ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTUS
ANDERSON MÔRI & TOMOTSUNE
ASHURST
AZB & PARTNERS
BAKER MCKENZIE
BERNITSAS LAW FIRM
BLAKE, CASSELS & GRAYDON LLP
BOWMANS
BREDIN PRAT
CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE
CALLOL, COCA & ASOCIADOS
CLEARY GOTTLIEB STEEN & HAMILTON LLP
CMS
CRAVATH, SWAINE & MOORE LLP
DEBEVOISE & PLIMPTON LLP
DENTONS
DLF ATTORNEYS-AT-LAW
ELIG GÜRKAYNAK ATTORNEYS-AT-LAW
FACIO & CAÑAS
HOUTHOFF
LAW FIRM BEKINA, ŠKURLA, DURMIŠ AND SPAJIĆ LTD
LCS & PARTNERS
MAYER BROWN
MILBANK LLP
PAUL HASTINGS LLP
PÉREZ BUSTAMANTE & PONCE
RAHMAT LIM & PARTNERS
SLAUGHTER AND MAY
UGGC AVOCATS
VALDES ABASCAL ABOGADOS SC
VEIRANO ADVOGADOS
WACHTELL, LIPTON, ROSEN & KATZ
WILMER CUTLER PICKERING HALE AND DORR LLP
## CONTENTS

PREFACE .......................................................................................................................................................... vii  
Ilene Knable Gotts

### Part I: General Papers

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>EU MERGER CONTROL</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Nicholas Levy, Patrick Bock and Esther Kelly</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>INTERNATIONAL MERGER REMEDIES</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>John Ratliff, Frédéric Louis and Cormac O’Daly</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>US MERGER CONTROL IN THE TECHNOLOGY SECTOR</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>Michael S Wise, Noah B Pinegar and Mary H Walser</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>US MERGER CONTROL IN THE MEDIA SECTOR</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>Ted Hassi and Michael Schaper</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>US MERGER CONTROL IN THE PHARMACEUTICAL SECTOR</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>Margaret Segall D’Amico and A Maya Khan</td>
<td></td>
</tr>
</tbody>
</table>

### Part II: Jurisdictions

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>AUSTRALIA</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td>Peter Armitage and Amanda Tesvic</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>AUSTRIA</td>
<td>93</td>
</tr>
<tr>
<td></td>
<td>Dieter Zandler, Linda Marterer and Vanessa Horaceck</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>BELGIUM</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>Carmen Verdonck and Nina Methens</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>BRAZIL</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>Mariana Villela and Leonardo Maniglia Duarte</td>
<td></td>
</tr>
</tbody>
</table>

© 2020 Law Business Research Ltd
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>CANADA</td>
<td>Julie A Soloway, Cassandra Brown and Peter Flynn</td>
</tr>
<tr>
<td>11</td>
<td>CHINA</td>
<td>Jet Deng and Ken Dai</td>
</tr>
<tr>
<td>12</td>
<td>COSTA RICA</td>
<td>Edgar Odio</td>
</tr>
<tr>
<td>13</td>
<td>CROATIA</td>
<td>Goran Durmiš, Ivana Ostojić, Tea Ivančić and Izabela Beber</td>
</tr>
<tr>
<td>14</td>
<td>ECUADOR</td>
<td>Diego Pérez-Ordóñez and Mario Navarrete-Serrano</td>
</tr>
<tr>
<td>15</td>
<td>FRANCE</td>
<td>Hugues Calvet, Olivier Billard and Guillaume Fabre</td>
</tr>
<tr>
<td>16</td>
<td>GERMANY</td>
<td>Alexander Rinne and Alexander Zyrewitz</td>
</tr>
<tr>
<td>17</td>
<td>GREECE</td>
<td>Tania Patsalia and Vangelis Kalogiannis</td>
</tr>
<tr>
<td>18</td>
<td>HONG KONG</td>
<td>Stephen Crosswell, Tom Jenkins and Donald Pan</td>
</tr>
<tr>
<td>19</td>
<td>INDIA</td>
<td>Aditi Gopalakrishnan, Gaurav Bansal, Pranav Mody and Varun Thakur</td>
</tr>
<tr>
<td>20</td>
<td>ITALY</td>
<td>Rino Caiazzo and Francesca Costantini</td>
</tr>
<tr>
<td>21</td>
<td>JAPAN</td>
<td>Yusuke Nakano, Takeshi Suzuki, Kiyoko Yagami and Kenichi Nakabayashi</td>
</tr>
<tr>
<td>22</td>
<td>MALAYSIA</td>
<td>Azman bin Othman Luk, Penny Wong and Yeo Sue May</td>
</tr>
<tr>
<td>23</td>
<td>MEXICO</td>
<td>Rafael Valdes Abascal and Enrique de la Peña Fajardo</td>
</tr>
<tr>
<td>Chapter</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>------------------</td>
<td>------</td>
</tr>
<tr>
<td>24</td>
<td>MOROCCO</td>
<td>282</td>
</tr>
<tr>
<td></td>
<td>Corinne Khayat and Maija Brossard</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>NETHERLANDS</td>
<td>288</td>
</tr>
<tr>
<td></td>
<td>Gerrit Oosterhuis and Weyer VerLoren van Themaat</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>RUSSIA</td>
<td>300</td>
</tr>
<tr>
<td></td>
<td>Maxim Boulba and Maria Ermolaeva</td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>SOUTH AFRICA</td>
<td>309</td>
</tr>
<tr>
<td></td>
<td>Xolani Nyali and Shakti Wood</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>SPAIN</td>
<td>320</td>
</tr>
<tr>
<td></td>
<td>Pedro Callol</td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>SWITZERLAND</td>
<td>330</td>
</tr>
<tr>
<td></td>
<td>Pascal G Favre and Marquard Christen</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>TAIWAN</td>
<td>340</td>
</tr>
<tr>
<td></td>
<td>Victor I Chang, Margaret Huang and Ariel Huang</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>TURKEY</td>
<td>348</td>
</tr>
<tr>
<td></td>
<td>Gönenc Gürkeymak and K Korhan Yıldırım</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>UKRAINE</td>
<td>357</td>
</tr>
<tr>
<td></td>
<td>Igor Dykunsky</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>UNITED KINGDOM</td>
<td>366</td>
</tr>
<tr>
<td></td>
<td>Jordan Ellison and Paul Walter</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>UNITED STATES</td>
<td>379</td>
</tr>
<tr>
<td></td>
<td>Ilene Knable Gotts</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>VIETNAM</td>
<td>386</td>
</tr>
<tr>
<td></td>
<td>John Hickin and Hannah Ha</td>
<td></td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS</td>
<td>395</td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTORS’ CONTACT DETAILS</td>
<td>423</td>
</tr>
</tbody>
</table>
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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. 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.

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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop 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 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 in 2018. 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 amended its law to ensure that it has the opportunity to review transactions in which the parties’ turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on ‘killer acquisitions’ (i.e., acquisitions by a dominant company of a nascent competitor), particularly
involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to ‘call in’ transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. 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 is similarly no ‘local’ effect 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., in 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 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.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the AIM/TMR transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, Amazon/Deliveroo, the CMA provisionally allowed the
transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

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 Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile’s antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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

The United States and the European Commission (EC) 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 that are found to be in violation. For example, the 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. 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 Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC 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 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. Even within the EC, there remain some jurisdictions 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 competition authority, 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 EC 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. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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

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

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2020
Chapter 1

EU MERGER CONTROL

Nicholas Levy, Patrick Bock and Esther Kelly

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 CO, the forms prescribed for the notification of reportable transactions. To facilitate

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 the authors’ 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 of 2004 O.J. L133/1; and Short Form CO for the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1.
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,6 substantive,7 and procedural matters8 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. . . . 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

---


7 The Commission Notice on the definition of the relevant market for purposes of Community competition law provides guidance on the Commission's approach to product and geographic market definition. Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997 O.J. C372/5. This Notice is currently under review to account for potential changes in market structures resulting from globalisation and digitisation. Results of the Commission's review are expected in 2021, with the potential adoption of an updated Market Definition Notice in 2022. In 2004, the Commission adopted Guidelines on the appraisal of horizontal mergers, which explain the analytical framework applied to the assessment of concentrations between competitors (the Horizontal Mergers Guidelines). Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05. In November 2007, the Commission adopted Guidelines on the appraisal of non-horizontal mergers, which explain the analytical framework applied to the assessment of concentrations involving companies active in vertical or related markets (the Non-Horizontal Mergers Guidelines). Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. C265/6.

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),11 and has underlined the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies:

[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. . . . Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.12

Commissioner Vestager, who was approved for a second term in 2019 with an expanded portfolio as Executive Vice President of the Commission responsible for making ‘Europe fit for the digital age’, 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, rejecting calls to ‘pick favourites’ in the quest to create European champions:

Because you don’t build strong champions by picking a favourite, and protecting them from competition in Europe. You do it by giving everyone a fair chance – so the best, the most productive and innovative companies can grow, without being held back by unfair competition.13

Since its adoption, the EC Merger Regulation has evolved from ‘one of the most dynamic domains in the competition portfolio’14 into a relatively ‘mature area of enforcement’,15 ‘a well-oiled machine which draws on many years of experience’.16

---

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’).
II YEAR IN REVIEW

In recent years, the Commission’s enforcement practice under the EC Merger Regulation has tightened and become less permissive: 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, 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.

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. A year later, in July 2014, the Commission issued a White Paper and a Staff Working Document confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings. 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 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...’)
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. 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’. 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'.

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.

In reaching this conclusion, the experts noted the effectiveness of the referral process for addressing transactions such as Apple/Shazam and Facebook/WhatsApp.

The departure of the UK from the EU will also affect the Commission’s jurisdiction. The UK will no longer be subject to EU competition law as of 1 January 2021, and the UK aspects of transactions currently subject to the Commission’s exclusive jurisdiction under the EC Merger Regulation may be reviewed in parallel by the UK Competition and Markets Authority (provided the applicable thresholds of UK merger control rules are met). The Commission will retain exclusive jurisdiction over transactions notified until the end of 2020. In practice, parties would need to notify before the end-of-year break (and so, at the latest, by 23 December 2020).

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

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 need to be examined further.') See more recently the Commissioner’s statements on the subject in June 2018. Charley Connor, ‘Vestager: EU is considering value-based thresholds’, Global Competition Review, 19 June 2019.


Margrethe Vestager, Competition Commissioner, cited in ‘Killer acquisitions are a recurring issue, says Vestager,’ Matt Richards, Global Competition Review, 17 January 2019.


Case COMP M.8788, Commission decision of 6 September 2018.

Case COMP M.7217, Commission decision of 3 October 2014.
administrative burden and cost for business at a time when it needs it most. In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.

Third, as to its enforcement practice, between 2012 and 31 December 2019, the Commission prohibited nine concentrations, conditionally approved a number of others on the basis of far-reaching remedies, and led a number of companies to abandon concentrations to avoid likely prohibition decisions, provoking suggestions that it had become more interventionist. Three transactions were prohibited in 2019 alone: Siemens/Alstom, Wieland/Aurubis, and Tata/ThyssenKrupp. At the time of writing, no prohibition decisions had been taken in 2020, although two concentrations were abandoned in the face of Commission concerns (Johnson & Johnson/Tächosil in April 2020 and Boeing/Embraer in May 2020).

The Commission has maintained its focus on unilateral effects, showing greater readiness to focus on the competition that will be lost through a merger rather than post-transaction

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.
38 Boeing/Embraer, Case COMP/M.9097; and Johnson & Johnson/Tächosil, Case COMP/M.9547.
market shares.\textsuperscript{39} 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.\textsuperscript{40} In 2015 and 2016, Commissioner Vestager reversed the policy of her predecessor, who had approved four-to-three mergers in the telecommunications sector.\textsuperscript{41} In 2015, the Commission caused the abandonment of a four-to-three transaction between two Danish telecommunications operators;\textsuperscript{42} in 2016, it prohibited a four-to-three transaction between two UK operators;\textsuperscript{43} and, in approving a transaction between two major Italian telecommunications operators, the Commission required the divestment of sufficient assets to facilitate the establishment of a new operator.\textsuperscript{44} In 2018, however, the Commission approved the combination of the third- and fourth-largest mobile operators in the Netherlands in \textit{T-Mobile Netherlands/Tele2}, finding 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.\textsuperscript{45}

In May 2020, the Commission’s \textit{Hutchison 3G UK/Telefonica UK} prohibition decision was reversed by the General Court, which found that, to demonstrate a ‘significant impediment to effective competition’ in a unilateral effects case, the Commission must show that a concentration involves (1) ‘the elimination of important competitive constraints that the merging parties had exerted upon each other’ and (2) ‘a reduction of competitive pressure on the remaining competitors’.\textsuperscript{46} In proving the elimination of ‘important competitive constraints’, the Court held that the Commission must establish that the competitor being acquired ‘stand[s] out from its competitors in terms of impact on competition’.\textsuperscript{47} In that connection, it is insufficient for the Commission merely to show that the acquired company had been growing its market shares or had a history of competing on price, had offered lower prices than its competitors on certain products or was a relatively close competitor. As the Court held, ‘if that were not the case, any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited.’\textsuperscript{48}

In a number of other cases, the Commission has required wide-ranging remedies to address coordinated effects concerns\textsuperscript{49} and conglomerate effects concerns,\textsuperscript{50} after several

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., \textit{Syniverse/MACH}, Case COMP/M.6690, Commission decision of 29 May 2013.
\item \textit{Hutchison 3G Austria/orange Austria}, Case COMP/M.6497, Commission decision of 12 December 2012; \textit{Hutchison 3G UK/Telefonica Ireland}, Case COMP/M.6992, Commission decision of 28 May 2014; and \textit{Telefonica Deutschland/E-Plus}, Case COMP/M.7018, Commission decision of 2 July 2014.
\item \textit{TeliaSonera/Telenor/JV}, Case COMP/M.7419, withdrawn on 11 September 2015.
\item \textit{Hutchison 3G UK/Telefonica UK}, Case COMP/M.7612, Commission decision of 11 May 2016.
\item \textit{Hutchison 3G Italy/WIND/JV}, Case COMP/M.7758, Commission decision of 1 September 2016.
\item \textit{T-Mobile NL/Tele2 NL}, Case COMP/M.8792, Commission decision of 27 November 2018.
\item \textit{AB InBev/SABMiller}, Case COMP/M.7881, Commission decision of 24 May 2016.
\item \textit{Dentsply/Sirona}, Case COMP/M.7822, Commission decision of 25 February 2016; \textit{Worldline/Equens/Paysquare}, Case COMP/M.7873, Commission decision of 20 April 2016; \textit{Microsoft/LinkedIn}, Case
\end{enumerate}
\end{footnotesize}
years in which neither theory of harm had been actively pursued. Even where remedies were not ultimately imposed, the Commission has engaged in extended reviews of conglomerate theories of harm, most notably in Essilor/Luxottica, ultimately cleared without remedies after a protracted Phase II investigation.51

Fourth, the Commission has continued to apply sophisticated quantitative tools,52 to engage in economic analysis,53 and to place increasing reliance on internal documents. Among other things, Form CO (as revised in 2013) encourages notifying parties to describe economic data collected in the ordinary course of business54 and calls for a wide range of internal documents to be provided with notifications.55 In addition, the Commission has shown increasing readiness to request large numbers of documents during its administrative procedure.56 The Commission’s focus on detailed economic data and analysis, and more systematic review of internal business documents, have lengthened the merger review timetable, particularly in complex Phase II cases.57 In 2018, the Courts confirmed that

COMP/M.8124, Commission decision of 6 December 2016; and Qualcomm/NXL, Case COMP M. 9306, Commission decision of 18 January 2018.

Essilor/Luxottica, Case COMP/M.8394, Commission decision of 1 March 2018.


See, e.g., Universal Music Group/EMI Music, Case COMP/M.6458, Commission decision of 21 September 2012, Annex I, Paragraphs 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’).

Introduction, Paragraph 1.8, Form CO.

Section 5.4, Form CO.

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).

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. In 2019–2020, the trend of long pre-notification periods and extended reviews in complex cases has continued. For example,
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.58

In March 2018, the then-Director General of DG COMP disclosed that the Commission was preparing Best Practices Guidelines on the use and production of internal documents. However, despite informal consultations on possible drafts, at the time of writing, guidance was still to be issued. In practice, 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. 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.

Fifth, the Commission has expanded its consideration of effects on innovation competition59 and has introduced new theories of harm aimed at capturing negative effects of concentrators 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;60 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’;61 and, in Dow/DuPont,62 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. In April 2020, Johnson & Johnson abandoned its proposed acquisition of Takeda’s Tachosil product following initiation of a Phase II review by the Commission, citing potential concerns about the effect

---

59 See, e.g., Pfizer/Pharmacia, Case COMP/M.2922, Commission decision of 27 February 2003, Paragraph 22; and Novartis/GlaxoSmithKline Oncology Business, Case COMP/M.7275, Commission decision of 28 January 2015, Paragraphs 84–94.
60 Novartis/GlaxoSmithKline Oncology Business, Case COMP/M.7275, Commission decision of 28 January 2015.
on innovation. 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 increase 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 the General Court and the European Court of Justice – 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. 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. 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

---

64 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.’).
65 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’ 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).
68 Case COMP/M.7184, Commission decision of 23 July 2014.
71 Altice/PT Portugal, Case COMP/M.7993, Commission decision of 24 April 2018.
change in control of the target undertaking, irrespective of whether that measure has market effects). In June 2019, the Commission imposed a fine of €28 million in Canon/Toshiba Medical Systems Corporation, where a warehousing structure had been used by the parties in breach of the EC Merger Regulation’s standstill obligation.

In response to the covid-19 crisis, the Commission initially asked companies only to notify transactions for ‘very compelling reasons’, in part due to difficulties in obtaining responses to information requests, but subsequently accepted notifications involving more complex issues, including LSE/Refinitiv and Peugeot/Fiat Chrysler, as businesses restarted. In a number of cases, the Commission ‘stopped-the-clock’ to give companies more time to gather information requested by the Commission. To facilitate notification, the Commission encouraged submissions (including filings) via email or the Commission’s new e-TrustEx tool. Telephone and video conferencing facilities are also being used where possible, including for at least one oral hearing.

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 and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013. 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, Hutchison 3G UK/Teléfonica Ireland, Telefónica Deutschland/E-Plus, Liberty Global/Ziggo and Huntsman Corporation/Equity Interests held by Rockwood Holdings), as did three of the seven Phase II commitments decisions rendered in 2015 (Zimmer/Biomet, Orange/Jazztel and General Electric/Astom), three of the six Phase II commitments decisions rendered in

---

72 Ernst & Young P/S v. Konkurrencenædet (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 KPMG 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).
73 Canon/Toshiba Medical Systems Corporation, Case COMP/M.8179, Commission decision of 27 June 2019.
76 See, e.g., Fincantieri/Chantiers de l’Atlantique, Case COMP M.9162.
78 See, e.g., Outokumpu/Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012, Paragraph 966 et seq.
79 Model Text for Divestiture Commitments.
80 Case COMP/M.6905, Commission decision of 8 May 2014.
81 Case COMP/M.6992, Commission decision of 28 May 2014.
82 Case COMP/M.7018, Commission decision of 2 July 2014.
83 Case COMP/M.7000, Commission decision of 10 October 2014.
84 Case COMP/M.7061, Commission decision of 10 September 2014.
85 Case COMP/M.7265, Commission decision of 30 March 2015.
86 Case COMP/M.7421, Commission decision of 19 May 2015.
87 Case COMP/M.7278, Commission decision of 8 September 2015.

© 2020 Law Business Research Ltd
2016 (Staples/Office Depot, Ball/Rexam and Liberty Global/BASE Belgium), one of the two Phase II commitment decisions rendered in 2017 (Dow/DuPont), three of the six Phase II commitment decisions rendered in 2018 (Bayer/Monsanto, Tronox/Cristal and Praxair/Linde), and three of the six Phase II commitment decisions rendered in 2019 (BASF/Solvay, Novelis/Aleris and Nidec/Whirlpool). Commitment decisions in Phase I commitments involving up-front buyer provisions have also become more common. Up-front buyer provisions were included in Phase I remedy packages in 2019 in: DA Agravis Machinery/Konekesko Eesti/Konekesko Latvia/Konekesko Lietuva/Konekesko Finnish Agrimachinery Trade Business and Amerra/Mubadala/Nireus/Selonda.

Additionally, as the Commission’s scrutiny of divestment packages has increased, requirements for divestments that extend beyond the strict competition concerns identified 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. At the same time, the Commission has shown flexibility as to the terms of commitments, adopting a waiver decision only one year after the Nidec/Whirlpool (Embraco Business) decision came into force (partially waiving Nidec’s commitments not to re-acquire part of the divestment business) on the ground that the structure of the relevant market had sufficiently changed in the intervening period. Likewise, in May 2020, the Commission waived commitments given in Takeda/Shire due to a combination of unforeseeable events related to a pipeline product that Takeda had committed to divest.

The Commission has faced calls to give greater weight to behavioural remedies, particularly following the Siemens/Alstom decision, when the French, German and Polish

88 Case COMP/M.7555, Commission decision of 10 February 2016.
89 Case COMP/M.7567, Commission decision of 15 January 2016.
90 Case COMP/M.7637, Commission decision of 4 February 2016.
91 Case COMP/M.7932, Commission decision of 27 March 2017.
93 Case COMP/M.8451, Commission decision of 4 July 2018.
94 Case COMP/M.8480, Commission decision of 20 August 2018.
95 Case COMP/M.8674, Commission decision of 18 January 2019 (not yet published).
96 Case COMP/M.9076, Commission decision of 1 October 2019.
97 Case COMP/M.8947, Nidec/Whirlpool (Embraco Business), Commission decision of 28 November 2018.
100 Case COMP/M.9110, Commission decision of 11 July 2019.
102 Telefónica Deutschland/E-Plus, Case COMP/M.9003, see also, Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition, Commission Press Release of 22 February 2019, IP/19/1371.
103 Case COMP/M.8947, Commission decision of 15 May 2020.
104 Case COMP/M.8955, Commission decision of 28 May 2020.
governments called on the Commission to ‘pay more attention to the relevance of behavioural remedies (e.g., commitments regarding price, quality or choice of contractual partners), especially if competition conditions may change in the short run, since such remedies are more flexible than structural ones (including sales of assets and other one-off irreversible measures modifying the companies’ structure).’ Although the Commission generally prefers structural remedies, in some cases it has remained open to accepting access remedies; for example, in 2019, in Vodafone/Certain Liberty Global Assets105 and Telia/Bonnier.106

Eighth, as to the defences available under the EC Merger Regulation, the Commission to date has approved two transactions on the basis of the ‘failing firm’ defence – Nynas/Shell/ Harburg Refinery107 and Aegean/Olympic (II)108 – and started to show greater willingness to take positive account of efficiencies,109 including in FedEx/TNT Express.110

The Commission’s Horizontal Merger Guidelines set a high bar for the failing firm defence111 and Commissioner Vestager has made clear that the covid-19 crisis ‘shouldn’t be a shield to allow mergers that would hurt consumers and hold back the recovery’.112 While the strict requirements for application of the failing firm defence remain unlikely to be softened, the crisis may lead to the Commission giving increased weight to the reduced competitive constraint exercised by financially struggling companies (sometimes referred to as the ‘flailing firm’ defence). The Commission may also be more open to approving concentrations on the basis of substantiated efficiencies and because reduced demand or high levels of unused capacity may render historical market data suggesting the existence of possible competition concerns less reliable.

As at the time of writing, the Commission had not relied on the efficiencies defence to approve a transaction that might otherwise have been prohibited. However, in its May 2020 judgment overturning the Commission’s Hutchison 3G UK/Telefonica UK prohibition decision, the General Court held that if the Commission performs a quantitative assessment

105 Case COMP/M.8864, Commission decision of 18 July 2019. The remedy involved providing the remedy taker (identified upfront) with access to the merged entity’s cable network in Germany to ‘replicate the competitive constraint exerted by Vodafone’. Additionally, the Merged Entity undertook to refrain from contractually restricting broadcasters’ freedom to also distribute content on an OTT service, not to increase feed-in fees paid by Feed-to-Air broadcasters, and to continue to carry the HbbTV signal of Free-to-Air broadcasters.


107 Case COMP/M.6360, Commission decision of 2 September 2013.

108 Case COMP/M.6796, Commission decision of 9 October 2013.

109 See, e.g., UPS/TNT Express, Case COMP/M.6570, Commission decision of 30 January 2013; and Deutsche Börse/NYSE Euronext, Case COMP/M.6166, Commission decision of 1 February 2012, Paragraphs 1145–1342.


111 Three criteria need to be met for the failing firm defence to succeed: (1) due to financial difficulties, the target would be forced out of the market in the near term if not acquired; (2) there is no less anticompetitive alternative purchaser; and (3) absent the merger, the assets of the failing firm would inevitably exit the market (which may underlie a finding that the market share of the failing firm would in any event accrue to the potential acquirer). Horizontal Merger Guidelines, Paragraph 90.

112 Nicholas Hirst, ‘Crisis no ‘shield’ for anticompetitive mergers, Vestager says’, MLex (24 April 2020); Lewis Crofts, ‘Failing firms won’t get more EU leeway to plead for mergers, Vestager says’, MLex (24 April 2020).
of a transaction’s likely effect on prices, it should also take account of any ‘standard efficiencies’ arising from that transaction (e.g., the elimination of duplicate resources) in assessing whether competition will be significantly impeded.113

Ninth, as to judicial review, in Cisco and Messagenet, which concerned an application to annul a Phase I unconditional approval decision (Microsoft/Skype),114 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,115 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.116 In 2015, the General Court117 upheld the Commission’s prohibition of the then-contemplated combination of Deutsche Börse and NYSE/Euronext,118 confirming the Commission’s broad discretion concerning the types of evidence that need be adduced to support its findings.119

In May 2020, the General Court revisited the question of the appropriate standard of proof in merger cases, clarifying in Hutchison 3G UK/Telefónica UK that, where the Commission is required to demonstrate a significant impediment to effective competition, it must ‘produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration’,120 According to the Court, this standard of proof is stricter than a balance of probabilities standard, but less strict than a beyond reasonable doubt standard. It is likely the Commission will appeal this finding to the Court of Justice.

In 2017, the General Court also annulled a Commission decision prohibiting the acquisition by United Parcel Service (UPS) of a rival express delivery services provider, TNT Express NV, 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

114 Case COMP/M.6281, Commission decision of 10 October 2011.
115 Cisco Systems Inc. and Messagenet SpA v. Commission (Cisco Systems and Messagenet), Case T-79/12 EU:T:2013:635, Paragraph 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’).
116 Cisco Systems and Messagenet, Paragraphs 45–50; at Paragraph 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, Paragraph 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).’).
118 Case COMP/M.6166, Commission decision of 1 February 2012.
119 Deutsche Börse, Paragraph 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).
the administrative procedure. That judgment was upheld on appeal in 2019.\textsuperscript{121} 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.\textsuperscript{122}

Finally, collaboration between the Commission and other antitrust agencies around the world has continued to deepen\textsuperscript{123} and instances of disagreement have remained infrequent. Within Europe, however, tensions emerged in 2014 between the Commission and certain Member State agencies concerning the Commission’s approval of a number of four-to-three concentrations impacting the telecommunications sector.\textsuperscript{124}

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 and to take better account of competition from global rivals. The proposals have been opposed by the Commission, as well as various practitioners,\textsuperscript{125} academics and certain national competition agencies.\textsuperscript{126} In 2020, the French and German governments repeated calls for the creation of European champions.\textsuperscript{127}


\textsuperscript{124} See, e.g., ‘Regulators revolt against Telefónica and E-Plus merger’, 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 (Telefónica Deutschland/E-Plus, Case COMP/M.7018, Commission decision of 2 July 2014)).

\textsuperscript{125} ‘Franco-German proposals would undermine competitive markets in the EU’, Letter from Vanessa Turner and others, Financial Times, 30 April 2019. See also N Levy, D R Little and H Mostyn, ‘European champions – Why politics should stay out of EU merger control’, Conferences, No. 2-2019.

\textsuperscript{126} See, e.g., J Brunsden and M Kahn, 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 Posner, ‘Macron’s battle against European unity’, Politico, 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’).

\textsuperscript{127} ‘EU competition rules should push for “industrial champions”, Merkel and Macron Say’, Areki Yaiche, MLex, 18 May 2020.
In response to suggestions that the Commission’s enforcement practice should take
greater account of global competition and the impact of digitalisation on competition, in
April 2020 the Commission launched a public consultation to review the 1997 Market
Definition Notice. This consultation followed Commissioner Vestager’s December 2019
announcement that ‘the time has come to review the Market Definition Notice’.[128] The
results of this evaluation are expected in 2021, with adoption of a new notice in 2022.[129]

Finally, in April 2019, the European Council adopted a new framework for screening
foreign direct investments coming into Europe.[130] The framework aims to create a cooperation
mechanism for the exchange of information between Member States and the Commission
and allow the Commission to issue opinions where an investment could pose a threat to
one or more Member States or undermine a programme of interest to the EU.

III THE MERGER CONTROL REGIME

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

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

All concentrations that meet prescribed jurisdictional ‘size’ tests are deemed to have
EU dimension and, as such, are subject to mandatory notification under the EC Merger
Regulation, irrespective of whether they have any effect in the EU. The Commission has
exclusive jurisdiction over such transactions (the ‘one-stop-shop’ principle).

Concentrations that fall below the EC Merger Regulation’s thresholds may be subject
to national merger control rules. Any Member State may ask the Commission to allow its
national competition agency to review a concentration that has an EU dimension. One or
more Member State agencies may also refer to the Commission concentrations that would
otherwise be subject to national competition rules. As of 1 May 2004, parties to a concentration
may petition the Commission either to have a transaction that is reportable at the EU level
referred to one or more national competition agencies or to have the Commission review a
transaction that would ordinarily be subject to national merger control rules.

The EC Merger Regulation contains deadlines for the Commission’s review of
reportable concentrations, although those deadlines have been progressively extended and,
particularly in complex cases, the Commission often encourages merging parties to engage in
lengthy pre-notification discussions and may ‘stop the clock’ to secure more time. The large
majority of concentrations are approved at the end of an initial 25 working day review period
(Phase I). Where the Commission has ‘serious doubts’ about a concentration’s compatibility

with EU competition rules, it opens an in-depth (Phase II) review that lasts 90 working
days, extendable to 125 working days. Both periods may be extended in situations where
commitments are offered to address competition concerns identified by the Commission.
Absent a derogation, reportable concentrations may not be implemented until they have
been approved, and, in cases of breach, the Commission may take remedial action. Fines
may also be imposed for failure to notify, late notifications, or the provision of incorrect or
misleading information.

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

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

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

An appraisal under Article 101 of the Treaty on the Functioning of the European
Union (TFEU), which prohibits anticompetitive agreements, may also be warranted under
the EC Merger Regulation in respect of full-function joint ventures that give rise to 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.131

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

131 In addition to reviewing appeals of Commission decisions, the EU courts have also issued a number
of important judgments following preliminary references from national courts, most recently in
Austria Asphalt v. Bundeskartellanwalt (Austria Asphalt), Case C-248/16 EU:C:2017:643 (clarifying the
circumstances in which the Merger Regulation applies to changes from joint to sole control); and Ernst &
Young P/S v. Konkurrencerådet (Ernst & Young), Case C-633/16 EU:C:2018:371 (clarifying EU rules on
gun-jumping rules).
decisions have been adopted, the EC Merger Regulation has produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets. The Commission has also adopted a pragmatic, open and informal approach to the EC Merger Regulation’s application. Former Commissioner Monti explained the Commission’s achievement under the EC Merger Regulation in the following terms:

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

Between September 1990, when it entered into force, and April 2020, the Commission had rendered decisions in around 7,700 notified transactions, of which around 6,800 (88 per cent) approved concentrations unconditionally in Phase I; 55 (less than 1 per cent) found the EC Merger Regulation to be inapplicable; 325 (4 per cent) approved transactions subject to undertakings given in Phase I; 62 (less than 1 per cent) approved transactions unconditionally during Phase II; and 134 (2 per cent) approved concentrations subject to undertakings given in Phase II. As at April 2020, the Commission had rendered 30 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. Around 220 notifications have been withdrawn, of which 45 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.

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.


Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.


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). Note, however,
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 handling of the concentrations in question (Airtours,137 Schneider138 and Tetra Laval).139 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

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.


138 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.

139 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.
whether to approve or prohibit a transaction. A comparison was drawn with the United States,\textsuperscript{140} 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.\textsuperscript{141}

In response to the judgments in \textit{Airtours}, \textit{Schneider} and \textit{Tetra Laval}, the Commission acknowledged that ‘the system put in place in 1990 [was] showing some signs of strain’\textsuperscript{142} and recognised that a ‘radical’\textsuperscript{143} package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques, and maintain the existing institutional framework in which the Commission approves or prohibits mergers.\textsuperscript{144} 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’.\textsuperscript{145} In December 2002, the Commission approved a ‘comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the Community’.\textsuperscript{146}

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 \textit{Jussila}\textsuperscript{147} and \textit{Menarini}\textsuperscript{148} 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

\begin{enumerate}
\item See, e.g., Donna Patterson and Carl Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons, 17 \textit{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.’).
\item 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.’).
\item Mario Monti, Europe’s Merger Monitor, \textit{The Economist}, 9 November 2002.
\item 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’).
\item See too Mario Monti, Europe’s Merger Monitor, \textit{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.’
\item 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).
\item Commission Press Release IP/02/1856 of 11 December 2002.
\item \textit{Jussila v. Finland}, Application No. 73053/01, judgment of 23 November 2006.
\item \textit{Menarini Diagnostics v. Italy}, Application No. 43509/08, judgment of 27 September 2011.
\end{enumerate}
by an independent and impartial tribunal’. Should, however, complaints resurface about the perceived absence of checks and balances on Commission decision-making and the lack of effective judicial review, the EU’s institutions might again be under pressure to consider further reforms.

IV OTHER STRATEGIC CONSIDERATIONS

Over the past decade, the Commission has pursued various initiatives designed to increase coordination, facilitate convergence and avoid divergent outcomes with other agencies around the world. Perhaps the most important of these is an agreement between the EU and the United States that was intended to promote cooperation between their respective competition agencies. This agreement has led to high level dialogue at political, senior management and academic level, about convergence on jurisdictional, substantive and procedural issues.

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the General Electric/Honeywell transaction. The US Department of Justice (DOJ) concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition. The Commission, however, prohibited the transaction, prompting criticism from US politicians and regulators. This disagreement represented the most significant divergence between Commission and US agencies.


150 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).

151 See, e.g., Joaquin 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"’).

152 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 ‘wholly unfounded’ and provided a breakdown of transactions challenged by the Commission, showing that, of the 13 concentrations that had been prohibited as at October 2000, only one had involved a US company.

153 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).
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 US Federal Trade Commission (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 reached with the FTC in April 2019, based on North American divestitures similar to those agreed one year earlier with the Commission.

Other cases reveal significant cooperation and coordination between agencies. For example, the Commission cleared UTC’s acquisition of US defence giant Raytheon subject to commitments on 13 March 2020, shortly before the DOJ announced reaching a similar conclusion on 26 March 2020. This process echoed similar synchronicity in the L3/Harris case where the Commission announced its conditional approval of the transaction very shortly after the DOJ cleared the transaction subject to remedies.

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. Novelis/Aleris provides an interesting example of merging companies pursuing different strategies in the EU and the US. Their decision not to offer remedies in the US similar to those given in the EU led the DOJ to pursue arbitration in an attempt to avoid proceedings before a federal court.

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,

154 Case IV/M.877, Commission decision of 30 July 1997.
158 Department of Justice, Press Release, Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns, 26 March 2020.
159 Harris Corporation/L3 Technologies, Case COMP/M.9234, Commission Decision of 21 June 2019 (not yet published).
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.

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.

In her 2019 mission letter to Commissioner Vestager, Commission President von der Leyen set out a series of ambitious goals, including strengthening competition enforcement, reviewing competition rules, including merger control, tackling the ‘distortive effects of foreign state ownership and subsidies’, and applying State aid rules as part of a broader European industrial strategy. Commissioner Vestager will also need to consider how, if at all, to adapt EC merger control to the challenges of the digital age.

In the immediate term, Commissioner Vestager will need to maintain the Commission’s efficient handling of cases while the covid-19 crisis continues. In the mid to long term, given mounting pressure from certain national governments to protect European companies and pursue a policy that favours European champions, the Commission will need to draw on its experience and pragmatism to maintain its independence in the field of merger control, to resist pressure to adapt EU merger control to take account of social, industrial, employment and other considerations, and to protect the EC Merger Regulation’s established architecture and analytical framework.
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 US and the EU 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 Su Şimşek, Álvaro Mateo Alonso and Virginia Del Pozo for their assistance.

2 For example, the European Commission (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 whether other national economic or public interest factors could exist.

Below we highlight some prominent cases that illustrate the diverse issues raised in international merger remedies: (1) the *Seagate/Samsung* and *Western Digital/Viviti* cases, (2) *Dow/DuPont*, (3) *Glencore/Xstrata*, (4) two examples of particularly effective cooperation between agencies, namely *Cisco/Tandberg* and *UTC/Goodrich*, and the very recent (5) *Danaher/GE Healthcare Life Sciences Biopharma* (see Section II). We then outline some

---

5 See, for example, the EU and Australian contributions to the OECD report, 2011, pp. 153 and 105, respectively.

6 Other notable transactions that required review and remedies in numerous jurisdictions include: *GE/Alstom*, which the EU and US authorities cleared conditionally on the same day (even though they had different concerns, the EC and the US Department of Justice (DOJ) adopted aligned remedies – see Commissioner Vestager’s speech ‘Merger review: Building a global community of practice’, 24 September 2015 (see footnote 3)) and which was notified to 23 other regulators (Sharis Pozen, then GE’s Vice President of Global Competition and Antitrust and a former acting assistant attorney general at the DOJ, is reported as stating that GE granted all the relevant authorities waivers to communicate with each other – see ‘Ex-DOJ Atty Urges Coordination In Defending Global Mergers’, Law 360, 13 April 2016); *Merck/AZ Electronic*, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction; and the *Holcim/Lafarge* merger, which involved multiple divestments (including in the US and Canada, the EU, Brazil, India and South Africa); see, e.g., the Federal Trade Commission (FTC) and Canadian Competition Bureau press releases, highlighting how these agencies cooperated in making sure that the remedies that they required fitted together, given that plants and terminals affected supply in the two countries: www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets and www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html. The case is also notable because the parties appear to have come to the regulators with advanced remedies proposals from the outset. In the *AB InBev/SABMiller* case, interestingly the DOJ required that it be allowed to review future ABI Craft Beer acquisitions even if they would not be compulsorily notifiable to the DOJ. See www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer. In *Bayer/Monsanto*, the DOJ press release noted that the DOJ had secured the largest-ever divestiture (see www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened) and the EC also required extensive structural remedies and a behavioural remedy. The Australian Competition and Consumer Commission (ACCC) noted that it would not oppose this transaction ‘on the basis of global divestments’ (see www.accc.gov.au/media-release/accc-wont-oppose-bayers-proposed-acquisition-of-monsanto) while the Competition Commission of India took account of the remedies elsewhere while also requiring behavioural remedies to address issues that were specific to India (see www.cci.gov.in/sites/default/files/whats_newdocument/Press%20Release%20dated%2020.06.2018.pdf). In *Tronox/Cristal*, the EC would have required a divestment to an upfront buyer (see http://europa.eu/rapid/press-release_IP-18-4361_en.htm) but the FTC obtained an injunction to prevent the deal from closing, which was upheld in court (see www.ftc.gov/system/files/documents/cases/docket_9377_tronox_et_al_initial_decision_redacted_public_version_0.pdf). In *Archer Daniels Midland/GrainCorp*, which involved Archer Daniels Midland’s planned acquisition of GrainCorp, the Australian Treasury also prevented the deal from closing notwithstanding that the ACCC had cleared the acquisition: see https://minsters.treasury.gov.au/ministers/joe-hockey-2015/transcripts/media-conference-sydney. The EC has published a ‘Competition Policy Brief’ on the main principles and its recent experience in international enforcement cooperation in mergers: see http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf.
of the key context, drawing on Organisation for Economic Co-operation and Development (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 hard disk drive (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 HDDs for storage of digital data on the condition that Western Digital (WD) sold some production assets to Toshiba. However, while China’s Ministry of Commerce (MOFCOM)9 allowed the transactions to go through, it imposed materially different remedies with worldwide impact. The main points of interest are as follows.

First, the EU, the US and China each had different approaches to the essentially simultaneous transactions. The European Commission (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 EU required WD/Viviti to divest certain production assets, including a production plant, to an approved third party before closing the deal.12 The

---

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 in Section II.ii, 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.
US 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 EU, 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 US and the EU 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.

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

---


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 in Section II.ii. 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 EU and the US.

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.
concentration if the two transactions went through. Rather than outright prohibitions, the hold-squares 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 US and the EU, 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 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.


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 expired after 24 months, which was much clearer for the parties than the ongoing review imposed on Seagate and WD.

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


24 See decision, Paragraph 4044.

© 2020 Law Business Research Ltd
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 research and development (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 US Department of Justice (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.

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 ACCC noted that its competition concerns would ‘be addressed by the global divestments’ (www.accc.gov.au/media-release/accc-wont-oppose-proposed-d-merger-of-dow-and-dupont-in-australia).


\textsuperscript{32} See, for example, the SACC’s decision in AB InBev/SABMiller, www.reuters.com/article/us-sabmiller-m-a-abinbev/south-africa-clears-ab-inbevs-takeover-of-sabmiller-idUSKCN0ZG1DH.
In April 2013, MOFCOM cleared the acquisition, subject to different remedies compared to those previously agreed with the EU. 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;
b) to guarantee a minimum supply of copper concentrate to Chinese companies until 2020, including pre-defined volumes at negotiated prices; and
c) to continue to sell zinc and lead to Chinese producers under both long-term and spot prices at fair and reasonable levels until 2020.

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

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

iv Cisco/Tandberg and United Technologies Corporation/Goodrich

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

In Cisco/Tandberg, Cisco proposed remedies to the EC to increase interoperability between its products and those of its competitors. The DOJ’s press release, announcing that it would not challenge Cisco’s acquisition, expressly noted the commitment entered into with the EC. Assistant Attorney General Christine Varney noted: “This investigation was a model

---


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 US, 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.

v Danaher/GE Healthcare Life Sciences Biopharma

Danaher’s acquisition of GE Healthcare Life Sciences’ Biopharma business (GE Biopharma) is an interesting example of a merger involving cooperation between multiple agencies, in this case in Brazil, China, the EU, Israel, Korea and the US, both in analysing the transaction and remedies.41

Given the complexity of the markets,42 the cooperation appears to have been useful in aligning remedies.

Both parties were suppliers of products and services used in the bioprocessing industries and the merger involved overlaps in several markets.43 The Brazilian and Japanese

---

42 The Korean authority stated that the conditional approval of this merger was its first remedy required in a merger in the bioprocess product market; see PaRR report of 4 February 2020, ‘GE/Danaher conditionally approved by Korean antitrust regulator’.
43 For example, the EC concluded that the merger would lead to concerns regarding certain products in microcarriers, bioprocess filtration, chromatography and molecular characterisation markets, but did not find any competition issues in other markets that are part of the single-use technology, bioprocess filtration, chromatography and other life sciences areas; see EC Press Release of 18 December 2019, ‘Mergers: Commission approves Danaher’s acquisition of GE Healthcare Life Sciences’ Biopharma Business, subject
International Merger Remedies

authorities approved the transaction without any remedy, whereas the parties offered to divest several businesses to alleviate competitive concerns raised by the agencies in China, the EU, Korea and the US.

The remedies, mainly focusing on concerns around actual competition, consisted of the divestment of several of Danaher’s businesses. China’s State Administration for Market Regulation (SAMR) also had concerns regarding potential competition, requiring Danaher to also provide the purchaser of the divested business package with an unfinished project and to continue R&D for two years after the closing of the deal, in addition to divestment of several businesses.

As for the timing of the regulatory process, following the announcement of the deal in February 2019, the merger control review procedures took different paths in the EU, the US and China. The parties notified the merger to the EC in November 2019, and obtained conditional approval in December 2019 after a Phase I review of the transaction. The EC granted purchaser approval in a separate decision in March 2020. This is another example of the time constraints in a Phase I review not allowing the EC to review and approve the purchaser at the same time as it analysed the main transaction (even though the proposed purchaser was already known).

In China, the parties first notified in April 2019, and then withdrew the notification to refile in December 2019. SAMR conditionally approved the merger in February 2020. Similar to the EC procedure, SAMR approved the same proposed purchaser of the divestment businesses in a separate decision. Danaher completed the sale of the divestiture to Sartorius on 30 April 2020.


In contrast to the two-step procedure in China and the EU, the last regulatory authority to approve the Danaher/GE Biopharma transaction conditionally, the FTC, announced its approval of the main transaction and the proposed purchaser at the same time.\(^{51}\)

Interestingly, it appears that the same monitoring trustee was appointed, at least in the US and the EU, offering efficiencies in the implementation and oversight of the divestment plan.\(^{52}\)

### III CONTEXT

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

First, international mergers tend to present two types of remedy situation: local remedies and international remedies common to many jurisdictions. Unsurprisingly, when addressing international remedies, there is potential for conflict both in substantive assessments and remedies, since the competition authorities work with their specific laws and from their different regional or national perspectives, and often with different approaches\(^{53}\) and inputs (e.g., in terms of market testing results).\(^{54}\)

Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD\(^{55}\) and the ICN.\(^{56}\) The work of these organisations is in parallel and is not case-specific,\(^{57}\) but rather provides a forum for regular discussions and a network of contacts between individuals,

---


52 See the FTC Order to Hold Separate and Maintain Assets of 19 March 2020, available at: www.ftc.gov/system/files/documents/cases/c4710gedahanermaintainassets.pdf; also see the EC’s approval of the monitoring trustee on 20 December 2019, available at: https://ec.europa.eu/competition/mergers/cases/additional_data/m9331_3268_3.pdf. SAMR and the Korean authority did not publish press releases on the monitoring trustee or the procedures following the conditional approval of the main transaction.

53 An interesting case in 2020, illustrating how cases may be dealt with differently in different jurisdictions is Novelis/Aleris. The case was cleared with remedies in the EU; see EC Press Release of 1 October 2019, ‘Mergers: Commission clears Novelis’ acquisition of Aleris, subject to conditions’, available at: https://ec.europa.eu/competition/presscorner/detail/en/IP_19_5949; while in the US, the DOJ agreed to refer the question of the correct market definition to arbitration. In light of a successful award, the DOJ’s required remedy applied; see ‘Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation’, Press Release No. 20-290; see www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

54 Barry Nigro, Deputy Assistant Attorney General, Antitrust Division in the DOJ, has also 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.

55 See, for example, the 2003 OECD Roundtable on Merger Remedies, the 2011 OECD Global Forum on Competition and the OECD report, 2011, all available on the OECD website, www.oecd.org.

56 See, for example, the ICN Merger Working Group, Merger Remedies Review Project report, June 2005, and the Teleseminar on Merger Remedies in February 2010, both available on the ICN website, www.internationalcompetitionnetwork.org.

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.\(^\text{58}\) 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.\(^\text{59}\) The Roundtable report also highlighted the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.\(^\text{60}\)

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.\(^\text{61}\) 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 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.\(^\text{62}\) 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\(^\text{63}\) and examples of cooperation on remedies.\(^\text{64}\)

There are also other layers of cooperation based on bilateral agreements. Clearly EC and US cooperation is close and important.\(^\text{65}\) EC and DOJ cooperation has developed from

\(^{58}\) See OECD 2013 Roundtable at p. 10.

\(^{59}\) id. at, inter alia, pp. 5 and 6.

\(^{60}\) id. at, inter alia, p. 6.


\(^{63}\) See Annex 1, p. 29.

\(^{64}\) See Annex 6, where, for example, cooperation on remedies in Nestlé/Pfizer, Holcim/Lafarge and Pfizer/Wyeth is outlined.

\(^{65}\) 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
their first cooperation agreement in 1991, with, more recently, the 2011 Best Practices on Cooperation in Merger Investigations. There are also specific agreements between the EU and Switzerland, and between Australia and New Zealand. Such cooperation can be case-specific, where supported by appropriate waivers of confidentiality. In 2019, the DOJ cooperated with 11 international counterparts on 20 different merger matters. The DOJ and the FTC have concluded a general ‘best practice’ agreement with the CCB; the Australian Competition and Consumer Commission (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. Since then, the EC has cooperated with (what is now) SAMR in at least five merger review cases.

The specific cooperation in the EU–UK Brexit Withdrawal Agreement (the Withdrawal Agreement), which will apply when the post-Brexit transition period ends, should also be mentioned. Under the Agreement, some specific rules are already set out. The main points for remedies are these:

a. it is agreed that, for cases arising before the end of the transition period, the EC will continue to monitor and enforce merger remedies imposed in relation to the UK, including where the decision was taken after the end of the transition period in a procedure started before the end of that period; and

b. the agreement also provides for the possibility that the EC and the relevant UK competition authority could agree to transfer that monitoring and enforcing role to the UK authorities in the future.


See the OECD report, 2011, p. 102. 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.

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.

See MLex report of 17 September 2019 ‘DOJ’s Delrahim breaks down agency’s efforts to protect consumers’.


See Article 95(2) of the Withdrawal Agreement.
A recent UK Competition and Markets Authority (CMA) publication (the CMA Guidance)\(^\text{78}\) explains that, where possible and appropriate, the CMA will ‘endeavour to coordinate merger reviews relating to the same or related cases’ with the EC.\(^\text{79}\)

The CMA Guidance also states: ‘Merging parties (and third parties) are encouraged to facilitate cooperation with the European Commission and other competition authorities wherever possible.’\(^\text{80}\) In practice, one may expect this to be achieved by granting standard confidentiality waivers allowing the EC and the CMA (or other relevant UK authority) to coordinate.

It will be interesting to see whether in the future, when the UK also investigates a case in parallel to the EU, the UK will require separate remedies, an issue likely to be assessed on a case-by-case basis (and linked to whether the UK would want a notification in the first place, with filing being, in principle, voluntary). In some cases, the CMA might consider that an EU remedy might suffice for all of Europe, including the UK. In others, the CMA may want its own remedy, for a specific UK issue, or simply to have its own decision and order in jurisdiction for enforceability.

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.\(^\text{81}\) 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.\(^\text{82}\) Cooperation has often led to coordination of remedies.\(^\text{83}\)

Agencies may cooperate even without waivers on the basis of public information or ‘agency non-public information’ such as an agency’s procedures regarding timing and views on the competitive assessment.\(^\text{84}\) 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 provide these two agencies with waivers. As a result, discussions between the

---


\(^\text{79}\) See CMA Guidance, Paragraph 3.31.

\(^\text{80}\) ibid.

\(^\text{81}\) See the US, EU and UK contributions to the OECD report, 2011, at pp. 296, 153 and 288–9, respectively.

\(^\text{82}\) 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.

\(^\text{83}\) In its assessment of the *Praxair/Linde* merger, the FTC cooperated with agencies in Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Korea and Mexico. The FTC required Praxair and Linde to divest assets in certain industrial gas markets, including source contracts equal to all of Praxair’s helium source contract volume less the volumes that the EC and SAMR ordered to be divested; see FTC Press Release of 22 October 2018, ‘FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger’, available at: www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc; also see EC Press Release of 20 August 2018 ‘Mergers: Commission clears merger between Praxair and Linde, subject to conditions’, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5083.

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.85

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.86

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.87 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.88

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 EU 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.89 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.90 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.

---

86 See id. at pp. 3–4.  
88 See the Singapore contribution to the OECD report, 2011, p. 249.  
89 See the South African contribution to the OECD report, 2011, p. 260.  
90 See, for example, the US contribution to the OECD report, 2011, p. 296. Similarly, post-Brexit, the EC and the UK’s Competition and Markets Authority 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.91

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction’s remedy to ensure enforcement.92 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.93 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.94

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.95 It also appears often to be the position of newer competition authorities, or those in smaller countries.96

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 that 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

91 See the Korean contribution to the OECD report, 2011, p. 170.
92 See the OECD report, 2011, p. 30.
93 See Undertaking to the ACCC, 30 March 2010, available on the ACCC website, http://transition.accc.gov.au/content/index.phtml/itemId/921363, Paragraphs 2.16–2.18 and Paragraphs 43 and 44.
94 See OECD 2013 Roundtable at p. 30 for Brazil requiring similar locally enforceable remedies.
96 See BIAC contribution to the OECD report, 2011, pp. 316–19. See also Allen & Overy’s ‘Global trends in merger control enforcement’, www.alenovey.com/global/>media/lenovey/2_documents/news_and_insights/campaigns/global_trends_in_merger_control_enforcement/merger_control_2018.pdf at p. 16, which notes increased use of behavioural remedies globally but not in the EU, the US or the UK.
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."97

Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required,98 taking into account the differences in authorities’ practices, such as the way that the FTC selects a purchaser itself, while in the EU 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 that 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.99

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 US and the EU are the only ones that matter. Clearly, those authorities are critically important, because they are responsible for large markets and their procedures and analysis are highly developed, which means that their decisions are often influential in other parts of the world.

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

Particularly in light of situations like MOFCOM’s remedies in Seagate/Samsung and WD/Viviti, parties must consider carefully the purchaser’s ‘walk-away’ rights, any related vendor’s break-up fees and valuation rules in the purchase agreement. Given that the initial

98 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. 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.
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. That may mean:

1. 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;
2. 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
3. talking to less-central authorities early on to ensure that they have enough information to consider that they could reasonably defer to others.

If possible, the parties should include a review clause in any undertakings given, so that they can be adjusted to other authorities’ demands. For example, in the (admittedly old) Shell/Montecatini case, the EU required divestiture of one holding in a joint venture to protect one technology, while the US required divestiture of the other linked to a rival technology. Fortunately, the parties were able to go back to the EU for review and revise their EU undertaking in light of the US one. This need for flexibility was recently illustrated by the Bayer/Monsanto case, where Bayer had to request the EC’s approval of two modifications to its prior commitments, which had already been approved by the EC in order to ‘address competition concerns arising in other jurisdictions’.

As illustrated in some of the case studies in Section II, the Chinese process often takes longer than others. As such, early contact with SAMR is advisable.

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. Generally, such solutions are manageable with willingness, creativity, hard work and patience.

100 id, at p. 22.
101 Case IV/M.269, EC decisions of 8 June 1994 and 24 April 1996; FTC File 941 0043, Press Release, 1 June 1995. 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.
102 See MLex report of 11 April 2018.
103 MOFCOM’s delay in clearing the planned Omnicom/Publicis merger has been cited as one of the reasons for that merger being abandoned. In February 2014, MOFCOM published details of an expedited preliminary merger review procedure for uncontroversial transactions that do not raise competition issues in China, which is designed to address delay issues. See www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737423411. SAMR has recently committed to speeding up merger reviews in the sectors hardest hit by the covid-19 outbreak to resume economic activity; see MLex report of 6 April 2020, ‘China’s SAMR ramps up efforts to assist Covid-19 battle, assist economic recovery’.
The headlines for the first half of 2020 have been dominated by the global covid-19 pandemic, which has driven changes across the economy, including several direct implications for high-tech mergers and acquisitions. On one hand, many high-tech companies have seen a significant increase in commercial activity as telework, online learning, online shopping, pharmaceutical development and other similar areas of the economy have taken increased prominence during the pandemic. On the other hand, the sudden, increased dependence on many large high-tech companies has resulted in renewed focus by some on curbing potential market abuses and preventing these companies from acquiring smaller rivals that may have struggled due to the pandemic and its aftermath.

Given the current situation, there have been efforts at both the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) to prioritise existing initiatives aimed at better understanding the high-tech economy and potentially increasing enforcement in the sector. As these initiatives move forward, we expect to see greater scrutiny of high-tech deals by both agencies, including deals that fall below the Hart-Scott-Rodino (HSR) reporting thresholds but otherwise provide opportunities for DOJ or FTC leaders to test new theories or modes of enforcement.

I FTC AND DOJ DIG INTO HIGH-TECH ISSUES

In February 2019, the FTC announced the establishment of its Technology Task Force dedicated to 'monitoring competition in US technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted'.

