger with Alstom SA (which was blocked by the EC and did not proceed), 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 and the New Zealand Refining Company in relation to the NZCC’s first-ever market study into retail fuel.

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.

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 and conducts investigations before the Federal Trade Commission, the US Department of Justice, and international enforcers, as well as in antitrust and competition-related litigation matters.

During his time as an attorney with the Federal Trade Commission, Mergers I division, Mr Pinegar was a member of multiple litigation/trial teams, including *FTC v. Staples/Office Depot* (2016) (Janet D Steiger award) and high-profile investigations in industries such as pharmaceuticals, medical devices, pharmacies and pharmacy benefit management.
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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.

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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.

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Rajshree Sharma is an associate in the competition practice at AZB & Partners. She has assisted in investigations into cartels (including leniency proceedings), anticompetitive vertical restraints, and abuse of dominance issues, and also has experience in merger control proceedings. She represents clients in antitrust investigations at the Competition Commission of India, the National Company Law Appellate Tribunal, the High Court of Delhi and the Supreme Court of India.

Rajshree earned her bachelors in English with honours in 2015, and her LLB at Law Centre II, University of Delhi in 2018.

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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 Allen & Gledhill’s corporate and commercial department, and its competition and antitrust practice.
A pioneering competition law specialist in Singapore and ASEAN with unparalleled antitrust experience in Southeast 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.

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Shreya’s experience cuts across multiple industries, including telecommunications, logistics, banking and insurance, airlines, internet and internet-enabled services, e-commerce, automobile and cement. Shreya earned her BA LLB with honours from Dr Ram Manohar Lohiya National Law University, Lucknow in 2015.

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Ms Soloway has worked in a leading capacity on some of Canada’s most complex and high-profile transactions, including Kinder Morgan/Trans Mountain Pipeline/Government of Canada, Stewart/Fidelity, Washington Companies/Dominion Diamond, Sagard/Fairfax Financial/Sports Group Ltd, Thermo Fisher/Pathen, Staples/Office Depot, 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 2019*, *Chambers Canada: Canada’s Leading Lawyers for Business 2019*, *Who's Who Legal: Thought Leaders 2019*, *The Legal 500 Canada 2019*, *Chambers Global: The World’s Leading Lawyers for Business 2018* and *Euromoney’s Guide to the World’s Leading Competition & Antitrust Experts 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.

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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.

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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.

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Carmen Verdonck is a partner at ALTIUS, heading the competition team. 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 the current 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.

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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 VerLoren van Themaat is recommended in, inter alia, Chambers Europe (2019 edition), The Legal 500 (2015 edition), Who’s Who Legal (2014 edition) and Best Lawyers (2014 edition). He is described as ‘smart and strategic’ (The Legal 500, 2017 edition: EU and Competition).
Interviewees highlight his strengths, saying: ‘He is practical and has so much experience he is on top of the subject. He always approaches difficult topics in a positive manner and we have very open communication with each other.’ (Chambers Europe, 2019 edition.)

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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.

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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.

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Michael Wise is of counsel in Paul Hastings' Antitrust and Competition practice, where he manages the firm's US merger review matters. He has developed substantial experience representing clients seeking transaction approval under the Hart-Scott-Rodino Act across a range of industries, including cutting edge sectors such as healthcare and high technology. This includes successful handling of preliminary investigations and Second Requests, as well as coordination of merger control filings for the European Commission and other foreign regulators.

Mr Wise also has expertise in antitrust litigation and related matters, including both criminal and civil antitrust disputes. He has handled complex litigation arising under the Sherman Act and state unfair competition laws, including defending clients involved in government investigations and civil class action claims. In addition, he has represented several companies in negotiating and responding to Civil Investigative Demands and subpoenas from the Department of Justice and the Federal Trade Commission. He also counsels domestic and international clients on compliance issues in order to minimise risks of future litigation under the antitrust laws, including developing internal compliance policies and assisting with internal audits.

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Shakti Wood is a Partner in our Johannesburg office and a member of the Competition practice.
She specialises in merger control, behavioural competition matters, preparing exemption applications and conducting compliance reviews.

Shakti’s experience has been primarily regarding the South African Competition Act, but she also has experience of competition law in COMESA, Kenya and Zambia. Shakti has acted for clients across various sectors including food and beverages, agriculture, mining, pharmaceuticals and healthcare, petroleum and telecommunications.

Shakti has BCom Honours (Economics) and LLB degrees from the University of the Witwatersrand.

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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 for more than 14 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.

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Mr Yun, a founding partner of Yulchon, is the honorary 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.

DIETER ZANDLER

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Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg as well as a Master of Laws from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian Cartel Court and has been an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU Law Office in Brussels.

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Ruohan is a partner from the regulatory group of King & Wood Mallesons. His current practice focuses on advising merger clearance for cross-border deals, representing clients in antitrust investigations, and advising on antitrust compliance issues (including designing and implementing divestiture plan in complex cases). Ruohan has been actively involved in drafting regulations, measures for implementation and guidelines accompanying the AML.

Ruohan joined KWM’s antitrust team in 2014. Before that, Mr. Zhang worked in an international law firm in Chicago, US and worked in an investment bank in Beijing.

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Appendix 2

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