Now called the Technology Enforcement Division, it is comprised of 17 members, mainly made up of FTC staff attorneys chosen from across divisions. Similar to other FTC investigations, the Division’s investigations will remain confidential, but initial reports indicated the FTC launched the review by visiting Silicon Valley and seeking out complaints of anticompetitive behaviour directly from industry participants. In merger enforcement, then-Director of the Bureau of Competition Bruce Hoffman called industry players to action, noting ‘[t]he
bottom line, for right now, is that to find anticompetitive nascent acquisitions, we need to do it the old-fashioned way: by looking and asking, and keeping our ear to the ground. And we need your help. Participants in these various industries might well be best-situated to spot problematic acquisitions and bring them to our attention.4

A year after the establishment of the Division, the FTC is no longer relying solely on tips from consumers and industry participants. On 11 February 2020, the FTC announced it had issued orders under Section 6(b) of the FTC Act to Alphabet Inc, Amazon.com, Inc, Apple Inc, Google Inc and Microsoft Corporation requiring them to provide information about prior consummated acquisitions not reported to the antitrust agencies under the HSR Act.5 FTC Chairman Joe Simons stated ‘[t]his initiative will enable the Commission to take a closer look at acquisitions in this important sector, and also to evaluate whether the federal agencies are getting adequate notice of transactions that might harm competition. This will help us continue to keep tech markets open and competitive, for the benefit of consumers.’6 The FTC intends to review acquisitions consummated between 1 January 2010 and 31 December 2019, which will reportedly include hundreds of transactions across these five companies.7 The orders require the companies to disclose information similar to what is called for under the HSR Act, while also requiring the companies to provide information and documents on their corporate acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies and post-employment covenants not to compete. Last, the orders ask for information related to post-acquisition product development and pricing, including whether and how acquired assets were integrated and how acquired data has been treated.8

Efforts in Washington to understand the competitive impact big tech has on the marketplace are not limited to the FTC. On 13 September 2019, the House Judiciary Committee announced that it had sent document requests to Google, Facebook, Amazon and Apple as part of its bipartisan investigation into competition in digital markets.9 Under the direction of the Antitrust Subcommittee, the review ‘will focus on three main areas: (1) documenting competition problems in digital markets; (2) examining whether

dominant firms are engaging in anticompetitive conduct; and (3) assessing whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues’. The House panel is expected to hold hearings and issue finding of facts, which could increase political pressure on regulators to take enforcement action against big tech.

The DOJ has likewise opened an investigation into technology giants. On 23 July 2019, the DOJ announced that it would review ‘whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers’. The DOJ has prioritised this effort, and while the Antitrust Chief Makan Delrahim and Deputy Assistant Attorney General Barry Nigro have recused themselves with respect to the investigation into Google, both Attorney General William Barr and Deputy Attorney General Jeffrey Rosen have reportedly added antitrust lawyers to their respective offices to take an active role in the inquiries of big tech. Indeed, Attorney General Barr indicated the DOJ’s intention to move quickly, touting the bipartisan support from Congress that something should be done in the form of enforcement action or legislative proposals. While the DOJ appears to be initially focused on anticompetitive conduct, these statements reflect a sentiment that will undoubtedly lead to careful scrutiny of high-tech mergers as well.

II DOJ GIVES ARBITRATION A TRIAL RUN – A MOVE THAT COULD BENEFIT HIGH-TECH DEAL REVIEWS

For the first time in 2019, the DOJ challenged a merger in a binding arbitration instead of a courtroom. While the deal itself did not fall in the high-tech space, it has interesting implications for high-tech deals going forward, given that these deals frequently turn on dispositive questions of market definition.

The arbitration involved the proposed acquisition by Novelis Inc of Aleris Corporation. It would have been an alleged four-to-three among producers of rolled aluminium sheet used in auto manufacturing. The merging parties and the DOJ disagreed on definition of the relevant market – whether other products such as steel auto body sheet constrain the price of aluminium – and agreed to binding arbitration on that single issue. The DOJ prevailed, forcing divestiture of Aleris’s auto body sheet business in North America.

The arbitration process is intended to provide a more efficient resolution of a narrow dispute. It may provide particular benefits where the government and the merging parties can agree that a single question is dispositive for the outcome of a merger review – in high-tech this may often be the issue of how to define a market around relatively new or novel technology. The merging parties necessarily cede their ability to mount a full assault on the DOJ’s case, but the cost-benefit calculation may favour such an approach, particularly given the expense and time necessary for a trial on the merits in federal court.

10 id.
The arbitration process has its critics. For example, many have pointed out that adjudication in an arbitration setting may be inappropriate if ‘the matter significantly affects persons or organisations . . . not party to the proceedings’ – such as customers or consumers downstream. Moreover, while the arbitration process arguably places issues before an adjudicator with specialised antitrust experience, critics have questioned whether this might not be better accomplished using the existing FTC adjudication process, which places matters before an administrative law judge and ultimately the five FTC commissioners. Nevertheless, in high-tech transactions that raise novel issues before the DOJ, we see potential for this method of dispute resolution to have some ongoing utility.

III  DOJ AND FTC ADOPT NEW VERTICAL MERGER GUIDELINES

In January 2020, the US agencies issued new draft vertical merger guidelines. After delays due to covid-19, the final guidelines were published on 30 June 2020. It has been more than 35 years since the last update from the agencies outlining their approach to vertical deals. While the last set of vertical guidelines provided the theories that are investigated, the reality is that challenges to vertical mergers in the United States have been rare – just two in the past 45 years. Additional guidance may be particularly useful in the high-tech space, where the current political environment and the lack of current policy guidance from both agencies drive an increased degree of uncertainty.

While the draft guidelines provided a quasi-safe harbour for vertical transactions – indicating less likelihood of a challenge where one deal party has a 20 per cent or lower market share in the upstream market and the other party has a share of 20 per cent or lower in a related product downstream market – the final guidelines omitted it. The change is not terribly significant; a quasi-safe harbour provides little more than none at all. The final guidelines provide detailed examples of the unilateral effects the regulators look for in investigations and also describe transactions involving companies at different stages of competing supply chains. The guidelines recognise the existing analysis of efficiencies from the horizontal guidelines, along with the elimination of double marginalisation, placing the burden on the merging parties to substantiate such gains.

We do not anticipate any dramatic changes in enforcement as a result of the vertical merger guidelines, but companies in the high-tech space in particular should see marginal benefits from added clarity around how the DOJ and FTC will evaluate potential upstream and downstream effects in future transactions.

IV  MULTI-SIDED MARKETS CONTINUE TO POSE QUESTIONS

When the Supreme Court issued the 2018 decision in Ohio v. American Express, observers wondered about its possible reach. While not a merger case, the American Express opinion reasoned that in the context of a multi-sided platform, efficiencies on one side of the platform must be taken into account when evaluating any potential competitive implications on the other side. Practitioners have speculated about the impact that this mode of analysis would have on merger reviews involving multi-sided platforms – many of which involve high-tech

---

platforms such as ride-hailing services, food delivery apps and online shopping hubs. The DOJ’s challenge to Sabre’s proposed acquisition of Farelogix showed that there is still much refinement to be done on the antitrust principles for these industries.

In Sabre/Farelogix,\textsuperscript{16} the DOJ was concerned with consolidation in a two-sided platform for airline bookings. Traditionally, bookings have been managed through global distribution systems (GDS) that connect travel agents looking to make bookings with airlines offering available seats. Sabre is one of the largest GDS providers. The DOJ complaint alleged that the next-generation booking software developed by Farelogix was a threat to Sabre’s legacy GDS. Farelogix focuses on providing airlines with software allowing them to offer targeted discounts and perks for bookings through a travel agent – potentially offering an alternative means for airlines to sell directly to travel agents without going through a GDS. Airline customers testified that the entry and success of Farelogix provided them with additional negotiating leverage against the traditional GDS providers, including Sabre. The DOJ argued that if the transaction went forward, Sabre would no longer be constrained in its negotiations, and would therefore be able to charge higher prices and have less incentive to innovate.

In litigating the transaction, the parties put the US Supreme Court’s American Express decision to the test by arguing about impacts on both sides of the GDS platform – airlines and travel agents. One key point raised by the parties was that while Sabre was indeed a multi-sided platform, selling services to both airlines and travel agents, Farelogix was primarily a software developer for the airlines, meaning that it arguably only operated on one side of the multi-sided platform at issue. Ultimately, the district court latched onto this distinction, reading American Express to rule out, as a matter of law, competition between single-market sellers and their multi-sided counterparts.

The court’s interpretation has drawn criticism from the DOJ and others in the antitrust bar. Shortly after the district court decision, the UK Competition and Markets Authority blocked the transaction, leading the parties to abandon their deal. The DOJ has since asked the Court of Appeals to vacate the district court’s decision to eliminate its precedential value. Meanwhile, significant uncertainty persists in the proper treatment of multi-sided platforms in merger review matters.

V PHARMACEUTICAL DEALS FACE INCREASED SCRUTINY

Even before the entrance of covid-19 on the global stage, the FTC was gearing up for increased scrutiny of pharmaceutical tie-ups, echoing political concerns that consolidation in the pharmaceutical sector has led to ever-increasing drug prices in the United States.

One key area of focus is whether pharmaceutical deals should continue to be analysed based on individual product overlaps, as has historically been the case, or whether a broader view of potential anticompetitive effects is warranted. This was seen starkly in the dissenting opinions of the two Democratic commissioners to the FTC’s decision to clear the acquisition of Celgene by Bristol-Myers Squibb in November 2019. For example, Commissioner Rohit Chopra stated plainly, ‘I am deeply skeptical that this approach [focusing on product overlaps

\textsuperscript{16} Case No. 1:19-cv-01548 (D. Del. 7 Apr. 2020).
and foreclosure incentives] can unearth the complete set of harms to patients and innovation, based on the history of anticompetitive conduct of the firms seeking to merge and the characteristics of today’s pharmaceutical industry when it comes to innovation.  

Commissioner Chopra’s statements echo sentiments from lawmakers urging greater scrutiny of large pharmaceutical deals. In September 2019, Senator Amy Klobuchar wrote to FTC Chairman Joe Simons on behalf of herself and eight other senators regarding antitrust enforcement in the pharmaceutical sector. Highlighting AbbVie/Allergan and Bristol-Myers/Celgene as two recent deals that ‘raise significant antitrust issues’, Senator Klobuchar asked the FTC to take note of the fact ‘industry consolidation is occurring against a backdrop of ever rising prescription drug spending and reports that one in four people taking prescription drugs have difficulty affording their medication’. Accordingly, she urged the agency to ‘take appropriate action to protect consumers’, adding that ‘if the FTC’s competitive concerns cannot be resolved by negotiated settlement, we urge the Commission to take appropriate action in district court to protect competition’.

Concerns over pharmaceutical industry consolidation are likely to be further elevated in the current environment, as the world scrutinises efforts to develop and distribute treatments to combat covid-19. If the Democrat-led scepticisms gain ground, it could mean higher hurdles for FTC clearance in large pharmaceutical deals. And in the meantime, it portends potentially longer antitrust reviews as FTC staff attorneys wrestle with these questions in the context of individual combinations.

VI CONCLUSION

The trend over the past several years towards greater scrutiny of high-tech transactions is accelerating, driven by political winds as well as concerns surrounding the response by various segments of the high-tech economy to the covid-19 crisis. While the prospect of additional clarity for tech deals coming from the forthcoming vertical merger guidelines offers some benefit to high-tech deal-makers, we must wait to see how policy shifts more generally will affect merger reviews. Among other things, it remains to be seen whether the FTC and DOJ high-tech initiatives will result in additional challenges to high-tech deals, whether the FTC’s merger retrospective will result in changes to its remedy policies, how efficiencies in deals involving multi-sided platforms will be scrutinised, and whether the FTC will pivot to examining a broader range of concerns in the context of pharmaceutical mergers. In the meantime, one thing we can expect is that in high-tech reviews generally, the parties will need to be prepared to spend additional time wrestling with these issues for the foreseeable future.

17 Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Bristol-Myers Squibb/Celgene, Comm’n File No. 1910061 (FTC 15 November 2019).
Chapter 4

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 pre-merger notification filings and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act (typically 30 days) has passed or the government has granted early termination of the waiting period.

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

---

news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest (12 August 2014,
12:39 PM); Mem Op & Order, Charter Commc’ns, Inc, 16 FCC Rcd 59, Paragraph 28 (FCC
5 May 2016) (In re Charter).

4 See Sallet, footnote 3; In re Charter, footnote 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 2020, in addition to more modest-sized deals in the television and radio spaces. The most prominent transaction during that time 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.

---

5 See 47 CFR, Section 73.3555(a) (2010).
6 See id., Section 73.3555(b), (e).
7 See id., Section 73.3555(c).
8 See id., Section 73.3555(d).
11 id.
12 See Sallet, footnote 3.
13 See footnote 10.
14 See Sallet, footnote 3.
15 See footnote 10.
On 22 October 2016, AT&T announced its intended US$85 billion acquisition of Time Warner, Inc. AT&T touted the benefits of combining ‘Time Warner’s vast library of content and ability to create new premium content’ with AT&T’s ‘extensive customer relationships, world’s largest pay TV subscriber base and leading scale in TV, mobile and broadband distribution’. 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’.

The antitrust review of the 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. 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. On 18 December 2017, AT&T announced that the company was unable to reach a satisfactory settlement with the DOJ. 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.

**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. Shortly following this announcement, FCC commissioner Ajit Pai confirmed that he did not expect the FCC to review the merger.

**Competition issues**

In its complaint, the DOJ raised three specific antitrust concerns in connection with the merger: (1) that the merged entity could raise costs of, or withhold content from, cable competitors, harming end consumers through passed-on price increases, (2) that AT&T/Time Warner...

---

17 See id.
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

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.24 Based on the above, the DOJ alleged that the merged entity would be in a position to demand higher prices for some or all of its content, and its competitors, fearing customer loss and the expenses of reacquiring customers, would agree to higher prices rather than lose the content. In turn, these competitors would pass the price 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.25

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

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

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

**Decision**

The court rejected the DOJ’s positions across the board. The court rejected the DOJ’s purported ‘real-world’ evidence of likely anticompetitive effects as speculative, unconvincing or inconsistent with the bulk of real-world evidence. The judge found that ‘Turner’s content

---

23 US v. AT&T, Complaint, p. 15.
24 id., at pp. 16–18.
25 id., at p. 18.
26 id., at p. 20.
27 id.
is not literally “must-have’, and any negotiating leverage resulting from the desirability of such content existed before the merger and would not be enhanced by the merger. The court also found no likelihood that the combined company would withhold programming from competing distributors or would gain increased negotiating leverage given the high cost of forgoing affiliate fees and advertising revenue. And the judge 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 US$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

28 United States v. AT&T Inc, 916 F.3d 1029, 1032 (D.C. Cir. 2019).
effect on content prices’.\textsuperscript{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 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’.\textsuperscript{30} 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.

\textbf{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.\textsuperscript{31} 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.\textsuperscript{32} Both the failed Comcast/Time Warner merger and the successful Charter/Time Warner merger involved FCC consideration of whether the transactions would serve the public interest, including growing consumer preference for cord cutting, namely, consumers cancelling traditional cable subscriptions in favour of more targeted viewing over the internet.\textsuperscript{33} The FCC’s reviews also highlighted its goal of geographic expansion of high-speed internet access to underserved areas of the United States.\textsuperscript{34} 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.

\textsuperscript{29} United States v. AT&T Inc, 916 F.3d 1029, 1031 (D.C. Cir. 2019).
\textsuperscript{30} United States v. AT&T Inc, 916 F.3d 1029, 1032 (D.C. Cir. 2019).
\textsuperscript{33} FCC chairman Tom Wheeler expressed his support for cord cutting and other forms of innovation in the television industry in an article he wrote for the influential tech blog Recode. See Tom Wheeler, ‘It’s Time to Unlock the Set-Top Box Market’, Recode (27 January 2016, 9:30 AM), www.recode.net/2016/1/27/11589108/its-time-to-unlock-the-set-top-box-market.
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’.35 FCC Chairman Wheeler stated that the merger ‘would have created a company with the most broadband and video subscribers in the nation alongside the ownership of significant programming interests’.36 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’.37

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.38 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,39 but the study did not persuade the FCC. The agency found that:

[b]ecause 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.40

36 id.
37 id.
39 In re Charter, footnote 3, Paragraph 37.
40 id., Paragraph 47.
Therefore, the FCC concluded, the merged company was likely to have a greater incentive to take actions negatively impacting OVDs following the merger.\(^{41}\)

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.\(^{42}\) The FCC found that this benefit was not specific to the transaction, however, because there would be a natural build-out to new customers within that time frame regardless of whether the transaction was approved. The FCC therefore modified the planned build-out, requiring the merged entity to build out high-speed internet access to at least 2 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 25 megabytes per second 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.\(^{47}\)

---

41 id.
42 See id., Paragraph 382.
43 Specifically, New Charter must provide access of at least 60 megabytes per second. id., Paragraph 388.
44 id.
45 See id., Paragraph 132.
46 See id., Paragraphs 135–36.
**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’. 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’. The DOJ imposed several conditions to address that issue. The DOJ prohibited the new company from entering into or enforcing any agreement with a programmer that forbids, limits or creates incentives to limit the programmer’s provision of content to OVDs. The DOJ also precluded the new company from taking advantage of other distributors’ most favoured nation provisions if they are inconsistent with this prohibition. Lastly, the DOJ barred the new company from retaliating against programmers for licensing to OVDs.

**iii Other media mergers**

**Viacom Inc and CBS Corporation**

On 4 December 2019, Viacom Inc and CBS Corporation concluded a merger of the mass media companies forming ViacomCBS. Both Viacom and CBS were television broadcasting companies, with Viacom controlling hallmark cable networks such as Comedy Central, Nickelodeon and MTV, and CBS controlling its broadcast CBS network. Both companies also own production studios, including Viacom’s Paramount Pictures’ film studio. The companies share a common history, with Viacom originating as a spin-off of CBS in 1971 and with the companies operating as one entity between 1999 and 2006.

The 2019 merger closed just four months after it was announced and was not subject to enforcement actions by antitrust regulators. The absence of action or even a lengthy review was almost certainly because of the pre-existing common control of the two entities. The Redstone family’s company National Amusements Inc owned a controlling stake in both Viacom and CBS. Under US antitrust law, a merger occurs ‘when two firms that had been separate come under common ownership or control’. Viacom and CBS have been under the control of the Redstone family since at least 1999 when Viacom acquired CBS the first time, so Viacom and CBS were not under separate control when the companies merged (again) in 2019. The deal’s size may also have played a role. While large in absolute terms – the merged entity had about US$26 billion in combined market capitalisation at the time of the merger – ViacomCBS is substantially smaller than its rivals, such as Walt Disney (with US$274 billion market capitalisation) and Comcast (with US$197 billion market capitalisation).

49 See id.
51 See id.
52 See id.
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. 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. No conditions were placed on the merged entity by the Justice Department. On 16 September 2019, the FCC blessed the merger and gave requisite approval for the sales that were part of Nexstar’s planned divestment.

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. 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. The transaction would have combined the two largest newspapers in Chicago. The DOJ immediately began an investigation into the potential acquisition. The investigation focused on whether the Chicago 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 Chicago Sun-Times being sold to a third party outside the Chicago newspaper market.

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

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]. 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.

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 pre-show 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.

66 See id.
\textbf{AT&T and DirecTV}\n
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.

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

\textbf{Disney Acquisition of 21st Century Fox}\n
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. 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.\textsuperscript{78} On 23 August 2019, the sale of Fox’s regional sports networks to Sinclair Broadcast Groups was completed.\textsuperscript{79}

**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.\textsuperscript{80} 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.\textsuperscript{81} The DOJ also alleged that the Entercom and Lincoln stations were particularly close substitutes that (among other things) targeted similar customers.\textsuperscript{82} 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.\textsuperscript{83} To address these concerns, Entercom agreed to divest three of its Denver area radio stations.\textsuperscript{84}

**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.\textsuperscript{85} In these markets, there would be only a single provider of wide-reaching, English-language radio advertising post-merger, leaving advertisers with no effective substitutes should Entercom raise prices. The DOJ noted the advertising market for sports commentary would be particularly affected, as the competitors owned the two highest-rated sports talk shows in Boston, these stations had similar listener demographics, and the stations competed against each other on price.\textsuperscript{86} To remedy these concerns, the final judgment required divestiture of the CBS radio stations in the Boston, Sacramento and San Francisco markets.\textsuperscript{87}

\textsuperscript{78} 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).


\textsuperscript{82} See id., at 6.

\textsuperscript{83} See id., at 7.

\textsuperscript{84} See Final Judgment, footnote 80, at 3–7.


\textsuperscript{86} id., at 7.

\textsuperscript{87} *US v. Entercom Communications Corp and CBS Corporation*, Final Judgment, 31 January 2018.
US v. Tribune Publishing Company

In March 2016, the DOJ sued to enjoin Tribune’s proposed acquisition, through a bankruptcy sale, of Freedom Communications Inc. Tribune owns the Los Angeles Times,88 while Freedom owned local newspapers in Orange County and Riverside County, both of which are in the greater Los Angeles area.89 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.90 The court agreed with the DOJ, noting that local newspapers serve the unique function of creating local content.91 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.92 The court held that ‘such a concentration clearly constitutes a threat to competition’.93 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.94 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 renewed importance placed on home-grown technology, the FCC under the Trump administration has placed a focus on supporting US excellence in telecommunications technologies, especially in regard to 5G. That has resulted in less predictable enforcement against media deals on the FCC side than in prior administrations. Still, companies would be wise to consider the factors outlined in this chapter in any merger applications submitted to antitrust regulators and the FCC.

89 See id.
90 See id., at 5–7
91 See id.
92 See id., at 8.
93 See id.
94 See id.
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 of February 2020, the minimum size-of-transaction threshold is US$94 million. The minimum size-of-person thresholds are US$18.8 million and US$188 million in either annual sales or total assets, respectively. For transactions valued at less than US$94 million, no HSR filing is required. For transactions valued between US$94 million and US$376 million, HSR notification is only required if one or both parties satisfy each of the size-of-person thresholds. For transactions valued above US$376 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 expiry 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 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

---


\(^5\) Id.
any FTC concerns about harm to competition from the proposed merger, the parties and the
FTC staff will work with the FTC Compliance Division to draft a settlement agreement.\textsuperscript{6} 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.\textsuperscript{7} 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 restraint 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 expiry of the branded product's patent, or if before such expiry, 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

\textsuperscript{6} See Section III for additional detail on the FTC remedial process.
\textsuperscript{7} See Brown Shoe Co v. United States, 370 US 294, 324 (1962) ('The "area of effective competition" must
be determined by reference to a product market (the "line of commerce") and a geographic market (the
"section of the country").'). See also US Department of Justice and the Federal Trade Commission,
Horizontal Merger Guidelines at 7–8 (10 August 2010), available at www.ftc.gov/sites/default/files/
attachments/merger-review/100819hmg.pdf.
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. 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’ 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

---


9 15 USC Section 18.
typically involves divesting one of the parties’ overlapping pharmaceutical products and its 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.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.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.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.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.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.

---

11 id. at 24.
12 id. at 10.
13 id. at 36.
14 id. at 37.
IV RECENT DEVELOPMENTS

Antitrust review in the pharmaceutical sector generally remained consistent with the transition from the Obama administration into the Trump administration, beginning in January 2017; however, mergers in the pharmaceutical sector have faced significantly increased scrutiny in the past year.

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 US$625 million acquisition of Claris’s injectable drug business. 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’. 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. 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. 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 US$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. 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 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.

---

16 id.
17 id.
18 id.
The FTC required a divestiture of branded products in February 2017, when the agency approved a final order in connection with CH Boehringer Sohn AG’s (Boehringer Ingelheim) US$13.53 billion acquisition of Sanofi’s animal health business.\(^2\) 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.\(^2\) 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.\(^2\)

Though these settlement agreements followed expected patterns, there were also 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.\(^2\) 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.\(^2\) 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.

In the past year, the FTC has reviewed mergers in the pharmaceutical sector with increased scrutiny. On 15 November 2019, the FTC issued a proposed consent order in Bristol-Myers Squibb Company’s (BMS) US$74 billion acquisition of Celgene Corporation that included the largest divestiture ever required by the FTC or DOJ in a merger enforcement matter.\(^2\) Specifically, BMS and Celgene agreed to divest Celgene’s Otezla, the most popular

---


23 id.


25 id.

oral treatment in the United States for moderate-to-severe psoriasis, for US$13.4 billion.\textsuperscript{27} The FTC’s press release regarding the settlement stated that the divestiture was ordered to prevent eliminating future competition in developing, manufacturing and selling products to treat moderate-to-severe psoriasis by preserving BMS’s incentive to continue developing its own oral product for treating this condition.\textsuperscript{28} Under the terms of the settlement agreement, the parties divested Celgene’s worldwide Otezla business (including its regulatory approvals, intellectual property, contracts and inventory) to Amgen, Inc.\textsuperscript{29} Dissenting statements to the proposed settlement were issued by Commissioners Rohit Chopra and Rebecca Kelly Slaughter, who stated that the settlement, which follows the Commission’s standard approach, did not fully capture all competitive consequences of the transaction, such as possible effects on drug prices, innovation competition and incentives to engage in other anticompetitive conduct.\textsuperscript{30} The proposed consent order was approved on 13 January 2020.\textsuperscript{31}

In April 2020, Novartis AG abandoned a planned US$900 million sale of its US Sandoz portfolio of oral solids and dermatology products to Aurobindo Pharma USA while the transaction was being reviewed by the FTC. In its press release, Novartis stated that ‘[t]his decision was taken as approval from the U.S. Federal Trade Commission for the transaction was not obtained within anticipated timelines’.\textsuperscript{32}

Also in April 2020, Johnson & Johnson’s subsidiary Ethicon abandoned a planned US$400 million acquisition of Takeda Pharmaceutical’s TachoSil, a surgical patch to control bleeding, after FTC staff had recommended that the Commission block the transaction due to concerns about the potential loss of competition between TachoSil and Johnson & Johnson’s Evarrest, the only two fibrin sealant patches approved in the United States to stop bleeding during surgery.\textsuperscript{33}

On 5 May 2020, the FTC issued a proposed consent order imposing conditions on AbbVie Inc’s US$63 billion acquisition of Allergan plc.\textsuperscript{34} The FTC’s press release regarding the settlement stated that the proposed acquisition would likely result in substantial competitive harm to consumers in the market for treatment of exocrine pancreatic insufficiency (EPI), a

\textsuperscript{27} id.
\textsuperscript{28} id.
\textsuperscript{29} id.
\textsuperscript{34} See FTC, FTC Imposes Conditions on AbbVie Inc.’s Acquisition of Allergan plc (5 May 2020), available at www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc.
condition resulting in the inability to properly digest food, and would eliminate future direct competition between AbbVie and Allergan in the development and sale of IL-23 inhibitor drugs for treatment of moderate-to-severe Crohn’s disease and moderate-to-severe ulcerative colitis. Under the terms of the proposed settlement agreement, the parties were required to divest Allergan’s assets related to EPI drugs Zenpep and Viokace to Nestlé, SA, and to transfer Allergan’s rights and assets related to an IL-23 inhibitor drug to AstraZeneca plc, the drug’s original developer. Commissioners Chopra and Slaughter again issued dissenting statements, raising several concerns with the proposed settlement agreement and the FTC’s approach in pharmaceutical mergers generally. Commissioner Chopra challenged the FTC’s approach of focusing on discrete product overlaps in pharmaceutical mergers and raised a number of general concerns with the divestiture process, including merging companies’ desire to sell assets to weak buyers, buyers’ lacking incentives and ability to restore competition and the increased likelihood that divestitures fail if the FTC relies on speculation rather than real-world data and robust due diligence. Commissioner Chopra also criticised the majority for approving a divestiture buyer with minimal prior experience in the pharmaceutical sector. Commissioner Slaughter generally agreed with Commissioner Chopra’s statements and also raised concerns with respect to harm to innovation.

V CONCLUSION

Merger review in the US pharmaceutical industry has generally developed and followed steady patterns over time, though recently has seen an increased level of scrutiny by the FTC, which has indicated a more sweeping evaluation of possible issues related to competition. 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,

35 id.
36 id.
39 id.
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, although recent
dissenting statements by Commissioners Chopra and Slaughter indicate that the agency may
take a broader approach to evaluating any potential anticompetitive issues and effects for
transactions in this complex industry.
Part II

JURISDICTIONS
Chapter 6

AUSTRALIA

Peter Armitage and Amanda Tesvic

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. 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.

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

---

1 Peter Armitage is a senior 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 the ACCC of 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.

<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>
<th>2019 FY (to 30 June)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reviews undertaken</td>
<td>213</td>
<td>242</td>
<td>278</td>
<td>287</td>
<td>253</td>
<td>252</td>
<td>305</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>
<td>17</td>
</tr>
<tr>
<td>Finished – no decision (including withdrawn)</td>
<td></td>
<td>-</td>
<td>5</td>
<td>8</td>
<td>3</td>
<td>1</td>
<td></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>
<td></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>
<td>5</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>
<td>0</td>
</tr>
<tr>
<td>Variation to remedy rejected</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<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>
<td>331</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.

Since 30 June 2019, the ACCC has not publicly opposed any mergers. However, this statistic is slightly misleading as it excludes those transactions in which the parties withdrew their request for informal clearance following the ACCC publishing a statement of issues outlining serious competition concerns with the transaction (see, for example, Bis Industries’

---

8 ACCC, ACCCount, 1 April to 30 June 2019, Table 1.2. See www.accc.gov.au/system/files/ACCCount%20-%20Apr%20to%20Jun%202019.PDF.
9 Final figures for the 2020 FY were not available at the time of writing.
proposed acquisition of Cougar Mining Group, INova Pharmaceuticals’ proposed acquisition of Juno PC Holdings and Assa Abloy Australia Pacific’s proposed acquisition of E Plus Building Products.

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

i  ACCC’s losing record in litigation opposing mergers continues

In the past 24 months, the ACCC unsuccessfully commenced its first court proceedings opposing a merger since 2011 and unsuccessfully defended legal proceedings seeking court clearance of an acquisition that the ACCC opposed.

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. The ACCC’s case was not, however, restricted to the merger. It also alleged that the parties entered into two anticompetitive agreements as part of the suite of transaction documents. 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 likely effect of substantially lessening competition, the ACCC 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.

The ACCC was, however, unsuccessful again in court. It lost at trial and, more comprehensively, on appeal. The trial and appeal courts were satisfied that ownership of the terminal by PN would raise barriers to entry to interstate intermodal rail haul. It was essential, however, that the ACCC also prove that there was a real commercial likelihood of entry if PN did not own the terminal. The appeal judges held unanimously that the ACCC’s evidence had failed to prove that entry was more than speculative and that, accordingly, the acquisition of the terminal was not likely to substantially lessen competition when compared with the situation if PN did not acquire the terminal.

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’.

---

13 The case also initially included an allegation that PN’s proposed acquisition of Aurizon’s Queensland intermodal business would be likely to have the effect of substantially lessening competition, but this was dropped following Linfox’s purchase of this part of the business.
14 The appeal decision was delivered on 6 May 2020.
In early May 2019, after a seven-month investigation, the ACCC opposed the merger of TPG Telecom and Vodafone Hutchison Australia. Vodafone, for reasons connected with Australia’s foreign investment control regime, applied to the Federal Court in late May for a declaration that the merger would not contravene the prohibition in Section 50 because it would not be likely to have the effect of substantially lessening competition in any relevant market. In February 2020, the Court made that declaration and the ACCC did not appeal the decision. The case was factually and legally complex but, significantly, the Court was not persuaded that the increase in concentration resulting from this merger would cause any lessening of competition. In fact, the Court concluded that competition would be improved because the merged entity would be a stronger competitive force. Importantly, in the context of the ACCC’s view that increased market concentration is, or should be, presumptively anticompetitive, the Court observed that ‘... it is not necessarily the number of competitors that are in the relevant market, but the quality of competition that must be assessed ...’.

ii ‘Gun-jumping’: a continuing ACCC target
Continuing the theme of scrutinising conduct surrounding mergers in addition to the transaction itself, the ACCC brought its first ‘gun-jumping’ case recently. 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.15 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.16 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.17

**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.’ This concern with market concentration intensified in 2020. Rod Sims asserted, at the ICN Merger Workshop in February 2020, that ‘my judgement is that Australia’s economy is too concentrated’.

In the majority of the mergers publicly reviewed by the ACCC in the past 12 months18 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,19 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. As discussed above, that decision was successfully challenged by the parties in the Federal Court.

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 the acquisition of GrainCorp’s Liquid Terminals business by ANZ Terminals, despite the transaction raising these types of concerns, as it was satisfied that the superior ability of the remaining market participants to expand capacity would provide sufficient competitive constraint on the merged entity.20 The transaction was effectively a ‘four into three’, but involved combining the two largest competitors in bulk liquid storage in the Port of Melbourne.

---

17 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-apa-group.
18 1 May 2019 to 30 April 2020.
The ACCC also cleared the acquisition of Oxford Cold Storage by Emergent Cold despite the fact that they were the second and third largest of the four major suppliers of cold storage services in Victoria. The ACCC concluded that Emergent Cold would be competitively constrained by the ability of competing suppliers to expand and build new capacity in response to demand in the coming years (including expansions sponsored by some larger customers if required) and by the prospect of some larger customers switching to self-supply in response to price increases.21

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 continued 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 its statement of issues concerning the proposed acquisition of E Plus Building Products by Assa Abloy.22 The ACCC expressed concerns that, not only were the merger parties two of the largest fire door core suppliers in an already concentrated market, but the acquisition would increase the risk of foreclosure by Assa Abloy preventing its competitors from testing their fire door cores and door hardware with Assa Abloy-owned door hardware and cores.

vi Covid-19 and merger clearance
In a speech on 30 March 2020, early in the covid-19 crisis, Rod Sims outlined the ACCC’s approach to merger reviews, particularly when dealing with failing firm arguments:

*The ACCC will play its part in merger assessments. Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anticompetitive increases in market power, or the rise of so-called ‘national champions’.*23

That has proven to be true in the early months of the crisis. Whether, as more businesses fail, that rigour will be maintained remains to be seen.

The likely financial failure of a firm is a relevant consideration in the competition assessment of a proposed acquisition of that firm. Mere speculation that a target firm will exit in the near future or evidence of declining profitability will not establish a likely absence of future competition between the target and the acquirer.

---


It is necessary to supply convincing evidence that, in the relevant future, there will be no competition between the target and the acquirer, such as:

a) the target will fail imminently and it is unlikely to be successfully restructured or acquired by any other firm; and

b) in the absence of the proposed acquisition, the target’s assets, including brands, will exit the industry.

The speech by Rod Sims indicates that the ACCC intends to apply this rigorous approach to covid-19-induced financial distress.

vii Conglomerate effects

In the past two years, 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,24 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,25 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.26

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

26 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 in the past 24 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.
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. 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. The application involved the two largest automotive retailers in Australia. AP Eagers Limited sought authorisation from the ACCC to acquire Automotive Holding Group Limited, which was granted with conditions. Since then, in January 2020, Gumtree AU, a subsidiary of eBay Inc, sought authorisation of its acquisition of Cox Media. The ACCC granted authorisation on 30 April 2020.

---

27 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. The ACCC is also increasingly requesting that parties to a multi-jurisdictional transaction disclose to it documents and materials that have been supplied to regulators overseas in connection with the transaction.

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 in 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 all types of mergers is gaining access to commercially sensitive confidential information of competitors.

Currently, the ACCC is vigorously investigating a completed acquisition of a minority interest for which the merger parties did not seek merger clearance from the ACCC.31 On 1 February 2019, Qantas announced that it had acquired a 19.9 per cent interest in Alliance Aviation Services (Alliance), and on 7 February 2019, the ACCC announced that it had commenced an enforcement investigation of the acquisition. As at 1 June 2020, the investigation was continuing and the ACCC explained that its investigation is focused

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.

31 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/qantas-airways-ltd-acquisition-of-199-interest-in-alliance-aviation-services-ltd. See also www.accc.gov.au/media-release/investigation-into-qantas%E2%80%99s-stake-in-alliance-airlines-continues in which Chair Rod Sims states: ‘The Australian aviation industry remains highly concentrated and it is crucial that competition provided by smaller airlines is maintained long-term. The ACCC has been closely scrutinising the effects of the acquisition of this shareholding by Qantas. Acquiring a strategic stake in a close competitor in such a concentrated market raises clear competition concerns.’
on the competitive dynamics between Qantas and Alliance, examining whether Qantas’s stake affects Alliance’s ability to raise funds, consider takeovers or participate in commercial ventures, and whether Qantas is attempting to exert influence on Alliance’s decision-making or operations.32

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

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

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

c 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:

a 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);

b the separation and management plan (as part of the ACCC’s approval of the independent manager of the divestiture business); and

c 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).33


33 Recent examples of these requirements are found in Nutrien’s acquisition of Ruralco, see: www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/landmark-proposed-acquisition-of-ruralco; ANZ Terminal’s acquisition of GrainCorp’s Liquid Terminals business.
Recent examples of the ACCC accepting post-closing divestitures, with the requirements outlined above, have included ANZ Terminals’ acquisition of GrainCorp’s Liquid Terminals business, Nutrien’s acquisition, through its Australian Landmark business, of Ruralco, and Asahi Group’s proposed acquisition of Carlton & United Breweries.

Notwithstanding the ACCC’s preference for divestiture remedies, it will, in some circumstances, clear transactions on the basis of behavioural remedies. In some cases, the behavioural remedies support a divestiture remedy (see the Asahi remedy described below) and in some cases they are effectively standalone remedies (see the ANZ Terminals remedy described below).

In 2020, the remedies required by the ACCC to clear Asahi Group’s acquisition included not only the divestment of a number of cider and beer brands, but also, to assist the viability of the divested brands, an undertaking by Asahi that it would ensure that the divested brands would get the same access to bars, pubs and clubs as well as off-premise space under the same tap-tying agreements as Asahi’s brands for the next three years.

In 2019, the remedies required by the ACCC to clear ANZ Terminals’ acquisition of GrainCorp’s Liquid Terminals business included the divestment of a terminal in Adelaide to address market concentration issues in that geographic market. They also included, to preserve the potential for new entry in another market, an undertaking by ANZ Terminals not to acquire any land in the vicinity of its terminals in Port of Melbourne without first obtaining the consent of the ACCC.

In 2016, the ACCC cleared Metcash’s acquisition of Home Timber and Hardware Group 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.34

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

---

34 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 toll road concessions. See: www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/transurban-limited.
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.35 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.36

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 Tribunal (under the previous authorisation process that no longer exists).37 The ACCC’s track record of (litigation) opposing mergers has been described by the ACCC’s chairman as ‘not good’, and its latest cases against Pacific National and Aurizon and against Vodafone and TPG are no exception, with the Court rejecting the ACCC’s arguments in both cases.38

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

38 In relation to the Full Court of the Federal Court finding unanimously that the acquisition of the Acacia Ridge Terminal by Pacific National was not likely to have the effect of substantially lessening competition, the ACCC chair stated that, ‘this was a particularly important case for Australia’s merger laws, and the outcome demonstrates the real difficulty of applying the substantial lessening of competition provisions in the legislation’.
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 losses in the Pacific National/Aurizon and TPG/Vodafone cases, we expect the ACCC to increase its lobbying for legislative change in relation to merger litigation in Australia. The form of that possible change is as yet unknown.
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 (the Cartel Court) and the Supreme Court acting as the Supreme Cartel
Court (OGH)). Merger notifications in Austria have to be submitted to the FCA and are then assessed by the Official Parties in Phase I. The Official Parties have the exclusive right to request an in-depth (Phase II) review of a notified transaction by the Cartel Court.

Notwithstanding the above aspects, it is important to note that the vast majority of transactions notified in Austria receive merger clearance in Phase I.\(^5\) 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 with 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 2019,\(^8\) 495 merger cases were notified to the FCA in total (an increase of 14 cases compared with 2018).\(^9\) The large majority of notifications (466) was cleared in Phase I after expiry of the initial four-week review period.\(^10\) In 21 cases, the Official Parties waived their right to request an in-depth (Phase II) review even before the expiry of the four-week review period, and in six cases, the notifying party or parties withdrew the filing in Phase I.\(^11\) One case was subject to a request for referral to the European Commission pursuant to Article 22 EUMR after

---

\(^5\) According to the FCA website, 98.4 per cent of the merger cases notified with the Official Parties in 2019 were cleared in Phase I; see www.bwb.gv.at/en/merger_control/2019/ (last accessed 21 May 2020).

\(^6\) A German version of the filing form/Austrian Form CO is available at www.bwb.gv.at/fileadmin/user_upload/Downloads/Zusammenschluesse/FormCOfinal101313.doc (last accessed 11 May 2020).

\(^7\) The FCA currently has 44 employees, including 32 case handlers (for more information, see www.bwb.gv.at/en/federal_competition_authority/staff/ (last accessed 11 May 2020); for 2018, see the FCA Annual Report 2018, page 13, available at www.bwb.gv.at/fileadmin/user_upload/Englsiche_PDFs/Annual_Reports/BWB_Annual_Report_2018.pdf (last accessed 21 May 2020)). The FCP consists of the Federal Cartel Prosecutor and his or her 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/home/justiz/justizbehorden/bundeskartellanwalt-36c.de.html (last accessed 11 May 2020)).

\(^8\) The authors would like to thank Mr Marcus Becka of the FCA for kindly contributing the merger control statistics for 2019, which are not yet available on the FCA website.


\(^10\) In three cases, the notification was cleared subject to commitments in Phase I (BWB/Z-4428, BWB/Z-4588 and BWB/Z-4651; see ‘Phase I cases from 2019 subject to commitments’ table in Section II.ii).

notification to the FCA. Conversely, one case that was initially notified to the European Commission was referred to the FCA (for the Austrian part of the transaction) and the German Federal Cartel Office (FCO) (for the German part of the transaction) following a partial referral request by the notifying parties under Article 4(4) EUMR. In the same case, the structural commitments (divestment of the operational part of the target company in Austria) agreed by the parties in Phase I led to a de facto abandonment of the Austrian part of the transaction.\(^{13}\)

Only one case notified in 2019 was subject to an in-depth (Phase II) review by the Cartel Court\(^{14}\) and was cleared subject to commitments. Some of the major Austrian merger control cases in 2019 are described below in more detail.

### i Fines for violation of the standstill obligation

It is important to note that the Official Parties are quite active in cases involving a violation of the standstill obligation and regularly request the imposition of fines by the Cartel Court in the 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.\(^{15}\) The following table lists the Cartel Court’s fine decisions rendered in 2019 for violations of the standstill obligation.\(^{16}\)

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 October 2019</td>
<td>Fashion retail</td>
<td>Aktieselskabet af 5.5.2010</td>
<td>€75,000*</td>
</tr>
<tr>
<td>1 October 2019</td>
<td>Manufacturing of motorcycle and snow protection equipment</td>
<td>Eurazeo SE</td>
<td>€30,000†</td>
</tr>
<tr>
<td>1 October 2019</td>
<td>Product design services</td>
<td>KTM AG; Kiska GmbH (jointly and severally)‡</td>
<td>€60,000</td>
</tr>
<tr>
<td>14 June 2019</td>
<td>Construction materials</td>
<td>WIG Wietersdorfer Holding GmbH</td>
<td>€70,000⁰</td>
</tr>
</tbody>
</table>

---

\(^{13}\) BWB/Z-4588, notified with the FCA on 13 September 2019 following referral by the European Commission and cleared subject to commitments; initially notified with the European Commission on 15 July 2019 and cleared on 7 August 2019; Case COMP/M.9142 – *REWE/Lekkerland* (see also footnote 2 in ‘Phase I cases from 2019 subject to commitments’ table in Section II.ii).  
\(^{14}\) BWB/Z-4392; see footnote 1 in ‘Phase II cases from 2019’ table in Section II.ii. The merger notification in Case BWB/Z-4180 (clearance subject to commitment) was notified on 12 November 2018 and decided on 5 March 2019 (see footnote 2 in the ‘Phase II cases from 2019’ table in Section II.ii).  
\(^{15}\) Section 17(2) KartG in conjunction with Section 29 No. 1a KartG. The most recent example for a case where fines were imposed on the grounds of a violation of commitments (incorrect or misleading information in connection with the closing of a supermarket store to avoid an increase of market share) and a violation of reporting obligations was the decision of the Cartel Court of 20 November 2018, 24 Kt 8/18h (*REWE International AG*; fine of €212,000).  
\(^{16}\) See www.bwb.gv.at/zusammenschlusse/verbotene_durchfuehrungen/ (last accessed on 11 May 2020).
### Phase II cases from 2019

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification: 12 April 2019, clearance: 13 June 2019 (request for in-depth review on 10 May 2019, withdrawal of request for in-depth review on 11 June 2019)</td>
<td>Measurement technology&lt;br&gt;Carl Zeiss AG; GOM GmbH</td>
<td>Clearance subject to commitments after request for an in-depth review*</td>
<td></td>
</tr>
<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&lt;br&gt;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>
<td></td>
</tr>
</tbody>
</table>

* WB/Z-4392; Cartel Court 13 June 2019, 24 Kt 12/19y; more detailed information on the commitments is available at www.bwb.gv.at/fileadmin/user_upload/Downloads/PDFs/Z-4392_Verpflichtungszusagen_Carl_Zeiss_AG_-GOM_GmbH.pdf (last accessed on 11 May 2020)

† WB/Z-4180; Cartel Court 5 March 2019, 27 Kt 6/18; more detailed information on the commitments is available at www.bwb.gv.at/fileadmin/user_upload/2HP_Z_4180_Meldung_Fresenius_Medical_Care__D_Med_Consulting_GmbH__Auflagen.pdf (last accessed on 11 May 2020)

### Phase I cases from 2019 subject to commitments

<table>
<thead>
<tr>
<th>Date</th>
<th>Sector</th>
<th>Undertakings</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification: 28 October 2019 (followed by a request for extension of initial four-week Phase I review period to six weeks)</td>
<td>Organisation of live events&lt;br&gt;EVENTIM LIVE GmbH; Barracuda Holding GmbH</td>
<td>Clearance subject to commitments (including monitoring) proposed by the notifying parties after pre-notification negotiations with the Official Parties and a market test*</td>
<td></td>
</tr>
<tr>
<td>Notification 13 September 2019 (followed by a request for extension of initial four-week Phase I review period to six weeks)</td>
<td>Retail and wholesale of food, beverages and tobacco&lt;br&gt;REWE-ZENTRALFINANZ eG; Lekkerland AG &amp; Co. KG; Lekkerland AG</td>
<td>Clearance subject to structural commitments (divestment of the operational part of the target company in Austria) – leading to a de facto abandonment of the Austrian part of the transaction in Phase I – proposed by the notifying parties after pre-notification negotiations with the Official Parties, a market test and information requests to market participants†</td>
<td></td>
</tr>
<tr>
<td>Notification: 15 May 2019 (followed by a request for extension of initial four-week Phase I review period to six weeks)</td>
<td>Postal services&lt;br&gt;Österreichische Post AG; DHL Paket (Austria) GmbH</td>
<td>Clearance subject to commitments (including monitoring) proposed by the notifying parties after pre-notification negotiations with the Official Parties, a market test and information requests to competitors, the Austrian postal market regulator RTR and other industry experts‡</td>
<td></td>
</tr>
</tbody>
</table>

* WB/Z-4651; for more detailed information on the commitments, see www.bwb.gv.at/fileadmin/user_upload/Downloads/PDFs/Z-4651_Verpflichtungszusagen.pdf (last accessed on 11 May 2020)

† WB/Z-4588; for more detailed information on the commitments, see www.bwb.gv.at/fileadmin/user_upload/Downloads/Z-4588_-_Auflagen_TW_20191021_clean.pdf (last accessed on 11 May 2020)

‡ WB/Z-4428; for more detailed information on the commitments, see www.bwb.gv.at/news/news_2019/detail/news/zusammenschluss_osterreichische_post_ag_assets_der_dhl_paket_austria_gmbh_mit_auflagen_freigeg/ (last accessed on 11 May 2020)
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\(^{17}\) or the new (‘transaction value’) thresholds of Section 9(4) KartG are met; and

c transaction has an effect on the domestic (Austrian) market or markets.\(^{18}\)

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;

d the establishment of interlocking directorates at the management board or supervisory board level (if at least half of the members of the management board or the supervisory board in two undertakings are identical);

e any other connection between undertakings directly or indirectly conferring one undertaking a decisive influence over another undertaking; or

f the establishment of a full-function JV.\(^{19}\)

Although Austrian merger control contains a specific provision declaring that the establishment of a full-function JV constitutes a concentration,\(^{20}\) it is currently the prevailing view that this provision does not exclude non-full-function JVs from the scope of Austrian merger control. Instead, the establishment of a non-full-function JV may also qualify as a concentration if the transaction falls under any of the other types of concentrations set out above.\(^{21}\)

iii Turnover thresholds
Under Austrian law, a concentration (see Section III.ii) shall be notified prior to its completion if the following turnover thresholds are met by the concerned undertakings in the previous financial year:

a combined worldwide turnover of all undertakings concerned exceeded €300 million;

b combined Austrian turnover of all undertakings concerned exceeded €30 million; and

---

17 Section 9(1) KartG (with the exemption in Section 9(2) KartG not being applicable).
18 Section 24(2) KartG.
19 Section 7(1) and 7(2) KartG.
20 Section 7(2) KartG.
21 Section 7(1) KartG.
c the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.\textsuperscript{22}

There are special rules on calculation of turnover for credit institutions and insurance undertakings.\textsuperscript{23} In addition, for media mergers, multipliers apply to determine whether the turnover thresholds are met (see Section III.vi).

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

\begin{itemize}
\item[a] only one undertaking concerned achieved a domestic turnover of more than €5 million;
\item[b] the combined aggregate worldwide turnover of the other undertakings concerned was less than €30 million.\textsuperscript{24}
\end{itemize}

v Transaction value threshold
The KaWeRÄG 2017 has introduced a new jurisdictional threshold based on a ‘value of consideration’ criterion that entered into force on 1 November 2017 and applies in addition to the existing turnover-based thresholds. According to the legislative materials, the new threshold based on the ‘value of consideration’ shall particularly prevent monopolisation in the field of companies from the digital economy. The legislative rationale behind the new provision is to make acquisitions of companies with low turnovers for which a high purchase price is paid (e.g., due to the value of data collected by such company) subject to merger control rules.\textsuperscript{25} A comparable transaction value threshold has also been introduced in Germany (with a transaction value of €400 million; see the Germany chapter) with the Austrian provision closely following the German one. Both the Austrian and the German transaction value thresholds in particular 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.\textsuperscript{26}

According to Section 9(4) KartG, concentrations that do not meet the turnover thresholds (set out in Section III.iii) 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 that will require clarification by the case law (in particular the terms ‘value of consideration’ and

\begin{itemize}
\item[\textsuperscript{22}] Section 9(1) KartG.
\item[\textsuperscript{23}] Section 22 Nos. 2 and 3 KartG.
\item[\textsuperscript{24}] Section 9(2) KartG.
\item[\textsuperscript{25}] ErlRV 1522 BlgNR 25. GP 3.
\item[\textsuperscript{26}] Commission, decision dated 3 October 2014, Case COMP/M.7217, Paragraphs 9–12.
\end{itemize}
significance of domestic activities’). To assist undertakings with filing requirements, in 2018 the FCA and the FCO published a draft of a joint guidance paper on the application of the new transaction value threshold (Guidance).27

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, the liabilities of the target company and the seller that are assumed by the buyer also form part of the value of consideration.28 In the view of the FCA and the FCO, the inclusion of liabilities, however, only applies for interest-bearing liabilities.29 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.30

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 users’ or ‘unique visits’ in the digital economy).31 According to the Guidance, the Austrian turnover may also be used as a benchmark.32

vi Media concentrations

A concentration qualifies as media concentration33 if:

a at least two undertakings concerned can be qualified as:

• media undertakings34 or media service companies;35
• media support undertakings (i.e., publishers, printing houses, undertakings that procure advertising orders, undertakings that procure the distribution of media on a large scale, film distributors);36 or

---

28 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). 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.
29 See Guidance, Paragraph 50 et seq.
31 ErlRV 1522 BlgNR 25, GP 3.
32 See Guidance, Paragraph 77 et seq.
33 Section 8(1) and 8(3) KartG.
34 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 the case of an electronic medium, its broadcast, accessibility or dissemination.
35 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.
36 Section 8(2) KartG.
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

One undertaking concerned can be qualified as a 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 Section III.iii) also apply to media concentrations with the difference that the turnovers of media undertakings and media service companies are multiplied by 200 and the turnovers of media support undertakings are multiplied by 20 for calculating the ‘combined’ (worldwide and domestic) turnover.37

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 met38 (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).39

**vii Consequences for completion without merger clearance**

In addition to fines, the main legal consequence for infringing the obligation of not implementing a merger without prior clearance is that the agreement implementing the concentration is invalid. Although there is no specific case law on whether a subsequent notification may cure such invalidity, it is common practice to also file for merger clearance in cases where a filing obligation initially has been ignored. According to the unanimous opinion expressed in legal writing, an agreement implementing a concentration prior to the expiry 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.40

Furthermore, the Cartel Court may:

a order measures to terminate the implementation of an unlawful concentration (only if clearance has not been obtained subsequently);41

b declare that a concentration was implemented contrary to the standstill obligation (if clearance has subsequently been obtained).42

---

37 Section 9(3) KartG in conjunction with Section 9(1) Nos. 1 and 2 and 9(2) No. 2 KartG.
38 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 BWB/Z-3915); Reidlinger/Hartung, Das österreichische Kartellrecht (2014), page 173 et seq.; Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Vor Section 7 KartG Paragraph 41.
39 Section 13 KartG.
40 Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Section 17 KartG Paragraph 31.
41 Section 26 KartG.
42 Section 28 KartG; this requires a legitimate interest of the party requesting the declaration.
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.\textsuperscript{43}

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).\textsuperscript{44}

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).

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.\textsuperscript{45} However, notifications must be submitted before the implementation of the transaction, as transactions subject to merger control must not be implemented before merger clearance (standstill obligation).

Every concerned undertaking is entitled to submit a merger notification to the FCA\textsuperscript{46} (i.e., not only the acquirer but also the target undertaking\textsuperscript{47} and (based on the case law) even the seller).\textsuperscript{48} There are no specific form requirements for merger filings with the exception that the notification has to be executed in four copies and has to include the information pursuant to Section 10(1) KartG.\textsuperscript{49} 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.\textsuperscript{50} 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.

\textsuperscript{43} Section 26 KartG.

\textsuperscript{44} See Section 37b No. 1 KartG.

\textsuperscript{45} OGH 23 June 1997, 16 Ok 4/97.

\textsuperscript{46} Section 10(1) first sentence KartG.

\textsuperscript{47} OGH 12 October 2016, 16 Ok 9/16h.

\textsuperscript{48} See OGH 23 June 1997, 16 Ok 6, 7, 8/97; Cartel Court 24 November 2008, 26 Kr 10/08, 26 Kr 11/08. Similarly, Hoffer,\textit{ Kartellgesetz} (2007), Section 10 page 158 et seq. and Reidlinger/Hartung,\textit{ Das österreichische Kartellrecht} (2014), page 191 hold the view that the seller is not entitled to directly make a merger filing.

\textsuperscript{49} The notification must, in particular, include (1) the corporate structure of the undertakings concerned and its connected undertakings, (2) their turnover in the previous financial year, (3) the market shares of the undertakings concerned in each relevant market, (4) information on the general market conditions, and (5) for a media concentration, information on all factors that may have negative effects on media plurality or diversity. In addition, a notification shall include information on all factors that may give rise to the creation or strengthening of a dominant market position.

\textsuperscript{50} See footnote 6.
Initial four-week (Phase I) review

The initial four-week review period will commence on the day the notification is received by the FCA provided that the notifying party has also paid the merger filing fee (currently €3,500)\(^{51}\) and the merger filing fee has been credited to the FCA’s account.\(^{52}\) Upon receipt of the filing fee, 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.\(^{53}\) This publication triggers a two-week period allowing interested third parties to provide comments to the Official Parties with respect to the proposed transaction.\(^{54}\) However, under Austrian merger control rules, third parties are not considered parties to the proceedings and do not have access to the file.

Unlike in many other countries, the Austrian merger control system does not have a ‘stop-the-clock’ mechanism if the Official Parties request additional information\(^{55}\) 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.\(^{56}\)

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.\(^{57}\)

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:

- expiry of the two-week period allowing an interested third party to provide comments with respect to the notified transaction;

\(^{51}\) Section 10a(1) Austrian Competition Act (WettbG). In the KaWeRÄG 2017, the filing fee for notifications made as of 25 April 2017 has been increased to €3,500 (from €1,500).

\(^{52}\) See Section 10a(2) WettbG and www.bwb.gv.at/en/merger_control/ (last accessed 11 May 2020).

\(^{53}\) Section 10(3) No. 2 KartG in conjunction with Section 10b WettbG.

\(^{54}\) Section 10(4) KartG.

\(^{55}\) If the Official Parties hold the view that they require further information for the assessment of a notified concentration and such information is not provided to them in time to complete the assessment within the initial review period, they may request an in-depth review of the notified concentration (see www.bwb.gv.at/recht_publikationen/standpunkte/mangelhaftevollstaendige_ameldung_eines_zusammenschlus/ (last accessed 11 May 2020)). If a merger notification does not contain the information required pursuant to Section 10(1) and 10(2) for a media concentration) KartG, the presiding judge of the Cartel Court may order ex officio or upon request by an Official Party in the application for in-depth review (within one month) the notifying party to supplement the merger notification. If the notifying party does not comply with such order, the merger notification can be rejected. Furthermore, a request for supplementing the merger notification from the Cartel Court will stop-the-clock until the supplemented merger notification has been received (see Section 43 KartG).

\(^{56}\) Section 11(1a) KartG. Such extension has been requested by the notifying parties, for example, in the following cases: BWB/Z-4651, BWB/Z-4588 and BWB/Z-4428; see ‘Phase I cases from 2019 subject to commitments’ table in Section II.i.

\(^{57}\) Section 11(4) KartG.
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 for the required expedited clearance (e.g., in the case of financial difficulties of the target company requiring a quick completion or refinancing; however, such financial distress is generally not pertinent during the review itself).^58

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.^59

**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 of receipt of the (first) request. If requested by the notifying party, this review period can be extended to six months.^60 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^61 (with the termination decision effecting a clearance of the transaction).^62

The Cartel Court may adopt a clearance decision subject to commitments if the transaction otherwise would not fulfil the clearance requirements.^63 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.^64

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.^65

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.^66

---


^59 Section 17(2) second sentence first alternative KartG.

^60 Section 14(1) second sentence KartG.

^61 Section 14(1) third sentence KartG.

^62 Section 17(1) third case KartG.

^63 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).

^64 Section 17(2) first case KartG.

^65 Section 16 KartG.

^66 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). In addition, the structural commitments (divestment of the operational part of the target company Lekkerland AG in Austria) agreed by the parties on
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).67

A final decision of the Cartel Court can be appealed with the OGH. The deadline for lodging an appeal is four weeks.68 The OGH has to render its decision within two months of receipt of the files from the Cartel Court.69 If the matter is referred back to the Cartel Court, it is likely that the Cartel Court will have another five months to adopt a new decision.70 Particularly in the 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 test, 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.71

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.72 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.73

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 will often 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.

The KartG contains rebuttable presumptions of (single or collective) dominance if certain market share thresholds are exceeded.74

---

21 October 2019 in Case BWB/Z-4588 (REWE-ZENTRALFINANZ eG/Lekkerland AG & Co KG/ Lekkerland AG) led to a de facto abandonment of the Austrian part of the transaction in Phase I (see also footnote 2 in ‘Phase I cases from 2019 subject to commitments’ table in Section II.ii).

67 Section 12(1) No. 1 KartG; see also footnote 55 on the treatment of merger filings that do not contain the information required by law.
68 Section 49(2) KartG.
69 Section 14(2) KartG.
70 OGH 17 December 2001, 16 Ok 9/01 (note that this decision was still made under the old Austrian Cartel Act 1988).
71 Section 13 KartG.
72 Section 4(1) KartG.
73 Section 4(1a) KartG.
74 Section 4(2) and 4(2a) KartG contain the various thresholds triggering a (rebuttable) presumption of dominance. In particular, a rebuttable presumption of (single) dominance exists if the market share of an undertaking in the relevant market exceeds 30 per cent. In these cases, the onus is on the concerned undertakings to prove that they do not hold a dominant market position.
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’. The Official Parties cooperate closely with other competition authorities, particularly with the German FCO.75 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.76 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. Pre-notification contacts can also be useful if there are any doubts regarding whether a filing is required (e.g., because a transaction lacks domestic effect or does not qualify as a concentration).

Because the initiation of an in-depth (Phase II) review leads to a change of the ‘decision-making’ body, the review process is basically restarted with the notifying party or parties and the Official Parties becoming parties of the Cartel Court proceedings. 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.

OUTLOOK AND CONCLUSIONS

As a result of the broad scope of application of the Austrian merger control regime, the number of merger control filings in Austria is increasing constantly year after year.77 Although in 2020 these numbers are expected to suffer a (slight) decrease due to reduced merger activity

75 For example, in connection with the commitments imposed in Case BWB/Z-3633 (acquisition of all shares in CIT Rail Holdings SAS by VTG Rail Assets GmbH; see the FCA Annual Report 2017, page 37, available at www.bwb.gv.at/fileadmin/user_upload/Downloads/taetigkeitsbereich/Taetigkeitsbericht_2017.pdf (last accessed 11 May 2020) and Cartel Court, 28 March 2018, 24 Kt 8/17g for more detailed information on the commitments). The same commitments were made in the German merger control proceedings before the FCO; see Bundeskartellamt, decision dated 21 March 2018, B 9–124/17.

76 According to the FCA, 26 pre-notification negotiations were held in 2019 (for 2018, see the FCA Annual Report 2018, page 42 et seq., available at www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Annual_Reports/BWB_Annual_Report_2018.pdf (last accessed 11 May 2020)). The most recent example of a case in which pre-notification discussions with the Official Parties allowed a clearance subject to commitments during Phase I was the acquisition of 71 per cent of the shares in Barracuda Holding GmbH by EVENTIM LIVE GmbH in Case BWB/Z-4651 (see footnote 1 in ‘Phase I cases from 2019 subject to commitments’ table in Section II.ii).

during the covid-19 crisis, the overall trend is likely to continue, in particular, because the new 'size of the transaction' threshold introduced by the KaWeRÄG 2017 will lead to a further increase of transactions qualifying as notifiable concentrations under Austrian merger control rules.

78 In April 2020, only 14 merger notifications were filed with the FCA (see www.bwb.gv.at/en/merger_control/2020/ (last accessed 21 May 2020)) compared with 42 merger notifications in April 2019 (see www.bwb.gv.at/en/merger_control/2019/ (last accessed 21 May 2020)).

79 According to the FCA, 15 notifications were submitted to the FCA based on the new transaction value threshold (for 2018, see the FCA Annual Report 2018, page 40, available at www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Annual_Reports/BWB_Annual_Report_2018.pdf (last accessed 11 May 2020)).
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 authority 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.\(^3\) 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.\(^4\) 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.\(^5\)

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.\(^6\) The Belgian merger

---

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 of 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 mechanism7 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

i General

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 2019, 30 final decisions were issued. Out of these final decisions, 22 were issued under the simplified procedure and eight under the non-simplified procedure. None of the notified concentrations required a Phase II investigation in 2019. It is expected that the proportion of merger proceedings following the simplified procedure will further increase as the BCA adopted, on 8 January 2020, new rules allowing the BCA prosecutors to use the simplified procedure for a number of additional categories of concentrations.

<table>
<thead>
<tr>
<th>Concentrations</th>
<th>Number of notifications</th>
<th>Number of final decisions</th>
<th>Number of non-simplified procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>59</td>
<td>61</td>
<td>29</td>
</tr>
<tr>
<td>2004</td>
<td>54</td>
<td>54</td>
<td>13</td>
</tr>
<tr>
<td>2005</td>
<td>17</td>
<td>15</td>
<td>7</td>
</tr>
<tr>
<td>2006</td>
<td>17</td>
<td>15</td>
<td>7</td>
</tr>
<tr>
<td>2007</td>
<td>20</td>
<td>20</td>
<td>1</td>
</tr>
<tr>
<td>2008</td>
<td>13</td>
<td>15</td>
<td>4</td>
</tr>
<tr>
<td>2009</td>
<td>7</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>2010</td>
<td>19</td>
<td>16</td>
<td>3</td>
</tr>
<tr>
<td>2011</td>
<td>20</td>
<td>20</td>
<td>3</td>
</tr>
<tr>
<td>2012</td>
<td>17</td>
<td>17</td>
<td>4</td>
</tr>
<tr>
<td>2013</td>
<td>25</td>
<td>23</td>
<td>2</td>
</tr>
<tr>
<td>2014</td>
<td>16</td>
<td>18</td>
<td>2</td>
</tr>
<tr>
<td>2015</td>
<td>30</td>
<td>29</td>
<td>5</td>
</tr>
<tr>
<td>2016</td>
<td>26</td>
<td>26</td>
<td>5</td>
</tr>
</tbody>
</table>

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

### ii Cases

**INEOS Oxide Limited/RWE Generation Belgium NV**

On 15 February 2019, the Competition College approved the acquisition by INEOS Oxide Limited (Ineos) of RWE Generation Belgium NV (RWE). Ineos owns an industrial site located in Zwijndrecht, where it produces chemical products on one hand, and sells and distributes electricity, steam, demineralised water and boiler water (the commodities) on the other. Other companies also operate in Zwijndrecht, among which is RWE, which operates a cogeneration plant called CHP Inesco for the production of electricity, steam, demineralised water and boiler water. RWE sells the commodities it produces to Ineos, which uses them for its own needs and sells the surplus to the other companies present in Zwijndrecht. Therefore, the Prosecutor focused the competitive analysis on the vertical effects of the concentration at hand. The Prosecutor identified five markets for four different commodities for competitive assessment: electricity, steam, demineralised water and boiler water: (1) the production and wholesale, (2) transport, (3) distribution, (4) retail supply and (5) ancillary services. For each of those product markets, the Prosecutor found that they were affected vertically, as RWE supplies electricity, steam, demineralised and boiler water to Ineos and the parties would hold 100 per cent of the market shares in those markets. The competitive analysis focused on potential non-coordinated effects, particularly client foreclosure (where the transaction was likely to foreclose upstream competitors by restricting their access to a sufficient customer base) and input foreclosure (where the transaction was likely to increase the costs of downstream competitors by restricting their access to an important input). The Prosecutor concluded that Ineos either would not have the capacity to foreclose, or would not have any incentive to do so. Regarding the electricity markets, it was noted that the regulatory obligations imposed on the parties by the Flemish Energy Regulator would limit their capacity to foreclose input. Therefore, the transaction would not significantly impede competition on the markets vertically linked to electricity, steam, demineralised water and boiler water. The Competition College followed the Prosecutor’s analysis and declared the concentration admissible.

---


© 2020 Law Business Research Ltd
In 2019, the Kinepolis saga continued. This case started over 20 years ago, when, on 17 November 1997, the BCA cleared a concentration between two cinema groups that established the Kinepolis Group. The thus-created Kinepolis would obtain a dominant position in the Belgian market, but the merger was nevertheless cleared subject to strict conditions allowing Kinepolis to internationally compete with major international cinema groups. The conditions imposed included, among other things, an obligation to obtain the BCA’s prior approval for any form of growth in the Belgian market, including not only takeovers, but also organic growth, expansions, renovations and replacements resulting in a 20 per cent increase in the capacity of the affected cinema complex. Since 1997, Kinepolis has made various attempts to have the merger commitments lifted and numerous decisions of the Brussels’ Court of Appeal and the BCA have followed. On 31 May 2017, the BCA again decided to partially lift the restriction on organic growth, subject to a two-year transition period, but left the other commitments in place. This decision was appealed by two competing cinema groups, and on 28 February 2018, the Court of Appeal found that the BCA had insufficiently justified its decision to lift the commitment and to impose a two-year transition period. The BCA adopted a new decision explaining and confirming its previous decision on 26 April 2018, but this decision was again appealed by a competitor and again annulled by the Brussels’ Court of Appeal on procedural grounds. According to the Court of Appeal, the BCA could not decide on the case twice with the same members sitting in the Competition College. On 28 January 2019, Kinepolis attempted once again to have the remaining conditions removed. On 25 March 2019, the BCA decided to lift in part the commitment preventing Kinepolis from growing organically to the extent it would concern the establishment of new cinema complexes with less than seven movie theatre halls and less than 1,125 seats. In addition, the BCA prohibited Kinepolis from establishing any new cinema complex within a 10km range of its other cinema complexes or to expand such new cinema complexes beyond the thresholds imposed without the BCA’s prior approval. The decision was again appealed. The Court of Appeal questioned the BCA’s review of the commitment preventing organic growth and lifted this commitment, but referred the case back to the BCA to determine the appropriate transition period allowing Kinepolis’ competitors to prepare for the removal of this restriction on organic growth on Kinepolis. On 11 February 2020, the BCA decided that after a transition period of 18 months (from 12 August 2021), Kinepolis will again be allowed to open new cinemas without the BCA’s prior approval. The BCA took into account the changed conditions in the market in which at least two large international cinema groups (UGC and Pathé) were now active and that all Kinepolis’ competitors could have reasonably foreseen the future removal of the condition prohibiting organic growth. This transition period was deemed to be sufficient for competitors to take measures to prepare to compete with any expansion of Kinepolis.

**Telenet Group BVBA/De Vijver Media NV**

On 13 May 2019, the BCA conditionally approved the acquisition of sole control by Telenet Group BVBA (Telenet) over De Vijver Media NV (DVM), in which the former already owned 50 per cent. The concentration was first notified to the European Commission, which decided to refer the case to the BCA at its request following Article 9 of the EU Merger Regulation in November 2018. Telenet is a Belgian cable network operator active in the provision of fixed internet, fixed telephone services and cable TV. DVM is the Belgian holding company of a group of companies active in the field of television broadcasting and related services, the sale of advertising and the production of television programmes. The loss of joint control over various links in the value chain would create a unit with Telenet having sole control over a fully vertically integrated group that would, post-transaction, comprise the production of content, TV channels and a dominant distribution platform. As Telenet would become a dominant vertically integrated group, the BCA identified a number of non-coordinated vertical effects, including the foreclosure of competing platforms and the partial foreclosure of access to Telenet’s distribution platform from competing broadcasters. To limit these concerns, Liberty Global Plc (Telenet’s parent company) offered various commitments. The first concerned the guarantee of access to DVM channels for competing TV platforms. The second addressed the ranking of channels in the Telenet platform’s digital broadcasting and programme guide. The third commitment prohibited discrimination between the distribution fees paid by competing broadcasters compared to the fees paid by Telenet’s own channels. The fourth concerned the access of channels to the platform, allowing them to advertise in a targeted way on the set-top boxes of the Telenet platform’s customers. Last, Telenet committed to guarantee non-discriminatory access to audience data for all channels distributed on the Telenet platform, whether the channels were owned or linked to Telenet, or whether they were competing channels. The BCA considered that these commitments targeted the general concern that the concentration would allow Telenet, as a dominant platform, to grant an advantage to its platform and to undertakings affiliated with its platform compared to third parties present on the platform who directly compete with Telenet as TV channels and content producers. The commitments will only expire seven years after the decision and a trustee was appointed to monitor Telenet’s compliance.

**Anders Hedin/Group Jacobs**

In its decision of 1 July 2019, the Competition College cleared the concentration between Hedin Belgien Bil AB, I A Hedin Bil AB (Anders Hedin) and J-Automotive BVBA (the Jacobs Group). Anders Hedin, the acquiring party, and the Jacobs Group operate in Belgium as authorised Daimler dealers for the Mercedes and Smart brands, including passenger cars, light commercial vehicles (LCV) and trucks. Anders Hedin carries out its activities in 13 locations, while the Jacobs Group has two branches located in Sint-Niklaas and Lokeren. The parties’ activities include the sale, repair and maintenance of bodywork and over-the-counter sale of spare parts and accessories for the three types of vehicles. Given the local market definition and the transaction’s single-brand character, the Auditor used a geographical proxy to assess the parties’ market shares on the local relevant markets. Assuming that (inter-)brand  

---

10 Decision No. BMA-2019-C/C-16 of 13 May 2019 in Case No. MEDE-C/C-19/0006, Telenet Group BVBA/De Vijver Media NV.

competition at a local level is symmetrical to the market position of the brand or brands, so that the parties' local market position will not deviate significantly from the national and provincial market shares of the brand or brands, the Auditor analysed the Mercedes' market share at the national and provincial level and compared it with the parties' total volumes. The Auditor identified three horizontally affected markets: the local brand-specific market for the maintenance and repair of (1) passenger cars, particularly at Anders Hedin in Gent and Jacobs in Lokeren, (2) LCV, particularly at Anders Hedin in Gent, Ninove and Zottegem and Jacobs in Lokeren and Sint-Niklaas, and (3) medium and heavy trucks, particularly at Anders Hedin in Gent and Ninove and Jacobs in Sint-Niklaas. In these markets, the Auditor analysed whether, in these specific areas, customers would have sufficient fallback options for repair and maintenance work post-transaction. To that end, both the position of the authorised repairers of the Mercedes brand and the position of the independent repairers were taken into account. Given the analysis of the market concentration and the effective fallback options for the parties' customers in the locations where the transaction could potentially affect competition, the Prosecutor concluded that the transaction would not give rise to any significant non-coordinated horizontal restrictive effects on competition in the relevant local catchment areas in the identified affected markets. The Competition College followed the Prosecutor's reasoning and cleared the concentration.

MIG/NAM

On 8 July 2019, the Competition College accepted that MIG Motors BVBA (MIG Motors) fully acquired NAM NV (NAM). MIG Motors is part of the NV Fleetinvest group and is active in various sites, such as Evergem, Aalter, MyCenter, Lievegem, Destelbergen and Zwijnaarde. Both parties are active in the retail sale of new and pre-owned passenger cars and LCVs from the Volkswagen, Audi and Skoda brands. This encompasses additional activities such as repair and maintenance, bodywork and sale of parts and accessories. Note that in assessing the relevant markets, the Auditor analysed the parties' activities in a separate market for bodywork, finding that body repair has a number of clearly distinct market characteristics compared to the market for maintenance and repair, including a separate infrastructure and organisation, the market-specific role of insurance companies and an essentially multi-brand approach. However, this specific product market was not considered a relevant market in this transaction. As happened in the Anders Hedin/Jacobs decision discussed above, the Auditor used a geographic proxy to approach the parties' local market shares. Based on that local approach, the effects of the transaction were assessed on the following (horizontally) affected markets: (1) the local brand-specific market for maintenance and repair of Skoda passenger cars (MIG Motors in Destelbergen and Aalter, and NAM Noord); (2) the local brand-specific market for maintenance and repair of Volkswagen passenger cars (MIG Motors in Zomergem) and (3) the local brand-specific market for maintenance and repair of Volkswagen LCV (MIG Motors in Evergem and Zomergem, and NAM Noord). The Auditor examined whether there were sufficient fallback facilities for repair and maintenance work in these areas, which would prevent non-coordinated horizontal effects. By means of its competitive analysis, the Auditor concluded that both accredited garages on the periphery of the catchment areas and independent garages in the catchment areas exerted significant competitive pressure on both the pricing and the quality of service of the parties' garages,

so that there was no risk of non-coordinated effects. As a result, the transaction would not significantly impede effective competition in the Belgian market or in a substantial part of it, and the Competition College approved it.

**Conway/Alvadis**

On 23 July 2019, the Competition College of the BCA approved the acquisition of Alvadis NV (Alvadis) by Conway – The Convenience Company Belgium NV (Conway).\(^{13}\) Conway is active in the distribution of food-to-go, tobacco products and pre-paid vouchers in Belgium, which it supplies to (large) retail chains and (smaller) independent retailers. Alvadis is mainly active in the distribution of pre-paid vouchers and the sale and lease of technologies related to payment systems. The main overlap between the parties’ activities lies in the distribution of pre-paid vouchers (telecom vouchers, payment vouchers for both online and offline transactions, and gift cards). The Prosecutor identified the relevant horizontal markets as being the Belgian market for the (1) purchase and (2) distribution of pre-paid vouchers. While the parties would have a combined market share of 35 to 40 per cent in the market for the purchase of pre-paid vouchers and 45 to 50 per cent in the market for the distribution of pre-paid vouchers, and although those markets are highly concentrated, the Prosecutor found that the transaction would not raise competition issues. Indeed, the Prosecutor set aside the risks for non-coordinated horizontal effects, taking into consideration that there are no barriers to switch from one distributor to another and that such a switch does not generate high costs. First, the Prosecutor considered that the final consumer would not have to pay a higher price for the pre-paid vouchers post-transaction, as the distributors do not have any influence on the prices, which are solely determined by the suppliers. Second, despite the parties’ high market shares, they do not have purchasing power with regard to the suppliers, which have alternative channels to sell their products. Third, both small and more important clients can easily switch to other distributors at low costs. Finally, there would still be various competitors on the post-transaction market that have a high capacity to develop easily in the markets concerned. The Prosecutor also found that as the market for the distribution of pre-paid vouchers is a non-transparent market, there would be little risk of coordinated effects. In light of the above, the Prosecutor argued that the transaction would not entail anticompetitive non-coordinated horizontal effects and the Competition College consequently declared the concentration admissible.

**AVS Group GmbH/Fero Group**

On 5 September 2019, the BCA approved the acquisition by AVS Group GmbH (AVS) of exclusive control over 3F NV, the holding company of the Fero Group (which includes Fero Signalatie NV, Signaroute SPRL, Signco BVBA, Haerens Invest NV, Admibo BVBA, Safetybloc BVBA, Moddy BVBA and Today Invest BVBA).\(^{14}\) AVS mainly sells equipment for temporary traffic signalling in Belgium, such as mobile lane separators, mobile traffic lights and temporary road markings. The Fero Group is mainly active in the provision of temporary traffic signalling services in Belgium. As AVS supplies equipment for temporary traffic signalling to providers of temporary traffic signalling services, including the Fero

---


© 2020 Law Business Research Ltd
Group, there is a vertical relation between the parties. Given the parties’ vertical relation, the Prosecutor identified the relevant markets as the Belgian market for the supply of temporary traffic signalling services and the European market for the supply of temporary traffic signalling equipment. The Prosecutor mainly assessed the non-coordinated vertical effects of the concentration, particularly the risks of (1) foreclosure of the supply of temporary traffic signalling equipment to competing providers of temporary traffic signalling services, and (2) foreclosure of suppliers of traffic signalling services to equipment suppliers. First, taking into account the parties’ low post-transaction market shares in the market for the supply of temporary traffic signalling equipment and the sufficient alternatives for other suppliers of temporary traffic signalling services, the Prosecutor concluded that parties would not be able to foreclose competitors. Second, the Prosecutor analysed whether AVS’s competitors would be foreclosed from the market if the Fero Group were to decide after the transaction to purchase only temporary traffic signalling equipment from AVS. Even if the Fero Group has a post-transaction market share of 35 to 45 per cent in the market for temporary traffic signalling services, this market power is relative because the market for the supply of temporary traffic signalling equipment is European and suppliers are active throughout Europe, supplying this equipment to providers active within Europe. In other words, AVS’s competitors would in any event not be able to be foreclosed from the market since they would still be able to supply temporary traffic signalling equipment to other market players in Europe. The Prosecutor did not identify risks of coordinated effects and concluded that the concentration would not significantly impede competition in the Belgian market, and the Competition College sided with the Auditor.

**Boulanger Group SAS and High Tech Multicanal Group SA/Krëfel NV, Assureka SA, Hifi International SA and Tones BVBA**

On 12 November 2019, the BCA’s Competition College authorised the High Tech Multicanal Group SA (HTM) and the Boulanger Group SAS (Boulanger) to acquire Krëfel NV (Krëfel), together with its two subsidiaries Hifi International SA and Tones BVBA, and Assureka SA.\(^{15}\) HTM is the holding company that oversees Boulanger and the Electro Dépôt Group (Electro Dépôt). Electro Dépôt operates ‘hard discount’ retail stores for household appliances as well as a website. Krëfel is a Belgian chain of retail stores for household appliances and fitted kitchens and also operates a website. The Prosecutor distinguished between the market for the supply of household appliances and the market for the retail sale of household appliances. Within the market for the retail sale of household appliances, three relevant markets were identified: (1) the retail sale of ‘white’ goods,\(^{16}\) (2) the retail sale of ‘grey’ goods\(^{17}\) and (3) the retail sale of ‘brown’ goods.\(^{18}\) An important contention point when defining the relevant markets concerned whether to include online sales in the product market. While certain elements such as the development of the multi-channel model in the sector and the relative comparability of the offline and online offer could indicate a single market, the Prosecutor...
considered it premature to include online sales in the market for the retail sale of household appliances. Indeed, the penetration of online sales remains relatively low in Belgium. Their geographical distribution is not yet homogenous and the pricing policy of pure online players is not comparable to that of physical stores. The Prosecutor analysed the three product markets within the market for the retail sale of household appliances both on a national and local level. On a local level, the Prosecutor identified one affected market, namely the market for the retail sale of white household appliances in the catchment area around Kréfel Waremme. Although online sales were not considered as part of the relevant markets at hand, the Prosecutor, in its competitive analysis, assessed whether online sales exert sufficient competitive pressure to prevent potential non-coordinated effects. The Competition College considered that the analysis of a local market can be decisive for its decision only if, in a particular local market, it is sufficiently large to constitute a substantial part of the Belgian market. Because the Prosecutor’s competitive analysis had not identified any elements that could prevent a clearance decision, there was no need to rule on the question of whether the local market in the area around Kréfel Waremme constitutes a substantial part of the Belgian market within the meaning of Article IV.9 of the Code of Economic Law. The Competition College therefore authorised the concentration.

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.

19 The Prosecutor also analysed the parties’ proximity, their post-merger pricing policy and the existence of sufficient local competition.
20 Article IV.7, Section 1 of the Code of Economic Law.
21 Article IV.11 Code of Economic Law.
22 Article IV.8 Code of Economic Law.
23 Article IV.10, Section 4 of the Code of Economic Law.
24 Article IV.66, Section 2, 2 of the Code of Economic Law.
25 The Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 recommend contacting the College of Competition Prosecutors at least two weeks before notification (see Section III.i). These Rules also remain applicable.
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 email, 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,26 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.27 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,28 otherwise the notification cannot have any effect.29 In general, the notification obligation falls on the party acquiring control through the concentration.30 In the case of a merger between two formerly independent companies, the obligation falls on both parties.31 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.32

The notification must be made in Dutch or in French.33 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. 34 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. 35

As is the case in European merger control, the parties must suspend the implementation of the merger until it has been cleared. 36 Failure to respect this standstill obligation can result in fines of up to 10 per cent of the notifying parties’ annual turnover. 37 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. 38

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. 39 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. 40

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

### 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. 41 The Rules were complemented by additional rules on 8 January 2020 to extend the scope of the simplified procedure.

---

34 Article 3, Section 4 of the Royal Decree on the notification of concentrations.
35 Article 3, Section 2 of the Royal Decree on the notification of concentrations.
36 Article IV.10, Section 4 Code of Economic Law.
37 Article IV.79, Section 1 and Article IV.80 Code of Economic Law.
38 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.
40 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. The same fines applied until the modification of Book IV of the Code of Economic Law in April 2019 for the failure to notify a merger, but this part of the legal provision was omitted by mistake in the new Book IV. It is expected that this mistake will be corrected by a legislative measure.
41 Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations on 8 June 2007.
The simplified procedure is highly practical, and today the vast majority (up to 80 per cent) of notifications are made using this procedure.

The simplified procedure has two essential characteristics: first, the Prosecutor examines the merger and decides whether to authorise it (and not the Competition College); second, the simplified procedure is very short, as the Prosecutor has to make a final decision within 15 working days of having received the notification (unless a request for information is sent to the parties, in which case the deadline can be extended until the information has been received according to the stop-the-clock mechanism introduced in 2019). 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:

1. 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;
2. 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;
3. 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
4. a party acquires sole control over an undertaking over which it already exercises joint control.

On 8 January 2020, the following three categories of mergers, for which the simplified procedure can be used, were added:

1. the combined market share of the parties to the proposed merger is below 50 per cent and the increase in the Herfindahl–Hirschman Index is less than 150;
2. the combined market share of the parties to the proposed merger is below 50 per cent and the increment in the parties’ market share resulting from the proposed merger is less than 2 per cent; and

42 Article IV.69, Section 6 and Article IV.40, Section 1 Code of Economic Law.
43 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.
44 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.
In view of all the circumstances, the merger does not raise any significant competition concern and (1) where the parties are active in the same markets, the parties’ combined market share does not exceed 40 per cent in any market; or (2) where the parties are active in vertically affected markets, the parties’ market share in either the relevant downstream or upstream market is less than 40 per cent.

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 be rejected and a full notification under the regular procedure must be made. 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.

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.

---

45 Article IV.70, Section 6 Code of Economic Law.
46 Article IV.70, Section 3 Code of Economic Law. This criterion was widely interpreted in case law. In the Belgian Airports/Brussels South Charleroi Airport case, the Prosecutor refused the application of the simplified procedure merely because a third party voiced an objection against the concentration (Case No. 2009-C/C-27 of 4 November 2009, Belgian Official Gazette 22 January 2010).
47 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’).
48 Article IV.70, Section 6 Code of Economic Law.
49 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.
50 Article IV.70, Sections 3 and 4 Code of Economic Law.
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. 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. 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. From the moment the Prosecutor’s decision proposal is submitted, the parties must be given full access to the file, except for confidential submissions from third parties. Third parties, on the other hand, only have a right of access to the file in limited circumstances. The Competition College must decide whether to approve the merger within 40 working days of 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

---

51 Article IV.64, Section 1 and 2 Code of Economic Law. However, the deadline can also be extended in the regular procedure, following the use of the stop-the-clock mechanism introduced in 2019; Article IV.40, Section 1 Code of Economic Law.
52 Article IV.64, Section 3 Code of Economic Law.
53 Article IV.65, Sections 3 and 4 Code of Economic Law.
54 Article IV.66, Section 3 Code of Economic Law. The deadline can also be extended in the regular procedure following the use of the stop-the-clock mechanism introduced in 2019; Article IV.40, Section 1 Code of Economic Law.
55 Article IV.66, Section 3, 1 and 2 Code of Economic Law.
56 Article IV.67, Section 1 Code of Economic Law.
57 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.
58 Article IV.68, Sections 1 and 2 Code of Economic Law.
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 *Mediabuis* 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 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

---

59 Article IV.68, Section 4 and Article IV.65 Code of Economic Law.
60 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. The deadline can also be extended if the stop-the-clock mechanism is used; Article IV.40, Section 1 Code of Economic Law.
61 Article IV.68, Section 1 and Article IV.65 Code of Economic Law.
64 Article IV.75, Sections 1 and 2 Code of Economic Law.
65 Article 74, Section 1 Code of Economic Law.
66 Article IV.90, Section 1 Code of Economic Law.
67 Article IV.90, Sections 4 and 5 Code of Economic Law.
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, the deadline imposed on the prosecutors to issue decisions in simplified merger filings was 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 the 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 2019, the number of concentrations filed under the regular merger control procedure remained as high as in 2017 and 2018. 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.

---

68 Article IV.90, Section 7 Code of Economic Law.
69 Article IV.90, Section 2 Code of Economic Law. This was confirmed in the decision of the Brussels Court of Appeal of 19 November 2014 in Case No. 2013/MR/30, De Persgroep NV/Belgian Competition Authority and Corelio NV and Concentra NV.
70 Article IV.90, Section 3 Code of Economic Law.
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, 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 structural remedies have also been imposed (e.g., in the Delhaize/Ahold, Kinepolis/Utopolis and 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, it saw no reason to raise these thresholds and after a stakeholder consultation decided not to modify the thresholds for the time being. However, as noted in Section I, a new Act was adopted on 25 April 2019 amending Belgian competition law on various other matters. 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 must make 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 make 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. On the other hand, the burden on undertakings notifying a concentration and the time required to obtain a decision may decrease if the intended concentration falls within the scope of the additional categories of concentrations that qualify for a simplified procedure as of 8 January 2020. Finally, merger decisions are expected to be delayed following the covid-19 crisis. In a press release on 19 March 2020, the BCA invited companies to delay any concentration project that is not urgent.
Chapter 9

BRAZIL

Mariana Villela and Leonardo Maniglia Duarte

I INTRODUCTION

i The Brazilian competition authority and the pre-merger control system

The Brazilian Competition Act (Law 12,529/2011) is the main statute governing merger control in Brazil. The Competition Act establishes a pre-merger review system, whereby parties to transactions that trigger a merger notification to the Brazilian Competition Authority (CADE) need to obtain antitrust clearance before closing them. For these transactions, CADE’s clearance is a legal condition precedent to closing.

CADE is comprised of the following entities:

a the Superintendent-General Office (SG): headed by CADE’s Superintendent-General, this is the entity in charge of reviewing all transactions submitted for merger control and clearing those that can be approved without CADE’s intervention;

b CADE’s Administrative Tribunal: composed of six commissioners and a president, this is the decision-making body in charge of ultimately deciding the cases that are challenged by the SG and the appeals presented by interested third parties against the SG’s decision to clear transactions; and

c the Department of Economic Studies: headed by CADE’s Chief Economist, this is a consulting body responsible for rendering non-binding economic opinions and preparing economic studies at the request of the Superintendent-General and the commissioners of the Administrative Tribunal.

ii When pre-merger notification is required

Jurisdictional nexus

Under the Competition Act, CADE has jurisdiction to analyse and decide transactions carried out in Brazil or abroad, provided that they are able to produce effects in the Brazilian territory. The approach usually adopted to define whether a transaction carried out abroad has the potential of producing effects in Brazil is to check if the target company (or target business, depending on the structure of the transaction) has a subsidiary in Brazil or if it has revenues originating in Brazil. Under existing case law, even if sales are merely occasional, they could be enough for the transaction to meet the effects criteria.
Transactions that qualify as concentration acts

If a transaction has jurisdictional nexus to Brazil, it is necessary to determine whether the transaction qualifies as a ‘concentration act’ under the Competition Act, requiring notification if the turnover thresholds are met. The Competition Act provides that the following transactions qualify as concentration acts for merger control purposes:

- the amalgamation of two or more previously independent companies;
- the direct or indirect acquisition of control or minority stakes in a company or group of companies, including the purchase or exchange of shares, quotas, bonds or securities convertible into shares, or tangible or intangible assets, by means of contractual instruments or any other mean or form;\(^4\)
- the merger of one company into another company; and
- the execution of an associative agreement, consortium or joint venture among two or more companies.

In Regulation No. 17/2016, CADE has defined the following criteria to qualify agreements as ‘associative agreements’ that would trigger a notification requirement under the Competition Act:

- agreements with a duration of two years or more, including possible renovations;
- the establishment of a joint enterprise between the parties with the purpose of engaging in an economic activity;
- the sharing of risk and profits between the parties; and
- the parties compete in the relevant market affected by the agreement.

The Competition Act provides that associative agreements, consortia or joint ventures are not considered by the Competition Act as concentration acts requiring notification if their purpose is to participate in direct or indirect public administration tenders or in contracts arising from them.

Turnover thresholds

If a transaction has jurisdictional nexus to Brazil and qualifies as a concentration act, it will trigger a merger control requirement in Brazil if its parties and respective economic groups meet the dual turnover thresholds provided by the Competition Act:

- one company or group of companies registered gross sales revenues or total volume of business equal to or greater than 750 million reais, in Brazil, in the year preceding the transaction; and
- at least another company or group of companies involved in the transaction registered gross sales revenues or total volume of business equal to or higher than 75 million reais, in Brazil, in the year preceding the transaction.

---

3 Article 90 of the Competition Act.
4 CADE Regulation No. 02/2012 (Articles 9 to 11) sets out de minimis rules to exempt from notification certain transactions involving the acquisition of a minority interest of capital stock or voting shares, by not considering them as concentration acts even if the notification thresholds are met.
5 CADE has not yet provided any indication on how it will interpret the meaning of ‘volume of business’ and how it should be calculated by applicants. In practice, CADE has been making reference solely to the revenue threshold and not to volume of business.

© 2020 Law Business Research Ltd
In this assessment, it is necessary to take into account not only the revenues registered by the companies directly involved in the transaction, but also the revenues registered by all companies that could be considered part of their respective economic groups, as per the definition of economic group provided by CADE’s regulations.6

Under the Competition Act, CADE may request the submission of any transactions that do not meet the thresholds for merger control review within one year of closing. This risk is more significant in transactions that result in significant horizontal overlaps or vertical integration. CADE has used this power in exceptional circumstances only.

iii New statutes, regulations and guidelines

In 2019, CADE issued a new regulation governing the procedures to investigate transactions that may have met the turnover thresholds, but have not been submitted for merger control approval, as well as transactions that have not met the turnover thresholds, but may raise competition concerns and be required to be submitted for approval within one year of closing.

In March 2020, CADE approved an amendment to its internal regulations to provide for the possibility of holding live public virtual judgment sessions while social distancing restrictions are imposed by local authorities as a result of the covid-19 pandemic to enable CADE’s Tribunal to continue to decide on cases.

In April 2020, the Brazilian Congress approved a bill of law exempting cooperation agreements such as joint ventures, associative agreements and consortiums between competitors from mandatory notification to CADE where merger control requirements may provide an obstacle for collaboration that may be necessary for preventing and combating the covid-19 pandemic and its effects in the economy. This exemption applies to agreements executed between 20 March 2020 and 30 October 2020 (or while the state of public emergency due to the pandemic lasts). Nevertheless, CADE may require the post-closing submission of these transactions for merger control review and impose remedies or even order their unwinding if it concludes that they raised anticompetitive concerns that could not be justified by the efforts to prevent and fight the covid-19 pandemic. At the time of writing, this bill of law had not yet been sanctioned by the President and, therefore, is not yet in effect.

II YEAR IN REVIEW

2019 was a challenging year for CADE. For almost three months, CADE’s Administrative Tribunal did not have the minimum quorum to decide cases because the Federal Senate did not approve the individuals nominated by the President to take office as CADE’s commissioners. Therefore, during this period, all legal deadlines were suspended. Transactions approved by

6 CADE Regulation No. 02/2012 (Article 4) states that the following entities will be considered as part of the same economic group for purposes of calculating the turnover thresholds: (1) companies that are under common control; and (2) companies in which any of the companies described in (1) have a direct or indirect participation of 20 per cent or more of the capital stock or voting shares. In the case of investment funds, the following entities will be considered part of the same economic group: (1) quota holders that hold a direct or indirect interest of 50 per cent or more of the quotas in the fund involved in the transaction (and their respective economic groups); and (2) companies controlled by the fund involved in the transaction and in which such fund holds a direct or indirect interest of 20 per cent or more of the capital stock or voting shares.

© 2020 Law Business Research Ltd
the Superintendent-General could not be closed and transactions pending decision from CADE’s Tribunal could not be decided. The quorum was re-established in October 2018, and CADE was able to resume its normal activities.

Despite these difficulties, CADE continued to impress with its fast review of merger notifications, with an average review time for cases eligible for the fast-track procedure of approximately 17 days in 2019. Transactions reviewed under the regular procedure were cleared within an average of approximately 90 days.7

In 2019, 442 concentration acts were submitted to CADE for approval and the authority decided on 433 cases. The majority (406) were approved unconditionally, and only five were approved subject to remedies. The other 22 transactions were either withdrawn by the parties or declined to be reviewed by CADE for not triggering a merger filing requirement under the Competition Act.8

Following the trends of previous years, CADE continued to subject merger cases to substantial scrutiny and opposition, even blocking high-profile mergers. Competition assessment has become more complex and sophisticated as a result of CADE’s accumulated experience and knowledge and of the increasing challenges and contributions by third parties.

CADE reviewed some high-profile merger cases in 2019, including transactions approved subject to sophisticated remedy solutions (including structural and behavioural remedies), most of which resulted from merger control agreements negotiated between the parties and CADE. Some of the main cases decided in 2019 and in the early months of 2020 are briefly described below.

One of the most important cases decided in 2019 was the acquisition of 21st Century Fox by The Walt Disney Company, which was initially approved subject to structural remedies in February 2019. The approval of the transaction was conditioned to the divestment of the Fox Sports channels, among other measures in a merger control agreement negotiated by the parties. CADE concluded that the transaction raised competition concerns in the market of cable sports channels, which included ESPN (The Walt Disney Company) and Fox Sports (21st Century Fox). In CADE’s view, the transaction would substantially increase concentration in the cable sports channel market in Brazil and could have the potential to decrease the quality and diversity of available sports content, as well as increasing pricing for consumers.

In November 2019, CADE decided that the acquisition of 21st Century Fox by The Walt Disney Company would be reviewed due to the non-compliance with the merger control agreement due to the lack of viable potential buyers. In April 2020, CADE reviewed the merger control agreement to allow Disney’s acquisition of the Fox Sports channel, replacing the structural remedies with behavioural ones to prevent anticompetitive discriminatory practices and secure diversity in the sports content available to Brazilian consumers.

In April 2019, CADE approved the merger between Bemis and Amcor in the international and national market for plastic containers. Although the merger created a virtual monopoly in the cold-form blister foil market, CADE’s Administrative Tribunal cleared the transaction without restrictions. According to CADE, Amcor’s market share had been steadily decreasing over recent years, and there was evidence that new companies were entering the national market and that imports were feasible. In April 2019, CADE also

8 id.
approved the joint venture formed by GSK and Pfizer with conditions. In CADE’s view, the joint venture would result in significant concentration in the national market for simple antacids that could raise competitive concerns.

In May 2019, CADE approved Notre Dame Intermédica’s acquisition of Mediplan with restrictions. CADE identified possible risks to competition resulting from the verticalisation of healthcare operators with their own hospitals. The parties negotiated a merger control agreement with behavioural remedies to prevent discriminatory practices against competing healthcare operators or hospitals.

In December 2019, CADE’s Administrative Tribunal approved the transaction between Prosegur and Transvip with remedies. CADE demonstrated concerns with the movement of acquisitions in the securities transportation market in recent years that, in its view, resulted in an increase in concentration and a non-organic growth pattern for companies in this sector. To mitigate these concerns, the parties negotiated a merger control agreement in which Prosegur committed to refrain from new acquisitions in the sector in Brazil for a three-year period.

In December 2019, CADE imposed a fine on IBM and Red Hat for closing their acquisition transaction before CADE’s Tribunal had rendered its final decision. IBM and Red Hat filed the transaction with CADE in April 2019. The Superintendent-General decided on the unconditional approval of the merger in June 2019; however, days later, the Administrative Tribunal called the case for second review. Nevertheless, the Tribunal’s activities were suspended due to the inability to meet the minimum quorum to decide cases. In July 2019, the case was still pending a final decision by the Tribunal, the companies informed CADE that the transaction had closed. Because the transaction was closed before CADE’s clearance, CADE imposed gun-jumping penalties on the parties in the amount of approximately 57 million reais. Because this was a global transaction that had already been cleared in other jurisdictions, it is assumed that the parties decided to run the risk of being penalised for gun-jumping rather than delay the closing of the deal.

In February 2020, CADE’s Tribunal approved the acquisition of TecnoGuarda by Brink’s in the securities transportation market. The parties to the transaction also negotiated a merger control agreement similar to that executed in December 2019 in the Prosegur/Transvip case, in which Brink’s also committed to refrain from new acquisitions in the sector in Brazil for a three-year period.

While 2019 was a challenging year for CADE due to the inability to meet the minimum quorum, which caused the suspension of the Tribunal’s activities, these difficulties seem unimportant in view of the new challenges presented by the covid-19 outbreak in 2020. Despite the social distancing restrictions, CADE has been able to continue its activities and the review of merger control cases at a pace surprisingly similar to normal times. CADE’s officers continue to work in home offices, holding meetings using video and audio conferencing. CADE’s Tribunal holds live public virtual judgment sessions enabling it to continue to decide on cases.

In May 2020, CADE held an extraordinary judgment session to authorise a collaboration agreement between competitors in the beverage and food products sectors. The agreement was executed between Ambev (Anheuser-Busch InBev), BRF, Aurora, Coca-Cola, Concentration Act No. 08700.001206/2019-90.

Concentration Act No. 08700.005705/2018-75.

Concentration Act No. 08700.003244/2019-87.
Heineken, Mondelez, Nestlé and PepsiCo for the joint distribution of their products during the pandemic. The purpose of the agreement is to mitigate the effects of the crisis created by the covid-19 pandemic, which affected the supply of products to points of sale, particularly in more remote regions of Brazil. The agreement will only be in force during the crisis. CADE concluded that there were reasonable economic reasons to justify the agreement and that the parties had adopted precautions to prevent possible antitrust risks.

III THE MERGER CONTROL REGIME

i Timing of submission and gun-jumping
CADE’s regulations provide that transactions should be notified, preferably after the signing of the formal agreement that binds the parties and, in all cases, before any act related to the transaction is implemented.12 There is no deadline for filing notifications, but the parties cannot close a transaction before CADE’s final approval.

CADE’s regulations also provide that transactions involving tender offers for the acquisition of shares that require notification may be submitted for approval from the date of their announcement, and do not depend on CADE’s approval for completion. Nevertheless, the acquirer cannot exercise the political rights related to the interest acquired as a result of the tender offer until final approval by CADE.13 The same rules apply to hostile transactions involving tender offers, which must be submitted for approval before closing.

If the parties take any action considered a step or a form of implementation of the transaction before CADE’s approval (gun-jumping), they may be subject to a fine ranging from 60 thousand reais to 60 million reais, and all acts undertaken for the implementation or closing of the transaction may be declared void. In addition, CADE may initiate an administrative proceeding to investigate possible pre-merger coordination or any other anticompetitive behaviour possibly derived from the transaction.

CADE’s regulations require that the parties maintain their unchanged physical structures and competitive conditions until CADE renders a final decision, and states that no transfer of assets, no type of influence of one party over another and no exchange of competitively sensitive information that is not strictly necessary for the execution of the agreement that binds the parties will be allowed.14

ii Merger notification forms and review procedures
CADE’s regulations provide for two types of notification forms and review procedures: a long form for cases not eligible for the fast-track procedure and a short form for cases eligible for the fast-track procedure.15

The short form requires the following information and documents:

a brief description of the transaction;

b information on the notifying parties and their economic groups, including the gross revenues obtained by the parties with respect to each of their economic activities;

c information regarding the transaction;

---

12 Article 147 of CADE Regulation No. 20/2017.
13 Article 148 of CADE Regulation No. 20/2017. Under certain circumstances, CADE may authorise the exercise of such political rights if it is necessary to preserve the full value of the investment.
14 Article 147, Paragraph 2 of CADE Regulation No. 20/2017.
15 CADE Regulation No. 2/2012.
documentation encompassing all agreements related to the transaction and a list of all other documents that have been produced as a result of the transaction;

information on the relevant markets affected by the transaction; and

information on the supply structure of the market in cases that may result in horizontal overlaps or vertical integration.

The long form requires more detailed and in-depth information in addition to the information required by the short form for markets with horizontal overlaps in which the parties will have combined market shares of 20 per cent or more, as well as for vertically related markets in which the parties will hold a market share of 30 per cent or more, such as:

information on the relevant market, including distribution channels, conditions of entry and rivalry in the relevant markets, intellectual property, infrastructure, brand loyalty, estimate of market production and pricing strategy;

information on demand structure;

analysis of monopsony power;

information on all overlapping products and identification and contact details for competitors, customers and suppliers in all overlapping product areas;

information on customer preferences; and

analysis of coordinated power.

The long form also requires the provision of internal company documents, such as market assessment studies, minutes of relevant body and committee meetings, ordinary course of business strategy and marketing reports and a business plan.

The parties may request confidential treatment for confidential documents and information, provided that they are not available to the public by other means, such as documents:

relating to the transaction;

containing details of the companies’ economic and financial situation and revenues;

containing company secrets;

encompassing production process and industrial secrets, particularly in terms of the manufacturing processes and formulas for the manufacture of products;

containing information on customers and suppliers; and

relating to the date and value of the transaction and the method of payment.

CADE’s horizontal mergers guidelines provide guidance to CADE’s officers and companies on the best competition practices and the review procedures that may be adopted by CADE in the assessment of merger transactions, particularly horizontal mergers. These guidelines consolidate CADE’s best practices and case law on merger review and contain details on the following: analysis; information sources; relevant market; concentration levels; unilateral effects; buying power; coordinated effects; efficiency gains; complementary and alternative methods; merger-related judicial recovery proceedings (failing firm situations); and non-competition provisions.
iii Statutory time periods

The Competition Act sets out statutory time periods for the review of transactions and a review period of 240 days from the date of notification for the issuance of a final administrative decision. This 240-day term may be extended by up to 90 days if the transactions require deeper analysis (maximum review period of up to 330 days). These periods of time cannot be suspended by the competition authorities or by the parties.\(^\text{16}\)

CADE’s regulations establish that if it does not render a final decision within the maximum review period set in the Competition Act, the transaction will be automatically approved.\(^\text{17}\) The timing of a decision will vary depending on whether a transaction is considered simple, non-simple or complex. Under existing regulations, certain transactions have limited potential to harm or restrict competition and, therefore, may be considered simple and may be eligible for a fast-track or summary procedure.

Transactions that are considered simple (i.e., in which the parties have combined market shares below 20 per cent in overlapping markets and market shares below 30 per cent in vertically related markets) are eligible for fast track, whereas transactions that are not considered simple require a longer notification form and will follow the ordinary procedure. The decision on whether a transaction will follow the fast-track procedure will be made on a discretionary basis by CADE. Certain non-simple transactions may be challenged by the SG and, if so, they will be ultimately decided by CADE’s Tribunal.\(^\text{18}\)

Although the regulations do not provide for intermediary periods for decisions on simple or less complex cases, according to publicly available information, CADE usually approves fast-track cases within 30 days of the date of submission. In non-simple cases, the average time of analysis varies between 60 and 120 days (and may ultimately reach 330 days in very complex cases).

The Competition Act and applicable regulations establish a time limit of 15 days in which third parties to transactions may request to be admitted as interested or intervenient parties in a merger control case. These third parties are required to demonstrate that they have legitimate interests that may be affected by the transaction under analysis.

Interested third parties admitted to the case can appeal an SG decision approving a transaction without restrictions to CADE’s Administrative Tribunal. The Administrative Tribunal may also present an opposition to the SG’s decision and request the transaction go to second review.

The time limit for appeals or request for a second review by the Tribunal is 15 days after publication of the SG’s approval decision. After the elapsing of this period without any appeals or requests by the Tribunal, the approval decision becomes final and appealable.\(^\text{19}\)

\(^{16}\) Article 88 of the Competition Act.

\(^{17}\) Article 173 of CADE Regulation No. 20/2017.

\(^{18}\) CADE’s decisions are final at the administrative level, but the parties may challenge them before the Federal Courts of Law in Brazil.

\(^{19}\) Article 172 of CADE Regulation No. 20/2017.
iv **Provisional authorisation to close**

The Competition Act states that CADE may provisionally authorise the closing of transactions before a final decision is rendered. Parties may seek a provisional authorisation to close a transaction when:

\[\begin{align*}
\text{a} & \quad \text{there is no danger of irreparable harm to competition in the market;} \\
\text{b} & \quad \text{the measures for which authorisation is requested are fully reversible; and} \\
\text{c} & \quad \text{the parties are able to show imminent risk of substantial and irreversible financial losses for the target company (if provisional authorisation is not granted).}
\end{align*}\]

v **Possible decisions and merger control agreements**

When assessing a transaction submitted for approval, the SG may render a unilateral decision approving it without restrictions or challenge it before the Administrative Tribunal if it considers that the transaction cannot be approved or could be approved with restrictions (which may encompass structural or behavioural remedies).

Therefore, if the SG decides that the transaction cannot be approved unconditionally, it will forward the case to the Administrative Tribunal with its recommendations for a final decision. A transaction will also be ultimately decided by the Tribunal whenever the Tribunal disagrees with the SG’s decision to clear a transaction or when an interested third party admitted to the case files an appeal against the SG’s decision to approve a transaction. The Administrative Tribunal, in its turn, may fully approve or reject the transaction or approve it with remedies.

According to the Competition Act, CADE may impose remedies that include:

\[\begin{align*}
\text{a} & \quad \text{the sale of assets or a group of assets that constitute a business activity;} \\
\text{b} & \quad \text{the spin-off of a company;} \\
\text{c} & \quad \text{the transfer of corporate control;} \\
\text{d} & \quad \text{accounting or legal segregation of a company’s activities;} \\
\text{e} & \quad \text{compulsory licensing of intellectual property rights;} \quad \text{or} \\
\text{f} & \quad \text{any other act or measure necessary to eliminate the possible anticompetitive effects in the affected markets.}
\end{align*}\]

In 2018, CADE published guidelines on remedies that consolidate the best practices and procedures adopted in the design, application and monitoring of remedies imposed by CADE or negotiated with the parties.

The parties to the transaction may negotiate a merger control agreement with CADE from the moment of the filing until 30 days after the SG has challenged the transaction before CADE’s Tribunal.\(^{20}\) Merger control agreements are negotiated with the SG or the Reporting Commissioner at the Tribunal, but they must be ultimately approved by CADE’s Administrative Tribunal.

IV **OTHER STRATEGIC CONSIDERATIONS**

Parties to transactions that require a merger control notification to CADE should be careful in taking any steps that could be viewed as gun-jumping or pre-merger coordination, as they may be subject to fines and to investigations for anticompetitive conduct. Considering

\(^{20}\) Article 165 of CADE Regulation No. 20/2017.
that CADE may render a decision imposing remedies on transactions or prohibiting them, parties should identify antitrust risks from the outset of the negotiations and consider using contractual covenants that adequately allocate these risks among them.

CADE is open to pre-filing contacts in cases that are not eligible for the fast-track procedure, which may be very useful to validate how it would view the affected relevant markets and the information that would be necessary for the competition assessment of the transaction. The pre-filing procedures can also be useful to limit the scope of the information required in the long notification form, particularly in cases that, although not eligible for the fast-track procedure, do not raise significant competition concerns and would not require an in-depth review. Pre-filing contacts are strongly advisable in non-fast-track cases and may even expedite the review process by allowing the parties to submit a notification more aligned with CADE’s expectations.

CADE may communicate and exchange non-confidential information with competition authorities from other jurisdictions. Therefore, it is important to ensure consistency in multi-jurisdictional merger filings.

CADE usually double checks the information presented by the parties with publicly available information (i.e., companies’ websites and public reports and statements) and, in more complex cases, CADE may also undertake a market test to validate the information provided. The submission of false or misleading information to CADE may subject the parties to heavy fines, undermine the parties’ credibility and derail a merger review process.

In exceptional situations of financial distress and risk of insolvency of the target company, the parties may request that CADE provide a provisional authorisation to close or, at least, to adopt certain measures to secure that the targets may continue to operate. Nevertheless, CADE may not be comfortable with granting this authorisation in transactions that may raise competition concerns and when the requested measures may not be reversible.

In transactions that may raise significant anticompetitive concerns in Brazil, negotiated solutions may present a less time-consuming path to obtain antitrust clearance and allow approval based on more reasonable and tailor-made remedies. The negotiation of merger control agreements in complex cases may allow the parties to design a solution together with CADE that may be enough to neutralise CADE’s concerns and, at the same time, avoid the imposition of excessive remedies and burdens. Without the cooperation of the parties in designing a more suitable solution, CADE may adopt a more conservative approach and impose stricter remedies than necessary or even reject a transaction.

V OUTLOOK AND CONCLUSIONS

CADE continues to prove its ability to efficiently examine transactions under a pre-merger review system and to continuously improve the Brazilian merger control system, as demonstrated by the new regulations and procedural matters enacted in 2019.

CADE’s merger review practices have grown more sophisticated in the past decade as a result of its accumulated experience, the increase of merger challenges by third parties and closer cooperation and exchange of best practices with authorities from other jurisdictions. In the past few years, CADE has been more rigorous in assessing mergers in general. Vertical mergers that, at another time, would not have faced many difficulties in being cleared, may now face stricter scrutiny by CADE.

Based on the profile of the new government, there is an expectation that the new members to take seat at CADE’s Tribunal, appointed by the new government in 2019, may
adopt a more pro-business approach in the review and approval of mergers and acquisitions. This expectation was confirmed in the 2020 review of the merger agreement executed in the *Walt Disney/Fox* case, in which CADE agreed to replace the previously imposed structural remedies with behavioural remedies.

The concerns that CADE may become over-influenced and pressured from a political perspective have grown in recent years. Nonetheless, CADE has developed solid institutional foundations inspired by best international practices in competition law enforcement and has continuously improved. Therefore, it is well positioned to successfully deal with all these challenges.

In 2020, the covid-19 pandemic presented unexpected and never imagined challenges for the entire society, including for CADE. Despite these unprecedented difficulties, CADE has proved to be able to continue to review and decide merger control cases during these times of crisis, with the use of technology, video and audio-conference meeting facilities and virtual judgment sessions to decide cases. CADE has also demonstrated that it is amenable to the challenges presented to companies by the pandemic and that it is open to adopting more flexible approaches based on reasonable justifications, as demonstrated in the recent approval of a collaboration agreement between big players in the food and beverage sectors to mitigate logistics difficulties in the distribution of products within Brazil during the pandemic.
I INTRODUCTION

Over the course of 2019 and the first quarter of 2020, the Competition Bureau (Bureau), led by the Commissioner of Competition (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 the Bureau heavily scrutinised a small number of major transactions, ultimately most of these transactions were cleared with no remedies required. Consistent with many global competition agencies, the Bureau also issued specific guidance with respect to its approach to merger review during the covid-19 global pandemic.

II YEAR IN REVIEW

In 2019, the Bureau concluded 216 merger reviews. From March 2019 to April 2020, 244 merger reviews were concluded. Of those, 109 merger reviews (45 per cent) concluded with the issuance of an advance ruling certificate (ARC) and 133 (55 per cent) concluded with the issuance of a no-action letter (NAL). In the first half of the Bureau’s 2019–2020 year, 116 merger reviews were concluded, of which 114 (98 per cent) had no enforcement action taken (42 ARCs (36 per cent) and 66 NALs (57 per cent)). The Bureau also reported that it cleared 98 per cent of its non-complex reviews and 90 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 review time in the first term of 2019–2020 for non-complex mergers was 11.6 days, and the average review time for complex mergers was 37.1 days.

Although the Bureau initially anticipated issuing SIRs only in the case of ‘those very few mergers that raise significant potential issues’, 13 SIRs were issued in 2018–2019 and six SIRs were issued in the first half of the Bureau’s 2019–2020 year. A SIR is not the Bureau’s only method for obtaining large volumes of additional data and information in respect of

---

1 Julie A Soloway and Cassandra Brown are partners and Peter Flynn is an associate at Blake, Cassels & Graydon LLP. The authors thank articling student Jennifer Crawford for her research assistance.

2 1 April 2019 to 30 September 2019.

3 Competition Bureau, ‘Speaking notes for Melanie L. Aitken, interim Commissioner of Competition’ (12 May 2009); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html.
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 issuance of a SIR does not signal that the Bureau will require a remedy.

The Bureau's response to the covid-19 pandemic has been focused on (1) protecting consumers and businesses from anticompetitive activity; and (2) providing guidance for competitor collaborations to support the crisis response efforts. It has been closely monitoring potentially harmful anticompetitive conduct seeking to take advantage of consumers and businesses during the covid-19 crisis, including deceptive marketing practices and collusion by competing businesses. Where there is a clear imperative for competitor collaboration in response to the crisis, and where the collaboration is executed in good faith and as a temporary measure, the Bureau has stated that it will generally refrain from exercising scrutiny. The Bureau has stated that it does not wish to see specific elements of competition law enforcement potentially chill what may be required to help Canadians. Notwithstanding this general approach, the Bureau has cautioned that it will have zero tolerance for attempts to abuse this flexibility or misuse its guidance regarding competitor collaborations as cover for unnecessary conduct that violates the Competition Act.

The Bureau also continues to issue position statements describing its analysis in complex mergers and key transactions. Major transactions reviewed from March 2019 to April 2020 include the following.

i Parmalat/Kraft
On 30 May 2019, the Bureau announced that it had concluded its review of the proposed acquisition of the assets associated with the natural cheese business of Kraft Heinz Canada ULC by Parmalat SpA. For the first time in a merger review since the 2009 amendments to the Competition Act, the Bureau obtained a federal court order requiring executives of the merging parties to be interviewed under oath by Bureau investigators. The Bureau also gathered evidence and obtained information through interviews with key market participants, including grocery retailers, food service companies, regulators, industry associations and cheese processors. The Bureau issued an NAL to the merging parties, confirming it would not challenge the proposed acquisition.

ii Harris/L3
On 21 June 2019, the Bureau announced that it had issued an NAL concerning the proposed merger between Harris Corporation (Harris) and L3 Technologies, Inc (L3). The terms of the NAL were subject to the implementation of a consent decree between the United States Department of Justice (the US DOJ) and the merging parties. The Bureau's investigation concluded that the proposed transaction would likely substantially lessen competition in certain markets related to night vision operations. However, the US DOJ had ordered Harris to divest the entirety of its night vision business to proceed with the merger. This remedy

---

4 Competition Bureau, ‘COVID-19: What the Competition Bureau is doing’ (updated 6 May 2020); available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04525.html.

resolved the Bureau’s competition concerns with the transaction. The Bureau worked with
the US DOJ and the European Commission in conducting its review, due to the parties’
supply of defence technology and services to both Canadian and foreign jurisdictions.6

iii Thoma Bravo/Aucerna

On 20 August 2019, the Bureau reached a consent agreement with Thoma Bravo whereby
Thoma Bravo agreed to sell Quorum’s MOSAIC business to a purchaser acceptable to the
Commissioner. Following Thoma Bravo’s acquisition of Aucerna in May 2019, Thoma Bravo
owned two of the largest oil and gas reserves software businesses in Canada (MOSAIC and
Val Nav). Following closing, and after the expiry of the statutory waiting period, the Bureau
applied to the Competition Tribunal on 14 June 2019 for an order requiring Thoma Bravo
to sell either MOSAIC or Val Nav. The Bureau asserted that the two entities had been one
another’s closest rivals and that the rivalry between them incentivised the businesses to
regularly enhance MOSAIC and Val Nav. The Bureau believed that the transaction resulted
in a merger to monopolise the supply of oil and gas reserves valuation and reporting software
to medium and large producers in Canada and that the transaction was likely to substantially
lessen competition, resulting in higher prices, lower quality service, reduced product quality
and less innovation for customers of reserves software in Canada.7

iv Parrish & Heimbecker/Louis Drefus Company grain elevator

On 20 December 2019, the Bureau announced that it was challenging Parrish & Heimbecker’s
(P&H) acquisition of a primary grain elevator in Virden, Manitoba from Louis Drefus
Company. The Bureau filed an application with the Tribunal for an order requiring P&H to
sell either its elevator in Moosomin, Saskatchewan or its newly acquired elevator in Virden,
Manitoba. With the acquisition, P&H controlled both grain elevators along a 180km stretch
of the Trans-Canada Highway. The Bureau alleges that prior to the acquisition, the elevators
in Moosomin and Virden were close competitors, monitoring each other’s wheat and canola
prices and responding to competitive activity from each other by offering farmers better
prices. As a result of the acquisition, the Bureau asserted that farmers in the corridor between
Moosomin and Virden would earn less for their wheat and canola.8 The Competition Tribunal
is currently expected to hear oral arguments on the Bureau’s application in December 2020.

6 Competition Bureau, ‘Competition Bureau will not oppose merger between defence contractors
Harris Corporation and L3 Technologies’ (21 June 2019); available online at www.canada.ca/en/
competition-bureau/news/2019/06/competition-bureau-will-not-oppose-merger-between-defence-
contractors-harris-corporation-and-l3-technologies.html.
7 Competition Bureau, ‘Competition preserved in the supply of oil and gas reserves software in Can-
da’ (20 August 2019); available online at www.canada.ca/en/competition-bureau/news/2019/08/
competition-preserved-in-the-supply-of-oil-and-gas-reserves-software-in-canada.html; Competition
Bureau, ‘Competition Bureau challenges Thoma Bravo’s acquisition of oil and gas reserves software firm
Aucerna’ (17 June 2019); available online at www.canada.ca/en/competition-bureau/news/2019/06/
8 Competition Bureau, ‘Competition Bureau challenges P&H’s acquisition of grain elevator from
Louis Dreyfus in Virden, MB’ (20 December 2019); available online at www.canada.ca/en/
competition-bureau/news/2019/12/competition-bureau-challenges-phs-acquisition-of-grain-elevator-
from-louis-dreyfus-in-virden-mb.html.
v  Evonik/PeroxyChem
On 28 January 2020, the Bureau reached an agreement with Evonik Industries AG whereby Evonik agreed to sell PeroxyChem’s hydrogen peroxide manufacturing facility located in Prince George, British Columbia, and related assets, to United Initiators (UI). The Bureau had concluded that Evonik’s acquisition of PeroxyChem was likely to result in a substantial lessening of competition in the supply of hydrogen peroxide in Western Canada. The Bureau concluded that UI was an acceptable buyer and was satisfied that the agreement would preserve competition for the supply of hydrogen peroxide in Western Canada.9

vi  Air Canada/Air Transat
On 27 March 2020, the Bureau announced its conclusion that Air Canada’s proposed acquisition of Air Transat was likely to result in a substantial lessening or prevention of competition for the supply of air travel and holiday packages to Canadians. The Commissioner delivered a report to the Minister of Transport outlining the Bureau’s concerns, which informed Transport Canada’s public interest review of the proposed transaction as it relates to national transportation. The Bureau asserted that by eliminating the rivalry between the airlines, the transaction would increase prices, decrease service and choice, and significantly reduce travel by Canadians on 83 routes where the parties’ existing networks overlap (including 22 routes where the parties were the only two carriers offering service). In its news release, the Bureau noted that its assessment was based on forward-looking analysis using data and information collected prior to the covid-19 pandemic. The Bureau recognised that the impact of covid-19 may be relevant to its views on the proposed transaction but said that it was impossible to know the full extent and duration of impacts at that time. The Governor in Council (Cabinet) will make the final decision regarding the Air Canada/Air Transat transaction. Transport Canada was required to provide its completed public interest assessment to the Minister by 2 May 2020.10

vii  United Technologies Corporation/Raytheon
On 30 March 2020, the Bureau announced that it had issued an NAL to United Technologies Corporation (UTC) and Raytheon Company regarding their proposed merger. The NAL confirmed that the Bureau would not challenge the proposed merger at that time. The terms of the NAL were subject to the implementation of the settlement agreement between the merging parties and the US DOJ, as well as the European Commission Directorate-General for Competition (EC). The Bureau concluded that the proposed transaction would likely substantially lessen competition in certain markets retailed to the military airborne radio and military GPS businesses of the merging parties. However, remedies obtained by the US DOJ and EC required UTC to sell its military GPS business and Raytheon to sell its military airborne radio business in their entirety to BAE Systems, Inc or another approved buyer. The

10 Competition Bureau, ‘Competition Bureau issues report outlining competition concerns with Air Canada’s proposed acquisition of Transat’ (27 March 2020); available online at www.canada.ca/en/competition-bureau/news/2020/03/competition-bureau-issues-report-outlining-competition-concerns-with-air-canadas-proposed-acquisition-of-transat.html.
Commissioner found that those remedies adequately resolved the Bureau’s concerns with the transaction. In light of UTC and Raytheon’s distribution of products in both Canada and foreign jurisdictions, the Bureau carried out its review in cooperation with the US DOJ and the EC.11

viii Canadian National Railway Company/H&R Transport

On 22 April 2020, the Bureau released a position statement outlining its analysis conducted in the investigation of Canadian National Railway Company’s (CN) proposed acquisition of H&R Transport Limited (H&R). In July 2019, the Commissioner entered into a timing agreement with CN and H&R regarding the timing and information required for the Bureau’s investigation into potential anticompetitive effects and the parties’ claimed efficiencies before deciding whether to challenge the transaction before the Competition Tribunal. This was the first merger review to make use of the Bureau’s draft model timing agreement for mergers involving claimed efficiencies. The Bureau’s investigation concluded that the proposed transaction would likely result in a substantial lessening of competition for full truckload refrigerated intermodal services in eight relevant Canadian markets. However, the Bureau concluded that the efficiency gains outweighed the likely anticompetitive effects of the transaction.12

ix American Iron & Metal Company/Total Metal Recovery

On 29 April 2020, the Bureau announced the closure of its investigation into scrap metal processor American Iron & Metal Company Inc’s (AIM) acquisition of Total Metal Recovery Inc (TMR). The Bureau’s conclusion came after a three-month inquiry into whether the transaction would affect competition for the purchase and sale of unprocessed and processed scrap metal in Quebec. Prior to the acquisition, AIM and TMR operated neighbouring scrap metal facilities in the Montreal area. On 18 December 2019, the Bureau announced that it had reached an interim agreement with AIM to preserve specific assets for 60 days while the Bureau investigated the transaction. AIM was required to maintain the viability and marketability of the assets throughout the 60-day period, and the agreement prevented AIM from selling TMR assets, among other actions, during the investigation. The Bureau found that TMR was a failing firm whose assets were likely to have exited the market in the absence of the merger. On that basis, no further action was required. In its 29 April 2020 news release, the Bureau reminded merging parties intending to make failing firm claims to provide complete information to the Bureau as early as possible during a review.13

III THE MERGER CONTROL REGIME

The Competition 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 Competition 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$50,000.14 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.15

For a pre-merger notification to be required under the Competition 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.16 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).17

Certain classes of transactions are exempted from notification, including transactions where all parties are affiliates of each other,18 an acquisition of real property or goods in the ordinary course of business,19 acquisitions of share interests in a combination for the sole purpose of underwriting the share or interest,20 acquisitions of collateral or receivables made by a creditor pursuant to a good faith credit transaction in the ordinary course of business,21 certain joint ventures,22 and where the Commissioner has issued an ARC.23

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),24 each party to the transaction must submit its completed notification.

---

14 Section 65(2) of the Competition Act.
15 Section 123.1 of the Competition Act.
16 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 2020.
17 Section 110(3)(b) of the Competition Act.
18 Section 113(a) of the Competition Act.
19 Section 111(a) of the Competition Act.
20 Section 111(b) of the Competition Act.
21 Section 111(d) of the Competition Act.
22 Section 112 of the Competition Act.
23 Section 113(b) of the Competition Act.
24 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.
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. 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).

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.

The Bureau’s non-binding Merger Review Process Guidelines (the 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 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.

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 Competition 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 Competition 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

---

25 Section 114(2) of the Competition Act.
26 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.
27 Section 100 of the Competition 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 Competition Act.
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.29 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 Hart-Scott-Rodino 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 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 court30 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 Competition Act, and parties should assume that the Bureau will share information with any other jurisdiction where the parties have notified their transaction.

29 ibid., at Section 3.4.2.
30 Subsection 123.1(4) of the Competition Act defines ‘a court’ for this purpose to mean the Tribunal, the Federal Court or the superior court of a province.
Substantive considerations

Regardless of whether a transaction is subject to pre-merger notification, the substantive provisions of the Competition Act apply to all mergers. The substantive test the Bureau applies in reviewing transactions is whether the transaction is likely to prevent or lessen competition substantially in a relevant market. There is an express efficiency defence to anticompetitive mergers, which applies to cases where the efficiencies from the merger are likely to be greater than, and offset any effects of, the prevention or lessening of competition. Mergers may be challenged only by the Commissioner, who can apply to the Tribunal to delay or block closing and to unwind or seek other remedies for completed mergers for up to one year after their completion.

The expiry of the applicable statutory waiting period does not always mean that the Bureau has completed its substantive review of a transaction. It is often the case that the Bureau’s review will extend beyond the waiting period in complex cases. However, unless the Commissioner is successful in obtaining an injunction under the Competition 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. In recent years, the Bureau has increasingly issued a press release concerning its ongoing substantive reviews after the expiry of the waiting period (and, in some cases, the closing of the transaction).

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.

OTHER STRATEGIC CONSIDERATIONS

On 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.

Commissioner Boswell has 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. As such, we expect to see an increased number of post-closing investigations initiated by the Bureau.

31 See, for example, Pembina/Veresen, Tervita/Newalta and Thoma Bravo/Aucerna.
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 Competition Act. This highlights a number of considerations that parties contemplating a transaction should keep in mind, including the following.

Regardless of whether a merger triggers a pre-merger notification requirement under Part IX of the Competition 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.

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.

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 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.33 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.

---

33 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 Competition Act (Section 29 of the Competition Act).
I INTRODUCTION

The State Administration for Market Regulation (SAMR) is currently the sole antitrust authority for merger control in China. The SAMR’s local offices at the provincial level may be empowered to take over certain types of merger control cases in the near future.

A pre-merger notification should be filed with the SAMR if the transaction meets the merger filing threshold as follows:

a the transaction constitutes a concentration of undertakings; and

b at least two undertakings concerned each have a turnover exceeding 400 million yuan in China in the previous financial year, and the combined turnover of all the undertakings concerned exceeded 2 billion yuan in China or 10 billion yuan worldwide in the previous financial year.

The SAMR has proposed major amendments to the current merger control rules. On 2 January 2020, the SAMR released a draft of amendments (the Draft Amendment) to the Anti-Monopoly Law of the People’s Republic of China (AML), which proposes several extensive changes to China’s merger control regime. On 7 January 2020, the SAMR released a draft of the Interim Provisions on Merger Review for public comment. The details of these legislative developments are discussed in Section II.

II YEAR IN REVIEW

i Enforcement

In 2019, the SAMR released public notices for 369 cases under the simplified procedure, cleared 96 cases under the normal procedure (including five cases cleared with conditions) and fined 16 cases for gun-jumping. Nearly 80 per cent of the filings were reviewed under the simplified procedure, and most of these simple cases were cleared in around 20 calendar days after being accepted as complete.
Conditional clearance
The SAMR conditionally cleared five cases in 2019 (KLA-Tencor/Orbotech, Cargotec/TTS, II-VI/Finisar, Zhejiang Garden/DSM and Novelis/Aleris).

On the procedural front, all of these cases underwent the re-filing procedure (and Novelis/Aleris refilled twice), and the review time ranged from 210 days to 532 days. Because China has not established the ‘stop-the-clock’ mechanism and the statutory 180 days are not sufficient for reviewing complex cases, the re-filing practice allows the SAMR more time to reach its conclusion.

On the substantive front, the SAMR imposed hold-separate conditions in Cargotec/TTS and II-VI/Finisar. Although these cases raised substantial horizontal issues (the combined market share is 50 to 60 per cent in Cargotec/TTS and 45 to 50 per cent in II-VI/Finisar), they were not required to divest the overlapping businesses. In Novelis/Aleris, however, a divestiture condition was imposed on the parties’ overlapping businesses, which had an even higher combined market share (70 to 80 per cent). The reason for the SAMR choosing the hold-separate remedy could be (1) there was promising market entry; (2) there was sufficient countervailing buyer power; (3) there was not a competent buyer for the divested business; or (4) the anticompetitive concerns were not substantial enough.

KLA-Tencor/Orbotech raised certain vertical foreclosure and conglomerate tying concerns, and the SAMR imposed behavioural conditions accordingly. In 2020, the SAMR imposed behavioural conditions in Infineon/Cypress and Nvidia/Mellanox, which demonstrates its approach for dealing with non-horizontal mergers, particularly those relating to sensitive sectors.

Gun-jumping
In the 16 gun-jumping cases, 15 cases involved the parties closing the transaction without notifying the SAMR, while in one case, the parties had submitted the notification but closed the deal during the waiting period.

According to the AML, the liabilities of gun-jumping include an administrative fine of up to 500,000 yuan and, when the transaction has severe anticompetitive effect, an administrative order requiring (1) termination of the merger transaction, (2) disposal of the shares or assets within the prescribed time limit, (3) assignment of business within the prescribed time limit, and (4) adoption of necessary measures to restore the status quo prior to the merger.

In the 51 gun-jumping cases publicised by the SAMR to date, none have been found to have adversely affected the market competition. In all cases, the parties were simply fined without receiving an administrative order to unwind the transaction. The range of fines imposed has been between 150,000 and 400,000 yuan. In the past two years, there has been a clear increase in fine amounts: all but one gun-jumping cases in 2019 were fined no less than 300,000 yuan. However, the risk of the transaction unwinding is still genuine and the SAMR
China

will not hesitate to use this power to set a precedent when facing a case with significant anticompetitive effect. Furthermore, with the amendment of the AML, gun-jumping fines are expected to rise sharply.

ii Legislation

In January 2020, the SAMR released both the Draft Amendment and the draft of the Interim Provisions on Merger Review for public comment. These two pieces of legislation propose major revisions to the merger control regime.

Draft Amendment

China’s antitrust authority has accumulated considerable experience with the nearly 3,000 merger filing cases that it has reviewed since 2008. Its experience shows that the current merger control regime does not function efficiently or effectively to prevent anticompetitive mergers and deter violations such as gun-jumping. The Draft Amendment aims, therefore, to reform, upgrade and strengthen the merger control regime.

The table below summarises all the major changes proposed to the merger control regime by the Draft Amendment.9

<table>
<thead>
<tr>
<th>Proposed revisions</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stipulating the definition of ‘control’</td>
<td>‘Control’ is the central concept of the merger control regime. Although current rules have provided a list of factors to assess when control is obtained, there is no definition or legal basis in the AML. In this regard, the Draft Amendment stipulates that ‘control means the right or actual status of an undertaking(s), which directly or indirectly, solely or jointly has or may have decisive influence on the production and operation activities or other major decisions of another undertaking’.</td>
</tr>
<tr>
<td>Adjusting the merger filing threshold</td>
<td>Currently, there is only a turnover-based filing threshold in China, and this threshold can only be set by the State Council. The Draft Amendment proposes to empower the SAMR to set and adjust the filing threshold based on economic development and industry size. This revision might envisage an increase to the current turnover threshold and supplement it with transaction size, market share or other types of filing threshold.</td>
</tr>
<tr>
<td>Launching the ‘stop-the-clock’ mechanism</td>
<td>The current rules do not provide a stop-the-clock mechanism. To allow the authority more time to review complicated filings, the current practice is for the notifying parties to withdraw and refile their cases one or more times. With the proposed ‘stop-the-clock’ mechanism, the statutory time limit of merger review can be suspended in the following scenarios: • upon application or consent by the notifying parties; • when the notifying parties are required to supplement materials; or • when the notifying parties are in negotiation with the antitrust authority on remedies. The detailed rules of the stop-the-clock mechanism will be enacted separately by the SAMR.</td>
</tr>
<tr>
<td>Specifying the liabilities for providing incorrect or inaccurate information</td>
<td>Merger clearance based on incorrect or inaccurate information may be revoked. Providing false information may also result in heavy fines, which can be up to 1 million yuan for an individual or, for a company, up to 1 per cent of the violator’s revenue in the previous year or up to 5 million yuan if there is no revenue or clear revenue record in the previous year.</td>
</tr>
<tr>
<td>Significant increase in fines for illegal concentration</td>
<td>Illegal concentration includes gun-jumping, breach of remedies, and concentration against decisions that block it. The fines for illegal mergers including gun-jumping have risen steeply, from the maximum of 500,000 yuan to the maximum of 10 per cent of the violator’s revenue in the previous year.</td>
</tr>
<tr>
<td>Empowering authorities to investigate mergers that are below the filing threshold but have potential anticompetitive effect</td>
<td>This rule is not a new creation and it originates from the Regulations on Merger Filing Threshold by the State Council (2008). Nonetheless, it is the first time that such a rule will be included in the AML. The Draft Amendment also specifies that the SAMR has the power to impose conditions or unwind such mergers if they have or may have anticompetitive effects.</td>
</tr>
</tbody>
</table>

The Draft Amendment was initiated by the State Council’s 2015 legislation plan and the Congress’ 2018–2023 legislation plan. Earlier in 2020, the SAMR solicited public opinion of the Draft Amendment. Following this, the Draft Amendment, with further revisions, will be submitted to the Ministry of Justice (MOJ), which is the legislative body under the State Council. After review by the MOJ, the further revised amendment will be reviewed by the State Council, and then by the National People's Congress (NPC) or its Standing Committee (NPCSC). Once passed by the NPC or NPCSC, it will be enacted by a Presidential Order.

In view of the foregoing, the Draft Amendment is expected to be enacted by March 2023 at the latest, but the process could be accelerated significantly if there are few diverging opinions on its content. After the Draft Amendment is enacted, there would typically be a transition period of several months before it comes into effect.

**Draft of the Interim Provisions on Merger Review**

The draft mainly consolidates six merger control rules enacted in the time of the Ministry of Commerce of the People’s Republic of China (MOFCOM, the previous Chinese antitrust authority in charge of merger control), which proposes few substantive changes. This SAMR rule is expected to be enacted in 2020, and it remains to be seen if any new rules will be adopted in the final version.

### iii Strategic impact

2019 did not see as much enforcement on monopolistic agreements or abuse of market domination as previous years, yet the number of merger cases reviewed by the SAMR is no less than it was before. The merger control regime has always been a focus of the SAMR. It has accumulated rich enforcement experience in this area and is not afraid to make innovations in its enforcement tools. With the Draft Amendment drastically increasing the liability for violations of merger control rules, the number of merger notifications is expected to rise in the future.

### iv Financial distress

According to the Interim Provisions on Assessment of Impact of Concentration of Undertakings on Competition, the SAMR should take into consideration whether the parties are facing impending bankruptcy in assessing the competitive influence of the transaction.

In addition, due to the covid-19 crisis, the SAMR has adopted several measures to alleviate certain difficulties the parties may encounter in the notification process. First, the SAMR has adopted electronic merger filing instead of hard copy submission, which has resulted in a noticeable reduction in the merger review process time. Second, an expedited review process is applied to the review of mergers: (1) in economic sectors closely related to people’s daily lives and prevention of the disease, such as the manufacture of medical equipment, food production and transportation; (2) in economic sectors greatly affected by the pandemic, such as catering, accommodation and tourism; and (3) aimed at the resumption of work.
THE MERGER CONTROL REGIME

i  Waiting periods and time frames

Transactions under the Chinese merger control regime are subject to a standstill obligation. After the parties submit notification, there is a pre-acceptance stage in which the SAMR makes a preliminary review before formally accepting the filing and usually issues a written list of required supplementary materials. For cases under the simplified procedure, almost all questions or issues will be resolved at this stage. When the SAMR is satisfied with the supplementary materials, it will formally accept the notification as complete and it then begins the process of formal review.

The formal review includes three phases. Phase 1 review can last 30 calendar days at most, and cases under both the simplified procedure and the normal procedure need to go through this stage. Notifications under the simplified procedure are subject to a 10-calendar day publicity period. The publicity period usually starts upon the SAMR’s formal acceptance and the time is included in the Phase 1 time period. If no third party raises an objection within the publicity period, the SAMR usually grants approval to simple cases in the Phase I review.

Phase 2 review can last up to 90 days. Notifications under the normal procedure usually need to go through this phase.

Phase 3 review can last 60 days at most. Notifications under the normal procedure with major competition concerns may need to be reviewed under Phase 3.

If the SAMR believes that the competition concerns cannot be fully analysed within the specified time periods, the parties may be required to withdraw the notification and refile.

ii  Parties’ ability to accelerate the review procedure

Normally there is no formal procedure to apply for an expedited review under the Chinese merger control regime. Nonetheless, adequate preparation and swift responses can help to effectively avoid time wasting. Communication with the SAMR about why the case is in urgent need for clearance would also help expedite the process. In addition, transactions that relate to the covid-19 pandemic, as discussed in Section II.iv, currently qualify for an expedited review process.

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

The ability for third parties to access files and the rights to challenge mergers are different depending on the review procedure of the case.

For cases under the simplified procedure, any third party is entitled to challenge the merger during the publicity period. At the beginning of the 10-day publicity period, the SAMR will release the publicity notice, stating the name of the transaction, the concentrating parties, the relevant markets, the range of the parties’ market shares in the relevant markets and the reason why the case is suitable for the simplified procedure. The public opinion received during this period is an important information source of factual knowledge for the SAMR and can materially influence its review of the merger. Notably, the Novelis/Aleris case, one of the five cases in 2019 that received conditional clearance, was originally filed under the simplified procedure, but the parties withdrew the case and resubmitted it under the normal procedure after a third party raised objections to it in the publicity period.

Cases under the normal procedure will not be subject to general public review, but the SAMR will seek opinions from the government departments in charge of the economic sectors to which the relevant markets belong, as well as from the industry associations in the
relevant markets. The opinions of the government departments and industry associations are of great value to the SAMR, and it would not generally clear a case if it received objections from these parties. Undertakings affected by the transaction (generally, competitors of the notifying parties) can voice their views through the government departments or industry associations.

iv Tender offers and hostile transactions

There is no legislation or case law suggesting that tender offers and hostile transactions should be reviewed differently from other transactions. In both cases, the parties are obliged to submit the notification with the SAMR before the closing of the deal. In fact, some of the cases fined for illegal concentration related to tender offers. For example, in the GRAM/PanAust case, the deal was made by off-market public takeover bid. GRAM did not notify the Chinese antitrust authority before the transaction and was fined 150,000 yuan for gun-jumping. This would be rather complicated in terms of hostile transactions, as it is not generally feasible for the acquirer to make the notification without the cooperation of the target. Timing can also be a crucial matter in this situation. For hostile transactions, it is recommended that pre-notification consultation be arranged with the SAMR to seek an alternative solution.

v Resolution of authorities’ competition concerns

When the authority has competition concerns about a transaction, it would ask the parties to propose remedies to resolve the concern. The parties can also voluntarily provide proposals of remedies before the SAMR asks for these. When the review takes longer than normal and the parties know the concentration might have an adverse effect on competition, the parties should consider submitting remedy proposals.

If the SAMR and the stakeholders are satisfied that the proposed remedies would effectively address the competition concern, the SAMR would clear the case with restrictive conditions. According to the Rules for Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation), the remedies can be imposed by the antitrust authority, and can cover both structural and behavioural remedies, including (1) divestiture of tangible assets, intellectual property and other intangible assets, or related interests, and (2) opening up networks or platforms and other infrastructure, licensing key technologies (including patents, know-how or other intellectual property rights), and terminating exclusive agreements, etc.

If the SAMR is not satisfied with the proposed remedies, it will consult with the parties, assess the effectiveness, feasibility and timeliness of the proposals and advise the parties of its opinion of these. The negotiation could proceed for several rounds and is time consuming. If the parties know that their transaction could have serious anticompetitive effects, it is recommended that preparations are made beforehand.

If the parties do not submit a proposal or the proposed remedies do not fully address the concerns of the authority, the SAMR will prohibit the transaction. To date, only two cases have been prohibited by the SAMR; however, there have been cases in which the parties have abandoned transactions for being unable to satisfy the authority’s requirements. For example,

---

in 2015, Applied Materials Company and Tokyo Electron Company abandoned their merger deal because they could not fully resolve the competition concerns of the antitrust authorities in China and other jurisdictions.

vi Appeals and judicial review
If the SAMR decides to prohibit a transaction or impose restrictive conditions, the relevant parties can apply for administrative reconsideration by the SAMR's Department of Regulations.

The administrative reconsideration is a review conducted by the authority's legal department on whether the issued decision was lawful and appropriate. An administrative reconsideration decision will be made after the legal department reviews the original decision. If it finds that the original decision is not lawful or appropriate, the legal department will make suggestions about how the authorities should have handled the matter.

The Department of Regulations' functions include: (1) organising the drafting of laws and regulations related to market supervision and management; (2) reviewing the legality of regulatory documents and drafts of international cooperation agreements and protocols; (3) undertaking the design of law enforcement procedures, and standardising discretion and administration enforcement supervision work in accordance with laws and regulations; (4) undertaking or participate in relevant administrative reviews, administrative responses and administrative compensation; and (5) organising and carrying out publicity and education on the rule of law.

If the relevant parties are not satisfied with the administrative reconsideration decision, or if the original decision relates to another matter (i.e., fines for gun-jumping), the parties can bring an administrative litigation against the SAMR before the Beijing No. 1 Intermediate People's Court. If the relevant parties refuse to accept the Court's judgment, they have the right to file an appeal before the Beijing Municipal High People's Court.

In most circumstances, the original decision will continue to be executed while the administrative reconsideration and litigation are taking place.

vii Effect of regulatory review
The SAMR is the sole authority responsible for reviewing merger cases. However, for cases under the normal procedure, as discussed in Section III.iii, the government department relevant to the case may provide its opinion of the transaction to the SAMR. The clock does not stop when the SAMR seeks third-party opinion, and the process can be quite time consuming.

IV OTHER STRATEGIC CONSIDERATIONS
i How to coordinate with other jurisdictions
China has signed more than 50 international cooperation agreements with jurisdictions including the United States, the European Union, Germany, Russia, South Africa and Brazil. The Chinese antitrust authority has established good communication channels with authorities in other jurisdictions and has cooperated with other authorities in more than 10 major international merger cases.

The open communication between the SAMR and other antitrust authorities mainly results in two consequences for the parties. First, the SAMR may sometimes take into consideration the decisions of other authorities in reviewing merger cases and vice versa. The
decision the parties receive in one jurisdiction may echo that in another jurisdiction, thereby creating a global effect for the parties. It is therefore recommended that when the parties negotiate restrictive conditions with one authority, it is important to consider the potential impact on its business or transaction if similar decisions are made in other jurisdictions. Second, it would be difficult to make the notification to one authority but ‘hide’ it from the others to which a notification should be made, or to make an inconsistent filing in terms of market definition and competitive analysis. A global notifiability assessment is therefore recommended to parties that have business in more than one jurisdiction.

ii How to deal with merger notifications with variable interest entity structure

The legality of the variable interest entity (VIE) structure is quite ambiguous under Chinese laws and regulations. Before the SAMR took on the responsibility for merger review, it was under the jurisdiction of MOFCOM, which is also the authority that reviews and approves foreign investment. As MOFCOM would not validate a VIE structure by reviewing a merger notification involving such arrangement, it refused to accept such notifications. This practice has not changed much since the SAMR took over merger review responsibility. However, recently, the SAMR released public notice of a case in which one of the parties has a VIE structure.

Whether this means that the SAMR is now completely open to VIE notification is not clear, but it sends out the signal that gun-jumping risks for VIE transactions have sharply increased.

V OUTLOOK AND CONCLUSIONS

i Legislation

The SAMR completed soliciting public opinion of the Draft Amendment at the end of January 2020, and it is now going through several phases of review by different authorities. It is expected to be enacted by March 2023 at the latest, but the process could be accelerated. There is likely to be a transition period of several months before it comes into effect.

For the draft of the Interim Provisions on Merger Review, the SAMR received 160 comments during the opinion-seeking period. The SAMR is currently making further revision of the draft and will release another version at a later stage.

ii Unresolved issues

Whether the SAMR has completely opened the door for VIE-structure notifications, is merely tolerating certain types of VIE transition notification or the recent acceptance of notification involving a VIE structure was simply a careless error demands clarification from the authority. It also remains to be seen how the SAMR will deal with historical VIE cases that were unable to make notifications when they perhaps should have.

Similar to the EU, China is also considering introducing a transaction value-based filing threshold to capture transactions involving potential platform giants in the digital economy. Also, how big data will be treated in merger review remains to be tested.
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.

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 conduct and concentrations. The same applies to the Association Agreement signed between Central America and the European Union, which aims at having a competition law and enforcement agency at a regional level in Central America.

In the telecommunications sector, General Telecommunications Law No. 8642, issued in 2008, contemplates specific competition regulations for the industry.

Costa Rica’s competition law underwent a major change in November 2019 when the Law for the Strengthening of Competition Authorities No. 9736 (Law) was issued. The Law was part of the reforms the country undertook to incorporate the best practices of the most developed countries to meet the requirements to become a member of the Organisation of Economic Co-operation and Development (OECD). The Law amends the Competition Law and the Telecommunications Law, contains a new set of regulations on different issues, and follows the recommendations contained in two peer reviews conducted by OECD experts.

One of the main topics discussed in the peer reviews was whether the telecommunications regulator (SUTEL) should continue acting as competition authority in that sector. The Law did not change the role of SUTEL as competition authority, although it did introduce changes so that the same competition law applies to SUTEL and COPROCOM, except for a few relatively small differences.

The following are the main recommendations from the OECD and the changes introduced by the Law:

- more independence for COPROCOM;
- an increase to COPROCOM’s budget and human resources;

---

1 Edgar Odio is a partner at Facio & Cañas.
c the expansion of COPROCOM’s advocacy powers;
d a reduction in the number of industries exempted by the Law;
e improvements to the merger control process;
f the creation of a special procedure for the investigation of anticompetitive conduct;
g the creation of a leniency programme; and
h an increase in sanctions for anticompetitive conduct.

Merger control is one of the areas with the most changes. The Law created a compulsory pre-merger notification process and eliminated the possibility of notifying a merger five days after closing. There are also new threshold rules and COPROCOM now has the capacity to move the thresholds within a certain range. COPROCOM will set a notification fee, according to a cost-based criterion and specific regulations yet to be issued. From a procedural perspective, a two-phase process was created. Analysis should now be more focused on competition risks than merely on structural changes. A more detailed description and analysis of the changes to merger control are given below.

II YEAR IN REVIEW

2019 was marked by the process of discussing the bid for the Law in Congress and negotiating changes proposed by different industries and government institutions. The leading entities in this process were the Ministry of Exports, the Ministry of Economy, COPROCOM and SUTEL. COPROCOM continued with merger control during 2019 and began working under the Law in November 2019. The following table lists some of the merger cases reviewed and approved by COPROCOM in 2019.

<table>
<thead>
<tr>
<th>Resolution</th>
<th>Parties</th>
<th>Key decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>01-2019</td>
<td>Banco Davivienda De Costa Rica SA and Recuperadora De Crédito Invercom SA</td>
<td>Approved</td>
</tr>
<tr>
<td>11-2019</td>
<td>Inversiones El Trueno SA, Centriz Costa Rica SA, Interbuses Uno de CR SA and Strategic Business SA</td>
<td>Market shares did not exceed 30% and no anticompetitive effects were identified as a result of the merger. The transaction contained a five-year non-compete provision. According to COPROCOM, a non-compete provision with a term of over three years is unreasonable and can harm competition. COPROCOM approved the transaction subject to the non-compete provision being reduced to three years.</td>
</tr>
<tr>
<td>24-2019</td>
<td>Productora La Florida SA, Distribuidora La Florida SA and Comercializadora LALA SA</td>
<td>Application withdrawn by the parties and approved by COPROCOM</td>
</tr>
<tr>
<td>30-2019</td>
<td>Roma Prince and Kalicox</td>
<td>Market shares did not exceed 30% and no anticompetitive effects were identified as a result of the merger. The transaction contained a seven-year non-compete provision. COPROCOM approved the transaction subject to the non-compete provision being reduced to three years.</td>
</tr>
<tr>
<td>31-2019</td>
<td>Bananera Dione SA, Hacienda Sahara SA and others</td>
<td>Approved</td>
</tr>
<tr>
<td>34-2019</td>
<td>CatalinaBD Holdings LP, CatalinaBD LLC, FRS Capital Corporation, Homeport Holdings, Inc and BIP Mercury I LP</td>
<td>Approved</td>
</tr>
<tr>
<td>37-2019</td>
<td>PepsiCo Inc, CytoSport Holdings Inc and Hormel Foods Corporation</td>
<td>Approved</td>
</tr>
<tr>
<td>40-2019</td>
<td>KPS Capital Partners, LP, C&amp;D Technologies Inc, Joule Aereo LLC, C&amp;D Technologies Inc and Trojan Battery Holdings LLC</td>
<td>Approved</td>
</tr>
<tr>
<td>41-2019</td>
<td>CMA CGM SA and CEVA Logistics AG</td>
<td>Approved</td>
</tr>
</tbody>
</table>

© 2020 Law Business Research Ltd
III THE MERGER CONTROL REGIME

Article 88 of the Law defines concentrations as the merger, acquisition, purchase of assets, strategic alliance or any other agreement by which corporations, associations, shares, trusts, powers of attorney or assets in general, concentrate, between competitors, suppliers, clients or other economic agents that are not related, and result in a long-lasting acquisition of economic control by one of the parties, or in the incorporation of a new economic agent. The definition also includes any transaction in which an economic agent acquires control of two or more distinct economic agents that are independent.

The definition refers to strategic alliances, but it does not specify that they must be full-function joint ventures. It does state that the result of the transaction must be a long-lasting acquisition of control. This will have to be clarified in the regulations or in merger guidelines. The other issue is that the definition refers to ‘assets in general’ and not only to productive assets. Article 89 of the Law contemplates the notification thresholds, and does refer to the value of productive assets. This distinction may be determinative as to whether there is a concentration and requirement for a filing before the competition authority.

Thresholds, exceptions and deadline to notify

According to Article 89 of the Law, concentrations that meet the following criteria must be notified *ex ante* to the competition authority:

- *a* at least two economic agents with activities in Costa Rica at any time during the previous two fiscal years;
- *b* the sum of total gross sales or the value of productive assets in Costa Rica of all economic agents involved in the transaction exceeds the threshold set by COPROCOM of between 30,000 and 60,000 base salaries. COPROCOM has set the threshold at the lower limit, which equates to approximately US$23 million (this can be changed by COPROCOM at any time, and must, therefore, be checked on case-by-case basis); and
- *c* at least two of the economic agents involved in the transaction have gross sales or productive assets in Costa Rica over the threshold set by COPROCOM of between 1,500 and 9,000 base salaries. Again, COPROCOM has set the threshold at the lower limit, which is approximately US$1.1 million.

These thresholds do not apply in the telecommunication markets because all concentrations in those markets must be notified to SUTEL.

All economic agents in a notifiable transaction are obliged to file a notification; however, notification by at least one party will be sufficient. In practice, this deserves special attention to make sure confidential information is properly protected.

Filing can be made at any time prior to closing. The transaction cannot be closed without COPROCOM’s approval, except in very exceptional cases if authorised by COPROCOM.

Acquisitions that are part of the regular business activity of the purchaser and do not have the object or effect of concentrating the operations of independent economic agents do not have to be notified. This may be the case in the purchase of credit portfolios that regularly take place between banks and financial institutions to manage their cash flow. Acquisitions of assets with the purpose of selling them in the short term (less than a year) are also exempted from filing provided the purchaser does not participate in the decision-making of the commercial strategy with regard to such assets.
Merger control for all markets, including regulated markets (except telecommunications), is within COPROCOM’s mandate. COPROCOM’s analysis is separate from the powers of the regulators and any other government authority. In regulated markets (specifically financial markets), COPROCOM has to consult with the regulator, although the final decision will be issued by COPROCOM, except in very special cases that may pose systemic risks for the financial industry.

The merger control procedure now has two phases. In the first phase, COPROCOM has to determine if the proposed transaction creates risks for the competition process. If it does, the transaction is subject to the second phase.

At the end of the first phase, COPROCOM can authorise the transaction, approve it subject to conditions offered by the parties at filing, or subject the transaction to second phase review. If the transaction is subject to second phase review, COPROCOM must indicate the risk to competition identified and notify the parties of the additional information required for the second phase analysis. This request must relate to the risks to competition identified in the first phase and the additional elements needed to demonstrate the possible efficiencies of the transaction. This is very significant because this provision forces COPROCOM to indicate exactly what it needs to verify the efficiencies the parties argue will be generated by the transaction. The previous process did not offer this opportunity, and although COPROCOM had the capacity to request from the parties any information it needed to resolve the investigation, it chose simply to let parties file whatever information and evidence they thought sufficient to prove the efficiencies and then normally rejected the efficiency defence, indicating that the parties had failed to demonstrate all aspects required for such defence. With the enactment of the Law, COPROCOM must ask the parties for the specific evidence it needs to verify the efficiencies, if this information is not already in the file.

At the end of the second phase, COPROCOM can: (1) approve the transaction with or without conditions; (2) ask the parties to propose conditions or remedies to the competition risks that have been identified; or (3) reject or prohibit the transaction if there are no available remedies to reduce or eliminate the anticompetitive effects.

COPROCOM shall approve concentrations that do not have the object or effect of creating a significant obstacle to competition. The government must issue the executive regulations of the Law before the end of 2020, which must include the ways to determine whether a concentration will create an obstacle to competition.

COPROCOM will consider whether: (1) the transaction creates or enhances market power; (2) the concentration will facilitate coordination among competitors; and (3) consumers will be harmed.

If the concentration has the object or effect of creating an obstacle for competition, COPROCOM shall consider: (1) if the transaction is necessary for achieving efficiencies, (2) if the transaction is necessary for preventing productive assets from leaving the market, if the seller is in an unsustainable financial situation (presumably, the regulations will determine the standard and requirements for this failing firm defence), (3) if the anticompetitive effect can be remedied; and (4) any other circumstance that may protect the interests of consumers.
iii Remedies and conditions

Remedies and conditions can be structural or behavioural. If the approval is subject to conditions or remedies, COPROCOM must indicate specifically what these are and the time frame for implementing and maintaining them. Remedies can be ordered for up to 10 years, extendable for five more years. If market conditions vary and remedies are no longer needed, the party may ask COPROCOM to review and remove the remedies.

If COPROCOM finds that a 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;
- a limit on the sale of products or services;
- an obligation to provide or sell certain products or services;
- the spin-off of the target company;
- a restriction on acquiring further concessions or permits;
- the introduction, amendment or elimination of certain contractual provisions; and
- any other condition that may be required to prevent, reduce or counterbalance the anticompetitive effects.

Remedies imposed by COPROCOM must be directly aimed at maintaining competition, and cannot be imposed to improve existing market conditions. Remedies must be easy to implement by the parties and easy to verify by COPROCOM. If COPROCOM can choose among different options, it must elect the remedy that is the least burdensome for the economic agents.

iv Time frames

The Law contemplates a two-phase procedure. The purpose of this is to facilitate and expedite the analysis of transactions that do not raise competition concerns. These cases can be approved relatively easily and quickly, based on a small amount of information gathered by the parties. Only cases that may raise competition concerns should be taken forward to the second phase of the procedure for a more detailed analysis.

The first phase gives COPROCOM 30 calendar days (commencing once the notification is complete) to determine if the concentration creates risks to competition; if it does, COPROCOM will start the second phase, which extends the process for an additional 90 calendar days, during which it may request more information from the parties.

After filing, COPROCOM has 15 working days to review the filing and verify that all the requirements are complete. If filing is not complete, COPROCOM shall grant the parties 15 calendar days to complete the information. If the parties do not complete the filing in the 15-day period, COPROCOM will order the conclusion of the proceeding and will close the filing. Unless the regulations indicate otherwise, the parties will lose the filing fee.

If COPROCOM subjects the case to the second phase of the proceeding, it shall notify the parties, indicating the competition risks identified and granting them 10 working days to file additional information. The parties shall have five working days to appeal this resolution.

If, in the second phase, COPROCOM concludes that the concentration has anticompetitive effects that can be remedied, it shall grant the parties 30 working days to propose such remedies. If COPROCOM considers that there are no available remedies, it shall reject the transaction. In any event, the parties will have 15 working days to file an appeal before COPROCOM.
If the parties file a proposal of remedies, COPROCOM shall approve or reject the proposal within 30 calendar days. This resolution can also be appealed by the parties within 15 working days. COPROCOM will resolve the appeal within 15 working days. If COPROCOM imposes remedies that are different to those proposed by the parties, the parties shall have 20 working days to decide whether they accept these new remedies. If the parties reject the remedies imposed by COPROCOM or do not respond within such time frame, the concentration will be rejected.

v Parties’ ability to accelerate the review procedure

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 cases may be completed in the first phase of the procedure.

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 prior to filing. 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 at the end of the first phase of the procedure.

If COPROCOM determines that the proposal is insufficient to counterbalance the anticompetitive effects, it will notify the parties, the case will be moved to the second phase of the procedure and COPROCOM will notify the parties, indicating the risk to competition and requesting additional information. The parties should be able to anticipate this scenario and move quickly to collect and provide the information requested by COPROCOM. This request should include the evidence needed by COPROCOM to prove the efficiencies alleged by the parties at filing.

Expediting the analysis of the possible anticompetitive effects and possible remedies depends on the ability of COPROCOM to quickly understand the market and the rationale of the concentration. Thus, 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.

Article 106 of the Law contemplates the possibility to request working meetings with COPROCOM to discuss the information on the file, proposals from the parties and concerns of the authority. The Law clearly states that the content of these discussions shall not be considered an advanced judgment, which enables COPROCOM’s officers to feel comfortable participating in these discussions and sharing their concerns and opinions, including about the risks to competition, possible remedies and proof of efficiencies. Prior to the Law coming into force, these meetings were useless because COPROCOM’s officers did not feel comfortable sharing their opinions or concerns.
vi Third-party access to the file and rights to challenge mergers
Once COPROCOM verifies that a filing is complete, it informs all interested parties about the filing by publishing a brief description of the transaction on its website, while protecting any confidential information. COPROCOM also commonly opens a file with the non-confidential information on record, which incorporates details of a public version of the parties’ briefs. Third parties have 10 days to file comments and provide additional information. COPROCOM 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 15 working days.

vii Resolution of competition concerns of the authorities, appeals and judicial review
COPROCOM’s decisions cannot be revoked by the Minister of Economy. Appeals are made before COPROCOM itself to reconsider its own opinion. Opinions can also be challenged before court.

Judicial review may include both the formalities and the substance of the case. In the cases ruled 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 in regulated markets (i.e., banking, stock, pension funds and insurance) are now examined and decided by COPROCOM. In all cases, COPROCOM must consult with the sector regulator but shall issue the final decision itself. Only in cases that may pose systemic risks in the financial industry does the regulator have the capacity to take control of the review and issue the final resolution. It is expected that the executive regulations will expand on this proceeding.

ix The Merger Guidelines
The competition authorities must issue new merger guidelines before the end of 2020. As indicated above, according to the Law, the analysis must be focused on harm to competition. In the meantime, the existing guidelines still offer useful tools for many aspects of the analysis, many of which will also be in the new guidelines.

The current Merger Guidelines (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. Additionally, COPROCOM’s application of the Guidelines 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 in which 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 in the place 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 Herfindahl–Hirschman Index (HHI) will be:

a. no anticompetitive effects: HHI variation of less than 100 and HHI of less than 1,500;

b. potential anticompetitive effects:
   • in markets with moderate concentration: HHI of between 1,500 and 2,500 and HHI variation greater than 100; and
   • in highly concentrated markets: HHI greater than 2,500 and HHI variation of 100 to 200; and

c. where market power can be increased: in highly concentrated markets: HHI greater than 2,500 and HHI variation greater than 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

Because many aspects of the Law are still pending, strategic considerations are currently difficult to assess. The private sector in general and key economic agencies should closely monitor the appointment of the new members of COPROCOM and the drafting of the executive regulations, the regulations to be issued by the authorities themselves and the technical guidelines, all of which should be achieved by early 2021. Once the competition landscape is complete, discussions about strategy will be more meaningful.

V OUTLOOK AND CONCLUSIONS

The completion of the implementation of the Law is expected to be complete by the end of 2020 or early 2021. This means we will see the appointment of three new full-time members and two substitute members of COPROCOM. The government should also issue the executive regulations of the Law, and COPROCOM and SUTEL are required to issue specific regulations on matters such as filing fees and details surrounding the calculation of penalties, among other things. Merger control guidelines for filings and analysis of concentrations are also expected. The workings of this new institutional and normative arrangement are eagerly anticipated.

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 conduct and merger control. If a country does not have a competition law in place (such as Guatemala), it should enact one within three years of the ratification of the Agreement by all countries. While this may still be in the future, as time passes, we should begin to see greater coordination and teamwork between the region’s competition authorities.
Chapter 13

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 (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.

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). This legislation provides very detailed procedural provisions, and the Act provides 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.

---

1 Goran Durmiš is a partner and Tea Ivančić, Izabela Beber and Ivana Ostojić are senior associates at Law Firm Bekina, Škurla, Durmiš and Spajić Ltd.
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 a merger of undertakings;

b an acquisition of undertakings; or

c 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:

• the acquisition of majority shares;

• the acquisition of majority voting rights; or

• any other means 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:

a 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

b 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.

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 maximum of eight days.

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

During 2019, the Agency continued to actively promote the importance of competition law policies. In their report for 2018, published in September 2019, the Agency stated that numerous activities marked 2018, not only in implementing market protection regulations, prohibiting competition and unfair trading practices in the food supply chain and the continued promotion of the culture of competition, but also in the development of competition protection generally.4

Much of the activity related to the prohibition of anticompetitive agreements between undertakings. In these cases, the Agency monitored and investigated anticompetitive practices by carrying out preliminary examinations of the situation in a number of relevant markets. After considering the facts and circumstances, and carrying out legal and economic analyses

---

of these markets, in one case the Agency accepted the undertaking’s proposed commitment for eliminating the negative effects on competition. The Agency did not find evidence of abuse of dominant position in initiated cases, despite the existence of certain indications.

Much of the activity during 2018 was also characterised by the effective promotion of law and competition policy, which is closely linked to the strengthening of a competitive culture and knowledge levels among undertakings and the general and professional public.

The preconditions for the effective implementation of regulations falling within the jurisdiction of the Agency are knowledge of the manner in which many markets function and their reciprocal relationships, as well as analysis of the regulatory framework for individual activities. Therefore, a significant part of the activities in 2018 relates to in-depth sectoral market analyses and individual market practices. Hence, the Agency establishes the basis for initiating proceedings against the undertakings, and also the opportunity to illustrate the need to change specific regulations that do not comply with provisions of competition law. The Agency conducted and completed four sectoral surveys in 2018.\(^5\)

In the framework of international activities and international cooperation, the Agency participated in the negotiation process of Directive (EU) 2019/1, cooperating with various international organisations, forums and working groups.

The Agency also provided key expert assistance to the State Attorney’s Office of the Republic of Croatia and a foreign law team representing the Republic of Croatia in international law arbitration proceedings before the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes in Washington. The proceeding had been initiated against the Republic of Croatia by a Dutch owner of the Croatian trading company CityEX. On 5 April 2019, the Arbitral Tribunal rejected most of the plaintiffs’ claims, including a claim for payment of the required amount of money. The Competition Authority issued a decision determining that there had been no predatory pricing by HP as dominant undertaking and that, consequently, the financial difficulties of CityEX had not been caused by a breach of competition rules. In 2019, this decision of the Competition Authority was effectively confirmed by the Arbitral Tribunal, which accepted the views of the Competition Authority in this matter.

According to the publicly available documents on the scope of activities undertaken by the Agency, there has been an increase in the number of merger and acquisition deals being notified and addressed by the Agency, with all the notified concentrations of 2018 being cleared by the Agency. Decisions in merger control cases are made publicly available on the Agency’s website.

In 2018, the Agency handled 688 cases, with 17 cases continuing in 2019. Below is a brief outline of the most notable merger control cases in 2019.

i Mondo Inc/Adria Media Group/Adria Media Zagreb

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant market.

In this business transaction, Mondo Inc d.o.o., through Adria Media Group d.o.o., acquired direct control over Adria Media Zagreb d.o.o., by acquisition of a majority interest in the latter, on a permanent basis.\(^6\)

\(^5\) id., p. 13.

ii  **YELLO/E2E4MUSIK/YAMMAT**

The Agency cleared this concentration between the undertakings concerned in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created in the form of the acquisition of a 51 per cent interest in YAMMAT d.o.o by YELLO d.o.o., through special purpose entity E2E4MUSIK d.o.o., on a permanent basis.7

iii  **Maca LM/Radio Trsat, Maca LM/Miroslav Kraljević and Maca LM/Radio Brod**

The Agency cleared all three concentrations between the undertakings concerned in the first phase stating that it would have no anticompetitive effects on the relevant markets.

The concentrations were created by Maca LM acquiring a 100 per cent interest in Radio Trsat d.o.o. and thus indirectly over Vanga d.o.o., a 51.29 per cent interest in Miroslav Kraljević d.o.o. and a 70 per cent interest in Radio Brod d.o.o. All three concentrations create an effect on the radio and radio advertising markets.8

iv  **Viro Tvornica Šećera/Tvornica Šećera Osijek**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created in the form of a new joint venture in which Viro Tvornica Šećera d.d., Tvornica Šećera Osijek d.o.o. and Sladorana Tvornica Šećera d.d. (the undertaking under direct sole control of Viro) have direct control.9

The concentration would have effects primarily in the sugar production market (which is closely linked to the upstream sugar beet production market) and wholesale sugar market in the segments of sales to industrial customers and retail chains. Specifically, with respect to both segments of the wholesale sugar market, after conducting analysis of all the circumstances and facts, the Agency found that the territorial size of the market in question extends beyond the territory of the Republic of Croatia. The foregoing arises primarily from the pattern of customer behaviour. The behaviour pattern of the buyers in the purchase of sugar indicates that their purchase depends on the price that has been offered on the market and not on the registered seat of the supplier. It is therefore clear that in this particular case competition in sugar production and wholesale is present in an area wider than the Croatian market, covering at least the European Economic Area.

v  **Studenac/Istarski Supermarketi**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would produce no anticompetitive effects on the relevant markets.

The concentration was created by Studenac d.o.o. acquiring permanent direct control of Istarski supermarket d.o.o.10

---

vi  **CE Invest 2P Sarl/H-Abduco/Dohel**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created by CE Invest 2P Sarl acquiring direct sole control on a permanent basis of H-Abduco d.o.o. and Dohel d.o.o. ¹¹

vii  **RTL Hrvatska/Telegram Media Grupa**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created by RTL Hrvatska acquiring permanent direct sole control of electronic publication *Net.hr* from Telegram Media Grupa. ¹²

viii  **Mondo INC/TVC Hungary Kft**

The Agency cleared the concentration between the undertakings concerned in the first phase, stating that it would have no anticompetitive effects on the relevant market. The concentration was created by Mondo Inc’s acquisition of 100 per cent of TVC. ¹³

ix  **Petrol/Crodux Plin**

The Agency cleared the concentration between the undertakings in the second phase, as understood by the provision of Article 22, Paragraph 7 of the Competition Act.

The concentration was created by Petrol d.o.o. acquiring direct control on a permanent basis of Crodux Plin d.o.o.’s liquefied petroleum gas business. In the second phase of the proceedings, the Agency considered publicly available sources, received data, documents, direct market participants and the applicant’s statements, and found that implementation of the concentration in question would not produce significant uncoordinated effects on the relevant market. Also, the analysis did not determine the existence of criteria for initiating a procedure to determine conditions for addressing coordinated actions that would lead to a negative effect on competition. ¹⁴

x  **Pozavarovalnica Sava/Zavarovalnica Triglav**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created by way of the undertakings forming a new joint venture, acting as an independent undertaking on a more permanent basis. ¹⁵

xi  **Geoplin/Crodux Plin**

The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

---


© 2020 Law Business Research Ltd
The concentration was created by Geoplin d.o.o. acquiring direct sole control on a permanent basis of Crodux Plin d.o.o.'s natural gas business.16

xii Studenac/Sonik Trgovina
The Agency cleared the concentration between the undertakings in the first phase, stating that it would have no anticompetitive effects on the relevant markets.

The concentration was created by Studenac d.o.o. acquiring direct sole control on a permanent basis of Sonik Trgovina d.o.o.17

xiii Triglav Skladi Družba Za Upravljanje d.o.o./Alta Skladi Družba Za Upravljanje d.d.
The Agency dismissed the notification of the proposed concentration between Triglav Skladi d.o.o. and Alta Skladi, both with seats in Ljubljana, Slovenia, due to the fact that within the meaning of Article 17, Paragraph 6 of the Competition Act, the criteria for initiation of the compatibility assessment proceeding in this particular case had not been satisfied.

Specifically, after having examined the notification that had been submitted by Triglav Skladi, the undertaking acquiring permanent direct control over Alta Skladi by acquiring 100 per cent of the latter, the Agency found that the criteria under Article 17, Paragraph 1 of the Competition Act had not been cumulatively met.

Specifically, the total turnover in the Republic of Croatia of Alta Skladi, the undertaking to be acquired in this particular concentration, did not meet the second criterion stipulated under Article 17, Paragraph 1, item 2 of the Competition Act. Therefore, the Agency dismissed the notification of the proposed concentration concerned.18

III THE MERGER CONTROL REGIME
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: (1) 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; (2) 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; (3) a party to the concentration acquires independent control over an undertaking over which they had previously exercised joint control; or (4) 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 it 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 by 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, and 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 of 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 the 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 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.

© 2020 Law Business Research Ltd
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.\(^{19}\)

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 a prohibited concentration is 10 per cent of the annual turnover of the undertaking, according to the last published financial statements.

**IV OTHER STRATEGIC CONSIDERATIONS**

It has been an ongoing goal of the Agency to align and equalise the practice of undertakings assuming obligations to repair the damage to competition, through acceptance of measures and conditions.

The measures and conditions to alleviate the negative effects to the competition are already rooted in the merger control regime, and have been successfully used in the past.

The Croatian legislator facilitates the use of these measures by encouraging the participants of the concentration to take a proactive approach and propose measures and conditions during the entire course of the proceedings.

This concept is further reinforced by the fact that the parties to the concentration are explicitly invited to submit their written proposals of the measures and conditions to the Agency within one month of the receipt of the notice on the preliminary determined facts.

The measures and conditions proposed to alleviate the negative impact of concentration may be divided into three groups: behavioural remedies, structural measures and quasi-structural measures.\(^{20}\)

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).\(^{21}\)

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

---

19 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.


21 ibid.
themselves, in cooperation with the Agency, assume the obligation to alleviate potentially harmful effects to 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 2019, the Agency 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 in 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 merger control cases in Croatia continues to highlight the importance of the role of the Agency in addressing and monitoring market competition issues. The fact that this will indeed continue to be the focus of the Agency is highlighted by the Agency’s statement citing market competitiveness as one of its main concerns.
Chapter 14

ECUADOR

Diego Pérez-Ordóñez and Mario Navarrete-Serrano

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, among them implementing economic thresholds for mergers.

Merger notifications are filed with the Intendancy for Concentration Control (the Merger Control Intendancy), an investigative authority that issues 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 investigatory 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 an economic analysis of the competitive landscape, the transaction’s potential impact on the competitive structure, and its final recommendation as to the clearance, conditional clearance subject to remedies, or denial, of the transaction. The agency recently created a fast-track procedure for transactions that do not pose substantive risks to competition, which is a welcome change for a regime that took, on average, five to six months from filing to clearance.

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, administration agreements and asset sales, inter alia, are defined as ‘concentration operations’,

---

1 Diego Pérez-Ordóñez is a partner and Mario Navarrete-Serrano is a senior associate at Pérez Bustamante & Ponce.
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 turnover or market share thresholds are met.

II YEAR IN REVIEW

The most consequential recent development in the Ecuadorian merger regime was the 22 April 2020 resolution by which both a fast-track merger procedure and a three-pronged failing firm defence were created. The failing firm defence is part of the fast-track procedure.

To benefit from the fast-track procedure:

a. the undertaking acquiring control should not, directly or indirectly, carry out economic activities in Ecuador;

b. in horizontal mergers:
   • the parties’ joint share in each relevant market must be less than 30 per cent; and
   • the Herfindahl–Hirschman Index (HHI) in each relevant market shall be less than 2,000 points and generate, as a consequence, an increase of less than 250 points;

c. in vertical mergers, the HHI of the affected relevant market shall be less than 2,000 points; or

d. the undertakings must be at risk of bankruptcy. This possibility, known as failing firm defence, is a new feature in the Ecuadorian competition regime. Following EU guidelines, the competition authority created a three-step test to determine the applicability of this criteria:
   • the failing firm would, in the near future, be forced out of the market due to financial difficulties;
   • there are no less anticompetitive alternatives than the proposed merger; and
   • in the absence of the merger, the assets of the failing firm would inevitably exit the market.

Although the effects of this new fast-track procedure are not yet apparent in practice, this regime will generate significant advantages for undertakings by reducing waiting times. Inevitably, as this regime is implemented, several practical questions requiring answers from the competition agency will arise.

III THE MERGER CONTROL REGIME

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, and a new Superintendent, Danilo Sylva 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 \emph{de facto} and \emph{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.

\textit{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.

\begin{tabular}{|l|c|c|}
\hline
\textbf{Type} & \textbf{Amount of unified basic remuneration*} & \textbf{Value (in US$)†} \\
\hline
a & Concentrations involving financial institutions and entities that participate in the stock exchange & 3.2 million & 1.28 billion \\
\hline
b & Concentrations involving insurance and reinsurance companies & 214,000 & 85.6 million \\
\hline
c & Concentrations involving undertakings not contemplated in (a) and (b) & 200,000 & 80 million \\
\hline
\textsuperscript{*} & The unified basic remuneration in Ecuador for 2020 is US$400 & \\
\textsuperscript{†} & The unified basic remuneration changes yearly; thus, the value in US dollars provided above will change on a yearly basis & \\
\end{tabular}

\textit{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 of whether the transaction reinforces this share.

### iii Execution and filing

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 provide further guidance in respect of the ‘conclusion’ concept, and stipulate that it should occur at the following times:

- **for mergers:** from the time when at least one of the participants at the shareholders’ meeting has agreed to the merger;
- **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;
- **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;
- **for joint venture and administration agreements:** from the time that the administrators have been designated by the shareholders’ meeting; and
- **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 Waiting periods and time frames

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 relatively complex merger, and eight to 12 months if there is a need to negotiate remedies.

On 20 April 2020, the agency enacted a resolution by which a fast-track procedure has been created (see Section II). Although influenced by the European regime, the specific criteria may be different. It takes at least 37 business days from the filing of the notification to complete the new procedure.

The Regulations grant the Superintendency the right to determine official fees for the evaluation of a concentration notification. In 2013, the Superintendency published regulations containing the parameters to be used to determine the fee charged for the processing of each concentration notification.
The regulations establish that the processing fee will be the greatest of the following:

- \( a \) 0.25 per cent of the income tax paid in the previous fiscal year in Ecuador;
- \( b \) 0.005 per cent of sales obtained in the previous fiscal year from the undertakings’ activities in Ecuador;
- \( c \) 0.01 per cent of the assets in Ecuador; or
- \( d \) 0.05 per cent of the book equity in Ecuador.

The current rules for fees require parties to validate their methodology of payment prior to making any disbursements. 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. However, this validation period tends to take several weeks, generally delaying the completion of the review period by two or three weeks. As a consequence, the Authority is currently considering new rules that would set a fixed fee subject to discounts depending on specific circumstances of the parties. These new rules have not yet been made public.

### Exemptions

Article 19 of the Law and Article 13 of the Regulations establish 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.

Even though it is highly likely that several undertakings will argue failing firm defences in the coming months, it is worth noting that in Ecuador this is not a proper defence, but rather a prior exemption granted by a (still undefined) public authority. Before considering a failing firm argument in Ecuador, consulting with local counsel is recommended.

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.

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

The Authority tends to be overzealous with the confidentiality of all files. No public excerpt or declaration is made regarding any pending cases, and only public versions of decisions are published when formally requested and after the statute of limitations for ordinary appeals runs out (20 business days). Unfortunately, the regulator does not even publish the public versions and Freedom of Information Act requests must be filed to obtain them.

This practice complicates any challenge to mergers. Since the decision is published only after the statute of limitation of ordinary appeals runs out, third parties have only exceptional
recourse, basically arguing gross misapplication of the law, new evidence or a material change in circumstances. These high bars have proven difficult to meet, and, therefore, few challenges have been proposed and even less have been at least partially successful.

vii Substantive assessment and remedies
The substantive test under Ecuadorian law is modelled on the European significant impediment to effective competition standard. However, the Authority has not fleshed out the contours of the practical application of the test, and at times the decisions seem to apply a more stringent and harder to satisfy substantial lessening of competition test. This is definitely an area that needs more clear development from the Authority.

The Ecuadorian Authority may impose both behavioural and structural remedies. Even though the Merger Control Intendant has voiced his preference for structural remedies (as he deems these more effective), because of their complexity behavioural remedies are often imposed in lieu of these. Furthermore, the largest structural remedy ever imposed by the Authority – the divestiture of the second largest beer brand as part of the SABMiller/AB InBev transaction – was annulled by the judiciary. This case resulted in a more restrained approach and reinforced the practical preference for behavioural remedies.

IV RECENT PRACTICE
The regulator has approved a large number of global transactions subject to multi-jurisdictional control and that required prior approval in Ecuador. Only one transaction was denied on formal grounds but was later approved on appeal, and only a handful of transactions were denied due to anticompetitive concerns. To date, few global transactions have been subjected to structural remedies; one was subsequently closed because of the termination of the original merger, another 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 2019, the regulator processed 24 merger control cases (there are no statistics for 2020 yet), among the most relevant being the acquisition of several independent clinics by the Ecuadorian subsidiary of Fresenius Medical Care and the clearance of HBO’s divestiture in a partnership with Ole Communications Inc. Unfortunately, the agency does not regularly publish its decisions.

V 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.

VI MERGER PROCEDURES

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 Mergers by union or takeover

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.

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.

### 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.

VII 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 for the closing of transactions. A bill was sent to the National Assembly in 2018 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 to 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 Intendancy 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.
Chapter 15

FRANCE

Hugues Calvet, Olivier Billard and Guillaume Fabre

I  INTRODUCTION

i  Merger control authority

Since a major overhaul of the French merger control regime (the 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 Article L430-1 et seq and Article 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.

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).

1  Hugues Calvet and Olivier Billard are partners, and Guillaume Fabre is a counsel, at Bredin Prat.
Accordingly, there is a concentration where:

a. two or more formerly independent undertakings merge;

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 of the 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:

- the combined worldwide pre-tax turnover of the parties exceeds €75 million;
- each of at least two of the parties concerned achieved a pre-tax turnover exceeding €15 million (or €5 million if the retail sector is concerned) in at least one of the French overseas territories concerned. This threshold does not have to be reached by all the parties concerned in one and the same territory; and
- the transaction does not fall within the scope of the EUMR.

The undertakings whose turnover is to be considered depend on the type of transaction. For instance, the following 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, and 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 L430-2 V of the 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.

If 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; or (2) impose a fine of 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 on 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, 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.

---

3 Judgment of the Supreme Administrative Court dated 15 April 2016, Appeal No. 375658.
On 8 November 2016, the FCA issued a particularly significant decision relating to Altice's practices when it notified (as two separate cases) the acquisitions of, respectively, exclusive control over SFR and OTL. Various competitors had complained to the FCA that Altice had begun implementing both transactions before the FCA had approved them in, respectively, June and September 2014. The FCA then carried out dawn raids at Altice, SFR and OTL's premises. At the end of its investigation, the FCA concluded that Altice had indeed begun to interfere in the respective commercial policies of SFR and OTL before it had approved of the transactions, in particular by (1) approving the conditions by 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, and 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 on Altice for gun-jumping. In parallel, Altice was recently fined €124.5 million by the EU Commission for implementing its acquisition of PT Portugal before notification or approval by the Commission. Those two fines are among the highest ever enforced for such infringement in the EU.

II  YEAR IN REVIEW

In 2019, 270 concentrations were reviewed and cleared by the FCA, nine of which were cleared conditionally (with remedies). So far in 2020, the FCA has adopted 72 decisions to clear concentrations, including one following a Phase II investigation.

These figures include a number of simplified decisions, in particular concerning the retail distribution sector, 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 are some of the significant FCA decisions in 2019 and early 2020.

i  D’aucy/Triskalia

On 24 July 2019, the FCA adopted a decision authorising the merger between two major agricultural cooperatives, both active in the Brittany region. The FCA reviewed in detail the horizontal overlaps in various sectors of the two cooperatives (procurement of raw vegetables and production of canned vegetables, procurement and marketing of cereals, retail distribution of gardening and home improvement tools, production and marketing of eggs and egg products, etc.). It also analysed in detail the consequences of the merger on the relationships between the farmers that collectively own each cooperative and the new merged cooperative. The FCA cleared the transaction in Phase I but only after a long pre-notification period of almost 18 months, and subject to various commitments. These commitments relate to the divestiture of stores in the retail sector and silos for the procurement of cereals. The parties also committed to modify their contractual relationships with the farmers, to ensure

farmers would remain free to sell their cereals to third parties and would not have to rely exclusively on the new cooperative to procure products necessary for their farming activities (seeds, tools, agro-services, etc.).

ii Itas/TDF

On 16 January 2020, the FCA refused to apply the rules prohibiting abuses of dominant positions to a transaction that did not meet the thresholds for merger control review in France. In this case, Towercast lodged a complaint against TDF to challenge TDF’s takeover of its competitor Itas in October 2016. Whereas Itas was too small for the turnover thresholds to be met, Towercast complained that this acquisition reinforced TDF’s dominant position in the market as Itas was one of its last competitors (in addition to Towercast). According to the FCA, such a merger could not constitute an abuse of a dominant position, as the adoption of a European system of compulsory prior control of mergers leads to the non-applicability of Article 102 of the Treaty on the Functioning of the European Union to operations corresponding to the definition of concentration. Regulation (EEC) No. 4064/89 of 21 December 1989 provides that ‘for pressing reasons of legal certainty, this new Regulation will apply solely and exclusively to concentrations’. Regulation (EC) No. 139/2004, currently in force, also specifies that antitrust regulations are not applicable to ‘concentrations’ as defined in its Article 3. This decision thus enhances legal certainty in the field of merger control. However, the FCA specified that, according to its views, national competition authorities would be allowed to refer transactions to the EU Commission pursuant to Article 22 of Regulation (EC) No. 139/2004, even when they are below the national thresholds for mandatory notification.

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 certain 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. Additionally, 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. To our knowledge, the FCA tends to rely more often on this possibility, in particular when it needs time to finalise its market investigation or the drafting of the decision.

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 of 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 of 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 of 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 on 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.

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 subject 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 EUMR).

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, first, 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 of publication of the notification of the concentration on the FCA’s website. Second, 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 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, particularly 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 past years suggests that the FCA is much more willing to accept behavioural commitments than the EU Commission might be.

For instance, in 2016, in five cases out of six, the FCA conditioned its approval only on behavioural remedies, whereas in the remaining case, structural and behavioural remedies were accepted. In 2017, out of eight cases, the FCA accepted behavioural commitments

5 Acquisition of Société Groupe Aqualande by Société Labeyrie Fine Foods and Les Aquaculteurs Landais, decision dated 22 April 2016, Case No. 16-DCC-55; acquisition of Agri-Négoce by Axéréal Participations, decision dated 21 September 2016, Case No. 16-DCC-147; acquisition of Société Geimex by the Casino group, decision dated 14 October 2016, Case No. 16-DCC-155; merger of Sicavyl with Sicarev, decision dated 9 December 2016, Case No. 16-DCC-208; and acquisition of Société Aéroports de Lyon by Société Vinci Airports, decision dated 31 October 2016, Case No. 16-DCC-167.

6 Acquisition of Darty by the Fnac Group, decision dated 27 July 2011, Case No. 16-DCC-111.
four times, and a mixture of behavioural and structural remedies for the other four. In 2018, in four cases out of five, the FCA conditioned its approval only on structural remedies, whereas in the remaining case, behavioural remedies were accepted.

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 remained 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, particularly 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.

---

7 Merger by absorption of Ecopolio 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 2017, 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; and creation of a full-function joint venture between La Poste and Suez, decision dated 21 December 2017, Case No. 17-DCC-209.

8 Acquisition of Anios by Ecolab, decision dated 31 January 2017, Case No. 17-DCC-12; acquisition of Médipôle-Partenaires by Elsan, decision dated 23 June 2017, Case No. 17-DCC-95; acquisition of the Bricorama group by ITM Equipement de la Maison, decision dated 18 December 2017, Case No. 17-DCC-215; and 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.

9 Acquisition of sole control of Zormat, Les Chênes and Puech Eco by Carrefour Supermarchés France, decision dated 27 April 2018, Case No. 18-DCC-65; acquisition of sole control of SDRO and Robert II by Groupe Bernard Hayot, decision dated 23 August 2018, Case No. 18-DCC-142; acquisition of sole control of Jardiland by InVivo Retail, decision dated 24 August 2018, Case No. 18-DCC-148; and acquisition of sole control of the prepared foods division of group Agripole by Cofigeo, decision dated 14 June 2018, Case No. 18-DCC-95.

10 Joint venture creation by Global Blue and Planet Payment, decision dated 28 December 2018, Case No. 18-DCC-235.

The Authority carefully monitors the implementation of remedies and may withdraw an authorisation in the 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 green light for its acquisition of SFR in 2014. First, 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.)12 Second, in March 2017, the FCA imposed a €40 million fine on Altice for failing to respect a behavioural commitment relating to the proper performance of a contract for the creation of a fibre optic network.13 In July 2018, the FCA imposed a €20 million fine on Fnac Darty for failure to divest three out of six stores in the required time frame.

**Appeals and judicial review**

The Authority’s decisions can be appealed before the Administrative Supreme Court within two months of the date of the notification of the FCA’s decision (for the parties) or of 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 a *prima facie* 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 of the date of notification of the Administrative Supreme Court’s decision.

The following case is noteworthy.

---

12 Case No. 16-D-07.
13 Case No. 17-D-04.
France

Fnac/Darty
On 7 November 2019, the Administrative Supreme Court confirmed the decision by which the FCA fined Fnac Darty €20 million for failing in the divestiture of three stores, which was a precondition for the clearance of the acquisition of Darty by Fnac in 2016. Fnac Darty was unable to divest the three remaining stores within the time frame imposed by the FCA. The FCA considered that the buyer found by Fnac Darty was not an adequate buyer and Fnac Darty was, therefore, left without a buyer a few days before the deadline for divesting the stores. The FCA opened infringement proceedings for failure to fully implement the commitments and, for the first time, fined an undertaking on these grounds, even though Fnac Darty spontaneously offered to divest two stores in lieu of the three stores it had failed to divest in time (these two alternative divestitures being able to remedy the concerns the FCA had set out in its authorising decision). In addition to the fine, the FCA decision requested that Fnac Darty divest the two alternative stores that it had offered to divest. The Administrative Supreme Court confirmed this decision and ruled, in a nutshell, that the FCA is not subject to the obligation to state reasons for the amount of fine imposed on the grounds of non-compliance with commitments, even if the fine must comply with the proportionality principle.

\( v \) Regulatory review

There are some specific areas in which specific merger rules apply, such as:

\( a \) the audiovisual sector, in which, unless otherwise agreed in international conventions to which France is a party, a foreign legal entity may not hold more than 20 per cent of the capital or voting rights of a company operating an audiovisual communications system in French. There are also specific rules on cross-media ownership; and

\( b \) the press sector, in which a single individual or legal entity may not control daily publications that represent more than 30 per cent of the total circulation of similar publications on the national market; for publications in French, the above 20 per cent rule applies.

In addition, in the course of Phase II, the FCA may request non-binding opinions from the relevant regulatory authorities. This particularly applies in the audiovisual sector (the Audiovisual Council), the banking sector (the Credit Institutions and Investment Firms Committee, the Banking Commission and the Financial Markets Authority), the insurance sector (the Insurance Companies Committee), the energy sector (the Energy Regulation Commission) and the telecommunications sector (the Regulatory Authority for Electronic Communications and Post).

IV OTHER STRATEGIC CONSIDERATIONS

\( i \) Coordinating with other jurisdictions

When dealing with concentrations, the FCA and competition authorities of other states (including EU Member States) may have concurrent jurisdiction. The Authority cooperates with competition authorities of other Member States through the European Competition Network. In parallel, the European Competition Authorities (ECA), which groups together
the competition authorities in the European Economic Area,\textsuperscript{14} 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. According to the arrangements agreed upon by the ECA, when an ECA authority is informed by the notifying parties that they have also notified or will be notifying the concentration to other authorities within the ECA, the relevant officials will contact their counterparts in the other ECA authorities informing them of the notification. The relevant officials of the notified ECA authorities will then exchange views on the case without exchanging confidential information (unless national legislation makes this possible), and keep each other informed of the development of the case as appropriate. 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.

In addition to 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 EU (May 2016). This document intends to provide guidance to companies that must notify a transaction in several Member States.

However, the FCA and the EU 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 (Article 4, Sections 4 and 5, and Articles 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 \textit{de facto} merger between Auchan and Système U. The Authority opened a Phase II review, at the end of which the parties withdrew their notification and abandoned the transaction in view of the risk of prohibition or onerous commitments.

\section*{ii \quad Dealing with special situations}
\subsection*{Ancillary restraints}
Agreements entered into by 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.

\textsuperscript{14} EU Member States and the Commission, Norway, Iceland, Liechtenstein and the European Free Trade Association Surveillance Authority.
Contrary to EU law, which has long provided that such restraints are covered by the decision clearing the concentration if they are directly related 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

---

15 Case No. 16-DCC-34.
holder (the dealer or the cooperative member). In this case, the FCA will assess what extent other elements could give the minority shareholder a decisive influence on the member. In one 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.\textsuperscript{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 \textit{de facto} prevents members from leaving the network for a very long time. Such provisions in the articles can be in consideration for stakes equal to a blocking minority or even for holding one preference share. In another case\textsuperscript{17} where the network leader owned only one preference share in a company operating a store 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 stores’ sales policy, 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.

\textbf{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, 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}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} Case No. 09-DCC-06.
\item \textsuperscript{17} Case No. 09-DCC-064.
\item \textsuperscript{18} Press release dated 23 May 2017.
\end{itemize}
\end{footnotesize}
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 and turnover calculation.

The Authority recalls that investors participating in investment funds do not usually exercise control. Control is normally exercised by the investment company that has set up the fund.

Allocation of turnover may also raise specific issues in the case of concentrations involving investment funds. Turnover of all portfolio companies held by the different funds over which the investment company exercises control will have to be taken into account.

Substantive assessment of a concentration involving an investment company raises specific issues as to the extent to which the investment company can be considered autonomous from the investors. In the case of a sufficiently autonomous investment company, the competitive assessment will take into account all undertakings over which it exercises decisive influence through its funds. When it appears that the investment company does not control any undertaking active in the same market in which the target is active or in an 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 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 created 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. It has recently also demonstrated a greater willingness to ensure that remedies are correctly implemented and that they are designed in a manner that allows full implementation. For instance, in 2018, the FCA imposed a €20 million fine on Fnac Darty for failing to implement a divestment remedy. In parallel, the FCA seems to more frequently request that the notifying party commits to fix-it-first remedies, whereby the buyer of the divestiture business must be identified and approved by the FCA in its decision approving the transaction. The FCA imposed such a fix-it-first remedy for the first time since 2015 in a decision in 2019 and imposed a similar remedy in May 2020.

Despite this efficient implementation of the merger control proceedings, there has been, as in other countries, some debate as to whether and how to modernise the French merger control proceedings.

19 Acquisition of Alsa by Dr Oetker, decision dated 29 January 2019, Case No. 19-DCC-15.
20 Acquisition of Vindémia by Groupe Bernard Hayot, decision dated 26 May 2020, Case No. 20-DCC-072.
On 7 June 2018, the FCA announced several measures to modernise its merger control procedures. First, the FCA widened the scope of its simplified procedure, so that more cases are eligible for this procedure, and simplified the procedure. In this context, in 2019, the FCA created an online platform to allow notifying parties to electronically notify transactions falling under the simplified procedure (amid the covid-19 pandemic, the FCA extended this possibility to the notification of all transactions, which may bring it to consider further digitising its merger review proceedings in the long term). Second, the FCA also came to the conclusion that (1) the notification thresholds applicable to mergers were adequate, and (2) taking into account the local competition issues that can arise, the existence of a specific threshold for the retail sector was still justified. Third, the FCA considered that the establishment of a threshold based on the value of transactions was not justified for the French economy. Finally, the FCA is currently reviewing its guidelines relating to merger control proceedings, and had announced, before the covid-19 crisis, that it would adopt new guidelines in 2020.

In parallel, the French Parliament is currently assessing a draft law that would, in a nutshell, create an ad hoc merger control system for acquisitions below the current notification thresholds. This draft legislation would apply to all ‘systemic undertakings’ and would impose that such undertakings declare any planned acquisition to the FCA. Should the FCA consider that such an acquisition risks negatively affecting the French market, it could request the systemic undertaking to notify the transaction so that it can be reviewed in relation to the French market. It appears that such a review would be suspensive. Also, should the FCA decide to open a Phase II investigation, it would be up to the systemic undertaking to show that its planned acquisition would not negatively affect competition on the market. At the time of writing, the draft legislation is being assessed by Parliament, and could be changed before being formally adopted (if it is so adopted).
I  INTRODUCTION

While Germany is the largest economy in Europe, the turnover thresholds that trigger a merger filing requirement in Germany are some of the lowest across the continent. Even though the near-final draft of the tenth amendment (the 10th Amendment) to the German Act against Restraints of Competition (ARC), which is expected to come into force by the end of 2020 or early 2021, aims to increase the lower of the two national turnover thresholds from €5 million to €10 million, the threshold remains very low compared to other jurisdictions.

In addition to the low thresholds, the types of transactions that are caught by the German merger control regime go significantly beyond the usual ‘acquisition of control’, which is the applicable test in the vast majority of other European jurisdictions (along with the EC Merger Regulation\(^2\) (ECMR) itself). As a result, unless subject to the ECMR, almost every significant European transaction that involves businesses with sales in or into Germany results in a German merger filing, with the German Federal Cartel Office (FCO) receiving well beyond 1,000 merger filings each year.

Although the FCO is a very experienced authority that never shies away from taking a hard line if a transaction raises serious competition concerns, its approach is generally pragmatic and cooperative. The FCO’s divisions are each responsible for certain industries. Thus, parties can generally expect decision makers with sector-specific knowledge and experience. Also, the formal requirements for submitting a complete notification in unproblematic cases are less burdensome than in many other jurisdictions.

In cases that raise serious competition concerns, the FCO’s approach tends to be more legalistic and focused on documentary and empirical evidence than in other major jurisdictions where economic theories increasingly appear to dominate merger reviews. Even if this is only a subtle difference – the FCO certainly employs economic theories and involves its chief economist team – it can make investigations less data-intensive. On the other hand, it can also lead to parties fearing that the authority does not sufficiently understand commercial realities.

All in all, the German merger control regime, although differing in many respects from regimes in other countries, strikes a strong working balance between an unusually wide scope of applicability on the one hand and a flexible and practical review on the other.

Regarding its industry focus, the FCO continues to show an active interest in the numerous aspects of e-commerce and online markets, big data, platform markets, network

---

1 Alexander Rinne is a partner and Alexander Zyrewitz is an associate at Milbank LLP.
effects, online marketing and others. Companies involved in transactions that require merger clearance in Germany are well advised to consider the implications of German merger control at an early stage of their contemplated transactions.

II YEAR IN REVIEW

2019 saw an average level of merger control enforcement in comparison with previous years. With the total number of merger filings submitted to the FCO increasing slightly to approximately 1,400 in 2019, the FCO issued six decisions following in-depth Phase II reviews. While two Phase II mergers were cleared (unconditionally), four mergers were prohibited. In five other cases, merger filings were withdrawn by the parties after the FCO informed them about its competition concerns during the merger review. In cases that may raise serious competition concerns, the FCO continues to be prepared to engage in detailed pre-filing consultations (see Section IV). The following overview highlights some recent key cases and developments in German merger control.

i Online platforms and big data

E-commerce and online content, including online platforms, continued to be an important focus of the FCO’s merger reviews. However, 2019 did not bring any significant cases or new developments with regard to actual cases but provided the FCO with opportunities to apply the experience it has gained in previous years.

ii Loomis/Ziemann

In a proposed transaction involving two companies primarily active in cash handling services, the FCO prohibited the acquisition of Germany-based Ziemann by Sweden-based Loomis. Even though the FCO acknowledged that the combined entity would not have reached a dominant position in any relevant market due to the existence of strong competitor and market incumbent Prosegur (as well as other established, albeit smaller, regional players) to which customers could have easily switched, it based its prohibition decision exclusively on the mere existence of unilateral effects due to the alleged high concentration in the market, although it was undisputed that the parties were not each other’s closest competitor (which was Prosegur). Potential coordinated effects were examined only marginally and as a mere subsidiary argument.

Should this become the new line of merger enforcement, it would considerably widen the scope of what is considered a ‘gap case’ under the significant impediment of effective competition (SIEC) test.

In its CK Hutchison decision, the European Court of Justice significantly raised the bar for finding unilateral effects in concentrated markets. It will be interesting to see what impact this decision will have on the German (and European) decisional practice.

3 This number is expected to decrease by approximately 20 per cent through the envisaged increase of the turnover threshold.
4 FCO, decision of 17 December 2019, B9-80/19 – Loomis/Ziemann.
5 European Court of Justice, decision of 28 May 2020, T-399/16 – CK Telecommunications UK Investments v. Commission.
iii Deutsche Telekom/EWE

In December 2019, the FCO rendered two decisions concerning the proposed creation of a joint venture between Deutsche Telekom and EWE, aiming to jointly build a fibre optic network in north-western Germany and jointly market wholesale access to the network.6

The FCO investigated the joint venture in two parallel proceedings: a merger review concerning the concentration as such as well as a behavioural investigation pursuant to Section 1 of the ARC (which is the national equivalent of Article 101 of the Treaty on the Functioning of the European Union) concerning potential collusion between the parties outside the concrete scope of the joint venture. Deutsche Telekom was the clear incumbent and EWE the strong number two in the relevant markets.

Remedies under the German merger control regime cannot require permanent monitoring by the FCO (or a monitoring trustee) and, therefore, must principally not be of behavioural, but rather structural, nature.

In a first step, the FCO imposed a range of behavioural remedies as part of the review, pursuant to Section 1 of the ARC, although those remedies also addressed concerns resulting from the concentration as such. In a second step, the FCO granted unconditional approval under the merger review by making reference to the remedies under the behavioural review.

Both decisions were appealed by intervening parties, inter alia, on the grounds of whether the FCO circumvented the prohibition to impose behavioural remedies in merger cases by imposing behavioural remedies that address structural issues of the merger as part of the parallel behavioural investigation.

iv CRRC/Vossloh

In April 2020, the FCO released a case report announcing a merger clearance concerning the acquisition of German Vossloh by Chinese state-owned CRRC,7 both active in the market for the manufacture of shunting locomotives. As the clearance decision has not yet been published, only two points are noted. First, the FCO reviewed market share statistics for the past five years instead of only the highest actual market shares in the year prior to the merger to capture the volatility of the shunting locomotives market. Second, it also increased the time period taken into account for its market prognosis from the usual three to five years to five to ten years, which is surprising since the predictability of marketplace developments decreases appreciably the longer the period considered.

III THE MERGER CONTROL REGIME

i Jurisdiction

The German merger control regime provides for a mandatory pre-merger filing requirement if:

a the transaction constitutes a concentration pursuant to Section 37 of the ARC;

b the turnover and transaction value thresholds of Section 35(1) and (1a) of the ARC are met; and

c none of the exemptions provided for in Section 35(2) of the ARC apply.

---

6 FCO, decision of 30 December 2019, B7-21/18 – Deutsche Telekom/EWE.
7 FCO, decision of 27 April 2020, B4-115/19 – CRRC/Vossloh.
**Concentration**

Unlike in many other jurisdictions, German merger control not only covers the acquisition of control (solely or jointly), but also:

- **a** the mere acquisition of at least 25 per cent of either the capital or voting rights in another company, irrespective of whether or not the shareholding will confer control or a significant influence over the target (all existing shareholdings of all entities of the purchaser's group have to be taken into account); and
- **b** the acquisition of shares or voting rights even below the threshold of 25 per cent if the transaction results in the acquisition of a 'competitively significant influence'. Competitively significant influence is less than control but generally requires the acquisition of significant influence through additional rights (plus factors) such as (1) information rights in respect of the operative business of the target, (2) the right to nominate members of the management board, the board of directors or the supervisory board, or (3) *de facto* blocking minority on annual shareholder meetings. Such influence is competitively significant if the purchaser is or controls a competitor of the target, or if the purchaser or any of its group companies is party to a significant vertical supply relationship with the target.

**Turnover thresholds**

The turnover thresholds (referring to the previous full business year) are as follows:

- **a** the combined worldwide turnover of all undertakings concerned exceeded €500 million;
- **b** one undertaking concerned had a turnover exceeding €25 million within Germany; and
- **c** at least one further undertaking concerned had a turnover in Germany exceeding €5 million.

The 10th Amendment intends to increase the third turnover threshold from €5 million to €10 million. However, this threshold is still very low in comparison with other EU Member States and, in fact, to a large extent, the increase compensates for past inflation.

**Transaction value threshold**

The transaction value threshold is structured similarly to the size-of-transaction test under US merger control law and will be triggered if the transaction value exceeds €400 million and the target has ‘significant’ business activities in Germany (local nexus). It is, however, combined with turnover thresholds and will apply if:

- **a** the combined worldwide turnover of all undertakings concerned exceeded €500 million;
- **b** in Germany:
  - one of the undertakings concerned had turnover of more than €25 million; and
  - neither the target nor any other undertaking concerned had turnover of more than €5 million;

---

8 The definition of control closely follows the definition contained in the ECMR and the Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

9 Special rules apply for the calculation of the turnover of financial services providers, insurance companies, companies active in the media sector (television broadcasting, radio, newspapers and periodicals) and certain trading activities. Companies operating in the field of publication, production and distribution of newspapers and magazines are subject to a turnover multiplier.
Germany

c the value of the consideration paid in return for the transaction is more than €400 million; and
d the target has significant activities in Germany.

The FCO and the Austrian Federal Competition Authority issued the joint ‘Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9(4) KartG)’ in July 2018. Additionally, the FCO recently resorted to the transaction value threshold to assume its jurisdiction in the Paypal/Honey case concerning a free browser extension that automatically finds and applies promotional and discount codes in online shops.

Application of reduced turnover thresholds based on FCO injunction

The 10th Amendment intends to provide the FCO with a tool to temporarily lower the turnover thresholds for individual undertakings in individual economic sectors to be determined by the FCO by way of an ‘injunction to notify future mergers’ (injunction) if the following criteria are met:

a the worldwide turnover of the undertaking addressed by the injunction exceeded €250 million in the previous full business year;
b the worldwide turnover of the undertaking to be acquired exceeded €2 million in the previous full business year and more than two-thirds of that turnover were generated in Germany; and
c there is an indication that future mergers involving the undertaking addressed by the injunction would restrict competition in Germany in the economic sectors determined in the injunction.

According to the legislative documentation, such indication can, for example, be deduced (1) from sector inquiry findings or from the fact that (2) a dominant undertaking has formed a pattern of consecutively acquiring smaller competitors, (3) an undertaking in a sensitive economic sector or an already concentrated market acquires a potentially threatening newcomer or (4) there are complaints by competitors, customers or consumers. While the principal concern is understandable, the thresholds appear to be extremely low and – if finally implemented – it remains to be seen how the FCO will apply these in practice.

Other

If the same parties enter into two or more transactions concerning the acquisition of parts of a company within a two-year period, these transactions will be treated as a single concentration. The thresholds will apply to the transaction as a whole, to ensure that parties do not circumvent a notification obligation by slicing a deal into staged transactions, each falling below the relevant threshold.

If the transaction also exceeds the turnover thresholds of the ECMR (see the EU chapter), a notification has to be made to the European Commission only, without the need for an additional review in Germany (the ‘one-stop shop’ principle). However, if a transaction

10 www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.html.
meets the ECMR turnover thresholds but does not qualify as a concentration under the ECMR (e.g., in the case of a non-controlling interest above 25 per cent or a non-full-function joint venture), German merger control remains applicable.

**Exemptions**

The ARC provides for two exemptions. A filing will not be required if:

- **a** one of the participating companies is independent (i.e., not under the control of another company) and has achieved a worldwide turnover of less than €10 million in the previous business year; or
- **b** the concentration has no ‘domestic effects’ or, in other words, no impact on the German market. Given that the German merger control regime requires at least two undertakings concerned generating turnover in Germany, this exemption only plays a role in joint venture cases where both joint venture partners, but not the joint venture itself, generate turnover in Germany.

Even though it is not an exemption from the formal filing requirement but rather a restriction of the FCO’s scope for assessing competition concerns, there is still an exemption when assessing mergers affecting *de minimis* markets (i.e., markets in existence for more than five years, with total turnover of less than €15 million in Germany in the previous calendar year). The 10th Amendment intends to increase this threshold to €20 million. Mergers meeting the exemption criteria need to be notified if they meet the relevant thresholds but cannot be blocked to the extent that *de minimis* markets are affected.

**ii Consequences of completion without merger clearance**

Concentrations that are subject to merger clearance in Germany must not be completed prior to having obtained clearance. The consequences of infringing the filing obligation are threefold.

- **a** A transaction that is completed before having obtained clearance is deemed to be invalid as far as Germany is affected. In particular, the acquisition of shares in German companies and the acquisition of assets located in Germany are invalid until clearance is obtained. In addition, intellectual property rights of the target are unenforceable in Germany. To remedy a legally defective acquisition and to obtain retroactive effect, the parties are required to submit a post-completion notice containing all details required in a pre-merger notification. The FCO will then assess the competitive issues triggered by the proposed transaction directly as part of a ‘merger dissolution procedure’ without any statutory deadlines running.

- **b** The parties are subject to fines that can theoretically range to up to 10 per cent of the parties’ worldwide group turnover in the previous business year. In practice, the fines have been well below this threshold, but can still be significant depending on the circumstances.

---

12 Section 36(1), No. 2 of the ARC.

13 In line with the EU’s merger control rules, the eighth amendment introduced an exception to the suspension obligation according to which public takeover bids or a series of transactions in securities may be implemented prior to clearance, provided that the transaction is notified to the FCO without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only on the basis of an exemption granted by the FCO.
c Finally, infringing the filing obligation can – if detected – seriously affect the parties’ relationship with the authority, which will make future filings much more difficult.

iii Procedure

There is no filing deadline. The filing can be made as soon as the parties to the concentration can show a good faith intention to complete the transaction.

There is also no official filing form that needs to be completed. Instead, German notifications are submitted in the form of a letter that has to include certain information required by law and can, following the implementation of the 10th Amendment, be submitted online (by German attorneys). The parties also have to submit a mandatory post-completion notice to the FCO, which needs to be filed without undue delay following completion of the transaction. This is, however, a mere formality and shall be abolished by the 10th Amendment.

The fact that a filing has been received (including the names of the parties and a brief description of the affected markets) will be published on the FCO’s website shortly after the submission of the filing.

The German merger control regime also provides for a potential stop-the-clock, with an automatic extension of the deadlines, upon submission of a remedy proposal, similar to that which occurs under the EU merger control regime. Once notified, the vast majority of cases are cleared after a Phase I inquiry lasting a maximum of one month. In straightforward cases, the FCO is generally prepared to clear the transaction even well before expiry of the Phase I one-month waiting period. Although this is entirely within the discretion of the FCO and also depends on the workload of the case handler, it is not uncommon to receive early clearance after two or three weeks, or even earlier.

The maximum time frame for an in-depth review, encompassing Phase I and Phase II, is four months from the time of receipt of the complete notification. The four-month period is extended by one month, to five months, if remedies are offered. With the parties’ consent, the time frame can be extended further without any given limit. The 10th Amendment aims to change these provisions by (1) extending the four- and five-month periods by one month, to five and six months, and (2) limiting the extendability with the parties’ consent to a maximum of one month.

In cases that give rise to competition concerns, the FCO must inform the notifying parties within one month of receipt of the complete notification that it is initiating an in-depth investigation of the proposed transaction. In the absence of such communication prior to the end of Phase I, the proposed merger is deemed to be cleared by time lapse (which never occurs in practice). Phase I clearances are communicated by standard clearance letters merely informing the parties that the requirements for a prohibition are not met without containing any substantive reasons or competitive assessment. A reasoned decision will only be issued following an in-depth Phase II investigation. As opposed to Phase I decisions, Phase II decisions are published by the FCO (in confidential versions agreed upon with the parties) and can be appealed before the Higher Regional Court of Düsseldorf.

In the case of a prohibition decision, the parties also have the option to apply for an overruling approval by the Federal Minister for Economic Affairs and Energy if the negative effects of the merger on competition are outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The ministerial decision may include
conditions imposed on the parties. Following the EDEKA/Kaiser’s Tengelmann ministerial authorisation and the dispute about the lack of transparency, the ninth amendment provided for a faster and more transparent procedure.

Third parties, such as competitors, suppliers and customers of the merging parties, generally have the opportunity to comment on a proposed merger in the context of information requests issued by the FCO in the course of its investigation, or to submit unsolicited comments and concerns.

Additionally, third parties whose economic interests will be substantially affected by a decision of the FCO may formally intervene in the proceedings upon application and admission by the authority. Once admitted, third-party interveners have the right to be heard, to submit comments on the proceeding and to have access to the non-confidential part of the authority’s file. They also have the right to appeal the FCO’s decision.

The FCO is among the most active authorities in the EU’s referral system: Article 4(4) and 4(5) of the ECMR provide for the possibility of pre-notification referrals at the initiative of the notifying parties, while Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by Member States – an option used by the FCO on a regular basis.

iv  Substantive assessment
The FCO principally applies the same substantive test as the European Commission; that is, whether the proposed transaction would lead to a SIEC; in particular, by means of the ‘creation or strengthening of a dominant position’.

According to its Guidance on Substantive Merger Control of March 2012, the FCO first distinguishes between three broad categories of mergers: horizontal, vertical and conglomerate mergers. For each of these three categories, in line with the European Commission’s Horizontal and Non-Horizontal Guidelines, the German competition authority distinguishes again between single and collective dominance.

For a finding of single and collective dominance, the German merger control regime provides for the following – rebuttable – presumptions: a single undertaking has a share of at least 40 per cent of the market; three or fewer undertakings possess an aggregate share of at least 50 per cent of the market; or five or fewer companies hold a combined market share of at least two-thirds.

However, in the FCO’s decision practice, these presumptions play a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. In practice, the presumptions primarily provide an indication as to whether a deal requires closer scrutiny.

The cooperative aspects of joint ventures will, in addition, be examined under the rules relating to anticompetitive agreements (Section 1 of the ARC).

A merger that leads to a SIEC will not be prohibited if the requirements of the balancing clause are met (i.e., if the companies show pro-competitive effects in a different market that outweigh the negative effects on the affected market). For the pro-competitive effects presented by the parties to be taken into account, they must be of a structural nature.

When the FCO reaches the preliminary conclusion that a concentration raises competition concerns, the parties can offer commitments in Phase II to secure conditional approval. Conditions precedent (i.e., conditions that must be satisfied before the actual merger may be implemented, such as upfront buyer solutions) are generally preferred by the FCO.
The type of remedy most likely to be accepted by the FCO is a structural remedy, namely a divestiture that removes the competition concerns. Even in cases where such structural remedy is not possible, the parties will likely face resistance from the authority in accepting any other remedy solution. While behavioural remedies are not generally impermissible, they are only (reluctantly) accepted if they are equivalent to divestitures in their effects and do not require constant monitoring by the FCO. Not surprisingly, it therefore continues to be difficult to convince the authority not to insist on structural remedies as a condition precedent.

In addition, certain transactions may not only require clearance by the FCO but also other regulatory approvals based on special rules for – among others – foreign investments, telecommunications or media. These rules apply in addition to the general merger control regime, are administered by special agencies and authorities, and can impose suspensory clearance requirements as well.

IV OTHER STRATEGIC CONSIDERATIONS

The wide concept of reportable transactions under the German merger control regime, which also covers non-controlling minority interests below 50 per cent and in certain cases even below 25 per cent, regularly results in companies being required to notify transactions in Germany even though no other competition authorities are competent to review the transaction. Despite the far-reaching German merger control regime, there is still room for transaction structures that do not trigger a German merger filing requirement. For example, it may be a suitable strategy to first merge new businesses before they are acquired by an investor if only the investor would trigger the relevant merger control thresholds.

While pre-filing contacts are neither mandatory nor generally expected by the FCO, they can be very helpful in addressing and overcoming potential competition issues early on or in securing a Phase I clearance where otherwise the FCO would have to open a Phase II review simply to have enough time to assess the transaction. Such pre-filing contacts are handled by the FCO on a strictly confidential basis and are only shared with other competition authorities upon the parties’ approval.

The FCO has a close involvement with, and a leading role in, both the European Competition Network and the International Competition Network, whose chair is Andreas Mundt, the president of the FCO. The close communications between the authorities require a coherent and consistent merger filing strategy by the parties in cases that are subject to merger filings in multiple jurisdictions.

Empirical and documentary evidence play an important role in German merger control. While the German merger control rules do not provide for a mandatory submission of internal documents prepared in connection with a transaction, such documents can be requested in an information request and reviewed by the FCO during the course of the merger review. Thus, utmost care is required when drafting internal documents in preparation for the transaction and presenting it to either boards or investors; in particular, when it comes to the expected effects of the transaction. In transactions that might give rise to competition concerns, all relevant draft documentation should be thoroughly prepared by involving operations and management and should, ideally, be reviewed by in-house or external antitrust counsel before finalisation to avoid any negative impact on obtaining merger clearance.

The FCO acts independently and free from political influence. Attempts to lobby or even to exercise political influence almost always proves to be counterproductive.
As third-party interveners can play a strong role in merger proceedings, it can be an attractive proposition to become an intervenor to challenge (certain parts of) the transaction, resulting in remedies that may form attractive acquisition opportunities.

V OUTLOOK AND CONCLUSIONS

The 10th Amendment will intensify the FCO’s already prevailing focus on internet, online and big data issues. This can be seen not only from its title, ‘Digitisation Law’, and its explicitly stated efforts to tackle challenges particularly arising from digitisation and digital platforms, but also from its most recent and prominent cases against Facebook and Amazon in 2019. Even though the corresponding amendments to the ARC and the *Facebook* and *Amazon* cases relate to the abuse of dominance, they send a clear message on the FCO’s focus of attention in its overall work, including merger control. Additionally, the FCO completed a sector review on comparison portals in April 2019, initiated another sector review on the gathering, analysis and output of user ratings in May 2019, and published a joint study with the French Autorité de la concurrence on algorithms and competition in November 2019. Transactions involving online businesses should, therefore, be prepared thoroughly with a particular view to the assessment of relevant customer data, network effects and innovations. Confidential pre-filing contacts may be recommendable to avoid surprises during the actual review process.

It remains to be seen to what extent the current draft of the 10th Amendment will be implemented. In particular, the newly proposed Section 39a of the ARC (‘injunction to notify future mergers’) does not blend in well with the prevailing structure of the German (and European) merger control regime and, hence, already gives rise to heated discussions.

The FCO will remain active in requesting referrals back from the European Commission to national level if the main effects of the transaction are to be expected in Germany.

As regards the substantive review, while the role of economists will continue to grow, it is also likely that it will remain less relevant than in other jurisdictions, with documentary and empirical evidence remaining important factors in the investigation.
Chapter 17

GREECE

Tania Patsalia and Vangelis Kalogiannis

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 for Development and Investments. The HCC is assisted in its tasks by the Directorate General for Competition, 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. The EETT has provided its clearance in two notable 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), abolishing and replacing the former Greek Competition Act (Law 703/1977). 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 524/VI/2011 ‘establishing the form for the submission of commitments in merger cases’, (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)’.

The HCC also takes into account the relevant EU principles, guidelines and case law as guidance on substantive assessment in merger control review.

---

1 Tania Patsalia is a senior associate and Vangelis Kalogiannis is a junior associate at Bernitsas Law Firm.
2 EETT Decision 733/047 of 18 September 2014.
3 EETT Decision 857/7 of 28 June 2018.
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, the establishment of a full-function joint venture (i.e., of a joint venture performing on a lasting basis all the functions of an autonomous economic entity) is also treated as concentration, therefore falling within the ambit of Greek merger control rules. To the extent that the establishment 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 of the Treaty on the Functioning of the European Union). 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 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 fulfilled prior to the HCC’s decision) where (1) the combined 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 the Greek Media Law, a concentration must be notified to the HCC where (1) the parties involved have achieved a combined 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. The number of decisions issued by the HCC, however, differs per year (usually between 10 and 20). According to its 2018 Annual Report, 18 merger control cases were brought before the HCC in 2018, out of which 13 were cleared during the year.6

In 2019, the HCC issued 17 merger control decisions according to publicly available information. Of those:

a 12 cases were cleared by the HCC following a Phase I review;
b four cases were taken to an in-depth review (Phase II), of which three were unconditionally cleared and one was resolved with remedies; and
c one case involved the extension of remedies that were undertaken under a former HCC conditional clearance decision.7

So far in 2020, according to publicly available information, the HCC has given unconditional clearance to eight notified concentrations, out of which one was cleared following an in-depth review (Phase II).

ii Recent key cases

Below we set out some recent key merger control cases.

EPALME/Mytilineos (acquisition of sole control, Phase II, commitments)

On 3 April 2019, the HCC rendered its clearance decision8 to the notified acquisition of sole control9 of EPALME, a company active in the market for the production and trade of secondary aluminium as well as the market for the reprocessing of scrap aluminium, by Mytilineos SA, the sole producer of primary aluminium in Greece.

By way of derogation from the relevant European Commission case law,10 the HCC relied on its past case law11 in finding that a single market for the production and trade of primary and secondary aluminium existed. The relevant geographic market for the production and trade of primary and secondary aluminium was defined as being worldwide, whereas the market for the reprocessing of scrap aluminium was limited to Greece.

Under the above market definitions, the HCC considered that EPALME and Mytilineos were competing in the single market for the production and trade of primary and secondary aluminium; however, due to the geographic segmentation of the market on a global scale, the aggregate market share of the parties was particularly low and, hence, the HCC found that the transaction did not give rise to horizontal effects.

---

6 HCC Annual Activity Report for 2018, p. 84.
7 HCC Decision 650/2017.
8 HCC Decision 682/2019.
9 By acquisition of 97.8723 per cent of the company’s share capital.
10 Cases COMP/M.1003 (Alcoa/Inespal) and COMP/M.1161 (Alcoa/Alumax).
The HCC, however, expressed its concerns about the vertical dimension of the notified concentration, due to the dominant position of EPALME in the downstream market for the reprocessing of scrap aluminium (75 to 85 per cent). In particular, the HCC considered that it was likely that the combined entity would be able to exploit its dominant position in the downstream market by offering the reprocessing service only as a tying service, along with the purchase of primary aluminium from Mytilineos, thus foreclosing competitors in the upstream market (i.e., that of the production and trade of primary and secondary aluminium) and allowing the combined entity to establish higher prices in the markets where it operated.

In light of the above concerns, the HCC accepted certain behavioural commitments offered by the participating entities for a three-year period, and, in particular, the undertaking of commitments:

(a) not to make the offering of reprocessing services to EPALME’s customers conditional upon the supply of these customers with the primary aluminium produced by Mytilineos;
(b) not to make the supply of primary aluminium produced by Mytilineos conditional upon the provision of reprocessing services by EPALME;
(c) to maintain the provision of reprocessing services to EPALME’s existing creditworthy clients under the condition that agreements between them are kept;
(d) not to bind participating entities’ clients by means of a written or oral agreement with an exclusivity clause regarding the supply of secondary aluminium and the provision of reprocessing services; and
(e) to publish a press release in participating entities’ websites and to send information letters to all their clients, notifying them of the above commitments.

With regard to the last commitment, the HCC noted that the communication and notification of commitments is a substantial behavioural measure because the provision of information to both customers and the market in general ensures an imperative condition for competition and consumers (i.e., that of information), particularly with regard to such critical commitments in terms of type and degree that are undertaken by companies with significant presence and position in the market.

**Opel Hellas/G and P Singelidis (acquisition of indirect sole control by a natural person, single economic entity)**

In another recent case involving a merger in the automotive sector (the acquisition of indirect sole control over Opel Hellas by P Singelidis), the HCC granted its unconditional clearance following a Phase I review.

The transaction consisted of the acquisition of the total share capital of Opel Hellas by G Singelidis (acquirer), father of P Singelidis, with the latter being appointed to the board of directors and taking over the role of CEO within the target. The HCC, essentially following European Commission case law, found that G Singelidis did not qualify as a concerned undertaking for the purpose of assessing the notified concentration as the latter did not carry out any other economic activity outside the target (i.e., Opel Hellas).

12 HCC Decision 691/2020.
13 Control was acquired following conclusion of a share and purchase agreement between G Singelidis and OPEL Europe Holdings SLU (seller).
14 Case COMP/M.3762 (Apax/Travelex).
In addition, P Singelidis was found to exercise indirect sole control over the target despite not having acquired any shares thereof. The HCC based its conclusion on the existence of close family ties between G Singelidis (acquirer) and P Singelidis (CEO of Opel Hellas), the position planned to be held by P Singelidis in Opel Hellas following the completion of the transaction, and the power of P Singelidis to adopt the target’s strategic business decisions.

It is also interesting that, in calculating the turnover of the undertakings concerned for jurisdictional purposes, the HCC found that all companies controlled by the Singelidis family formed a de facto group wherein the leading figure was considered to be that of P Singelidis. In this context, the HCC stipulated that, due to the existence of family and economic (structural) ties, there was a considerable centralisation of management in said companies, which formed, in essence, a single economic entity. As such, the total turnover of the single economic entity was attributed entirely to P Singelidis.

**Alpha (media sector, acquisition of joint control, Phase II)**

Earlier in 2019, the HCC cleared the acquisition of joint control over Alpha Satellite Television SA, Alpha Radio SA and Alpha Radio Kronos SA by Motor Oil (Hellas) Corinth Refineries SA, Alpha Media Group Limited and a natural person, through holding company Nevine Holdings Limited. In this context, the HCC took the opportunity to clarify the interface between the Greek Competition Act and the Greek Media Law.

In assessing the transaction, the HCC implemented the provisions of both the Greek Media Law and the Greek Competition Act for those relevant markets falling within their ambit. In particular, the authority considered three relevant markets in its assessment, particularly: (1) the market of informative TV media, excluding pay-TV (Alpha Satellite Television SA); (2) the market of informative radio media (Alpha Radio SA); and (3) the market of non-informative radio media (Alpha Radio Kronos SA). In assessing the relevant markets under (1) and (2) above, the HCC applied the criteria under the Greek Media Law (i.e., holding of a particular market share), whereas for the relevant market under (3), the HCC applied the criteria under the Greek Competition Act (i.e., not to significantly impede competition in the national market or substantial part thereof).

The HCC found that the proposed transaction fell below the applicable thresholds in the relevant markets as set out in the Greek Media Law, namely below 35 per cent in each of the markets under (1) and (2), thus excluding the possibility for the notifying parties to establish a dominant position in these relevant media markets, while, on the other hand, the HCC established that it did not significantly impede competition in the national market or parts thereof, under the meaning of the Greek Competition Act.

Note that the HCC recently rendered a clearance decision over the proposed acquisition of sole control over the operations of Alpha Satellite Television SA, Alpha Radio SA and Alpha Radio Kronos SA by Motor Oil (Hellas) Corinth Refineries SA. As per its previous decision (of acquisition of joint control), the HCC also found that the notified transaction raised no doubts with regard to its compatibility with the rules under the Greek Media Law and the Greek Competition Act.

---

16 HCC Press Release of 10 February 2020 (at the time of writing, the HCC decision was not publicly available).
III MERGER CONTROL REGIME

i Waiting periods and time frames

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

In particular, pre-merger filings must be submitted to the HCC within 30 calendar days of 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 HCC case law, the above deadline may also be 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 case-by-case basis.

Where a wilful failure to observe the above statutory deadline occurs, the HCC may impose on the undertakings concerned a fine of from €30,000 up to 10 per cent of their aggregate group turnover. 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). More recently, the HCC imposed fines amounting to €110,000 against the media company Dimera Media Investments for failure to notify and violation of the standstill obligation.

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 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.

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).

---

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 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 of the introduction of the case before the HCC).

A decision prohibiting the notified concentration must be issued within a deadline of 90 days of 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 corrections to the initial notification from the notifying parties within seven business days of the date of 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 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 of the expiry of the time limit determined by the HCC for the provision of such information.

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 the information submitted, the less time the review period will last.

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

In terms of hostile transactions, these are rarely dealt with by the HCC. A notable hostile transaction that has undergone HCC scrutiny extends back to 2010 (Vivartia/Mevgal). The transaction was cleared with conditions, by virtue of HCC Decision 515/VI/2011, but was dropped and notified again a few years later. In particular, by means of HCC Decision 598/2014, the notified concentration was cleared again, but fulfilment did not take place. Currently, control over Mevgal has been converted from sole to joint following
the granting of the HCC’s (third) conditional clearance. Note 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:

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. 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 in a daily financial newspaper with national coverage, within a period of five days of the notification of the concentration, after 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 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, and which is available on the HCC’s website.

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.

---

20 HCC Decision 650/2017.
21 Article 15, Paragraph 9 of HCC's Rules of Internal Procedure and Management.
22 HCC Decision 524/VI/2011.
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. 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). 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.

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 European Commission, 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.

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 Co-operation 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.

The HCC may take into account the financial situation of the undertakings concerned when calculating the applicable fine in the case of violation of the standstill obligation. This aspect was, for example, looked into in the Dimera/Radioteleoptiki case, in which the HCC

23 See Section I.i.
24 HCC Decision 656/2018.
25 EETT Decision 857/7 of 28 June 2018.
26 Article 28 of the Greek Competition Act.
27 id. at Article 9.
28 HCC Decision 652/2017.
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 the undertakings participating in the concentration 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 EC Merger Regulation, 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.29 This has been ruled by the HCC in the Folli-Follie/Duty Free Shops case, where, although Folli-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.30 Exercise of joint control by minority shareholders was recently touched upon by the HCC in the GEK Terna/Nea Odos case,31 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. The HCC is in the process of completing a Code of Procedures with regard to the examination of anticompetitive practices (horizontal and vertical agreements, abuse of dominance), mergers and competition advocacy.32

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.33

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.

31 HCC Decision 673/2018.
33 HCC Decisions 652/2017 (Dimera/Radischeoptiki), 655/2018 (Dimera/Pigasos) and 665/2018 (Mavoutis/ Promitheftiki).
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, to deal with the low number of merger notifications filed with the HCC per year and as a response to the tendency discussions and practices identified in other EU Member States.
I INTRODUCTION

Hong Kong’s merger control regime is voluntary in nature and – substantively speaking – only applies to mergers involving a telecommunications carrier licensee. Mergers that fall outside of the merger control regime are wholly excluded from the application of competition law per Schedule 1, Section 4 of the Competition Ordinance.

The merger control regime under the Competition Ordinance

The Competition Ordinance, which came into full effect 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.

The Merger Rules (most of which are contained in Schedule 7 to the Ordinance) replaced the previous regime established under the Telecommunications Ordinance.

Merger control remains relevant only to mergers involving a telecommunications carrier licensee.

Both the Competition Commission and the Communications Authority (together, the Competition Authorities) have concurrent jurisdiction to review competition law matters in the telecommunications sector. Pursuant to the memorandum of understanding between the two agencies, the Communications Authority will usually be the lead agency on telecommunications matters, including mergers. 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 Competition Authorities.

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 a telecommunications carrier licence or that directly or indirectly control such licensees. 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

---

1 Stephen Crosswell is a partner, Tom Jenkins is a special counsel and Donald Pan is a senior associate at Baker McKenzie.
2 Competition Ordinance, Section 159.
3 Memorandum of Understanding between the Competition Commission and Communications Authority, Clause 1.2.
4 Competition Ordinance, Section 4 of Schedule 7.
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.

When the Competition Ordinance was enacted, the government undertook to review its scope and operation after three years. In February 2020, the Commerce and Economic Development Bureau (CEDB) (the government agency responsible for competition law and policy in Hong Kong) confirmed that this review was in progress. Senior Competition Commission officials, including both the chief executive\(^5\) and chairperson,\(^6\) had publicly expressed support for extending the Merger Rule to all sectors of the economy. However, the CEDB stated in August 2019 that this review would be limited to the applicability of the Competition Ordinance to statutory bodies, and does not include a proposed extension of the Merger Rule to other sectors of Hong Kong's economy.\(^7\) It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.

**ii Types of transactions caught**

Sections 3 and 4 of Schedule 7 to the Competition Ordinance provide that the following types of transactions constitute a 'merger' for the purposes of the Merger Rule:

\(a\) 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).

---

\(^5\) See Hong Kong Lawyer, October 2018 ‘Face to Face with Brent Snyder, CEO of the Competition Commission’, available at www.hk-lawyer.org/content/face-face-brent-snyder-ceo-competition-commission.


\(^7\) See comments made by the CEDB to MLEX, 19 February 2020, reported at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1164885&siteid=202&rdir=1.
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. Consistent with the position under EU law, Paragraph 2.7 of the Merger Rule Guidelines states 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, similar to EU law, an acquisition of a minority stake could also qualify as a merger if it leads to the acquisition of control over 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 Merger Rule Guidelines state that these are joint 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 generally be seen as bringing about a lasting change. Additionally, a full-function joint venture must ultimately have sufficient resources (in the form of management personnel, financial resources and other assets) 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 generally be seen as having autonomy on the market.8

In line with most other regimes (including the EU), intra-group mergers (i.e., where the parties form part of a single undertaking) are outside the purview of the Ordinance. 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.9 Although the Competition Authorities’ guidance on this point is not entirely clear, the Merger Rule Guidelines suggest 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.

---

8 Merger Rule Guidelines, Paragraphs 2.8 to 2.12.
9 Competition Ordinance, Section 4 of Schedule 1.
iii  **Standard of review: substantial lessening of competition**

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:

- The extent of competition from competitors outside Hong Kong;
- Whether the acquired undertaking, or part of the acquired undertaking, has failed or is likely to fail in the near future;
- The extent to which substitutes are available or are likely to be available in the market;
- The existence and height of any barriers to entry into the market;
- Whether the merger would result in the removal of an effective and vigorous competitor;
- The degree of countervailing power in the market; and
- The nature and extent of change and innovation in the market.

The above factors are not exhaustive. The Competition Authorities have developed a more comprehensive methodology for their assessment, which is set out at Paragraphs 3.21 to 3.85 of the Merger Rule Guidelines. 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 Merger Rule Guidelines provide indicative market concentration safe harbours below which a substantial lessening of competition is deemed unlikely.

The Merger Rule Guidelines state that, in general, horizontal mergers leading to a combined market share of 40 per cent or more are likely to raise competition concerns, and warrant a detailed investigation.\(^{10}\) Below this market share threshold, there may still be concerns for transactions falling outside of the safe harbour measures. The safe harbour measures are set out at Paragraphs 3.15 to 3.19 of the Guidelines.

- Safe harbour one: (1) the post-merger combined market share of the four 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; or (2) CR4 is greater than 75 per cent, but the market share of the merged entity in the relevant market is less than 15 per cent.
- Safe harbour two, based on the Herfindahl–Hirschman Index (HHI):\(^{11}\) (1) the merger leads to a post-merger HHI of less than 1,000 on the relevant markets; (2) the merger leads to a post-merger HHI of between 1,000 and 1,800 and produces an increase in the HHI of less than 100; and (3) the merger leads to a post-merger HHI of more than 1,800 and produces an increase in the HHI of less than 50.

The Merger Rule Guidelines state that the Competition Authorities are unlikely to assess any mergers that fall within one of these safe harbours, but do not categorically rule out such an assessment.\(^{12}\)

---

11 The HHI measures market concentration. It is calculated by adding together the squares of the market shares of all firms operating in the market. The increase in the HHI resulting from the merger is calculated by subtracting the pre-merger index from the expected value of the HHI following the merger, the difference being known as the ‘delta’.
12 Merger Rule Guidelines, Paragraph 3.20.
The Merger Rule Guidelines state that it will normally be appropriate to assess a merger against the prevailing conditions of competition at the time. However, they state that this may not be the correct counterfactual in all circumstances, giving the example of a merger where one of the parties is a failing firm.\textsuperscript{13} To date, the Competition Authorities have not had to consider the ‘failing firm’ defence.

The power of adjudication in respect of the Merger Rule belongs to the Competition Tribunal. The powers of the Competition Authorities under the Competition Ordinance in relation to mergers are limited to conducting investigations. While the Competition Authorities can seek to resolve issues informally or by way of commitments, most adjudicative powers belong to the Competition Tribunal.

iv Voluntary notification

There is no requirement to notify the Competition Authorities of a merger falling within the Merger Rule. The merger control regime is voluntary. The Merger Rule Guidelines state that the Competition Authorities will keep themselves informed about merger activity by, for example, monitoring the media and through receiving information or complaints from third parties.

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,\textsuperscript{14} but even then, the Competition Authorities have no obligation to issue a decision.

To remedy this very limited scope of application, the Competition Authorities have introduced an informal notification regime under the Merger Rule Guidelines. Under this informal procedure, parties are invited to approach the Competition Authorities to discuss their transaction and seek informal non-binding advice on the transaction on a confidential basis.\textsuperscript{15} That said, note the caution in the Merger Rule Guidelines that, because such advice is given without the benefit of third-party views being made known, it is not binding.

II YEAR IN REVIEW

The merger control regime under the Competition Ordinance took effect on 14 December 2015 and enforcement is still 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

\textsuperscript{13} Merger Rules Guidelines, Paragraph 3.37.
\textsuperscript{14} Competition Ordinance, Section 11 of Schedule 7.
\textsuperscript{15} Merger Rule Guidelines, Paragraphs 5.4 to 5.8.
Communications Authority no longer has the power to adopt formal decisions, except where causes for exclusion are invoked. Accordingly, most enforcement activities now take place outside of the formal statutory framework.

### Mergers in the telecommunications sector

At the time of writing, neither the Communications Authority nor the Competition Commission has published details relating to its review of any mergers in 2020. During the course of 2018 and 2019, the Communications Authority reviewed two transactions under the Merger Rule. The details of one of these transactions (including the identity of the parties) was not disclosed by the Communications Authority, apart from a statement that no concerns were identified. The other transaction was HKBN’s acquisition of WTT Holdings. On 17 April 2019, the Communications Authority announced its decision to accept behavioural commitments from the parties in lieu of commencing an investigation under the Competition Ordinance. According to the Communications Authority’s preliminary assessment, the merged entity would 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 Communications 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 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 Communications 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.

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, the Communications Authority decided to accept these commitments and not investigate the transaction further.

---

17 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 Corporation by HKBN Ltd (with commitments accepted enclosed).
18 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 Corporation by HKBN Ltd (13 February 2019).
ii Other developments
On 10 January 2019, the Competition Commission announced that it was investigating a commercial alliance between four 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). 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 Competition Commission has stated publicly (in support of his view that the Merger Rule should be extended),19 were this alliance to have been structured in such a way, the Competition Commission would have had no jurisdiction to investigate. As at the time of writing, this investigation remains ongoing.

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 suspension obligation
In the absence of a statutory obligation for parties to notify and obtain clearance from the Competition Authorities in respect of a merger falling within the scope of the Merger Rule, parties are not subject to any corresponding obligation to suspend the implementation or consummation of their transaction.

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.

The Competition Authorities can apply to the Competition Tribunal for interim measures for the purpose of ‘preventing pre-emptive action’, which may prejudice the hearing of the application by the Tribunal. Interim measures would include measures akin to hold-separate orders or stand-still obligations. To date, these powers have not been exercised.

ii Challenges by the Competition Authorities

Completed mergers
Notwithstanding its general power to conduct investigations in respect of a suspected contravention of the Ordinance (under Section 39), investigations of a completed merger must be commenced within 30 days of the day on which the Competition Authorities first became aware, or ought to have become aware, that a merger has taken place. Further, the Competition Authorities may only mount a challenge before the Competition Tribunal within six months of 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 their ability to remedy the consequences of a contravention of the Merger Rule.

Once an 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 Competition Authorities are subject to more onerous procedural constraints in respect of proceedings initiated against completed mergers, these do not apply to anticipated mergers. Accordingly, they may exercise their 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 Competition Authorities) that wish to challenge a judgment of the Competition Tribunal may bring an appeal in the Court of Appeal.

**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 Merger Rule Guidelines, 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.20 Several options are available to merging parties that wish to seek comfort that their transaction will not be challenged. The Ordinance provides for two formal procedures, whose

---

20 Merger Rule Guidelines, Paragraph 5.6.
scope of application is regrettably very limited. This has led the Competition Authorities to establish informal procedures, one of which is documented in the Merger Rule Guidelines. 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 Competition Authorities 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), the most relevant of which 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 Competition Authorities or the Competition Tribunal.

The Competition Authorities are not under a statutory obligation to consider an application for a decision under Section 11 of Schedule 7 to the Ordinance unless three specific conditions are met. In other words, it retains the discretion to decline to consider an application altogether unless:

- the application poses novel or unresolved questions of wider importance or public interest in relation to the application for an exclusion;
- the application raises a question for which there is no clarification in existing case law or decisions of the Competition Authorities; and
- 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 Competition Authorities’ 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 above 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 Competition Authorities 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 Merger Rule Guidelines, the Competition Authorities state that they will endeavour to process applications in an efficient and timely manner with due regard being paid to the circumstances of the case.

Although the Competition Authorities’ statutory obligation is only limited to considering an application and it does not follow that they will also issue a formal decision, they would be expected to adopt a decision in all cases where they decide 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

---

21 Merger Rule Guidelines, Paragraph 5.21.
for the efficiency exclusion, affording immunity from enforcement. However, the very narrow scope of application of the procedure suggests that formal decisions from the Competition Authorities 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 Competition Authorities. 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 has 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 Merger Rule Guidelines give clear indication that parties consummate their transactions at their own risks, and that they are advised to engage with the Competition Authorities (in practice, the Communications Authority) to discuss proposed mergers at an early stage to understand whether they have any concerns.\(^{22}\) However, the Competition Authorities’ 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. There is no strict timetable applicable to this process. This procedure may have limited appeal for transaction parties as a result.

**Possible outcomes and other possible procedures**

The Merger Rule Guidelines contemplate 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 Competition Authorities to develop other approaches and procedures that offer more legal comfort to merging parties. For example, the Competition Authorities 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.

---

\(^{22}\) Merger Rule Guidelines, Paragraphs 5.2, 5.3 and 5.6.
IV OUTLOOK AND CONCLUSIONS

While the merger control regime remains relatively new and some procedural uncertainty continues to linger, particularly for parties wishing to obtain formal legal comfort from the Authorities, 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. Senior Competition Commission officials are on the record as saying they will support the extension of the Merger Rule. However, it remains to be seen whether the Merger Rule will be extended to other sectors of Hong Kong’s economy. It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.
Chapter 19

INDIA

Aditi Gopalakrishnan, Gaurav Bansal, Pranav Mody and Varun Thakur

I INTRODUCTION

The Indian merger control regime came into effect on 1 June 2011 with the notification of Sections 5 and 6 of the Competition Act 2002 (the Competition Act). The regime is governed by the Competition Act, notifications issued by the Ministry of Corporate Affairs, Government of India (MCA) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, as amended up to 13 August 2019 (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 2020, the CCI had cleared approximately 642 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.1

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 Aditi Gopalakrishnan is a partner, Gaurav Bansal is a senior associate, Pranav Mody and Varun Thakur are associates, at AZB & Partners.

2 The CCI has passed orders directing structural modifications in combinations relating to diverse sectors. These are: (1) Schneider/Larsen and Toubro C-2018/07/586, dated 18 April 2018, in the electrical and automation sector; (2) Lindel/Prasair, C-2018/01/545, dated 6 September 2018, in the gas and energy sector; (3) Bayer/Monsanto, C-2017/08/523, dated 14 June 2018, Agrison/Potash, C-2016/10/443, dated 27 October 2017 and Dow/DuPont, C-2016/05/400, dated 8 June 2017, in the agrochemical sector; (4) PVR/DT Cinemas, C-2015/07/288, dated 4 May 2016, in the film exhibition and distribution sector; (5) Holcim/Lafarge, C-2014/07/190, dated 30 March 2016, in the cement sector; and (6) Sun/Ranbaxy, C-2014/05/170, dated 5 December 2014, in the pharmaceutical sector.
II  YEAR IN REVIEW

Over the past year, the CCI has introduced a ‘green channel’ approval mechanism, which was intended to expedite the approval process for non-problematic transactions. The green channel was introduced through an amendment to the Combination Regulations (the 2019 Amendment) and set out that transactions that do not involve any horizontal overlaps, vertical relations or complementary business activities could be deemed to be approved on notification. As at 1 May 2020, a total of 12 combinations had been approved by the CCI under the green channel route.

Based on the CCI’s guidance on eligibility for a green channel approval, the parties to the transaction are required to map overlaps by reviewing: (1) their investments in any entity exceeding 10 per cent of the total shareholding, and (2) investments in which the parties are conferred with the right to appoint a director or observer or any special rights that are not conferred upon an ordinary shareholder. If the CCI concludes that the transaction does not qualify for the green channel approval or that the self-assessment declaration is incorrect, the notice and the deemed approval shall be void ab initio and the CCI shall deal with the combination in accordance with the provisions of the Competition Act. Before coming to this conclusion, the CCI shall hear the notifying parties.

The 2019 Amendment also altered the scope of information required to be furnished in a shorter Form I filing, making it more exhaustive. For instance, the parties are now required to provide market-facing data (such as market share or competitor presence) for three years instead of one. Additionally, the parties are also required to map complementary business activities between parties to a transaction. On the other hand, if there are no horizontal or vertical overlaps, the parties are not required to provide any market-facing information.

The CCI has also adapted its merger review process to deal with the outbreak of covid-19. In light of the India-wide lockdown announced by the Prime Minister in March 2020, the CCI has started accepting filings electronically and conducting pre-filing meetings by video conference.

Over a period of time, the CCI has also introduced substantial relaxations from merger filing requirements, consistent with the present government’s mandate of ‘ease of doing business’ in India. For instance, on 27 March 2017, the MCA issued a notification (the March 2017 Notification)3 that primarily (1) extended the scope of the de minimis exemption to mergers; this was previously only applicable to transactions structured as acquisitions, and (2) in a transaction involving transfer of a portion of an enterprise (i.e., in an asset sale), limited the applicability of jurisdictional thresholds and the de minimis exemption to account for the value of assets and turnover of the portion of the enterprise, division or business being transferred only, instead of the entire target enterprise. These changes were far-reaching and welcomed by the industry.

Subsequently, on 29 June 2017, the MCA issued another notification, which removed the requirement to necessarily notify a combination within 30 calendar days of the trigger event. The measure was taken to alleviate the concerns of stakeholders who felt constrained by the deadline stipulated under the Competition Act. 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.

---

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 broadly 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:

- combined assets in India of 20 billion rupees;
- combined turnover in India of 60 billion rupees;
- combined global assets of US$1 billion, including combined assets in India of 10 billion rupees; or
- combined global turnover of US$3 billion, including combined turnover in India of 30 billion rupees.\(^4\)

Even if the parties’ test thresholds are not met, a notification may still be triggered if the ‘group’ to which the parties would belong post-transaction has any of the following:

- assets in India of 80 billion rupees;
- turnover in India of 240 billion rupees;
- global assets of US$4 billion, including assets in India of 10 billion rupees; or
- global turnover of US$12 billion, including turnover in India of 30 billion rupees.\(^5\)

ii  Exemptions
Every combination must mandatorily be notified to the CCI, unless the parties are able to benefit from the exemptions provided in the Competition Act, the Combination Regulations or the March 2017 Notification. 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,\(^6\) venture capital funds,\(^7\) public financial institutions\(^8\) or 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.\(^9\)

---

\(^4\) Sections 5(a)(i), 5(b)(i) and 5(c)(i) of the Competition Act, read with the notification SO 675(E), dated 4 March 2016 issued by the MCA.

\(^5\) Sections 5(a)(ii), 5(b)(ii) and 5(c)(ii) of the Competition Act, read with the notification SO 675(E), dated 4 March 2016 issued by the MCA.

\(^6\) 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 (the SEBI Act).

\(^7\) As defined in Regulation 2(m) of the Securities and Exchange Board Of India (Venture Capital Funds) Regulations, 1996 introduced under the SEBI Act.

\(^8\) As defined in Section 2(72) of the Companies Act, 2013.

\(^9\) As defined in Section 6(4) of the Competition Act.
In terms of categories of transactions usually exempt from mandatory notification, Schedule I 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. Some of these exemptions include: (1) a minority acquisition exemption for investments of below 25 per cent shareholding in the target; (2) intra-group mergers and acquisitions; (3) acquisitions of shares pursuant to rights issues, bonus issues or buy-backs; and (4) creeping acquisitions of between 25 and 50 per cent of the total shareholding.

**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 (it was previously only applicable to transactions structured as acquisitions).

**iii ‘Control’ as per the CCI**

The acquisition of control or a shift from joint to sole control is an important determinant to assess the applicability of exemptions to minority investments and intra-group reorganisations. 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’.

In terms of shareholding percentage, the CCI has identified 25 per cent shareholding as akin to a controlling stake. The reason for this is that a 25 per cent shareholding confers upon the shareholder the right to block a special resolution under the provisions of (Indian) Companies Act, 2013.10

The CCI has examined the meaning of control in several cases and has consistently held that ‘negative’ control amounts to control for the purposes of Competition Act. By way of decisional practice,11 the CCI has consistently 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; appointment and termination of key managerial personnel (including material terms of their employment); changing material terms of employee benefit plans; approval of the business plan; approval of the annual operating plan (including budget); and discontinuing any existing line or commencing a new line of business.

As a general matter, the CCI seems to have evaluated a bundle of veto rights to ascertain control and has not yet identified any specific rights that it considers control conferring.12

Apart from assessing the applicability of exemptions, the meaning of control assumes significant importance in mapping overlaps between the parties to a combination. The Competition Act requires the overlap assessment to be conducted between the acquirer group and target (including its subsidiaries). Accordingly, the acquirer is required to map overlaps by taking into consideration all its group companies and their controlling investments.

---

10 See Paragraph 17 of the CCI’s order dated 3 July 2018 under Section 43A of the Competition Act passed against Telenor ASA.
12 C-2012/06/63, dated 9 August 2012.
For instance, as the CCI penalised UltraTech Cement Limited (UltraTech) for omitting to disclose material information 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 its promoter group, which, inter alia, comprised Kumar Mangalam Birla and his family members (KMB/KMB Family), in competing enterprises (i.e., Century Textiles and Industries (Century) and Kesoram Industries (Kesoram)). While UltraTech contended that there was no requirement to disclose these details as Century and Kesoram did not qualify as group entities, the CCI held that control included ‘material influence’ in addition to de facto and 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, and structural and financial arrangements. 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, 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. This could extend to entirely innocuous financial investments.

iv Treatment of joint ventures

One of the common ways in which investors choose to do business in India is by way of joint ventures (JVs) with Indian counterparts. These joint ventures may be ‘greenfield’ (i.e., through the setting up of an entirely new enterprise) or ‘brownfield’ (i.e., via an investment in an existing enterprise).

The Competition Act does not specifically deal with JVs from a merger control perspective. However, as setting up a greenfield JV or the entry of a new partner in a brownfield JV involves the acquisition of shares, voting rights or assets, such acquisition may require notification to the CCI if the jurisdictional thresholds are met and are not otherwise eligible for any exemption.

A greenfield JV would involve the setting-up of a new enterprise, which, by itself, will not have sufficient assets or turnover to trigger a notification. However, where any of the parent companies to the JV transfer assets to the JV at the time of incorporation, a merger filing may be triggered on account of the anti-circumvention rule in Regulation 5(9) of the Combination Regulations. The anti-circumvention rule read with the March 2017 Notification states 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 Section 5 of the Act, the value of assets and turnover of such a portion of the enterprise, division or business being transferred are required to be considered.

14 Under Section 44(b) of the Competition Act.
15 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).
v  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 that has, or is likely to have, an AAEC in the relevant market in India, and treats all such combinations as void.\(^{16}\)

Consistent with practices in other jurisdictions, the CCI first determines the relevant market or 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.

The CCI has used economic tools such as the Elzinga–Hogarty test, the Herfindahl–Hirschman Index and chains of substitution in certain cases\(^{17}\) 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. For competitive assessment, the CCI is required to consider the following factors specified under Section 19(7) of the Competition Act: competition through imports, barriers to entry, countervailing buyer power, market shares, competitors’ position in the market, extent of vertical integration, etc.

The CCI 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 in the market, nature of the products and services, existing structure of the market, extent of vertical integration, portfolio effects, possibility of a failing business and countervailing buyer power to determine whether the combination being considered is likely to cause an AAEC. For instance, 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 that there would be an absence of effective competitors and, therefore, the combination of PVR and DT would likely have an AAEC.\(^{18}\)

In *Bayer/Monsanto*,\(^{19}\) the CCI identified harm to future innovation efforts, input foreclosures and portfolio effects arising out of the transaction, before approving the transaction with modifications.

In *Schneider/Larsen and Toubro*,\(^{20}\) the CCI noted that consumers in the electronic switchgear market have a strong preference for use of the same brand of products in building a complete switchboard. Thus, market players offering the complete portfolio of components enjoy an inherent advantage. The clustering pattern and portfolio effects unique to this sector, coupled with the consolidation of two of the largest players in this sector, were some of the main reasons for the CCI to view this combination as raising competition concerns.

---

\(^{16}\) Section 6(1) of the Competition Act.

\(^{17}\) *Holcim/Lafarge, Linde/Praxair and Bayer/Monsanto*.

\(^{18}\) C-2016/07/414, dated 9 August 2016.

\(^{19}\) See footnote 2.

India

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 20 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.\(^{21}\) In Mumbai International Airport Private Limited/Oil PSUs,\(^ {22}\) 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,\(^ {23}\) the CCI approved the transaction after the parties agreed to modify the scope of a non-compete clause in the agreement and reduce its scope from five to four years. In 2017, the CCI issued a Guidance Note on Non-Compete Restrictions\(^ {24}\) 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 this in its approval decision.\(^ {25}\) This is a departure from its previous practice where it would direct parties to modify the non-compete restriction before approving 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,\(^ {26}\) the parties offered voluntary structural remedies through divestment of assets. In China National Chemical Corporation/Syngenta AG,\(^ {27}\) 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 JFDHL/Den Networks\(^ {28}\) and JCDHPL/Hathway,\(^ {29}\) concerning the cable market,

\(^{21}\) Regulation 19(3) of the Combination Regulations.
\(^{22}\) C-2014/04/164, dated 29 September 2014.
\(^{23}\) C-2014/01/148, dated 26 March 2014.
\(^{24}\) Available at http://cci.gov.in/sites/default/files/Non-Compete/Introductory_%20para_on_Non-compete.pdf.
\(^{26}\) C-2016/08/418, dated 13 December 2016.
\(^{27}\) C-2016/08/424, dated 16 May 2017.
\(^{29}\) C-2018/10/610, dated 21 January 2019.
the CCI granted approval after accepting similar undertakings. These undertakings include (1) bearing the cost of realignment or change in customer premises equipment, in the case of technical realignment, as well as customers retaining the liberty to bundle broadband, cable TV and telephone without a 'pre-fixed' set, and (2) providing compliance reports to the CCI for five years. Northern TK Venture/Fortis Healthcare\(^{30}\) involved an investment by Northern TK Venture (Northern TK) in Fortis Healthcare Hospital and Fortis Malar Hospital. Northern 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 commercially sensitive information relating to pricing data and day-to-day operations was not exchanged or disclosed.

Similarly, in Nippon Yuesen/Mitsui OSK/Kawasaki,\(^{31}\) three major ship liners agreed to merge their container liner shipping businesses and container terminal services businesses globally, excluding Japan. The CCI noted that the parties were engaged in certain activities that did not form part of the combination but may lead to spill-over effects. To address this concern, the parties offered voluntary commitments by implementing 'a rule of information control' (i.e., to implement strict Chinese walls between the merged business and the businesses that operate independently).

More recently, in Tata/GMR, the CCI noted that this acquisition may result in vertical integration between airlines operated by Tata Group and GMR, which was responsible for the management of various airports in India. The CCI approved the transaction after accepting the following voluntary commitments by Tata Sons: (1) Tata Sons would not appoint any director in any airport entities (existing and future) managed by GMR; and (2) there would be no exchange of commercially sensitive information between GMR and Tata Sons. Similarly, in Hyundai/Ola, the parties offered a voluntary commitment that Ola, in the radio taxi market, would not: (1) give preference to drivers using Hyundai or Kia vehicles, or (2) discriminate against any driver operating passenger vehicles manufactured by any other automobile manufacturers.

**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, seven of which 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 period of time, and would also sell off their maleic anhydride 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

---


\(^{31}\) C-2016/11/459, dated 29 June 2017.
a stake in the divested businesses for a period of 10 years. The CCI approved Linde/Praxair subject to divestment of Linde India Ltd’s shareholding in a joint venture as well as some of the on-site plants and cylinder filling stations, separately owned by Linde and Praxair.

The CCI also 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 of Bayer’s businesses – its global glufosinate ammonium business and its global broad acre crop seeds and traits business – to an approved purchaser and accepted the following voluntary commitments: (1) to 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.

The CCI also approved Schneider/Larsen and Tubro based on certain behavioural commitments offered by the parties, which included (1) Schneider reserving a part of Larsen and Tubro’s (L&T) installed capacity to offer white labelling services to third-party competitors for a period of five years (these white labelling services would enable third-party competitors to procure L&T products at reasonable prices to sell under their own brands); (2) Schneider opening up its distribution policies and removing the de facto exclusivity present in its distribution agreements; and (3) Schneider committing to not discontinue L&T products and not increase its average selling price for a period of five years.

### vi Merger filing time frames

The CCI accepts a merger filing pursuant to 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.

Over time, the CCI also appears to have expanded the scope of trigger events to include:

- binding term sheets;\(^{32}\)
- non-binding term sheets;\(^{35}\)
- contract notes and collaboration agreements;\(^{34}\)
- settlement agreements or agreed structures;\(^{36}\) and
- implementation agreements.\(^{36}\)

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.

---

32 Caladium Investment Pte Ltd/Bandhan Financial Services Limited (C-2015/01/243), dated 5 March 2015.
33 NBCC (India) Limited/Hindustan Steel Works Construction Limited (C-2017/03/491), dated 31 March 2017.
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
- **cross-conditionalities in transaction documents or public announcement of the parties.**

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). One of the most notable implications of two transactions being viewed as interconnected is the extension of the CCI’s review jurisdiction and standstill obligations to such transactions that may have otherwise been exempt from notification requirements.

Parties with overlapping business activities 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 it.

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.

**vii Invalidation of notifications**

The CCI has enhanced powers to invalidate a notification within the 30-working-day review period in three circumstances:

- **if it is not in accordance with the Combination Regulations**;
- **if there is any change in the information submitted in the notification, which affects the competitive assessment of the CCI**; and
- **if the transaction was notified in Form I, but the CCI is of the view that the transaction ought to have been notified in Form II (in this case, the CCI returns the Form I notification and directs parties to refile 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 Combination Regulations also allow the parties to withdraw the notification during the review process and refile a fresh notification to ensure completeness instead of having the notification invalidated later by the CCI.

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. Recently, the CCI directed parties to refile the *Bandhan/Gruh* merger primarily because in some narrower segments the (indirect) combined market shares were greater than 15 per cent, although there was a miniscule incremental increase in market shares.

Similarly, in *RIL/Alok*, the CCI invalidated the notification in Form I, following a similar approach, as the combined market share of the parties in narrower market segments exceeded the thresholds. In *Hyundai/Ola*, the CCI invalidated an earlier notification submitted in Form I and later approved the combination after a fresh notification was filed in Form II.

### viii Gun-jumping (or failure to file)

Failure to file before implementation of the transaction or gun-jumping 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 pre-payment of consideration, in the form of ‘token money’ in advance of signing definitive transaction documents amounted 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*.
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 another instance, the CCI imposed a penalty of 5 million rupees on CPPIB for not notifying an interconnected step. According to the CCI, CPPIB’s acquisition of 16.33 per cent of equity shareholding in ReNew, which was notified to the CCI, was interconnected to ReNew’s acquisition of Ostro. However, CPPIB did not disclose the Ostro investment in its notification for acquisition of shares in ReNew. Placing reliance on an internal email correspondence and press releases issued by ReNew and CPPIB, the CCI noted that CPPIB was not only aware of ReNew’s acquisition in Ostro but also considered it as a key consideration and business rationale for its investment in ReNew.

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.

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

The CCI levied penalties for omission to disclose material information in the UltraTech case. 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. Similarly, while levying a penalty on CPPIB, the CCI observed that ReNew’s acquisition of Ostro was a material fact for the purpose of the ReNew investment, and that CPPIB was aware of this materiality. Accordingly, the non-disclosure of ReNew’s acquisition of Ostro in the notification for the ReNew investment amounted to a material non-disclosure.

**x Pre-notification consultation**

The CCI provides for a pre-notification consultation (including for filings proposed to be made under the green channel route) under which the parties to a proposed combination have the option to consult with the officers of the CCI. The pre-filing consultation mechanism helps parties secure the CCI’s informal views on the applicability of exemptions, determination of type of filing or the extent of market-facing data required in an untested market. The views of the CCI discussed at such pre-merger consultation are not binding on the CCI.

---

50 Under Section 44(b) of the Competition Act.
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 only grants confidential treatment 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.

Judicial review of mergers and the appellate process

On 26 May 2017, all the powers and duties of the Competition Appellate Tribunal (COMPAT) were transferred to the National Competition Law Appellate Tribunal (NCLAT). As a result, decisions of the CCI may be challenged before the NCLAT. A further appeal from any order of the NCLAT lies to the Supreme Court of India.

COMPAT decisions in the context of merger reviews include the challenge in the case of the CCI’s order in Jet/Etihad, which allowed Etihad to acquire a certain percentage of the equity share capital of Jet. The complainant alleged that the CCI allowed the combination without correctly appreciating the facts of the case or carrying out a detailed assessment. The COMPAT, however, dismissed the matter, ruling that the complainant was not an ‘aggrieved party’ within the meaning of the Competition Act and hence had no locus standi to challenge the CCI’s order.

Regarding gun-jumping and belated filing penalties, the COMPAT upheld the penalty imposed by the CCI on Piramal for failing to notify three interconnected transactions. In CCI v. Thomas Cook, the Supreme Court dismissed the COMPAT’s order that had overturned the penalty imposed by the CCI on Thomas Cook for alleged gun-jumping. The Supreme Court held that there was no requirement of mens rea under Section 43A of the Competition Act or intentional breach as an essential element for levying penalties. The Supreme Court further emphasised that technical interpretation to isolate two different steps of transactions of a composite combination was against the spirit and provisions of the Competition Act.

More recently, on 12 March 2020, the CCI’s order imposing a penalty on Eli Lilly & Company for gun-jumping was set aside by the NCLAT. The CCI had previously penalised Eli Lilly for not notifying its acquisition of Novartis’ animal health business division in India. Eli Lilly argued that the asset value and turnover of the animal health business division were below the de minimis exemption threshold. The CCI disagreed and held that the thresholds of the de minimis exemption did not apply to the business division being acquired but the target entity in which such business division is housed (i.e., Novartis India Ltd). The NCLAT dismissed the CCI’s order, noting that the de minimis exemption always intended to apply to the ‘true’ target (i.e., the relevant asset in the case of a business transfer). This decision suggests that the appellate authorities are willing to take a holistic and practical view of the exemptions provided under the Competition Act.
Further, in *CAIT v. CCI*,\(^{56}\) the NCLAT upheld the CCI’s order approving Walmart’s acquisition of Flipkart. In this appeal, CAIT\(^ {57}\) had argued that this acquisition would enable Walmart to undertake business-to-consumer (B2C) sales by selling its own inventory to end-consumers on Flipkart’s website.\(^ {58}\) According to CAIT, the CCI did not assess Walmart’s entry into the B2C segment and instead focused on the existing horizontal overlaps in the business-to-business (B2B) segment only. The NCLAT held that the CCI had correctly examined the horizontal overlaps in the B2B segment through this acquisition. Making reference to the foreign direct investment policy, the NCLAT noted that Walmart’s business activities would be restricted to carrying out B2B sales only. Lastly, the NCLAT observed that this acquisition would not only preserve a successful e-commerce platform but would also enhance its financial strength.

**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 Federal Trade Commission, the European Commission, 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 reviews in the past year is that it has considered transactions in the context of consolidation in the sector 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, agrochemical and industrial gas sectors,\(^ {59}\) the CCI is increasingly examining transactions in sectors that are sensitive to the Indian political economy with greater scrutiny. Further, parties to competitively significant global transactions should factor in longer review timelines and the possibility of divestitures to attain the CCI’s approval. For example, the *Linde/Praxair* 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 to date primarily involve the steel and cement sectors. Further, the CCI has approved approximately 16 transactions filed pursuant to a resolution plan under the IBC Code to the Committee of

\(^{56}\) Competition Appeal No. 62 of 2018.

\(^{57}\) CAIT is a major trade association comprising of retailers all across India.

\(^{58}\) It was alleged that Flipkart had a web of preferred sellers with whom it had associational links through common shareholders, directors, etc., and which were given a preferential listing on the Flipkart website.

\(^{59}\) See *ChinaChem/Syngenta*, *Dow/Dupont* and *Linde/Praxair*.
Creditors. 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 an average of one month to decide such complex transactions.

V OUTLOOK AND CONCLUSIONS

The CCI has been faced with complex transactions in various 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. The newly implemented green channel regime allows automatic approval for ‘no issue’ transactions and will allow the CCI to focus its attention on only those transactions that involve more in-depth competition law analysis. The introduction of the green channel regime reflects the CCI’s responsive attitude towards business needs. Further, the CCI has easily adapted to challenges posed by covid-19 by moving the entire merger filing process to electronic means, to ensure continued functioning.

The CCI has taken steps towards adapting its processes to best practices and applying lessons learned in more mature merger control jurisdictions. For instance, the revisions introduced to Form-I, as well as the revised guidance notes, are intended to bring greater clarity and certainty to the notifying parties. Although the Indian merger 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.
Chapter 20

ITALY

Rino Caiazzo and Francesca Costantini

I INTRODUCTION

The Italian merger control regime was implemented with Law No. 287/1990, entitled ‘Provisions for the protection of competition and the market’ (Act). The Act was drafted on the basis of the ‘reciprocal exclusivity’ or ‘single barrier’ principles. 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 (Authority) may also apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) 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 (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

1 Rino Caiazzo is a founding partner and Francesca Costantini is a senior associate at Caiazzo Donnini Pappalardo & Associati – CDP Studio Legale.
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, prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for 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 €504 million and the gross turnover in Italy of at least two of the participants exceeds €31 million.\(^2\) Notification thresholds are subject to an annual adjustment to reflect inflation. Filing fees are not required.

The Act defines ‘concentrations’ to include mergers, share or asset purchases resulting in the acquisition of control over another undertaking, and the creation of concentrative, as opposed to cooperative, joint ventures.

The Authority considers that a preliminary agreement is not sufficient to create a concentration for the purposes of the Act.

Section 7 of the Act adopts the definition of control set forth by the Italian Civil Code for the purposes of Italian corporate law generally. Section 2359 of the Civil Code recognises both \textit{de jure} control (i.e., when a majority of the voting rights are held), as well as certain cases of \textit{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 \textit{de facto} control by providing that such control may exist in a variety of circumstances giving rise to the right to exercise decisive influence over the productive activity of an undertaking. Such rights may, inter alia, concern the ability to use all or a portion of the assets of the undertaking or involve special rights in terms of the composition of the administrative bodies of a company. The definition of control in Section 7 may also cover persons who are indirect holders of such rights. In various cases, the Authority has considered that control over a company is created by means of shareholders’ agreements, especially when a minority shareholder is given the right to appoint one or more members of the administration board, or when the by-laws require a certain voting quorum in the administration board that makes the participation and the vote of the director or directors appointed by the minority shareholder essential.

The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration.\(^3\) However, the Authority

\(^2\) These figures apply for 2020.
\(^3\) The acquisition of intangible assets such as goodwill or trademarks could lead to a concentration. See the Authority’s Annual Report of 1994, pp. 135, 136; in particular for the insurance sector, see Decision
considers that no concentration takes place when the target company does not conduct (nor has conducted or has plans to conduct) any economic activity, even if it owns some assets. However, should the non-active target company be granted authorisations or licences that are necessary to enter a given market, its acquisition is considered to be a concentration.4

With specific regard to joint ventures, the Authority distinguishes cooperative joint ventures from concentrative ones. Ventures with the principal object of coordinating the behaviour of otherwise independent undertakings are dealt with as ‘restrictive agreements’ rather than as ‘concentrations’ under the Act. Full functionality of the venture must be verified to establish that the venture is concentrative in nature. In this respect, to ascertain 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:

a. the range of choice available to suppliers and consumers;

b. the market shares of the parties involved in the concentration and their access to sources of supply or market outlets;

c. the structure of the relevant markets;

d. the competitive situation of the national industry;

e. barriers to entry into the relevant market; and

f. the trends in supply and demand for the products or services in question.

To date, the Authority’s decisions show that it considers market shares, entry barriers and the degree of competitiveness in the relevant market to be the most relevant criteria in evaluating concentrations. The Authority also focuses on the opportunity for the parties to the concentration to preserve the market share that they would hold after the transaction as a factor to be taken into consideration in evaluating the competitive impact of a concentration. Such opportunity depends not only on the degree of competitiveness on the market and on the barriers to entry in the same, but also on other factors, such as the degree of evolution of

---

4 Decision No. 4516 of 19 December 1996, Agip Petroli/Varie società and Decision No. 9529 of 17 May 2001, Benetton Group/Vari. However, the licences must be released at the time of the transactions: see Decision No. 15464 of 10 May 2006, Enel Trade/Nuove Energie.

No. 11775 of 6 March 2003, Nuova Maa Asicurazioni/Mediolatnum Asicurazioni and Decision No. 1852 of 16 March 1994, Ticino Asicurazioni/Sis; in these cases, the contractual relationships of the companies were considered to be business divisions.
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. Note 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 to

---

5 The Authority had interpreted this exemption narrowly. For example, in a decision involving an abuse of dominant position, the monopoly granted to the then state-owned telecommunications concern, SIP (now Telecom Italia), was interpreted by the Authority as not extending to non-reserved neighbouring markets (payment of voice-telephone services by credit cards), exclusivity clauses in the franchise agreements of SIP concerning the distribution of mobile terminals and the new pan-European digital mobile telecommunications services.
authorise potentially restrictive concentrations that would be in the general interest of the national economy within the framework of European integration (although this provision has never been used).

II YEAR IN REVIEW

Among the most significant decisions made during the past year were two proceedings concerning mergers authorised subject to the adoption of corrective measures. On 20 May 2019, the Authority issued its decision regarding the acquisition by Sky Italian Holding SpA (Sky) of certain assets of the digital terrestrial pay-TV business owned by Mediaset Premium SpA (MP).\(^6\) The acquisition involved the sale of R2 Srl (R2) to Sky. R2 operates the terrestrial digital broadcasting technical platform of MP, Sky’s main pay-TV competitor in Italy. The Authority, having expressed concern about the impact of the acquisition on the market, opened a Phase II investigation. At the end of the investigation, the Authority found that the transaction – that had been implemented prior to obtaining the clearance – strengthened the dominant position of Sky in the pay-TV retail service market, as well as in the wholesale market of pay-TV terrestrial digital broadcasting platform access services, thereby eliminating or substantially reducing competition in those markets and in related markets such as digital broadcasting, pay-TV content and pay-TV channels. In this respect, the Authority asserted that although the transaction related only to the technology platform owned by MP to distribute its programmes, the sale of such assets to Sky necessarily resulted in an exit of MP from the pay-TV market, which in fact occurred in April 2019. These effects are irreversible and the competitive conditions that existed prior to the merger were not restored following the return, implemented by the parties to the transaction, of part of R2 to Mediaset Group. For this reason, the Authority decided to impose, for a period of three years, remedies to restore competition in the pay-TV market and the above-mentioned related markets; in particular it: (1) prohibited Sky from entering into exclusive rights for audiovisual content and linear channels for internet platforms in Italy, so that content would be available for other operators that provide their services through the internet, and (2) ordered Sky to grant competitors access to any newly developed platform that is compatible with R2’s assets, under fair, reasonable and non-discriminatory conditions.

By Decision No. 27842 of 17 July 2019, the Authority authorised with conditions the acquisition by BPER Banca SpA of exclusive control of Unipol Banca SpA.\(^7\) The Authority took the view that the proposed merger might restrain competition in many banking markets in the region of Sardinia where BPER already had a leading position, owning about 55 per cent of the bank branches in the region and having a substantive competitive advantage over its competitors (Intesa Sanpaolo and Unicredit). For these reasons, the Authority opened a Phase II investigation, focusing in particular on the economic effects of the merger in the following problematic markets: (1) deposit-taking, (2) lending to families, family businesses and small and medium-sized enterprises, and (3) distribution of investment funds and provision of wealth management services. On the contrary, the Authority was not concerned about the competitive impact of the merger in the markets for lending to large firms or public entities due to the low shares held by the parties in the above markets. The Authority finally decided that the transaction may be authorised based on agreed measures


\(^7\) Decision No. 27842 of 17 July 2019, BPER Banca/Unipol Banca.
resolving the identified competitive weaknesses and restoring the competition structure of the relevant markets to pre-merger levels. The measures imposed relate to the disposal of an undisclosed number of branches of Unipol Banca SpA, in problematic geographical areas, to an independent third party capable of being an actual or potential competitor in the market. The purchaser has to be approved by the Authority.

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.8 In general, the Authority may also request hearings with third parties, which have the right to access the documents of the proceedings with the exception of those documents providing confidential data.

Third parties who feel aggrieved by a decision of the Authority to permit a merger have the right to initiate an appeal against that decision before the Lazio court. In this respect, the administrative courts have recognised that competing companies have a qualified interest to oppose the decisions of the Authority, as such decisions may directly produce effects on their activity. Therefore, if the Authority authorises a merger that violates competitors’ rights, the competitors may appeal the decision before the administrative judge.9

---

8 Section 6(4) of DPR 217/98.
9 As indicated by the Italian Supreme Administrative Court in Decision No. 280 of 3 February 2005, parties that are not directly involved in an antitrust procedure can also legitimately appeal a decision of the Authority if they have a different and qualified interest in the procedure, and if they can prove that the same interest has been damaged by a decision. In this respect, see also Regional Administrative Court of Lazio, Decision No. 10757 of 20 October 2006 and Supreme Administrative Court, Judgment No. 1113 of 21 March 2005.
The Authority may also impose conditions upon the authorisation of the proposed merger. These conditions can be directly imposed by the Authority or as a result of negotiations. The Act does not provide for the Authority to enter into any such negotiations with the parties, although in practice this may well happen.

In general, should the Authority consider that a concentration is forbidden under the Act, an authorisation may be granted provided that the parties undertake to fulfil some specific undertakings that can be divided into structural and behavioural remedies. Considering the cases that have been dealt with by the Authority, the following remedies can be envisaged:

**a) structural remedies:**
- divestiture of business or branches: this may be imposed to reduce the market share created by the concentration or more narrowly with regard to some geographical areas where the overlaps arising out of the concentration are deemed to be incompatible with the Act. In general, the Authority requires that divestiture be made to an undertaking with no structural, financial or personal links to the parties, and with financial resources and expertise in the involved market. The re-acquisition of the divested business may be forbidden indefinitely or for a limited time period. The Authority may also provide for a temporary moratorium on any further acquisition of third parties operating on the relevant market;
- undertaking to reduce production capacity: the Authority may ask the parties to divest production capacity and related assets and personnel necessary to operate in a given market. The same objective can also be attained by means of a ‘conduct’ remedy, consisting of an undertaking by the parties to reduce production capacity for a given period;
- reduction of the scale of the business acquisition;
- undertaking by the parties not to commercialise products under a certain trademark; and
- transfer of brands and other intellectual property rights; and

**b) behavioural remedies:**
- grant competitors access to essential facilities and know-how; and
- create an internal committee responsible for the future compliance of the interested company with the competition law.

The Authority may expressly reserve the right to revoke its decision to clear the concentration and to impose fines for any failure to observe the prescribed undertakings.

Finally, the Authority must prohibit a concentration that creates or strengthens a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner. If the Authority has not issued a suspension order and finds that a merger violates the provisions of the Act, it may issue an order to restore competition in the market. Such order may require divestiture of a company, business or assets that have been acquired.

Decisions of the Authority may be appealed within 60 days of 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 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 TFEU 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, 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

In February 2020, the Authority, along with the Italian Electronic Communications Authority and the Data Protection Authority, published the results of the joint sector inquiry on big data that they launched in 2007 to develop a deep understanding of the impact of big data on the protection of personal data, market regulation, consumer protection and antitrust law. As a result, guidelines and recommendations of policies for big data have been issued to improve the effectiveness of the authorities’ intervention. Merger regulation is also being considered. Specifically, the authorities recommend the reform of the rules on merger analysis to provide for examination of those concentrations that do not meet the prior notification thresholds but are capable of reducing potential competition, with particular reference to ‘killing acquisitions’ (i.e., the acquisitions by major digital firms of innovative start-ups).
The above authorities also recommend the amendment of Article 6(1) of Law No. 287/90 to introduce an evaluation standard grounded on the significant impediment of effective competition criteria, which may be more suitable in challenges involving the digital economy.
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.

---

1 Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami are partners, and Kenichi Nakabayashi is an associate, at Anderson Mōri & Tomotsune.
2 The JFTC uses the term ‘merger’ in its English translation of the AMA to describe what is called an ‘amalgamation’ in many other jurisdictions.
3 Article 10, Paragraph 5 of the AMA.
Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.4

**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,5 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,6 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:7

- **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 that 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 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.8

---

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 (see footnote 6) specify detailed thresholds for ‘control’ to exist, which might be found even in cases where the ratio of beneficially owned voting rights is even slightly higher than 40 per cent. The concept of control to decide which companies are to be included in the combined business group is in line with the concept of control used to define group companies under the Ordinance for the Enforcement of Companies Act. This concept of control generally (there are still some differences) aligns Japanese merger control with the merger rules of other jurisdictions, especially the EU rules as to the identification of the undertaking concerned.

5 Article 10, Paragraph 2 of the AMA.

6 The Rules on Applications for Approval, Reporting, Notification, etc., pursuant to Articles 9 to 16 of the AMA (as amended).

7 Article 2, Paragraph 1 of the Merger Notification Rules.

8 Article 2, Paragraph 2 of the Merger Notification Rules.
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 (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.

---

9 Article 10, Paragraph 2 of the AMA.
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.
Regulations and guidelines relating to merger control issued in the past year

In December 2019, the JFTC amended the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination Merger Guidelines (the Merger Guidelines) in response to, among other things, the increased necessity of dealing with M&A transactions in the digital market. The key amendments to the Merger Guidelines are as follows.

a) Market definition: the amended Merger Guidelines clarify that, in the case of a two-sided market, the JFTC will basically define a relevant market for each user segment and then determine how the proposed transaction will affect competition in light of the characteristics of the two-sided market, such as network effects and economies of scale.

b) Competition analysis for horizontal business combination: according to the amended Merger Guidelines, both direct and indirect network effects may be taken into consideration in a merger review of a two-sided market.

c) Competition analysis for vertical and conglomerate business combinations: the amended Merger Guidelines provide the JFTC’s views on theory of harm, including: (1) input, customer foreclosure and exchange of confidential information in a vertical business combination; and (2) foreclosure through bundling or tying, and access to confidential information in a conglomerate business combination.

In addition to the Merger Guidelines, the JFTC simultaneously amended the Policies Concerning Procedures of Review of Business Combination (the Policies for Merger Review). This amendment is significant because the JFTC, in a manner clearer than ever before, indicates its willingness to review M&A transactions that have a large value that will likely affect Japanese consumers, but that do not meet the reporting threshold based on the (aggregate) domestic turnover of the target (non-reportable transactions). Further, the amendment encourages voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, if one or more of the following factors are met:

a) the business base or research and development base of the acquired company is located in Japan;

b) the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or

c) the aggregate domestic turnover of the acquired company and its subsidiaries exceeds ¥100 million.

Given that the JFTC recently opened a review of the acquisition by M3, Inc (M3) of shares in Nihon Ultmarc Inc (Ultmarc), presumably after the closing, even though that case did not meet the notification thresholds (see Section II.i), companies engaging in non-reportable transactions for which any of the above three factors are applicable should pay close attention to the potential need to make a voluntary filing with the JFTC.


II YEAR IN REVIEW

During the 2019 fiscal year (from 1 April 2019 to 31 March 2020; hereafter FY 2019), the JFTC opened one Phase II case that is still under review: the share acquisition by Korea Shipbuilding & Offshore Engineering Co, Ltd of Daewoo Shipbuilding & Marine Engineering Co, Ltd. Among the cases closed during FY 2019, the JFTC has published the review results of M3’s share acquisition of Ultmarc (see Section II.i) and the share acquisition by Matsumotokiyoshi Holdings Co, Ltd of Cocokara Fine Inc (see Section II.ii).

i M3’s share acquisition of Ultmarc

In 2019, the JFTC initiated the review of M3’s acquisition of all of the shares in Ultmarc, even though the acquisition did not meet the domestic turnover thresholds for mandatory filing. 18

M3 is one of the major operators of online platforms providing doctors with free information and advertising relating to prescription drugs. Statistics showed that at least 85 per cent of doctors in Japan were registered with M3’s platform. Pharmaceutical companies paid certain fees to M3 for the ability to provide doctors with drug information for marketing purposes on M3’s platform. Ultmarc is the operator of medical information databases known as medical databases (MDBs), which are composed of information on medical institutions and the doctors working at those medical institutions. The MDB is recognised as the de facto standard database among pharmaceutical companies and drug information platform operators as the advertising of medical drugs to the general public is prohibited in Japan.

Focusing on the medical information database market (x), and the drug information platform market (y), for pharmaceutical companies (a), and doctors (b), the JFTC characterised the transaction in two ways:

a a vertical business combination (upstream market: (x); downstream markets: (y), (a) and (b)); and

b a conglomerate business combination ((x) on one hand and (y), (a) and (b) on the other hand).

It is noteworthy that the JFTC defined two sets of two-sided markets ((x) and (y), (a); and (x) and (y),(b)). From the perspective of a vertical business combination, the JFTC was concerned that the firm post-merger would have the ability and incentive to refuse to provide M3’s competitors with the MDB, and might take advantage of competitively confidential information of M3’s competitors obtained by Ultmarc. Under a conglomerate business theory, the JFTC further expressed its concerns that the firm post-merger would have the ability and incentive to adopt a tying or bundling strategy for M3’s online platform and the MDB, thereby excluding M3’s competitors from the (y), (a) and (b) markets. Subsequently, to address the JFTC’s concerns, the parties proposed the following remedies (all of which are intended for an infinite period of time, with the exception of (e)):

a not to refuse to provide M3’s competitors with the MDB or other databases;

b not to treat M3’s competitors discriminatorily with respect to, among other things, the prices for, and quality of, the MDB and other similar databases;

c to take certain measures to prevent the parties from sharing confidential information of M3’s competitors;

---

\[d\] not to adopt a tying or bundling strategy for the MDB and M3’s services; and  
\[e\] to report the parties’ status of compliance with the proposed remedies once a year for a period of five years.

The JFTC concluded that if the parties implemented these remedies the transaction would not substantially restrain competition in any of the relevant markets.

\[ii\] Share acquisition by Matsumotokiyoshi of Cocokara Fine

Matsumotokiyoshi and Cocokara Fine both operate large drug stores in Japan. Their drug stores primarily sell over-the-counter (OTC) drugs, cosmetics, household goods and groceries to general consumers. Matsumotokiyoshi filed a notification with the JFTC of its intent to acquire shares of Cocokara Fine, whereby Matsumotokiyoshi would hold, post-acquisition, more than 20 per cent of Cocokara Fine’s voting rights.

In defining relevant market, the JFTC first analysed substitutability of various services, namely, (1) drug stores and pharmacies (which primarily sell prescription drugs), (2) drug stores and other types of retail stores, such as supermarkets, convenience stores and discount stores, and (3) (bricks-and-mortar) drug stores and online sales of OTC drugs and other items. Having concluded that the respective substitutability of (1), (2) and (3) is limited, the JFTC defined the relevant service market for this case as (bricks-and-mortar) drug stores. Further, considering that drug store companies compete on a store-by-store basis, the JFTC defined the relevant geographic market as a circle with a radius of 0.5km to 2km, centred on each respective store of the parties, depending on their location, surrounding facilities, population and other factors.

In the course of its review, the JFTC mentioned that, among 295 geographic areas where Matsumotokiyoshi and Cocokara Fine compete, potential competitive concerns would arise in 84 geographic areas where the number of drug store groups would reduce ‘from three to two’ or ‘from two to one’. However, given competitive pressure from competitors in the same or neighbouring areas, inactive competition between Matsumotokiyoshi and Cocokara Fine prior to the transaction and competitive pressure from other types of retail stores, such as supermarkets, and taking into account the result of economic analysis, the JFTC found that the impact of the notified transaction on competition in these 84 areas would be limited. The JFTC therefore concluded that the notified transaction would not substantially restrain competition in any of the relevant markets.

\[iii\] Statistics of the JFTC’s activity

According to the JFTC, the total number of merger notifications filed in FY 2019 was 310.

In the past 10 years, there have been a few cases brought into Phase II review each year, while there have been no formal prohibition decisions made by the JFTC. According to the JFTC’s statistics, the number of filings and the cases cleared after Phase II review are as follows.
### 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). If the JFTC intends to order necessary measures regarding the notified transaction, it will do so within the 30-day (or shortened) waiting period (which is extremely rare) or, if a Phase II review is opened, within the longer period of either 120 calendar days from the date of receipt of the initial notification or 90 calendar days from the date of the JFTC’s receipt of all of the additionally requested information. It should be noted that the JFTC does not have the power to ‘stop the clock’ in either the Phase I or Phase II review periods. It is, however, possible for the notifying party to ‘pull and re-file’ the notification during the Phase I period, thereby effectively restarting the clock.

#### ii Parties’ ability to accelerate the review procedure

There is no provision in the law and there are no regulations regarding the ability to accelerate the review process. However, in practice, it may be possible to put pressure on the JFTC by submitting a written request to the JFTC in cases where a filing is made less than 30 calendar days before the planned closing date. The Merger Guidelines state that the JFTC may shorten the waiting period when it is evident that the notified merger may not substantially restrain competition in any relevant market (which means when the JFTC closes its review prior to the expiry 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 these limited disclosures, 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

---

19 Policies for Merger Review.

---

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of filings</td>
<td>985</td>
<td>265</td>
<td>275</td>
<td>349</td>
<td>264</td>
<td>289</td>
<td>295</td>
<td>319</td>
<td>306</td>
<td>321</td>
<td>310</td>
</tr>
<tr>
<td>No. of cases cleared</td>
<td>0</td>
<td>4</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>
to the JFTC in the course of a merger review: to notify the JFTC’s investigation bureau of a possible breach of the AMA;\textsuperscript{20} or 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\textsuperscript{21} if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings, and market tests by way of questionnaires, with third parties, including competitors, distributors and customers, in the course of its review, as it did in the review of the M3 acquisition of Ultmarc (see Section II.i).

\textbf{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.\textsuperscript{22}

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.

\textbf{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.

\textbf{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.

\textsuperscript{20} Article 45, Paragraph 1 of the AMA.
\textsuperscript{21} Article 42 of the AMA.
\textsuperscript{22} Article 9 of the Rules on the Procedures of Hearing of Opinions.
Additionally, the amended Merger Guidelines suggest that if the transaction parties are both engaged in research and development in competing markets, the proposed transactions will likely reduce potential competition between the parties. The amended Policies for Merger Review, which make clear that the JFTC may request the parties to submit their internal documents concerning the proposed transaction (e.g., minutes of the board of directors, documents used for analysis and decision-making), may be utilised by the JFTC to assess, among other things, the potential effects in terms of research and development activities of the parties.

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 are 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 2,500.23

The amended Merger Guidelines indicate that even if one of the safe harbour thresholds is satisfied, the JFTC may conduct a substantive review of the proposed transaction if the market shares of the parties do not reflect their potential competitive significance (e.g., due to access to important data or intellectual property).

In addition to the safe harbour, 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.

---

23 Part IV, 1(3) Part V, 1(2) and Part VI, 1(2) 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.
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.

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 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 the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda with various competition 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 South Korea, for example, in the recent review of the acquisition of Brocade by Broadcom in 2017 and the merger between Abbott Laboratories Group and St Jude Medical Group in 2016.

#### 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. However, neither of the Phase I or Phase II review periods can be extended even where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock.

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. In fact, in almost all of the recent cases that the JFTC has cleared after Phase II review, the JFTC made specific notes in its announcements that the parties had

---

24 Article 43-2 of the AMA.

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 the informal procedure to try and alleviate any potential concerns early. This is also true in multi-jurisdictional merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions among various jurisdictions. In such pre-filing communications, coordination among Japanese and foreign attorneys is of great importance.

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.

Size of a relevant market

The amended Merger Guidelines indicate that in a case in which a relevant market is not large enough for the parties to efficiently compete even without a proposed transaction, such proposed transaction would not substantially restrain competition in the relevant market in general even if only the notifying parties will remain active in the relevant market after the transaction. This principle was applied for the first time to the acquisition by Fukuoka Financial Group Ltd of The Eighteenth Bank Ltd, for which the JFTC issued a press release in 2018 stating that it found no substantial restraint of competition even though the notifying party would remain as only one bank in certain rural areas because those areas were too small for the parties to make a profit regardless of rationalisation of their operations.

Minority ownership interests

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. 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 the acquisition of a partial share of Showa Shell by Idemitsu in 2016, the JFTC, for the purpose of 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 is 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

Under the AMA, the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether the filing thresholds are met. The JFTC has actually investigated transactions that had not been notified in the past, including in the case of M3 and Ultmarc and certain 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 substantively review such voluntary notifications.

V OUTLOOK AND CONCLUSIONS

Although the 2019 amendments to the Merger Guidelines and the Policies for Merger Review were significant, the majority of these simply reflected the developments of practice and case law since the 2011 amendments, which is largely consistent with developments in other major jurisdictions.

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 in recent years. For example, in the acquisition by Usen-Next Holdings Co, Ltd of Cansystem Co, Ltd in 2018, 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 how network effects will be taken into account in a substantive review). It is hoped that the JFTC will take action, for example, through the publication of more decisions in the near future.
I INTRODUCTION

There is currently no general merger control regime specified in the Malaysian Competition Act 2010. The Malaysia Competition Commission (MyCC) has, however, indicated that a merger control regime is likely to be introduced in Malaysia by the end of 2020. MyCC has also stated that the merger control regime in Malaysia is likely to be a mandatory pre-merger notification regime, although no further details have yet been formally issued.

Notwithstanding the absence of a general merger control regime in Malaysia, MyCC has the authority to investigate the behavioural conduct of parties post-merger. This was highlighted in the recent acquisition of Uber’s South East Asia business by Grab. While MyCC did not have the authority to unwind the transaction under the Competition Act, the acquisition triggered an investigation by MyCC into Grab, which subsequently resulted in a proposed infringement decision being issued against Grab, under which it was alleged that Grab had abused its dominant position in the e-hailing market.

Also, while there is no general merger control regime in Malaysia at present, there are sector-specific merger control regimes, namely in the aviation services sector under the Malaysian Aviation Commission Act 2010 (MACA), and in the communications sector under the Communications and Multimedia Act 1998 (CMA).

i Aviation services sector

Under the MACA, mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation services market are prohibited. ‘Aviation services’ is defined to mean the provision of any of the following services:

a the carriage of passengers, mail or cargo for hire or reward by air or by the use of any aircraft between two or more places, of which at least one place is in Malaysia;

b the provision in Malaysia of any ground handling services as specified in the Second Schedule to the MACA;

c the operation of an aerodrome in Malaysia for the take-off and landing of any aircraft engaged in the carriage of passengers, mail or cargo for hire or reward; or

d any other service determined by the Commission 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.

---

1 Azman bin Othman Luk is a managing partner, Penny Wong is a principal associate and Yeo Sue May is an associate at Rahmat Lim & Partners.

Under Section 54 of the MACA, a merger occurs if:

- two or more enterprises, previously independent of one another, merge;
- one or more persons or enterprises acquire direct or indirect control of the whole or part of one or more enterprises;
- the result of an acquisition by one enterprise (the first enterprise) of the assets (including goodwill), or a substantial part of the assets, of another enterprise (the second enterprise) is to place the first enterprise in a position to replace or substantially replace the second enterprise in the business or, as appropriate, the part concerned of the business in which that enterprise was engaged immediately before the acquisition; or
- a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity.

The Malaysian Aviation Commission (MAVCOM), which is the regulatory body regulating all economic and commercial aspects relating to the civil aviation industry in Malaysia, has indicated in its Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger (the MAVCOM Merger Guidelines) that it is likely to investigate a merger if:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the merger is at least 50 million ringgit; or
- the combined worldwide turnover of the merger parties in the financial year preceding the merger is at least 500 million ringgit.

Merger parties that meet the above thresholds may voluntarily notify MAVCOM of a proposed merger to obtain clearance. Even if the above-mentioned thresholds are not met, however, MAVCOM has the power to investigate the merger if it is of the view that the merger is likely to result in a substantial lessening of competition in any aviation services market in Malaysia.

MAVCOM recognises a failing firm defence in which a merger party may claim that, without the merger, it would be forced to exit the relevant aviation service market, with the resultant loss of competition provided by the failing firm. In assessing whether a failing firm is able to invoke the failing firm defence, MAVCOM will give due consideration to the following factors:

- whether the merger party is in such a dire situation that it would exit the relevant aviation service market within the near future;
- whether the merger party is unable to meet its financial obligations in the near future;
- whether there is any serious prospect of reorganising the business; and
- whether there is any less anticompetitive alternative to the merger.

ii Communications sector

Mergers are prohibited if they result in a substantial lessening of competition in the communications market. Under the CMA, ‘communications market’ is defined as an economic market for:

- a network service;
- an applications service;
- goods or services used in conjunction with a network service or an applications service; or
- access to facilities used in conjunction with either a network service or an applications service.
On 17 May 2019, the Malaysian Communications and Multimedia Commission (MCMC), which is the regulatory body for communication and multimedia matters in Malaysia, issued its Guidelines on Mergers and Acquisitions (the MCMC Merger Guidelines) and its Guidelines on Authorisation of Conduct (collectively, the MCMC Authorisation Guidelines). These Guidelines aim to provide greater clarity on the substantial assessment of mergers and merger procedures within the communications sector.

As is the case with the merger control regime for the aviation services sector, licensees under the CMA may voluntarily notify MCMC of a merger if:

a. the merger results in a licensee under the CMA obtaining a dominant position in a communications market; or
b. one of the parties to the merger is already in a dominant position in a communications market.

In the communications market, dominance is likely to be established if the merged or acquired entity has a market share of 40 per cent or more in the relevant communications market. Also note that the threshold for dominance in the communications market is significantly lower than the dominance threshold adopted by MyCC in general, which is 60 per cent or more. This is due to the highly concentrated nature of the communications market, in which there are only a handful of market players, which, in turn, warrants a lower dominance threshold.

The MCMC Authorisation Guidelines provide an avenue for licensees to seek authorisation from MCMC for particular conduct, including a merger. In other words, if licensees are of the view that a merger is likely to substantially lessen competition in the communications market but it is in the nation's interest, they should seek authorisation from MCMC for the merger. In determining whether the merger is crucial to the nation's interests, MCMC will adopt the national policy objectives stipulated in the CMA as the basis for arriving at its decision; that is, the merger will have to meet the following objectives:

a. to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
b. to promote a civil society where information-based services will provide the basis for continued enhancements to quality of work and life;
c. to grow and nurture local information resources and cultural representation that facilitate national identity and global diversity;
d. to regulate the long-term benefit of the end user;
e. to promote a higher level of consumer confidence in the delivery of services in the industry;
f. to ensure an equitable provision of affordable services over ubiquitous national infrastructure;
g. to create a robust applications environment for end users;
h. to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
i. to promote the development of capabilities and skills within Malaysia's convergence industries; and
j. to ensure information security and network reliability and integrity.
MCMC also recognises a failing firm defence in which a merger is unlikely to have an anticompetitive effect on the market if the merger involves a firm that is facing imminent failure and that would cause the assets of that firm to exit the relevant communications market. For a firm to invoke the failing firm defence, the following conditions must be established:

- the failing firm must be in such a deteriorated financial situation that it and its assets would exit the market in the near future if the merger does not take place;
- there must be no serious prospect of restructuring the business in any other way; and
- there should be no available alternatives to the merger that would be less anticompetitive.

II YEAR IN REVIEW

i Aviation services sector

Based on publicly available information, MAVCOM has yet to issue any clearance in respect of a merger within the aviation services sector. MAVCOM has, however, granted several individual exemptions in respect of collaboration arrangements and contractual joint ventures entered into between companies operating in the sector. Interestingly, prior to the enactment of the MACA, all matters pertaining to the aviation services sector fell within the purview of MyCC. During that period, MyCC imposed a financial penalty of 10 million ringgit each on Malaysia Airlines Berhad (previously known as Malaysian Airline System Berhad (MAS)), AirAsia Berhad and AirAsia X Sdn Bhd (collectively, AirAsia) for purporting to enter into a collaboration agreement that resulted in parties sharing the market with each other.

In light of the current covid-19 pandemic, numerous airlines across the world are reported to have suffered grave financial losses that have resulted in them dissolving the business, retrenching employees, requiring government bail-outs or merging with competing airlines to stay in business during these trying times. In Malaysia, there have been recent unconfirmed reports of a potential merger between MAS and AirAsia, which are essentially two of the largest airline operators in Malaysia. If such a merger were to materialise, the merging parties would be required to demonstrate to MAVCOM that the merger would give rise to efficiencies and cost-savings that would be passed on to consumers as the merger would inevitably create an ‘airline giant’ in Malaysia.

ii Communications sector

There have also been very few merger cases in the communications sector. The most recent high-profile merger that MCMC sought to review was the proposed merger of Axiata Group Bhd (Axiata Celcom) and the Asian operations of Telenor ASA (Digi.com Bhd) in May 2019. The proposed merger would have been likely to create the largest cellular operator in Malaysia, considering that Axiata Celcom and Digi.com are two of the largest telecommunications companies in the country. The proposed merger was, however, called off in September 2019 with the parties citing ‘complexities involved in the proposed transactions’ as the reason for merger discussions ending. Although there have been reports stating that the proposed merger may still take place, there have not been any official statements issued by the relevant parties on this front.

Malaysia

III THE MERGER CONTROL REGIME

i Aviation services sector

The merger control regime in the aviation services sector is a voluntary regime under which parties can decide, on their own volition, whether or not to notify MAVCOM of a merger or anticipated merger.

Under the MAVCOM Merger Guidelines, the amount of time that MAVCOM will take to assess a notification and application is subject to a wide variety of factors, including, but not limited to, the complexity of the issues as well as whether the information and documentation furnished by the applicants are complete and adequate. In brief, if MAVCOM is satisfied that the transaction that is the subject of an application meets the definition of a merger under the MACA during its Phase 1 assessment, it will publish a summary of the application on its website for public consultation, and members of the public are then able to provide their feedback on the merger within a period of 30 days of the date of publication. Upon expiry of the 30-day period, MAVCOM will evaluate the possible competitive effects of the merger by assessing the information provided by the applicants and the public. If MAVCOM is satisfied that the merger will not raise any competition concerns, a proposed decision will be published on its website for a further 30 days to enable feedback to be obtained from the public. MAVCOM will only issue its final decision of non-infringement upon expiry of this 30-day period. Once issued, a non-infringement decision will only be valid for a specific period, as prescribed by MAVCOM. Merger parties will, therefore, be required to complete the merger within the specified period.

If, on the other hand, MAVCOM is of the view that the merger is likely to raise competition concerns, it will proceed with a Phase 2 assessment, which will entail a more detailed and extensive examination of the competition effects of the merger. After such examination, MAVCOM will publish its proposed decision on its website for a period of 30 days for public consultation purposes. The parties will also have the opportunity to submit a written presentation to MAVCOM in respect of the merger, which may include an undertaking to refrain from, or remedy, any anticompetitive conduct arising from the merger.

If MAVCOM issues an infringement decision, the relevant parties may apply to the Minister of Transport within 14 days of them being notified of the infringement decision, requesting that the merger be exempted from the prohibition under the MACA on public interest grounds (i.e., where the merger promotes public or national security and defence interests). Separately, the merger parties also have the option to appeal the decision to the High Court within three months of the date on which they were notified of the decision.

Due to the voluntary nature of the merger control regime under the MACA, the regime is non-suspensory, and the parties may choose to carry out the anticipated merger while an application is pending before MAVCOM.

ii Communications sector

The merger control regime in the communications sector is also voluntary in nature and licensees have the option of notifying MCMC and obtaining clearance if the parties are of the view that the merger is likely to result in a substantial lessening of competition in the communications market.

Upon receipt of a notification or application from a licensee, MCMC will undertake a preliminary review to determine if the transaction (1) falls within the definition of a merger
as prescribed under the CMA, and (2) meets the notification threshold set out in the MCMC Merger Guidelines. The results of MCMC’s preliminary review will then be communicated to the licensee within 10 business days of receipt of the notification or application.

If the transaction constitutes a merger and the parties meet the notification threshold, MCMC will then proceed to a Phase 1 assessment, which must be completed within 30 business days of the date MCMC notifies the licensee that its application has been received, subject to an extension of time if MCMC deems fit. Upon completion of its Phase 1 assessment, MCMC will then issue a notice of ‘no objection’ to the licensee or inform the licensee that the application will proceed to a Phase 2 assessment. In general, MCMC will only be required to conduct a Phase 2 assessment if it is unable to determine the anticompetitive effect of the merger, if any, during the Phase 1 assessment.

As is the case with a Phase 2 assessment undertaken by MAVCOM, a Phase 2 assessment by MCMC will entail a more detailed and extensive assessment of the effect that the merger will have on competition in the communications market. A Phase 2 assessment will generally be completed within 120 days of the date of commencement, subject to a further extension as MCMC deems fit. If, upon completion of the Phase 2 assessment, MCMC is of the view that it is likely to issue a decision that is unfavourable to the licensee, a statement of issues will be given to the licensee, setting out the grounds for MCMC’s findings, and the licensee will be given 30 days to provide a written response.

A merger that is unlikely to result in a substantial lessening of competition will be cleared by MCMC and licensees will receive a notice of ‘no objection’, pursuant to which the merger will have to be completed within a specific period as prescribed by MCMC. On the flip side, if the merger is deemed likely to result in a substantial lessening of competition, MCMC will issue a notice of objection to the licensees pursuant to which the licensees may be required to, among other things, cease particular types of conduct and implement appropriate remedies as directed by MCMC. Licensees can apply for a review of the decision by submitting an application to the Appeal Tribunal, or can request a statement of reasons from MCMC. It is only after exhausting all available remedies that licensees may apply for judicial review of the decision by the High Court.

IV OTHER STRATEGIC CONSIDERATIONS

As there is currently no real precedent in Malaysia in the merger scene, it remains to be seen how the relevant regulators will handle a merger application, especially where the merger is carried out under extenuating circumstances. If the merger between MAS and AirAsia comes to fruition, this will set a precedent in Malaysia. The key questions that MAVCOM would have to consider in such an instance would be whether MAS would be able to satisfy the failing firm defence, and if so, what factors MAVCOM should take into consideration in allowing companies to rely on this defence. It remains to be seen whether any decision made by MAVCOM will be of persuasive effect in MyCC proceedings.

In South Korea, for example, the Korean Federal Trade Commission recently approved the acquisition of Eastar Jet by its competitor Jeju Air on the grounds that Eastar was construed to be ‘unrecoverable’ under the Fair Trade Act and the company was therefore granted an exemption for a horizontal merger.4

V OUTLOOK AND CONCLUSIONS

MyCC has announced that it is reviewing amendments to the Competition Act 2010 (slated to come into effect by the end of 2020), which will include merger control provisions. At present, it appears that MyCC is inclined to adopt a pre-merger mandatory notification regime, although no further details are available at the time of writing.

Further, in the civil aviation scene, the government of Malaysia had previously decided to merge MAVCOM (the body overseeing commercial and economic activities within the aviation sector) with the Civil Aviation Authority of Malaysia (CAAM) (the regulatory body overseeing safety and security in the aviation sector). The proposed merger has been met with mixed responses, particularly from industry players, as there is concern that a merger of the roles of MAVCOM and CAAM may have a detrimental and counterproductive effect on the industry. To date, however, the merger has yet to be formalised.
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 COFECE or IFT before consummation. 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 2020, pre-merger notification is required when:

a the transaction’s value exceeds 1,563.84 million pesos in Mexico;2
b an economic agent acquires 35 per cent or more of the assets or capital stock of an economic agent with assets or annual sales of at least 1,563.84 million pesos; or
c the acquired assets or capital stock amount to more than 729.79 million pesos,3 and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 4,170.24 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. The value of assets is the greater of book value and commercial value (i.e., the price paid).

Failure to file can result in a fine of between 434,400 pesos5 and 5 per cent of the parties’ annual sales.

---

1 Rafael Valdes Abascal is the founding partner and Enrique de la Peña Fajardo is senior associate at Valdes Abascal Abogados SC.
2 18 million times the unit of measure and update (UMA), currently: 86.88 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:

a. intra-corporate transactions;
b. acquisitions of capital stock by an acquirer who has held control of the company since its incorporation or since such control was approved by COFECE or IFT;
c. transfers of assets or capital stock to administration or warranty trusts;
d. international transactions not implying acquisition of control of Mexican companies or accumulation of assets in Mexican territory; and
e. certain acquisitions solely for investment purposes.

Additionally, there is a special rule for the telecommunications and broadcasting sectors regarding the requisite of previous authorisation. The 2013 constitutional amendments ordered for IFT to determine if preponderant economic agents (i.e., agents whose national share surpassed 50 per cent) exist in the telecommunications and broadcasting sectors, which was confirmed by IFT on March 2014 and other later decisions. Afterwards, the ninth transitory provision of the Federal Law of Telecommunications and Broadcasting, effective as of 13 August 2014, provided that as long as preponderant economic agents exist, mergers between concessionaries (i.e., operators in such sectors) will not require previous authorisation from IFT whenever:

a. the preponderant economic agent is not involved in the transaction;
b. 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;
c. as a result of the transaction, the economic agent has a share of less than 20 per cent in the corresponding sector; and
d. the merger does not produce harmful effects to competition in the sector.

These types of transactions will require a post-closing notice instead of the pre-merger notification filing. This notice must be filed before the IFT within 10 days of the closing. The IFT will have 90 days to investigate the merger and, if substantial market power in the relevant market exists, the authority will be entitled to impose measures to protect competition.

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 for approval and to eliminate the possibility of further investigation.

---

6. The Competition Law provides eight exemptions. Note 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.
In the past year, there have been no important changes to the Mexican merger control regime. In addition to the Competition Law, some of the most important regulations, guidelines and rules related to merger control are the following:

a. Regulations of the Competition Law, issued and amended by COFECE per the publications in the Official Journal of the Federation on 10 November 2014, 5 February 2016, 14 February 2018, 1 August 2019 and 4 March 2020. These regulations complement the merger control provisions established in the Competition Law;

b. Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued and amended by the IFT per the publications in the Official Journal of the Federation on 12 January 2015, 1 February 2019 and 22 November 2019. These regulations complement the merger control provisions established in the Competition Law;

c. Guidelines for the Notification of Concentrations, issued by 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, and non-compete clauses, among other issues;

d. 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;

e. Regulations of the use of Electronic Systems of COFECE, issued and amended by such authority per the publications in the Official Journal of the Federation on 8 December 2017 and 18 July 2019. These regulations establish the rules for the operation of the Electronic System of Filings of COFECE (including merger control filing); and

f. Rules for the Notification of Concentrations via electronic systems, issued and amended by COFECE per the publications in the Official Journal of the Federation on 8 December 2017 and 18 July 2019. These rules establish the requirements and the procedure via the electronic system. It is important to note that under the latest amendments to these rules, the submission of a concentration filing via the electronic system has been mandatory since January 2020.

Finally, other rules and guidelines relating to the Mexican merger control regime are the following:

a. Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the relevant market;

b. Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the telecommunications and broadcasting sectors;

c. Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers;

d. Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers in the telecommunications and broadcasting sectors; and

e. Guidelines for Exchange of Information between Economic Agents.
II YEAR IN REVIEW

In 2019, COFECE received 153 pre-merger notifications and concluded reviews of 134 with the following outcomes: 132 transactions were authorised and two transactions were denied (Walmart/Cornershop MX and Inmueblemar/Soriana/Planigrupo). Ten transactions did not finish the review procedure and nine reviews were extended into 2020. The sectors involving the highest number of pre-merger notifications were manufacturing (36), real estate and leasing (16), transportation, postal services and storage (14), mining (12), electricity, water and gas (12), and retail (11).

In the first quarter of 2020, COFECE reviewed 82 pre-merger notifications with the following outcomes: 37 transactions were authorised and 45 continued under review. In 2019, COFECE imposed 16 fines for failure to notify a transaction.

During 2019, IFT received and reviewed seven pre-merger notifications with the following outcomes: six were authorised and one transaction was conditioned to comply with undertakings. The IFT also reviewed two post-closing notices.

Of the past year’s cases, it is worth mentioning the Walmart/Cornershop MX transaction by which Walmart intended to acquire Cornershop MX. In this case, COFECE decided to object to the transaction. Walmart is an international company that operates retail stores, price clubs, pharmacies and online stores, while Cornershop MX is a Mexican company that provides logistics services through the exhibition, sale and delivery of products offered by other companies via websites or apps. After reviewing the transaction, COFECE identified three possible risks to competition: (1) Cornershop MX might refuse to provide its services to Walmart’s competitors, (2) Walmart might refuse to sell its products in competing platforms of Cornershop MX, and (3) the combined entity might have the potential to cause the exit of Walmart’s competitors that used Cornershop MX by using the strategic information provided to and produced in the platform (especially the sales information). Walmart and Cornershop MX filed a proposal of undertakings, which were deemed insufficient by COFECE.

2019 was the year in which COFECE and IFT completed their review of the Disney/Fox transaction. 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, to eliminate risks to competition in the distribution of films for 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. Regarding IFT’s review, after analysing 10 markets related to telecommunications and broadcasting, it was found that the transaction would harm competition in two markets: provision and licensing of restricted channels to cable TV providers in the ‘factual’ (which includes culture programmes, documentaries and reality TV) and ‘sports’ categories. 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.

III THE MERGER CONTROL REGIME

Notifications must be filed by all parties involved in the transaction (e.g., buyer and seller), and a common representative must be appointed to act on behalf of the parties before COFECE. As of 1 January 2020, a filing fee of 190,020 pesos must be paid for COFECE’s filings, while filings before IFT does not require such payment.

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 an initial 10-business-day period, COFECE may request basic information that was not provided with the initial filing, and such information must be submitted within a 10-business-day period, extendable under duly justified causes.

By reviewing the basic information, 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 to proceed with a deeper analysis of concentration effects.

Typically, 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. However, in exceptionally complex cases, the 15-business-day term may be extended for another 40 business days. 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 in a high level of detail. The response to the additional information request must be submitted within a 15-business-day term, extendable under duly justified causes for 40 additional business days.

If the notifying parties fail to comply with the information requests (basic and additional), 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.

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. COFECE’s 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

---

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 transaction will be valid for a six-month period, which may be extended for another six months when justified causes are credited by the parties. The transaction may not be closed after the expiry of such periods unless a new notification is filed. The parties shall provide COFECE with documents evidencing the transaction formalisation within 30 business days after closing.

If during the notification process the concentration raises competition concerns, COFECE will inform the parties about such concerns at least 10 business days before the case is included for decision in the board of commissioners’ agenda. No later than one day after 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 for issuing the decision will start to count again from the day the proposed undertakings are filed. Also, parties can offer undertakings at any time from the beginning of the process. If they are offered with the initial filing the terms will not be interrupted, although this is rarely recommended.

COFECE is empowered to, and frequently does, request information from third parties that 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 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 COFECE when issuing its decision.

During the notification process, only the notifying parties may have access to the file. Once the process concludes, COFECE publishes its decision, excluding the information classified as confidential, and any person may have access to the non-confidential information contained in the file, through a specific petition filed under the transparency law.

Finally, it is worth mentioning that concurrent review of concentrations is possible when a transaction affects markets in which COFECE and IFT have jurisdiction. However, the decision may only be issued with regard to the markets in which each agency has jurisdiction. Article 5 of the Competition Law provides that if one of the two agencies determines that it should be reviewing a case that is being reviewed by the other agency, it must inform the agency reviewing the case of its reasons for this determination. 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, the procedure will be suspended and the case will be sent to the economic competition, telecommunications and broadcasting circuit courts 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 agency, the case should be sent within five business days to this agency. 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.

The Uber/Cornershop MX case14 raised a jurisdiction conflict between COFECE and IFT because both agencies deemed that they had jurisdiction over the case. On one hand, the IFT deemed that both companies operate over the top platforms that require the infrastructure provided by telecommunications operators. On the other hand, COFECE argued that the economic agents that participate in the transaction are not telecommunications operators.

14 As the Walmart/Cornershop MX merger was refused by COFECE, Uber is now trying to buy Cornershop MX.
themselves. The federal circuit court ruled that COFECE is the authority that should review
the transaction since the affected markets are reserved to the jurisdiction of this authority
(delivery of food via Uber eats, as well as intermediation and delivery of products available in
retail stores and other store formats).

IV OTHER STRATEGIC CONSIDERATIONS

The legal time frames provided for the merger control procedure cover many months and
the actual time for obtaining an authorisation can only be estimated on a case-by-case basis.
In the authors’ experience, an authorisation for a case that does not produce effects (i.e., no
overlaps or vertical integration) can be obtained in one and a half to two months. The review
of a case with no significant overlaps, combined with other factors (availability of market
share information, non-relevant market effects and presence of important competitors), may
take two to three months and more complex cases may take six to 12 months or even longer.

There are some strategies that parties may use to accelerate the procedure. For example,
if the parties believe that the merger is not expected to produce competition risks, they should
provide economic information with the filling. Even though the parties are not obliged
to provide such information at that time, its provision may avoid a request of additional
information, which would speed up the process.

It is also recommended to approach the competition authorities 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. The
assistance of executives of the concerned parties, especially those involved in the operation
and commercial divisions, is very helpful at these meetings, and the meetings themselves may
reduce the scope of information requests (basic or additional).

COFECE and 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 decision before federal courts.

Another aspect worth mentioning is the treatment of collaboration agreements in the
Mexican antitrust regime, which are not regulated in the Competition Law. According to the
latest Guidelines for Notification of Concentrations issued by COFECE, such agreements
may be reviewed under the merger control procedure whenever the transactions meet the
characteristics of a concentration. This means that the parties will have certainty regarding
the legality of a collaboration agreement if they submit it to scrutiny by 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.

Finally, regarding international transactions, there are two important aspects to note.
First, the Mexican competition authorities have well-established communication channels
with other competition authorities (especially those in the United States), and it is common for
the Mexican authorities to ask for waivers and to follow the investigation lines or approaches
that other authorities are adopting. Second, there are no derogations from the standstill
provisions in the Mexican merger control regime, which means that a notified transaction
must be approved before its consummation. Notwithstanding this, if the legal time frames provided in the merger control procedure are not compatible with the transaction calendar or closing date, a carve-out might be designed by the parties to enable the transaction to close in other jurisdictions without producing effects in Mexico. For example, the shares of the Mexican subsidiaries could be transferred to a trust while the merger control procedure is taking place, with the shares being reverted to the acquirer once the transaction is approved.

V OUTLOOK AND CONCLUSIONS

As 2019 was a difficult year, economically, for Mexico (the economy shrank by 0.14 per cent, according to the National Institute of Statistics and Geography), the number of cases filed before COFECE decreased by 16.39 per cent compared with 2018 (153 versus 183 filings). The aggregate transaction value of cases decreased by 91.5 per cent compared with 2018 (0.6 versus 7.8 billion pesos). This situation is expected to worsen due to the effects of the covid-19 crisis in Mexico.

COFECE has taken all necessary measures to ensure the health crisis is not an obstacle to current and future transactions. First, while COFECE has suspended some of its procedures, merger control is an exception. This decision is due to two factors: (1) COFECE knows that suspending the current merger control procedures could mean transactions being terminated and (2) the electronic system for the merger control procedure allows for all stages of the notification procedure to take place electronically (notifications with their corresponding annexes, receipt of requests for information and decisions, filing of responses and documents) and provides remote access to files 24 hours a day.

Finally, the expectation is that the covid-19 crisis will result in future mergers of firms in financial distress. In this regard, it is important to mention that the Mexican merger control regime does not provide special rules for this scenario. However, the economic agents facing this situation can anticipate that the competition authorities will take the failing firm defence into consideration in their analysis and will provide their full cooperation in accelerating the review process.
I  INTRODUCTION

Under the former legal framework, Moroccan merger control existed through Law No. 06-99 of 5 June 2000\(^2\) on free pricing and competition, and its Enforcement Decree No. 2-00-854, under which mergers were notified to the Chief of Government, and the Competition Council had a consultative role when the notified concentration was 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\(^3\) 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\(^4\) and its Enforcement Decree No. 2-15-109 of 4 June 2015, which transferred the merger control function to the Moroccan Competition Council. Under this new legal framework, only residual powers are 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 this new legal framework have only been applicable since December 2018, when the new president and members of the Competition Council were appointed; the Competition Council was not operational between 2014 and 2018.

Under the Moroccan merger control regime, a concentration occurs where:

\begin{itemize}
  \item[a] two or more previously independent undertakings merge;
  \item[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
  \item[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 or more other undertakings.
\end{itemize}

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 merger control rules.

---

1 Corinne Khayat is a partner and Maïja Brossard is a senior associate at UGGC Avocats.
2 Dahir No. 01-00-225.
3 Dahir No. 1-14-116.
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 by 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 that are 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 transaction has no impact in Morocco; it is hoped that the legislation will be amended in the future to clarify this point; 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

2019 was the first year of application of the new legal framework and the Competition Council has been very active since its reactivation in December 2018. Indeed, its first decisions were delivered during the first half of 2019 and it also adopted internal documents in 2019, such as its rules of procedure.

In total, more than 60 transactions were notified to the Competition Council in 2019 and more than 20 have already been filed in 2020.

The vast majority of these transactions were authorised at the end of the first phase. A second-phase investigation was, however, opened in September 2019 to allow the Competition Council to conduct an in-depth investigation of Uber’s acquisition of the assets of its competitor Careem.

Since the declaration of a state of public health emergency linked to the coronavirus crisis, the Competition Council has remained operational.

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

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

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.
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 the 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:

a) decide that the notified transaction does not fall under the scope of the merger control;
b) authorise the operation, subject, where applicable, to the effective implementation of the remedies proposed by the notifying parties;
c) 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
d) 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:

a) authorise the operation, subject to, where applicable, the effective implementation of commitments offered by the notifying parties;
b) authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements; or
c) prohibit the concentration and require the parties, when applicable, to take all appropriate measures to re-establish sufficient competition.

Within 30 days of receiving a copy of the decision or being informed of it by the Competition Council, the Chief of Government or the delegated governmental authority may exert their power and issue a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation).

At the end of these 30 days, the authorisation is deemed to be granted. No accelerated procedure is provided.
v Third-party involvement and access to files

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).

vi Appeals and judicial review

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 of 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.

An association between Morocco and the Member States of the European Union 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 2020, the Moroccan Competition Council has announced a new partnership with the EU to harmonise and converge competition law provision matters.

The Moroccan Competition Council was also a founding member of the Euro–Mediterranean Competition Forum, an informal regional network set up in 2012.

A bilateral cooperation has been developed with the Tunisian competition authority.

In 2019, the Moroccan Competition Council entered into an agreement with Spain’s National Commission on Markets and Competition and announced its will to strengthen its bilateral cooperation with the Portuguese Competition Authority and the Chilean National Economic Prosecutor.

In 2019, the Moroccan Competition Council also announced new exchanges of information and expertise with China in 2019 and 2020.

The Competition Council, now that it is operational, is therefore very likely to cooperate with these other jurisdictions in reviewing multi-jurisdictional merger cases.

Certain specific economic sectors are regulated in Morocco by sectoral authorities: telecommunications (the National Telecommunications Regulatory Authority (ANRT)), the audiovisual market (the High Authority for Audiovisual Communication), banks (Bank Al Maghrib), the capital market (the Financial Market Authority), insurance (the Supervisory Authority for Insurance and Social Security) and ports (the 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 will therefore be clarified now that the Competition Council is fully operational. For instance, in 2019, the Competition Council and Bank Al Maghrib entered into a cooperation agreement establishing the conditions and terms of their collaboration on the competitive issues in the banking industry. Such clarification is especially important for the ANRT, which is authorised by constitutive texts to enforce antitrust and merger control provisions in the telecommunications sector and has already imposed its first fine under Law No. 06-99 for an abuse of dominant position in 2020.

Specific situations

A minority ownership interest might fall under the scope of 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 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, for example, 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 members of the Moroccan Competition Council in December 2018 triggered the entry into effect of Laws Nos. 104-12 and 20-13, which grant the Competition Council decision-making power over merger control cases.

The Competition Council has been very active since its reactivation, handling more than 80 filings and adopting internal documents, and is currently working on its first annual report since reactivation and on a circular note about the investigation of 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 clarified in the future.

The purpose of the new 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 continue to strengthen.
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\(^2\) (ACM) when it comes to, for example, the full functionality of a joint venture\(^3\) or the geographical allocation of turnover.\(^4\)

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.

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.

---

\(^1\) Gerrit Oosterhuis and Weyer VerLoren van Themaat are partners 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 on 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, see the European Union chapter.
YEAR IN REVIEW

Workload

The ACM received 134 notifications and reached 127 decisions in Phase I in 2019, which is significantly more than the workload in 2018 (107 notifications and 93 Phase I decisions). The majority of notifications resulted in one-page short decisions. Only nine Phase I decisions were substantiated (with reasons, around the same as the seven in 2018 and down from 14 in 2017). In addition, the ACM received seven requests for decisions in Phase II and issued three decisions in Phase II, which shows an increase in workload and increased complexity in comparison to 2018.

Five of the substantiated decisions in Phase I concerned acquisitions within the healthcare (home care, elderly care, rehabilitation care and general hospital care) and pharmacy sectors. Two decisions concerned the food sector, with one acquisition in the field of meat and meat substitutes (including both production and packaging) and one involving the production of private label biscuits, cakes and snacks. Of the two remaining (substantiated) decisions in Phase I, one concerned the clearance (with remedies) of transaction in the childcare and after-school care sector and one acquisition in the insurance sector.

The Phase II decisions concerned acquisitions in the field of educational technology, laundry services (both permitted) and the Dutch postal services (prohibited). Remarkable with respect to the latter is that for the first time, the Dutch Minister of Economic Affairs overruled the ACM by granting permission for the acquisition despite the negative ACM decision.

Similar to 2018, an exemption from the mandatory waiting period was granted three times in 2019.

The ACM did not impose any fines for failure to notify a concentration in 2019.

---

6 The decisions in Phase II concern the following: Decision ACM 28 August 2019 (Sanoma/Iddink) Case ACM/19/035555; Decision ACM 29 August 2019 (Active Capital Company/LipsPlus) Case ACM/19/035860; and Decision ACM 5 September 2019 (PostNL/Sandd) Case ACM/19/035460.
7 The decisions concern the following: Decision ACM 24 April 2019 (Stichting Zorggroep Apeldoorn en Oostrekeken/Stichting Trimenzo) Case ACM/19/035178; Decision ACM 2 May 2019 (Stichting OLVG Afdelingen/Sloetersartsziekenhuis) Case ACM/18/034722; Decision ACM 17 July 2019 (Ziekenhuis St. Janudal/Locatie Lelystad MC IJsselmeerziekenhuizen) Case ACM/19/034888; and Decision ACM 15 November 2019 (Stichting Sensire/Stichting Trimenzo) Case ACM/19/036556.
8 Decision ACM 17 October 2019 (BENU Apotheeken/20 apotheeken van Thio) Case ACM/19/036154.
10 Decision ACM 27 September 2019 (Banketgroep Holding International/Nieuwko Holding) Case ACM/19/036102.
11 Decision ACM 20 December 2019 (KidsFoundation/Partou) Case ACM/19/035829.
12 Decision ACM 18 November 2019 (NNN/Vivat) Case ACM/19/036284.
13 Decision ACM 28 August 2019 (Sanoma/Iddink) Case ACM/19/035555 and Decision ACM 29 August 2019 (Active Capital Company/LipsPlus) Case ACM/19/035860.
14 Decision ACM 5 September 2019 (PostNL/Sandd) Case ACM/19/035460.
15 See Section II.iv.
16 Decision ACM 5 February 2019 (Ziekenhuis St. Janudal/Locatie Lelystad MC IJsselmeerziekenhuizen) Case ACM/19/034888; Decision ACM 5 September 2019 (Mirage/Green Swan) Case ACM/19/036357; and Decision ACM 11 October 2019 (Stichting Sensire/Stichting Trimenzo) Case ACM/19/036556.
infringements of formal obligations and legal proceedings

The only judgment regarding merger control in 2019 concerned the ruling of the Trade and Industry Appeals Tribunal (CBb) of 8 October 2019, in which the CBb ruled in favour of the ACM.17

This case can be traced back to 2016, when the ACM approved, subject to remedies, the acquisition of Mediq pharmacies by its competitor Brocacef. Brocacef is also active as a pharmaceutical wholesaler.18 The decision of the ACM was appealed but confirmed by the Rotterdam District Court.19 This judgment was in turn appealed to the CBb, where the debate focused on the remedies. Brocacef was obliged to sell 89 local pharmacies and was prohibited to enter into a new wholesale relationship with the divested business for two years. The CBb confirmed that the divestment sufficiently limited the horizontal overlap between the parties. The cooling-off period was held to be sufficiently long to ensure that the divested pharmacies created lasting relationships with new wholesalers, which solved the vertical and horizontal issues. The ACM had refused to impose a general prohibition on Brocacef to acquire additional pharmacies after the implementation of the remedies. The CBb agreed that such general prohibition was not required, as any new acquisitions would have no causal link with the notified Mediq transaction and hence could not be addressed by the ACM in this case. Finally, the ACM had required Brocacef to sell some wholesale activities. In the appeal, the claimants submitted that the approved buyer of those activities was not suitable. The CBb held that the ACM had investigated the qualities of the buyer to the requisite degree: the ACM could not have foreseen that the buyer would later run into financial difficulties.

The appellants may have wanted the ACM to create an even more competitive environment through the remedies, but the decision of the CBb shows that the ACM cannot shape the market at will but can only address problems that are actually created by the relevant concentration.

Phase I decisions

Insurance company NN Group was allowed to acquire the indemnity and income protection insurance activities of its rival Vivat.20 Market shares were, depending on the segmentation, between 20 per cent and 50 per cent, but the ACM found sufficient levels of competition due to a lack of capacity restraints and ease of switching for consumers. The ACM investigated the potential impact of bundled offering of insurance products and mortgages, but found that price comparison websites and intermediaries were a guarantee against non-competitive offerings.

In its clearance of an acquisition by Banketgroep (part of Biscuit International),21 the ACM defined a new market for biscuits, cakes, cookies and between-meal snacks, which comprises several markets that were previously defined separately. The ACM found not just demand-side substitution – as all products are impulse acquisitions – but also supply-side substitution as most products are produced in the same factories or even on the same production lines.

---

17 Trade and Industry Appeals Tribunal, 8 October 2019 (Mosadex e.a./ACM) ECLI:NL:CBB:2019:474.
18 Decision ACM 13 June 2016 (Brocacef/Mediq) Case ACM 0849.24.
19 Rotterdam District Court, 7 September 2017 (Mosadex e.a./ACM) ECLI:NL:RBROT:2017:6833), discussed in the eighth and ninth editions of The Merger Control Review.
20 Decision ACM 18 November 2019 (NN/Vivat) Case ACM/19/036284.
21 Decision ACM 27 September 2019 (Banketgroep Holding International/Nieuwko Holding) Case ACM/19/036102.
In the Kidsfoundation/Partou case,\(^\text{22}\) the ACM had to define, for the first time, the markets for childcare (for children of up to four years old) and after-school childcare (for children aged from four to 13 years old). For both product markets, the ACM included not only professional providers but also registered host families on the supply side, as the latter have to comply with the same regulations as establishments of formal (after-school) childcare providers. The geographical market was defined as an area within 10 minutes’ travel time by bicycle from a childcare establishment. For after-school childcare, the ACM took into account an area of eight minutes’ travel time by foot and 10 minutes’ travel time by bicycle. Here, the starting point is the school, as after-school childcare close to the child’s school might be preferred. Vicinity and capacity are deemed important parameters, and on this basis the parties were obliged to divest a number of establishments in Amsterdam.

Hilton Foods/Dalco Food\(^\text{23}\) concerned the markets for the production of processed beef and pork products and the markets for the production of meat substitutes and meat alternatives as well as the markets for packaging such products. The ACM saw no impediment to competition as there was little overlap.

Regarding the proposed merger between Stichting Zorggroep Apeldoorn and Stichting Trimeno,\(^\text{24}\) the ACM identified concerns in the market for nursing home care in the municipality of Voorst and required a more thorough investigation of the market in Phase II. The parties subsequently abandoned their merger.

The OLVG hospital received clearance to obtain certain activities from the bankrupt Slotervaartziekenhuis hospital,\(^\text{25}\) both serving Amsterdam. OLVG would obtain a strong position, but the ACM held that there was no causal link with the acquisition, as most of Slotervaartziekenhuis’s patients would have moved to OLVG even without the acquisition due to its geographical proximity. The acquisition had closed prior to the clearance decision as a result of a waiver in the standstill obligation due to Slotervaartziekenhuis’s bankruptcy.

In another hospital bankruptcy case, St Jansdal Hospital received clearance to acquire the bankrupt IJsselmeerziekenhuizen hospital in the town of Lelystad.\(^\text{26}\) This is the first case in which the ACM applied its new best practices regarding the analysis of product markets in healthcare sectors, which requires that the consequences of a concentration are analysed by patient groups rather than by market.\(^\text{27}\) Indeed, the ACM had concerns for particular patient groups,\(^\text{28}\) but St Jansdal was saved by the causal link. The ACM held that, due to

\(^{22}\) Decision ACM 20 December 2019 (Kidsfoundation/Partou) Case ACM/19/035829.

\(^{23}\) Decision ACM 8 January 2019 (Hilton Foods Limited/Dalco Food) Case ACM/18/034486.

\(^{24}\) Decision ACM 24 April 2019 (Stichting Zorggroep Apeldoorn en Omstreken/Stichting Trimeno) Case ACM/19/035178.

\(^{25}\) Decision ACM 2 May 2019 (Stichting OLVG Afdelingen/Slotervaartziekenhuis) Case ACM/18/034722.

\(^{26}\) Decision ACM 17 July 2019 (Ziekenhuis St. Jansdal/Locatie Lelystad MC IJsselmeerziekenhuizen) Case ACM/19/034888.


\(^{28}\) The ACM also thought that the most important health insurance company would not be able to discipline St Jansdal Hospital after the acquisition. Interestingly, the health insurance company itself did not have this concern.
the bankruptcy of IJsselmeeschulpenhuisen, absent the acquisition by St Jansdal competition and patients would be worse off, and that an acquisition by another interested buyer would not be better.

Brocacef was allowed to acquire 20 pharmacies from Thio. The ACM held that the acquisition did not change the conditions on the market as Thio already had a partnership with Brocacef and did not, in practice, compete with Brocacef.

iv Phase II cases

The proposed acquisition of LipsPlus by its rival CleanLease went into Phase II as the ACM was concerned about the strong position of the parties in the market for the cleaning of hospital laundry. However, in Phase II the ACM allowed the acquisition without remedies. It found that the market shares of the parties had been declining and that smaller competitors exercised considerable pressure on the parties, helped by the tendering processes organised by relevant hospitals.

The acquisition of Iddink by Sanoma notably concerned three markets: the publishing of hardcopy and digital educational materials for secondary schools (Sanoma had a 25 per cent share); the distribution of educational materials (Iddink had a 30 per cent share); and the supply of learning management systems (LMS) (comprising student administration systems and e-portals: Iddink had a 70 to 80 per cent share). The ACM found that the parties could hinder competition by providing (1) better compatibility for Sanoma’s materials in Iddink’s LMS, and (2) commercially relevant data regarding competing publishers (obtained through Iddink’s LMS) to Sanoma. The ACM imposed behavioural remedies for an indefinite duration: competing publishers must be able to connect to Iddink’s LMS on fair, reasonable and non-discriminatory terms and must receive access to relevant data from the LMS on equal terms as Sanoma. In addition, Chinese Walls must be erected between Iddink’s LMS and Sanoma’s publishing branches.

PostNL, the Dutch incumbent postal operator, agreed to acquire its only national competitor, Sandd. The ACM found, after extensive research in Phase II – including the study of many internal documents of the parties – that the acquisition would lead to a price increase of 30 to 40 per cent for business senders and that the prices for consumers would also increase. Importantly, the ACM held that electronic post does not exert pricing pressure on standard post. The ACM was not convinced that, absent the acquisition, one of the two parties would disappear from the market due to the decline of postal volumes. Neither did the ACM believe that the – undisputed – efficiencies resulting from the integration of the networks, would offset the lessening of competition. Finally, the ACM did not believe that the acquisition was necessary for maintaining the Universal Service Obligation. Consequently, it prohibited the acquisition.

Subsequently, the Minister of Economic Affairs used – for the first time ever – its statutory power to overrule the ACM and allowed the acquisition. Notably, the Minister invoked the maintenance of the Universal Service Obligation.

29 Decision ACM 17 October 2019 (BENU Apotheken/20 apotheken van Thio) Case ACM/19/036154.
30 Decision ACM 29 August 2019 (Active Capital Company/LipsPlus) Case ACM/19/035860.
31 Decision ACM 28 August 2019 (Sanoma/Iddink) Case ACM/19/035555.
32 Normally, the ACM only accepts structural remedies.
33 Decision ACM 5 September 2019 (PostNL/Sandd) Case ACM/19/035460.
Notably, postal workers’ working conditions had deteriorated due to the heavy competition between PostNL and Sandd, which may have played a role in the Ministerial permission for the acquisition.

v Exemptions from the standstill period
The ACM granted two exemptions from the standstill period in 2019, both in the healthcare sector and both resulting from the target being bankrupt or running an immediate risk of going bankrupt. In both cases, the ACM seems to have acted quickly and in a rather pragmatic way.

vi Reports and position papers
In 2019, the Belgian, Dutch and Luxembourg competition authorities jointly published a memorandum on the challenges faced by competition authorities in the digital economy. The memorandum argues, first, that it would be useful for the European Community (EC) to commission an economic study on merger control in the digital sector, especially in relation to dominant platforms with quickly growing user bases. Second, it exhorts competition authorities to provide ex ante guidance to operators in the digital economy. Third, the memorandum invites the EC and national competition authorities to develop an approach that would sidestep the infringement route in a much less formal, fast-track procedure, with the goal of obtaining commitments from relevant parties. Finally, the memorandum suggests the introduction of a new ex ante intervention tool to target specific behaviour of dominant companies in markets with winner-takes-most dynamics. The tool should be ex ante allowing authorities to act before a market has tipped, and non-punitive to prevent long procedures and to obtain concessions from the market operators.

This memorandum is thought to have been strategically introduced to float ideas that the EC could pick up on – as it has indeed done – if they were well received.

III THE MERGER CONTROL REGIME
i Merger control thresholds
Article 29 of the 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 Decision ACM 11 October 2019 (Stichting Sensire/Stichting Trimenza) Case ACM/19/036556; and Decision ACM 5 February 2019 (Ziekenhuis St. Jansdal/Locatie Lelystad MC IJsselmeerziekenhuizen) Case ACM/19/034888.


36 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.
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).\(^{37}\) 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 relevant thresholds.

For the purpose of the control by the ACM, a healthcare undertaking is an undertaking that achieves at least €5.5 million turnover through healthcare services. A concentration between two or more healthcare undertakings must be notified to the ACM if:

\(a\) the combined turnover of all undertakings concerned exceeds €55 million in the calendar year preceding the concentration; and

\(b\) of this turnover, at least two of the undertakings concerned each achieved at least €10 million in the Netherlands.\(^{38}\)

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 have applied since 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.\(^{39}\)

ii Investigation phases

Notification phase

The Dutch procedure consists of two phases. In Phase I, the ACM will investigate upon notification whether there are reasons to assume that the concentration may impede effective competition in certain markets (notification phase). If there are no such reasons, the 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).

\(^{37}\) The relevant amendment to the Health Care (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014.

\(^{38}\) These thresholds will continue to apply until at least 1 January 2023.

\(^{39}\) 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).
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

In the Netherlands, if a concentration is prohibited, there is a possibility of requesting the Minister of Economic Affairs to grant a licence for serious reasons of general interest. In 2019, the Minister did so for the first time.40

iii  Duration procedure and waiting period (standstill obligation)

Phase I is a 28-day review period, whereas Phase II has a maximum duration of 13 weeks. However, these periods may be suspended if the 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.41 There are no requirements for pre-notification.

Exemption waiting period

As previously indicated, the concentration may not be completed during the review period. Some exceptions apply, which are similar to those under the 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 the case of exemptions, the concentration must be unwound if it is subsequently prohibited by the authority.

---

40  See Section II.iv.
41  Decision NMa 18 February 2010 (Coöperatie Vlietland/Vlietland Ziekenhuis), Case No. 6669.
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.\(^42\)

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.\(^43\) 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,\(^44\) but does require, inter alia:

- the proposal to be in writing;
- a detailed description of the nature and size of the remedy;
- 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
- a timely filing of the proposal.

Nevertheless, there are some differences between the procedures in the two phases. First, in the notification phase the remedy proposal should be handed in a week 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

---

\(^42\) The ACM has published ‘rules of the game for merger control procedures’ providing detailed information on its approach in merger control cases, available at www.acm.nl/nl/download/publicatie?id=11348 (in Dutch).

\(^43\) Remedies guidelines 2007. This section is based on these guidelines.

\(^44\) In its guidelines, the authority does refer to model texts from the European Commission.
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.45

**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 the case of recidivism. On the basis of Articles 2.5 and 2.6 of the 2014 ACM Fining Policy Rule,46 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 the case of recidivism.

v **Appeals and judicial review**

**Merger control decisions**

Each phase ends with a decision, which can be appealed before the District Court of Rotterdam by any party directly affected by the decision, including the parties involved in the concentration, and usually also competitors, customers and possibly suppliers. Further appeal against a judgment of the Rotterdam District Court can be lodged with the CBb.

Third parties directly affected by the decision do not have access to the authority’s file, but they can request information from the authority on the basis of the Government Information (Public Access) Act when the merger control procedure has been completed. Information that is generally not provided to third parties under this Act includes confidential business information and internal memos of the authority.

**Sanction decisions**

Before imposing a fine, the ACM draws up a statement of objections on which parties may comment (in writing or orally). After this, the ACM will take a decision against which a notice of objection can be filed with the ACM. An appeal can be lodged against the ACM’s decision (on administrative appeal) to the District Court of Rotterdam. An appeal can be lodged with the CBb against the District Court’s decision.

IV **OTHER STRATEGIC CONSIDERATIONS**

As previously indicated, the ACM is stringent in its interpretation of its jurisdiction, gun-jumping issues, late notifications and failure to comply with remedies, and has a track record of imposing heavy fines in cases of non-compliance. If it is unclear whether a concentration must be notified, the parties can seek informal guidance from the ACM. The ACM is required to react to such queries, and does so within two weeks (often within days).

45 For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the fourth edition of *The Merger Control Review*.

46 Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (www.acm.nl/en/download/attachment/?id=12098).
V OUTLOOK AND CONCLUSIONS

The ACM generally remains quite realistic in its analyses in the field of merger control. An interesting development is that the ACM has, for the first time in a long period, accepted behavioural remedies.\(^\text{47}\) Consistent with enforcement trends in the EU, the ACM is very keen to investigate all aspects of the digital economy, particularly where platforms are involved.

Unfortunately, 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 2019.

A major challenge is the healthcare-specific merger test of the NZa.\(^\text{48}\) The Minister had proposed to transfer this test to the ACM, which may bring some procedural efficiency, on 1 January 2017.\(^\text{49}\) The transfer would not affect the essence of the test and hence will continue to pose a heavy administrative burden on the parties involved. At the time of writing, the legislative proposal had not been adopted by the Dutch parliament.\(^\text{50}\)

An even bigger challenge, at least for hospital mergers, may be posed by the proposal to ban mergers between healthcare providers that demonstrably have significant market power, unless the concentration would result in significant efficiencies. This was originally published by the ACM in 2018 (on request of the Dutch Ministry for Health, Welfare and Sport).\(^\text{51}\) At the time of writing, the Dutch Minister for Health, Welfare and Sport further supported the proposed ban of healthcare mergers in its letter to the Dutch Lower House.\(^\text{52}\) This initiative, combined with the new best practices of the ACM regarding healthcare mergers,\(^\text{53}\) seems to have had its desired effect already, as the number of hospital mergers has reduced dramatically. The cases discussed in Section II.iii are illustrative of this: the two hospital mergers were only permitted due to bankruptcy on the part of the target.

The general EU trend to be more cautious about foreign direct investment continues. In 2018, the Dutch government submitted a bill to parliament to protect companies in the Dutch telecoms sector against unwanted acquisition or exercise of control. The proposal aimed to enable the Dutch Cabinet 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, has been unanimously adopted by the House of Representatives.\(^\text{54}\) Furthermore, in 2019, the legislative debates on additional legal mechanisms to protect companies from hostile takeovers led to the submission of a bill introducing a statutory cooling-off period for Dutch-listed companies, allowing the management board of a listed company more time to

\(^{47}\) See Sanoma/Iddink, Section II.iv.

\(^{48}\) Article 49 of the Health Care (Market Regulation) Act of 1 October 2006.

\(^{49}\) Proposal of Law of 8 April 2016, 34445.

\(^{50}\) See www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2016Z07311&dossier=34445.

\(^{51}\) ACM, Letter to the Minister for Health, Welfare and Sport, 19 July 2018, regarding Reaction ACM to requests by the Minister for suggestions to intensify merger control (Reactie ACM op verzoeken Minister om suggesties voor verscherping fusietoezicht), see www.rijksoverheid.nl/documenten/brieven/2018/10/22/reactie-autoriteit-consument-ma

\(^{52}\) See www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z03236&did=2020D06833.

\(^{53}\) These best practices were discussed in the 10th edition of The Merger Control Review.

\(^{54}\) See www.eerstekamer.nl/wetsvoorstel/35153_wet_ongewenste_zeggenschap.
draw up a statement of affairs and weigh up the interest of the company and its stakeholders.\textsuperscript{55} At the time of writing, the proposed bill was still under examination by the Dutch House of Representatives.\textsuperscript{56}

\textsuperscript{55} See Proposal of Law of 18 December 2019, 35367.

\textsuperscript{56} See www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35367.
Chapter 26

RUSSIA

Maxim Boulba and Maria Ermolaeva

I INTRODUCTION

Federal Law No. 135-FZ dated 26 July 2006 on Protection of Competition (the Competition Law), which has undergone a series of amendments, is the main statute in the area of merger control. The Russian competition authority, the Federal Anti-monopoly Service (FAS), and its regional offices remain the authority responsible for the enforcement of the merger control rules.

Decrees of the Russian government and regulations of the FAS are adopted in furtherance of the statutory provisions and deal with the technical aspects of the filing, including the contents of merger clearance notifications and other procedural issues. In addition, the competition authority has issued clarifications and guidelines; for instance, on the assessment of joint venture agreements, which shed some light on the analysis of non-compete clauses.

Apart from the Competition Law requirements (i.e., the merger control regime), transactions involving a foreign party may be caught by Federal Law No. 160-FZ dated 9 July 1999 on Foreign Investments in the Russian Federation (the Foreign Investments Law) and Federal Law No. 57-FZ dated 29 April 2008 on Procedures for Foreign Investment in Companies of Strategic Importance for National Defence and Security of the Russian Federation (the Strategic Investments Law), which 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 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, 2019 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. In 2019, the FAS reviewed such notifications across different industries. Thus, if the following thresholds are met, the joint activity requires mandatory clearance:

- the aggregate worldwide value of assets of the groups involved exceeds 7 billion roubles;
- or
- the aggregate worldwide revenue of such groups for the past year exceeds 10 billion roubles.

Clearly, the term ‘establishment of a joint venture’ is correct. The term ‘agreement on joint activities’, however, is broad (as suggested by the FAS’s clarifications published in 2013, well before the entry into force of the Fourth Anti-monopoly Package) so, in principle, it may also catch other commercial arrangements aimed at establishing cooperation. As a consequence, regardless of whether a separate legal entity is created, the merger clearance requirements of the Competition Law may potentially catch cooperation agreements even though they are not an M&A transaction.

Still, taking into account the broad definition of ‘agreement on joint activities’ and somewhat limited experience of the competition authority in the matter, competitors should treat all contemplated cooperation agreements with caution and assess whether the merger clearance provisions of the Competition Law are going to be triggered. If the above thresholds are not exceeded by the parties involved, formally there is no need to clear an agreement on joint activities. 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 on its website (including those relating to the joint venture agreements discussed above) so that all interested parties are able to provide their opinion on the impact of the transaction on competition.

Furthermore, the parties may submit information on the contemplated transaction, provide supporting documents and economic analysis, and propose remedies before filing a formal notification. 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 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 the 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 in recent years 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 platforms 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.

According to the FAS's officials, 1,052 pre-transaction notifications (lower than in 2018, due to reduced M&A activity) and 144 post-transaction notifications were reviewed in 2019. Overall, the pattern established in the past remains in place.

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, 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 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 at the latest reporting date preceding the notification date. The value of assets (turnover) of the acquirer’s group and the target’s group are taken into account. The assets of the seller and its group are not relevant if the deal results in the seller and its group losing the right to determine the business activities of the target. Still, if the seller disposes of a minority stake or otherwise retains control over the target, the assets of the ‘whole’ group are used for the calculation.

Under the Competition Law, the following transactions require pre-transaction approval from the FAS if the thresholds are met:

a the acquisition of more than 25 per cent, 50 per cent or 75 per cent of the voting shares in a Russian joint-stock company, or more than one-third, one-half or two-thirds of the participatory interests in a Russian limited liability company;

b the acquisition of direct or indirect rights to determine the business activities of a Russian company (including those based on voting arrangements or agreements such as the shareholders’ agreements providing for additional voting rights) or to act as its executive body;

c the acquisition of the fixed assets (except for land plots and non-industrial buildings or premises, such as warehouses) or intangible assets of a company if the book value of the acquired assets located in Russia exceeds 20 per cent of the total book value of the fixed and intangible assets of the transferor (for companies operating in commodity markets);

d the incorporation of a company if:

• its charter capital is paid up by the shares, participatory interests or fixed or intangible assets of another company; and

• a new company, as a result, acquires: more than 25 per cent of the voting shares in a Russian joint-stock company; more than one-third of the participatory interests in a Russian limited liability company; or fixed or intangible assets that are located in Russia and amount to more than 20 per cent of the total book value of the fixed and intangible assets of the transferor;

e the reorganisation (in the form of a merger or consolidation); and

f the execution of a joint venture agreement between competitors.
Pure foreign-to-foreign transactions need to be cleared before the Russian competition authority if they are related to the acquisition of more than 50 per cent of the voting shares in a foreign company that generated turnover on the Russian market in an amount that exceeds 1 billion roubles in the preceding year, or the acquisition of direct or indirect rights to determine the business activities or to act as the executive body of such company. A local presence is not required.

Furthermore, the acquisition of shares in a non-Russian holding company that owns shares in a Russian subsidiary may be caught by the Russian merger control rules as the acquisition of indirect control rights over the Russian subsidiary. This is one of the most common grounds for clearance, partially 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 and review procedure

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. 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.

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 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 and construction). 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. Such 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).

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 to 45 days (which includes 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 to pre-empt any official requests. In contrast to official written requests that are likely to lead to the extension of the review period, ‘informal’ requests can be addressed swiftly, which results in a more straightforward review of the notification.

### Third-party access

The role of third parties in the FAS’s review is rather limited. Their basic right is to provide their outlook on the envisaged transaction to the authority. Interested parties may provide their opinions as to the 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).

iv  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: administrative barriers (practical application) constitute one of the main impediments for their development; behavioural remedies are clearly 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 formally free to prescribe the remedies it deems appropriate without consulting with the parties. However, the parties may propose certain alternatives to address the competition concerns. According to the FAS’s 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.

v  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 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. The government commission is in charge of the approval of transactions caught by the Strategic Investments Law: only the Commission can grant ‘strategic’ clearance. By way of background, other laws may contain industry-specific merger approval requirements (for instance, in banking and insurance where the Central Bank of Russia is the regulator), which are separate from the Competition Law provisions, and restrictions or prohibitions as to foreign participation (media, air transportation).

IV OTHER STRATEGIC CONSIDERATIONS

The key issues associated with coordinating the clearance of a global transaction with a Russia-related component are the strict suspensory regime of the Competition Law with a limited number of carve-out options and the arbitrary approach often exercised by the FAS in relation to more complex transactions, which makes it difficult to predict the exact scenario of the review. In this regard, the basic recommendation would be to start preparation of the filing in advance and structure the relevant undertaking with due consideration of the Russian filing and its time frame. Particular attention should be paid to proposed transactions with ‘strategic’ companies: the importance of initial analysis, planning and compliance with the formal requirements cannot be overestimated.

Considering that not all matters in the area of merger control are expressly dealt with in the Competition Law, the FAS’s practice is evolving, as is the Competition Law. Still, a lot of concepts and rules existing in other jurisdictions or used in the course of global deals are provided for in the Competition Law and may not be applicable or are highly problematic in Russia.

There are no special rules applicable to situations where the Russian target is in financial distress or undergoing insolvency. Thus, if the financial thresholds are met by the companies and groups involved, transactions with the companies under insolvency proceedings (most notably, the asset deals) are subject to the same treatment as those with ‘active’ companies. Essentially the same requirements for obtaining the clearance will apply.

V OUTLOOK AND CONCLUSIONS

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 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 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, and to what extent, these initiatives will be enacted.
Chapter 27

SOUTH AFRICA

Xolani Nyali and Shakti Wood

1

I INTRODUCTION

Competition law in South Africa is regulated by the Competition Act 89 of 1998 (as amended) (Act) and the regulations promulgated in terms of the Act. The Act is enforced by the Competition Commission (Commission), the Competition Tribunal (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 the 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 these requirements are met, 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 target and acquirer must be at or above 600 million rand. A merger 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 transferred) firm is defined narrowly, referring to the actual business (or assets) being acquired.

---

1 Xolani Nyali and Shakti Wood are partners at Bowmans.
In the ordinary course, only intermediate and large mergers require 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 applies 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, not all the amendments are 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 applicable to merger assessments. 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 separate 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, this provision is not yet in effect and there is no

---

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.
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.

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 2018/19 annual report, the Commission considered 348 mergers and finalised 336 of them. Of the 336 reviewed, 41 mergers were approved with conditions and four were prohibited.

i Prohibited transactions

In a press release dated 23 January 2019, the Commission advised that it had 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 was 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.

The merging parties applied to the Tribunal for a reconsideration of the merger. On 16 August 2019, the Tribunal approved the merger subject to a number of conditions aimed at ensuring the availability of ostrich feathers, ostrich meat, fillet and trimmings and ensuring access to the merging parties’ abattoirs and tanneries in South Africa. In approving the merger, the Tribunal also noted that the merger was proposed to take place in an industry that was declining, and the merger therefore had the potential to benefit the industry (i.e., it served a public interest objective).

In May 2019, the Commission issued its recommendation that the Tribunal prohibit the large merger relating to the proposed acquisition of WeBuyCars (Pty) Ltd (WeBuyCars) by MIH eCommerce Holdings (Pty) Ltd (MIH eCommerce). 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, intended to acquire a 60 per cent interest in WeBuyCars, which operates an online platform for used cars sales. MIH eCommerce (which falls within the Naspers group) has investments in OLX and a Naspers subsidiary trading as AutoTrader. In its investigation, the Commission found that the Naspers group

---

3 Annual Report 2018/19 Competition Commission of South Africa.
had developed plans to enter the 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 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 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, and as such fell to be prohibited by the Tribunal. On 27 March 2020, the Tribunal issued an order prohibiting the merger. Reasons for the prohibition of the merger are still to be published by the Tribunal.

In a press release dated 1 April 2019, the Commission advised that it had prohibited the merger between Rebel Packaging (Pty) Ltd (Rebel), a subsidiary of Mpact Ltd (Mpact), and Seyfert Corrugated Western Cape (Pty) Ltd (Seyfert). The merger involved Rebel acquiring 49 per cent of the shares in Seyfert and had been implemented in 2011 without notification to the competition authorities. The parties did not consider the acquisition to constitute a merger for purposes of the Act. The Commission found that the merger facilitated collusion between Mpact and Seyfert as Mpact did not acquire sole control of Seyfert and as such, Mpact and Seyfert did not constitute a single economic entity. The collusion between Mpact and Seyfert violated Section 4(1)(b) of the Act and therefore the prior implemented merger between Mpact and Seyfert substantially prevented and lessened competition. As a consequence of the merger being prohibited, Mpact was ordered by the Commission to divest its 49 per cent share in Seyfert.

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 they were 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 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[^5] 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 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. The CAC considered this question, against 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 restructure strategically 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, while the Tribunal considered that the parties had undertaken a reasonable and rational process in assessing the number of retrenchments, 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 21 November 2018, the Tribunal approved a merger between Sibanye Gold Limited (Sibanye) and Lonmin PLC (Lonmin), subject to a wide range of conditions. The Tribunal considered the following public interest factors in assessing the merger: (1) the proposed large-scale retrenchments at Lonmin post-merger; (2) the past non-compliance of the merging parties with their Social and Labour Plans (SLPs); (3) the effect of the merger on local suppliers of Lonmin and historically disadvantaged persons; and (4) the implementation of programmes by Sibanye post-merger to create economic and social benefits for local communities.

Retrenchments

It was brought to the attention of the Tribunal that although the merging parties were contemplating retrenchments, there were discrepancies in respect of exactly how many of the contemplated retrenchments were merger-specific. The Tribunal therefore imposed a moratorium on all retrenchments at Lonmin and Sibanye for a period of six months from the date of implementation of the merger, to provide the merging parties an opportunity to consult with relevant stakeholders and undertake a proper assessment of their operational requirements.

SLPs

Prior to the merger, both Sibanye and Lonmin were accused of failing to comply with their SLPs as required under the Mineral and Petroleum Resources Development Act 28 of 2002. Lonmin’s alleged non-compliance with these SLPs had caused substantial prejudice in disadvantaged communities and, as such, the Commission was particularly concerned with how these obligations would be addressed post-merger. The Tribunal imposed an obligation on Sibanye, inter alia, to honour Lonmin’s existing and future SLP commitments.

Local suppliers and social benefits to local communities

Further conditions imposed included (1) Sibanye agreeing to honour the existing contracts that were entered into between the Bapo Ba Mogale Traditional Community and Lonmin, and (2) Sibanye honouring all existing contracts with historically disadvantaged suppliers and service providers of Lonmin. Furthermore, Sibanye was required to finalise its Agri-Industrial Community Development Programme and to conduct a feasibility study to expand the geographic scope of the initiative. If feasible, Sibanye would be obliged to contribute land measuring approximately 500 hectares to facilitate the expanded application of the initiative.
If the feasibility study did not support the further application of the initiative, then for two years following finalisation of the feasibility study, Sibanye would be obliged to consider other similar potential initiatives to promote and develop agricultural and social benefits.

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 hearing of the matter or for a pre-hearing conference (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 service standards that set 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 following timelines are contemplated.

Phase I (non-complex)

The Commission aims to review a Phase I merger within 20 business days. These are mergers in which there is little or no overlap between the activities of the merging parties, no public interest issues and a simple control structure.

Phase II (complex)

The Commission aims to review a Phase II merger within 45 business days. These are mergers between direct or potential competitors, or between customers and suppliers, where the merging parties have a combined market share of more than 15 per cent, or where public interest issues arise.
Phase III (very complex)
The Commission aims to review a Phase III intermediate merger within 60 business days and a Phase III large merger within 120 business days. Phase III mergers are likely to result in a substantial prevention or lessening of competition (including any transactions involving ‘leading market participants’ where the combined market share of the transacting parties is more than 30 per cent).

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 interest grounds. Employee representatives and trade unions also have locus standi to intervene in respect of employment-related matters, as per Section 13A of the Act and Rule 37 of the Commission Rules.

Section 13B(3) of the Act 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 merging 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.

---

6 Section 18 of the Act.
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 reconsideration 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.

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.

---

7 Section 13B(1) of the Act.
8 Section 14(1)(b)(i)–(iii) of the Act.
9 Section 14A(1)(b) of the Act.
10 Section 15(1) of the Act.
11 Section 15(1)(a) of the Act.
12 Section 15(1)(b) of the Act.
13 Section 15(1)(c) of the Act.
14 Section 16 of the Act.
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 and the International Competition Network and regularly participates in activities of the Organisation for Economic Co-operation 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: the International Finance Corporation; the Eswatini Competition Commission; the Administrative Council for Economic Defence of Brazil; Competition Authority of Kenya; the Competition Commission of Mauritius; the Namibian Competition Commission; the 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\(^1\) 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

\(^{15}\) FTN228FEB16 [2016] ZACT 56 (5 July 2016).
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.\textsuperscript{16} Put differently, the obligation to notify arises immediately upon the expiry of the ‘grace period’.

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.\textsuperscript{17} 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.

\section*{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.

\textsuperscript{16} 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.

\textsuperscript{17} Competition Commission and Aveng Africa Limited t/a Steeldale and Others, Case Nos. 84/CR/Dec09 and 08/CR/Feb11. Contrite v. Competition Commission, Case No. 106/CAC/Dec2010.
Chapter 28

SPAIN

Pedro Callol

I INTRODUCTION

i Regulations

The merger control regime is regulated by the Competition Act and its implementing regulation and interpretative guidelines.

ii 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 national sector regulatory authorities (energy, telecommunications and media, railways, postal, airports). 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 also possible 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).

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 the case of a tied vote at the Council.

In the area of merger control, the Council of Ministers (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.

1 Pedro Callol is a partner at Callol, Coca & Asociados.
3 Royal Decree 261/2008 of 22 February 2008, approving the Competition Implementing Regulation.
4 CNMC Notice of 21 October 2015 on cases where the short-form filings may be used.
CNMC Council members are appointed for non-renewable terms of six years. Renewal of various Council members, including the president, who is acting on a prorogued mandate, is still due at the time of writing.

The bulk of the CNMC is made up 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. The Competition Directorate deals with the enforcement of competition law and 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. The Competition Directorate is a professional office with career civil servants who act impartially and with a business-like attitude when addressing companies’ issues.

iii 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. Shifting alliances have, in some instances, received a particular treatment in Spain, distinct from what could generally be acceptable under EU law and the European Commission Consolidated Jurisdictional Notice.

Thresholds triggering merger control in Spain

The Competition Act provides that concentrations that meet either one of the following thresholds must be notified to the CNMC for merger control purposes:

a 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 previous 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 in Section III.

In our experience, the market share threshold poses some practical questions; for instance, the market share threshold can be met if the target company alone has a 30 per cent (or 50 per cent, as the case may be) share in a relevant market, even if the acquirer has a zero per cent market share, although this would be a candidate for a short-form merger filing and quick review. Market definition must be carried out on the basis of existing merger control practice and precedents persuasive in Spain, including those of the CNMC. Generally, the market share threshold need not be problematic; it can be dealt with expeditiously and in a constructive fashion.

**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 actively monitors gun-jumping, including that of transactions that had to be reported pursuant to the market share threshold, which the CNMC has shown it has will to enforce (with the majority of gun-jumping investigations being triggered by the market share threshold). 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.\(^5\) 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 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 2013 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 to 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

\(^5\) 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).
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 is currently €1,545.45.

II YEAR IN REVIEW

Although more active than in some previous years in terms of deal flow, 2019 has been a rather standard year in merger review terms, with two transactions having been subjected to Phase II proceedings. Conversely, we have seen 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. The CNMC has also increased its track record of clearing easy transactions well ahead of the Phase I deadline, sometimes in a matter of a few days.

Overall, roughly 89 concentrations were subject to merger control in 2019 in all sectors including online platforms for managing food orders at home, healthcare, manufacture and sale of white cement, the private gaming sector and telecommunications. We set out below some significant merger cases.

i Quirón/Clínica Santa Cristina merger

This matter concerns the acquisition of Clinic Santa Cristina’s healthcare business in Albacete by Helios Healthcare Spain 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 CNMC during Phase I proceedings. Additionally, the market power acquired in the delivery of in-patient healthcare services 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.

The unilateral effects of the merger were compounded by economic, technical and legal barriers to entry, effectively hindering the deployment of new private hospitals in the province of Albacete, at least in the short term.

On the basis of the above, the CNMC considered that an in-depth analysis of the notified operation was 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

---

6 At the time of writing, the CNMC had not yet published its review of activities for 2019.
7 Decision of 16 April 2019, Quiron/Clinica Santa Cristina, file C/0966/18.
and guarantee the supply of healthcare services to all patients at stable prices and quality levels. In particular, the CNMC drew up a statement of facts that identified three potential competition problems:

\( a \) commitments were submitted seeking to avoid a reduction in service quality and to ensure the continuation of existing collaboration with public health systems;

\( b \) to guarantee the continued collaboration with the public health system, Quirón agreed to provide the Health Service of Castilla-La Mancha the same portfolio of services it currently provides; and committed not to close certain specialities, including those not provided by the public hospital of Albacete and not to lower the quality of care indicators for patients referred from the public health system; and

\( c \) finally, regarding the risk that the market would be closed off to other real or potential competitors, Quirón agreed to maintain the legal relationships with those health professionals who were already providing their services in competing hospitals and to guarantee access to the medical professionals who were renting spaces in Quirón.

ii Acquisition of GGSO by CIRSA

These parties overlapped in the private gaming sector, in particular in off-line gaming offerings in the regions of Cataluña, Valencia and Aragon.\(^8\) High market shares were identified in Cataluña specifically, for the management of type B machines in food and drink establishments, as well as in arcades and bingo halls. Conditional clearance was granted on condition of eliminating the exclusivity clauses in all contracts signed by the merged entity in Cataluña to enhance competition between the operators of gaming machines within premises. In addition, Cirsa committed to limit the duration of contracts to five years in both food and drink establishments and arcades. Finally, Cirsa committed to close two bingo halls in Barcelona, making those licences available to new entrants.

iii Lyntia’s purchase of usage rights for the excess dark fibre network of Iberdrola

This transaction involves Lyntia’s acquisition of the right to use the excess capacity of the fibre optic network over which Iberdrola Spain, Iberdrola Distribución Eléctrica and Iberdrola Generación (Iberdrola) have exclusive, long-term ownership or usage rights.\(^9\) In addition, Lyntia is acquiring Iberdrola’s portfolio of contracts with fibre optic clients.

Iberdrola markets wholesale telecommunications services using fibre optic networks deployed for its own electricity distribution and transmission infrastructure and in networks deployed by third parties, for which it has usage rights. The dark fibre market in Spain is very concentrated (the two main operators, Reintel and Lyntia, account for over 90 per cent of the market) and there are significant barriers to entry.

As a result, the transaction was approved subject to commitments to alleviate the vertical effects (foreclosure) of the merger. Lyntia will not unreasonably terminate existing contracts and will offer to extend existing contracts expiring within 10 years. Likewise, it will offer access, under reasonable conditions and via the different existing commercial methods, to its entire dark fibre network in Spain for a period of five years.

---

\(^8\) Decision of 30 July 2019, CIRSA/GGSO, file C/1035/19.

\(^9\) Decision of 30 July 2019, Lyntia/Activos Iberdrola, file C/1031/19.
iv Merger of Just Eat and Canary

Both parties are online platforms for managing home food orders. However, while Just Eat operates nationally, Canary only has a presence in the Canary Islands.

This is a good example of a merger in a two-sided market. In this case, one obvious issue would be if the resulting platform has many exclusives with restaurants, as this can make it difficult for new operators to enter the market.

The operation strengthened Just Eat, particularly in Las Palmas de Gran Canaria where it would lead the market. However, the CNMC did not expect there to be competition problems for several reasons. First, Canary has been operating in this market for years without any significant innovations compared to other platforms, so this is not an acquisition that would eliminate a new, innovative and thriving competitor. Second, the acquired company is small. Third, the market for such platforms is dynamic, and new companies such as Glovo and Uber Eats have recently entered the market and have achieved significant market shares in a short period of time. Finally, the entry of these new competitors coincided with the commitments that the CNMC approved when it authorised the Just Eat/La Nevera Roja merger. The latter commitments (the duration of which is confidential according to the merger decision, but which applies nationally, including within the Canary Islands) were focused on Just Eat’s undertaking not to bind restaurants exclusively.

v Merger of MIH Food Delivery Holdings and Just Eat

The CNMC cleared the acquisition with commitments by MIH Food Delivery Holdings, BV (MIH) of Just Eat plc (Just Eat) through a hostile takeover bid. The combination would impact the handling of online platforms for managing food orders at home, which are accessed via internet or mobile applications. The market is relatively concentrated and demand is expected to continue growing at significant rates in coming years.

The CNMC analysed the implications of MIH’s minority interest (less than 25 per cent) in Delivery Hero and the stake that Delivery Hero has in Glovo (less than 20 per cent). This would result in the buyer of Just Eat having an indirect minority interest in its main competitor in Spain, Glovo. These interests could facilitate MIH’s access to information related to Glovo’s strategic commercial policy, since directly or indirectly (through Delivery Hero), MIH would have access to the information made available to the board of directors of Just Eat and Glovo, respectively. Likewise, the indirect presence of MIH on the board of directors of the main competitor of Just Eat enables interference in this competitor’s business.

Consequently, the transaction was subject to commitments seeking to: (1) guarantee that MIH cannot have access to Delivery Hero or Glovo’s sensitive commercial information; (2) prevent MIH from influencing Glovo’s strategy in competition with Just Eat in Spain; and (3) prohibit Delivery Hero (and, therefore, Glovo) from accessing Just Eat’s sensitive business information.

Cross-ownership restrictions in competing companies are in place in Spain in some concentrated or sensitive industries, such as telecommunications, energy and media.

---

10 Decision of 10 September 2019, Just Eat/Canary, file C/1046/19.
11 Decision of 31 March 2016, Just Eat/La Nevera Roja, file C/0730/16.
12 Decision of 5 December 2019, MIH Food Delivery Holdings/Just Eat, file C/1072/19.
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 are referred to Phase II in-depth analysis.

Phase I proceedings last in principle for one month, counted from the date 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.

The maximum period for Phase II proceedings is two months, counted from the date the CNMC decides to open a Phase II review. 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 proceedings).

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.

All maximum periods can be interrupted by the CNMC in regulated events such as formal information requests.

Due to the covid-19 situation, administrative periods and timelines, including for merger control, are on pause at the time of writing. However, the CNMC has, until recently, been dealing with pre-notifications and meeting merger review deadlines.

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; 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 EC Merger Regulation. 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. These are normal dynamics in Phase II, where third parties have a relevant role and provide input that 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,\textsuperscript{13} where the participation of a third party in the proceedings was expressly discussed in the merger decision.

Indeed, the CNMC will listen to third parties concerns and if these have merit, the CNMC should be expected to raise the level of scrutiny of a given merger.

Third parties also play a role in reporting mergers that should have been filed for merger review but were not.\textsuperscript{14}

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 also acts 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.

\textsuperscript{13} Decision of 22 December 2016, Helios/Quironsalud, file C/0813/16.
\textsuperscript{14} For example, Decision of 29 July 2010, Bergé/Maritima Candina, file R/0006/10.
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 often grants approval in 10 to 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 the 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 recently made it clear that it is ready to use its powers to punish individual directors and managers for competition breaches (which has hitherto not materialised in any actual fines to individuals 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. Specifically, the CNMC has initiated proceedings against Nufri, Sociedad Agraria de Transformación for having closed the acquisition of Grupo Idulleida before gaining merger clearance.15

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 in 2013 (see Section I). The integration was criticised at the time. In the medium to longer term, it cannot be ruled out that a future legal reform will again separate the national regulatory authorities from the Competition Authority. This possibility has been discussed, although there does not currently appear to be momentum for it.

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.

The current economic crisis has triggered considerable financial difficulty for many companies in a country where tourism and transportation-related activities are very important to the economy. In this regard, the failing firm defence is acknowledged and used by the CNMC and may well apply to concentrations in the current circumstances, provided it can

be appropriately substantiated and evidenced. In the past, the CNMC has invoked the failing firm defence in restrictive circumstances only, and has avoided its use in temporary crisis situations (e.g., the Antena 3/La Sexta merger).16

Another area that overlaps with merger control, and that is directly related to concentrations, is that of foreign direct investment (FDI) screening. In April 2020, the government introduced a new FDI screening regime, which is very broad in scope and which, like merger control, requires clearance prior to the closing of an acquisition, under penalty of fines of up to the consideration of the transaction. At the time of writing, this regime poses serious issues of interpretation, pending the approval of an implementing regulation, so careful advice may be required.

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 to be a trend at European Commission level and in neighbouring countries such as France.

---

Chapter 29

SWITZERLAND

Pascal G Favre and Marquard Christen

I INTRODUCTION

Merger control in Switzerland is governed primarily by the Federal Act on Cartels and Other Restraints of Competition (CartA) and the Merger Control Ordinance (MCO; see Section III). 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 Berne that consists of up to 15 members. There are currently 12 members who were nominated by the federal government, the majority of whom 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 current staff of more than 70 employees (full-time and part-time), mostly made up of lawyers and economists), organised under four divisions: product markets, services, infrastructure and construction. A resources division is in charge of administrative and technical tasks within the Secretariat of the Competition Commission.

The types of transactions that are subject to merger control are mergers of two or more 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 exercises all the functions of an independent business entity on a lasting basis. If a joint venture 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 of the CartA, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year before the concentration as follows:

a the undertakings concerned have reported a worldwide aggregate turnover of at least 2 billion Swiss francs, or an aggregate turnover in Switzerland of at least 500 million Swiss francs; and

b at least two of the undertakings concerned have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

1 Pascal G Favre and Marquard Christen are partners at CMS von Erlach Poncet Ltd. The authors thank Fabian Martens, counsel at CMS von Erlach Poncet Ltd, for his contribution.

2 www.weko.admin.ch.
These thresholds are considered to be relatively high in comparison with international standards. 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 of 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) of the 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, as explained above, in the case of a dominant undertaking, the concentration must be notified to the Competition Commission before its implementation. If a concentration 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, however, has 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 such concentration for reasons of creditors’ protection alone, 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; this is sometimes called the ‘dominance-plus test’. Pursuant to Article 10 of the CartA, the Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

- creates or strengthens a dominant position;
- is capable of eliminating effective competition; and
- 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 were 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 some cases (notably the Tamedial/PPSR (Edipresse) case from 2009), 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 only very recently started playing a role (see the Gateway Basel North joint venture in Section II).

II YEAR IN REVIEW

The statistics in the Competition Commission’s recently released Annual Report for 2019 showed generally higher M&A activity than in previous years. The Commission received a total of 40 merger notifications in 2019 (compared with 34 in the previous year), of which 37 were cleared in Phase I. In three cases, the authority entered into an in-depth (Phase II) investigation, of which two were cleared in 2019 without conditions or requirements. The following concentrations were investigated in detail (Phase II).

The Swiss Federal Railways (SBB), Hupac and Rethman intended to create the Gateway Basel North, a national container terminal for import and export movements as well as the transalpine traffic of goods. The final stage of the project is a trimodal transshipment terminal connecting rail, river (the Rhine) and road. The Commission approved the transaction after an in-depth investigation (Phase II). The Commission found that the first large Swiss container terminal eliminated effective competition for the handling of containers, swap bodies and semitrailers in import and export traffic, primarily with regard to the turnover of goods transported by rail and ship-to-rail transshipment. However, the Gateway Basel North is also expected to produce substantial economies of scale in intermodal transport and increase competition in the import and export rail transport. The Commission held the view that these advantages would counter the negative impact of a dominant position in the goods handling sector.

In the telecommunication sector, the Commission examined a planned takeover of UPC (Liberty Global) by Sunrise. With the merger, Sunrise would have become the second-largest telecommunications company in Switzerland after incumbent Swisscom, by offering – as Swisscom – fixed network, broadband internet and mobile telephony services as

well as digital television on its own infrastructure in Switzerland. The in-depth investigation focused on the likelihood of the creation of joint dominance of the new Sunrise and Swisscom. However, the Commission concluded that the acquisition would not lead to a collective dominance of Sunrise and Swisscom and that coordination between the companies was unlikely since UPC and Sunrise on one hand, and Swisscom on the other, were positioned differently. As a result, the merger was not considered to lead to the creation or consolidation of a dominant position in any of the markets analysed and was, therefore, approved by the Commission in September 2019. However, the deal was later cancelled due to a lack of Sunrise shareholder backing.

In December 2019, the Commission communicated that it would investigate the takeover of SBB Cargo by SBB and the logistics providers Planzer and Camion-Transport in detail. Planzer and Camion-Transport intended to participate with 35 per cent in SBB Cargo through their jointly held subsidiary Swiss Combi. Two other logistics providers each held 10 per cent in Swiss Combi. Planzer and Camion-Transport intended to bring their logistics expertise into SBB Cargo to optimise existing products and develop new products, and thereby increase SBB Cargo’s economic efficiency and competitiveness. The Commission initially found indications of a dominant position in various relevant markets in the rail freight traffic, operator services and handling sectors. In April 2020, however, the Commission approved the merger. It concluded that the merger would create a dominant position for handling services in combined traffic in the region of Gossau/St Gallen in eastern Switzerland, but that the companies involved would not be able to eliminate effective competition.

Furthermore, in June 2019, the Swiss Federal Supreme Court rendered its decision on the right of Ticketcorner to appeal against the Commission’s decision to block the planned merger between Ticketcorner and Starticket. Ticketcorner, the Swiss market leader in tickets sales, including events in entertainment, culture and sports, as well as ski ticketing in various ski areas, also operates numerous media platforms, including print magazines, digital channels, blogs and social media. Starticket, on the other hand, the second-biggest ticket marketer in Switzerland by volume of sales, was the ticket brokerage arm of the leading Swiss media group Tamedia (now TX Group). In May 2018, the Federal Administrative Court had rejected the appeal filed by Ticketcorner against the Commission’s blocking decision due to the fact that Tamedia, Starticket’s parent company, did not join that appeal. In June 2019, the Swiss Federal Supreme Court reversed this judgment of the Federal Administrative Court and instructed the Court to consider the appeal and reach a decision on the merits of the case. In the meantime, TX Group has sold Starticket to the UK-based See Ticket, a leading player in the global ticketing market.

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 and takes place in a related market, the filing of a merger notification is mandatory before the implementation of the concentration. 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. Such course of action can streamline the notification procedure. For example, the Secretariat
can agree to waive some legal requirements in relation to the contents of the notification, or confirm completeness of the notification prior to the official filing of the notification. Furthermore, parties often contact the Secretariat for a preliminary assessment of the question as to whether or not a given transaction is subject to notification.

In the case of a merger, 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. However, if the assessment of a draft notification involves a large amount of work, the Secretariat may invoice this work as billable 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 is filed and the Competition Commission considers the filing complete, it will conduct a preliminary assessment (Phase I) and will have to decide within one month of the date of the filing whether there is a need to open an in-depth investigation (Phase II). If the Competition Commission decides to launch an in-depth investigation, it will have to complete it within four months. As regards the internal organisation, under its internal rules of procedure 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 conducted and whether the merger can be implemented ahead of the regular 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 investigation independent of that 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 dictate that as appropriate. Pursuant to the internal rules of procedure (in force since 1 November 2015), Andreas Heinemann (president), Armin Schmutzler and Danièle Wüthrich-Meyer (both vice presidents of the Competition Commission) have been appointed as members of the Chamber for merger control.

As a rule, the implementation of a concentration should not take place before the competition authorities' clearance. However, in specific cases, the authorities may allow an implementation to happen before clearance if it is for compelling reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid (see Section IV). 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 is to 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 the following three conditions are fulfilled:

a the Competition Commission must be informed adequately about the concentration;
b specific reasons must be provided explaining why the notification cannot be submitted at that time; and
c if, after the Commission’s review the concentration is not allowed, a potential cancellation of the transaction must be assessed.
In that particular case, those 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 Secretariat of the Competition Commission for review before the formal notification.

If the Competition Commission decides to launch a Phase II investigation, it has to publish its 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 of such remedies. 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 predetermined deadline. The Competition Commission, however, is not bound by third-party opinions or by the answers to the 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 given concentration.

A decision of the Competition Commission may be appealed within 30 days before the Federal Administrative Tribunal and, ultimately, before the Swiss Supreme Court. The duration of an appeal procedure varies, but may well exceed one year at each stage.

On 1 October 2019, 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 CartA ‘applies to practices that have an effect in Switzerland’. Up until the time when the Merger Control Communication was issued, the Competition Commission and the Swiss courts held that each time the turnover thresholds set forth in Article 9 of the CartA were reached, the concentration would be considered to have an effect on the Swiss market. Thus, if a joint venture with no activity in Switzerland were created, in which the turnover thresholds were met by the parent companies, a notification would be required (see, for example, 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 into Switzerland) and does not plan to be active in Switzerland in the future, then the creation of this joint venture is not considered to 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 into Switzerland.

Another 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 (and later held in the Merger Control Communication) 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;
- a shift from joint control to sole control concluded in a binding agreement; and
- a maximum transition period of one year.

Until that decision, the Competition Commission considered that a transition period of up to three years was acceptable to analyse a case as a single concentration. However, to align its practice with that of the European Commission in its Jurisdictional Notice of 10 July 2007, the Competition Commission decided to reduce the transition period to one year.

On a related topic, in an informal consultation dated 2017, the Secretariat of the Competition Commission provided a clarification on a series of transactions, whereby the first transaction would lead to the sole acquisition of a target by one undertaking and a subsequent 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 the duty to notify, provided the individual transactions were dependent on each other and together formed a single operation.

The Merger Control Communication also addresses the subject of the geographic allocation of turnovers. In general, the test for geographic allocation of the turnover is the contractual delivery place of a product (place of performance) and, respectively, the place where the competition with other alternative suppliers takes place. The billing address is not relevant. Special rules apply to the calculation of turnovers based on the provision of services.

The Merger Control Communication further 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. Once again, the Competition Commission has aligned its practice in this regard with the practice in the EU. In general, a detailed description of such markets in the context of the merger control notification is only required if one of the following additional conditions is met: if another undertaking involved plans to enter the affected market or if that undertaking 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. The authority will also examine cases more closely in which another undertaking involved is already active in the same product market.

---

4 Article 11, Paragraph 1(d) MCO.
but not the same 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.

The clarification added in the Merger Control Communication on 1 October 2019 concerns takeovers by means of joint ventures (i.e., if a joint venture acquires control over the target). In this event, in general, only the joint venture is considered an undertaking acquiring control and, thus, an undertaking concerned. However, the Competition Commission will instead consider the parent companies as the undertakings concerned, rather than the joint venture, if one of the following conditions is met:

- the joint venture has been founded specifically for the purpose of acquiring the target, or, respectively, has not yet started to operate;
- an existing joint venture is not a full-function joint venture;
- the joint venture is an association of undertakings; or
- the parent companies are, in fact, the acting companies in the acquisition.

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 as an annex to the Swiss notification. This reduces the workload for the drafting of the Swiss notification, as the parties 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 still be drafted in one of the three Swiss official languages: French, German or Italian.

The Competition Commission usually strives to make a decision coherent with that of the European Commission in cases requiring parallel notifications in Brussels and Berne. On 17 May 2013, the Swiss government signed an agreement between the Swiss Confederation and the EU concerning cooperation on the application of their competition laws (Agreement). The Agreement entered into force on 1 December 2014. Under the Agreement, in merger procedures with parallel notifications in Switzerland and the EU (as may often be the case in cross-border M&A), the Secretariat of the Competition Commission no longer requires the prior consent of the parties to a transaction to initiate exchanges with the staff of the Directorate-General for Competition on technical and substantive issues to ensure coordination and streamlining in the parallel proceedings.

More generally, the Taskforce Cartel Act’s report of January 2009 (see Section V) stated that in the context of growing globalisation, it would be appropriate for Switzerland to conclude cooperation agreements with its main trading partners to allow for the exchange of confidential information between competition authorities. In essence, the Agreement regulates the cooperation between the Swiss and European competition authorities. The Agreement is of a purely procedural nature and does not provide for any harmonisation of substantive competition laws. The two competition authorities shall notify each other in writing of enforcement activities that could affect important interests of the other contracting party. The Agreement contains a list of examples of cases in which notification must be given and provides for a time frame for notifications in relation to mergers and other cases (Article 3, Paragraphs 3 and 4). Furthermore, the Agreement sets forth the legal basis for the competition authorities to be able to coordinate their enforcement activities with regard to related matters.

© 2020 Law Business Research Ltd
The CartA does not contain any specific rules regarding public takeover bids. However, 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, in this regard also, substantially follows the rules of the EU Merger Control Regulation on public takeover bids. In addition, it is possible to request an early (provisional) implementation of a concentration prior to clearance, 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 (see also Section IV). Article 59a of the CartA requires the federal government to evaluate the efficiency and conformity of any proposed measure in relation to the CartA before submitting a report and recommendation to the parliament regarding such measure. As regards concentrations, the Taskforce Cartel Act took the view at the time that, compared with other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition (under the current 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. The Taskforce recommended a harmonisation of the Swiss merger control system with the EU merger control system to eliminate such risk and to reduce the administrative workload with respect to transnational concentrations due to diverging tests, as well as the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (the significant impediment to effective competition (SIEC) test, an 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 with either a simple dominance test (whereby the additional criterion of a possible elimination of competition would be dropped) or a SIEC test by analogy with 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 both over Switzerland and at least the European Economic Area (EEA), and the concentration is appraised by the European Commission.

Based on the results of the consultation procedure, on 22 February 2012 the federal government released a dispatch to the 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 the 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 for concentrations whereby all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration would be assessed by the European Commission. In such cases, the filing of a copy of Form CE with the Swiss authorities for information purposes would have been sufficient.

However, in September 2014, after a long parliamentary debate, the National Council finally rejected the proposed amendments and the CartA was not revised. According to the Competition Commission, a general rejection of the suggested amendments at the time without even considering the individual proposals was a missed opportunity to meet the need for reform highlighted in the evaluation. It also meant that several important changes proposed by the Council of States, including changes to the merger control regime, were no longer on the table.

Following rejection of the reform in 2014, individual parliamentary proposals have been submitted with the aim of revising specific points in the CartA. At the same time, the Federal Council, based on its report on the issue of restrictions of parallel imports, dated 22 June 2016, instructed the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on modernising the merger control procedures in the CartA. The Federal Council takes the view that the current merger control regime does not sufficiently take into account the negative and positive effects of mergers, and that the current dominance-plus test should 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 (SECO), which had overall responsibility for drafting the bill, commissioned two reports on the implications of the introduction of the SIEC test on the Swiss merger control regime. The first report, which was released on 27 October 2017, analysed the consequences from an economic perspective that are likely to result from the introduction of the SIEC test in Switzerland. Among other conclusions, it recommends that such test be introduced. The second report, which was released on 12 February 2020, examined the extent to which mergers would have been assessed differently in Switzerland under the SIEC test. It concluded that the SIEC test is particularly suitable for intervening in mergers that are harmful to competition.

On 12 February 2020, the Federal Council tasked the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on a partial revision of the CartA with one of its main points being the modernisation of the merger control regime with the introduction of the SIEC test as recommended by the two reports commissioned by the SECO. The consultation is expected to start in the fourth quarter of 2020.

Another subject matter raised in the context of a revision of the Swiss merger control regime is the introduction of a control mechanism for direct foreign investments in Switzerland to allow for security and public order considerations when assessing such investments (postulate Molina). The Federal Council has rejected the postulate, arguing that the currently available means to monitor such direct investments are sufficient. The postulate has not yet been debated in the parliament.

---

See, for instance the de Buman Parliamentary Initiative of 30 September 2016, which demanded that four specific undisputed points addressed in the proposal rejected in 2014 be reintroduced, namely the amendments to the merger control regime, but which have been withdrawn in the meanwhile.
Taiwan

Victor I Chang, Margaret Huang and Ariel Huang

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 2015 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 Asia-Pacific Economic Cooperation Forum (APEC) Competition Policy and Law Database on behalf of the 21 member economies that comprise the 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 Organisation for Economic Co-operation and Development 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
Yageo Corporation and KEMET Corporation
Yageo Corporation intended to acquire all of the ordinary shares of KEMET Corporation through its wholly owned subsidiary, Sky Merger Sub Inc. After the proposed acquisition, Yageo would indirectly and wholly own KEMET through its subsidiary, Yageo Holding Hungary Limited Liability Company. As the revenue of Yageo and KEMET in the previous

---

1 Victor I Chang and Margaret Huang are partners and Ariel Huang is an associate at LCS & Partners.
fiscal year exceeded the TFTC’s threshold for pre-merger notification and the participating parties held over one-quarter of the market share in the relevant market, Yageo and KEMET filed a pre-merger notification with the TFTC. The TFTC decided on 15 April 2020 not to prohibit the proposed acquisition.

Both Yageo and KEMET were manufacturers of passive components. The products relevant to the proposed acquisition included multi-layer ceramic capacitors (MLCCs), aluminium capacitors, inductors, resistors, tantalum capacitors and thin-film capacitors. Yageo and KEMET’s overlapping products included MLCCs, aluminium capacitors and inductors. Yageo would enter the tantalum capacitor and thin-film capacitor markets after the completion of the proposed acquisition. The TFTC found that: (1) the increases of the parties’ market shares in the relevant product markets would be limited; (2) the overlapping products were few and the products supplied by the participating parties were complementary to each other; (3) specific entry barriers did not exist in the relevant product markets; (4) competitors competing for the same customers as the parties were numerous; and (5) the countervailing power of buyer existed in the relevant markets. Thus, the TFTC concluded that the proposed acquisition would not impose a significant anticompetitive impact on the relevant markets. In addition to its own analysis, the TFTC also gathered opinion for the proposed acquisition from the competent authorities of the relevant industries, competitors in the same markets and the firms operating in the upstream and downstream markets. The TFTC decided not to prohibit the proposed acquisition through its comprehensive consideration of the foregoing factors.

**Applied Materials, Inc and Kokusai Electric Corporation**

Applied Materials, Inc intended to acquire the shares of Kokusai Electric Corporation from KKR HKE Investment LP. Because the revenue of Applied Materials and Kokusai in the previous fiscal year exceeded the TFTC’s threshold for pre-merger notification and the participating parties held over one-quarter of the market share in the relevant market, Applied Materials and Kokusai filed a pre-merger notification with the TFTC. The TFTC decided on 4 March 2020 not to prohibit the proposed acquisition.

Both Applied Materials and Kokusai were the suppliers of semiconductor manufacturing equipment, but they supplied the equipment for different manufacturing processes, and the production and application of relevant equipment were also different. The TFTC determined that the relevant market was the market for rapid thermal processing of heat treatment. The TFTC concluded that the proposed acquisition would result in a slight increase to the participating parties’ market share in the relevant market, but the relevant market would still be a considerably competitive market because semiconductor equipment constitutes highly customised products. Therefore, competitors with considerable scale would still operate in the relevant market and the countervailing power of buyers also existed in the relevant market. In addition to its own analysis, the TFTC also gathered the opinion for the proposed acquisition from the competent authorities of the relevant industries, competitors in the same markets and the firms operating in the upstream and downstream markets. The TFTC determined that there would be no significant restrictions on competition and decided not to prohibit the proposed acquisition.
Recent proposed mergers prohibited by the TFTC

Between the time the Fair Trade Act was promulgated in 1992 and March 2020, 7,055 applications have been submitted for merger approval (for filings made before the amendments to the Fair Trade Act in February 2002) or merger notification (for filings made since February 2002, subsequent to the amendments to the Fair Trade Act). Of those filings, only 12 of the proposed transactions have been refused or prohibited by the TFTC, representing approximately 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 2019, 64 merger notifications were filed with the TFTC; only one of which was prohibited. In 2020, 19 merger notifications were filed, and none had been prohibited as at March 2020, according to the most recent statistics from 9 May 2020.

Cashbox Partyworld Co, Ltd and Holiday Entertainment Co, Ltd

The only decision prohibited by the TFTC in 2019 was the acquisition contemplated by Cashbox Partyworld Co, Ltd of 100 per cent of the shares in Holiday Entertainment Co, Ltd, to control Holiday Entertainment’s business operation or the appointment or discharge of its personnel. Cashbox Partyworld and Holiday Entertainment were the top two market-share leaders offering, as their main business, audiovisual and singing services by providing customers with the equipment and venue for karaoke in Taiwan.

The proposed merger was approved by the TFTC subject to specific conditions in 2003, but it did not take place. After failing to complete the initial transaction, the parties knocked on the door of the TFTC again in 2006 for clearance but, to the parties’ surprise, the TFTC prohibited consummation of the contemplated transaction because the parties’ market share had increased and the karaoke market was no longer the same as in 2003.

In 2019, the parties submitted a merger filing for the third time, in which they asserted a new and broader definition of the relevant ‘market’ that included the markets of live platform, online karaoke, apps used for singing and portable mini karaoke booths (an independent space for a single person to sing karaoke, which is usually located in public areas such as department stores, cinemas or hotels). However, the TFTC concluded that the relevant market should only cover the provision of audiovisual and singing services. For the calculation of the parties’ market share in the relevant market, the TFTC considered that the market share should be determined by the parties’ revenues rather than the number of karaoke rooms authorised by upstream suppliers or the equipment for audiovisual and singing services provided by each entity, which was never suggested by the parties.

As such, the TFTC determined that the true market shares of the parties after the proposed acquisition would reach 45.35 per cent in the aggregate. Apart from the high market share, Cashbox Partyworld and Holiday Entertainment would no longer act as each other’s principal competitor. Hence, it would drastically increase the incentive for the parties to increase prices. Even if the parties agreed to commit to various post-merger commitments, including price maintenance for five years, no investment in overseas audiovisual or singing services for five years, and no abuse of their dominant market position, none of these commitments would be sufficient to remove the TFTC’s concern of the potential anticompetitive conduct of the parties once the proposed acquisition occurred.
Therefore, the TFTC prohibited the proposed acquisition again on 21 August 2019 indicating that its harm to competition was not outweighed by the overall economic benefits. It is worth watching the future interaction between the TFTC and the parties in this proposed acquisition.

### 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
- \(e\) 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.

---

\(^2\) 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.
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 Corporation and Worldwide Semiconductor Manufacturing Corporation would both merge into and be survived by Taiwan Semiconductor Manufacturing Corporation (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 [integrated circuit] 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.

v Third-party challenge, external opinion and judicial review
Third parties do not have the right to access merger files under the TFTC’s custody; however, during the seven-day TFTC public opinion solicitation period, they may challenge the proposed merger. Persuasive challenges may prompt the TFTC to request more information from the merging parties, thereby, in some cases, delaying or breaking the deal. Under the 2017 amendment, the TFTC is also provided with the discretion to seek external opinion, and if necessary, appoint an academic research institution to conduct industrial economic analysis to supplement its review of the merger application. In addition, the TFTC shall provide necessary merger application information to the targeted enterprise in the hostile acquisition and consult with the targeted enterprise before a decision is made. Should parties be dissatisfied with the TFTC’s decision, they have the right to file for an administrative litigation directly without first going through an administrative appeal within two months of the day after receiving the disposition letter.

vi Concurrent regulatory review
The National Communications Commission (NCC) has concurrent merger control authority with the TFTC over the media sector. Pursuant to the agreement between the two agencies, the TFTC must first consult the NCC before substantively reviewing a merger filing of parties in the media sector.

IV OTHER STRATEGIC CONSIDERATIONS

i Requests for waiver
In certain cases, it may be difficult to determine whether the proposed transaction is a covered transaction, or to determine whether the filing thresholds have been met for various reasons (e.g., because the relevant market is not easily defined). In such cases, a request for waiver may be made to the TFTC in the form of a letter. Recently, however, we note that the TFTC has been prone to not respond to such request for a waiver, as it 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 in Section III.iv, 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, in the same draft amendment, the TFTC proposed to suspend the current five-year statute of limitations once it 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, which applies, inter alia, to merger control matters, 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. 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 (the 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 (the Horizontal Guidelines) and the Guidelines on Non-horizontal Mergers and Acquisitions (the Non-horizontal Guidelines), respectively. These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish

---

1 Gönenç Gürkaynak is a founding partner and K Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law.
2 97/C372/03.
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 Competition Board. One of the amendments introduced in Communiqué No. 2017/2 (Article 1) abolished Article 7(2) of Communiqué No. 2010/4, which had required that ‘The thresholds . . . are re-determined by the Competition Board biannually’. Through this amendment, the Competition 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. Second, Article 2 of Communiqué No. 2017/2 modified Article 8(5) of Communiqué No. 2010/4. With this amendment, the Competition Board is now 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 Competition Board. The Competition 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.

**Thresholds**

Article 7 of Communiqué No. 2010/4 provides for the following thresholds:

a. the total turnover of the parties to a concentration in Turkey exceeds 100 million lira and the respective Turkish turnover of at least two of the parties individually exceed 30 million lira; or

b. 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. 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; and

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, be no less than 31,903 lira for 2020. 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. 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 (Report) for 2019, the Competition Board reviewed a total of 208 transactions in 2019; one of which was privatisation. The number of mergers and acquisitions reviewed in 2019 is higher than the average of the past seven years, which is 202. When compared with the number of mergers and acquisitions reviewed in 2018, a decrease of 7 per cent is observed in 2019. Note that none of the filings in 2019 have resulted in a no-go decision; two of them were taken into Phase II review and three transactions were conditionally cleared.

The Competition Board’s most important merger control decisions in 2019 were as follows.

A notable transaction concluded in 2019 was the Competition Board’s *Harris Corporation* decision, in which the Competition Board conditionally approved the acquisition of sole control by Harris Corporation of L3 Technologies, Inc. Based on the commitments submitted to the European Commission. The Competition Board held that the commitments completely eliminated the overlap between the parties, and thus, the transaction did not result in the creation or strengthening of a dominant position and did not significantly impede competition. These commitments require Harris to divest its businesses of night vision devices and the image intensifier tube technologies used in these devices, thereby eliminating the vertical overlap.

The Competition Board has concluded its Phase II review of the acquisition of sole control of Embraco, the compressor manufacturing business of Whirlpool Corporation, by Nidec Corporation. As a result of the Phase II review, the Competition Board unanimously

---

20 June 2019, 19-22/327-145.
held in its decision\textsuperscript{4} that the notified transaction could not be approved under Article 7 of Law No. 4054. Notwithstanding the foregoing, the transaction was approved based on the commitment package submitted to the EU Commission providing for the divestment of Nidec’s own light commercial compressor and household compressor businesses.

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.\textsuperscript{5} 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 a 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. Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:

\begin{enumerate}
\item the anticompetitive effects that a merger would have in the relevant markets;
\item the buyer power as a countervailing factor to anticompetitive effects resulting from the merger;
\item the role of entry in maintaining effective competition in the relevant markets;
\item efficiencies as a factor counteracting the harmful effects on competition that might otherwise result from the merger; and
\item the conditions of a failing company defence.
\end{enumerate}

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 in which 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.\textsuperscript{6} 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.

\textsuperscript{4} 18 April 2019, 19-16/231-103.
\textsuperscript{5} 2004/C 31/03.
\textsuperscript{6} 2008/C 265/07.
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.7

In line with this trend, the Turkish Competition Authority issued the Guidelines on Remedies. The Guidelines on Remedies aim 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 set 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 of 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 of 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. 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. 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 (the Competition Directorate-General) to apply relevant measures.

The Turkish merger control regime currently utilises a dominance test in the evaluation of concentrations. However, there were exceptional cases in which the Competition Board used a joint dominance test to discuss the coordinated effects arising out of transactions. In this regard, transactions concerning the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected by the Competition Board on the grounds that the relevant transactions would lead to joint dominance of the market. In its analysis, the Competition Board considered factors such as ‘structural links between the undertakings in the market’, ‘past coordinative behaviour’, ‘entry barriers’, ‘transparency of the market’ and the ‘structure of demand’.

Economic analysis and econometric modelling have also been seen more often in recent years. For example, in AFM/Mars Cinema, the Competition Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Competition Board also used the Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg and White/Koenker NR2 tests and the Arellano–Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses that are used more often are the HHI and concentration ratio indices to analyse concentration levels. In 2019, the Competition Board also published the Handbook on Economic Analyses Used in Competition Board Decisions, which outlines the most prominent methods utilised by the Competition Authority (e.g., correlation analysis, the small but significant and non-transitory increase in price test and the Elzinga–Hogarty test).

---

8 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.
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.
I INTRODUCTION

The Antimonopoly Committee of Ukraine (AMCU) is the state authority with special status focused on ensuring state protection for 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.

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 of 2001, known as the Competition Law, with its amendments;
b the Law of Ukraine on the Antimonopoly Committee of Ukraine of 1993;
c the Regulation of the Antimonopoly Committee of Ukraine on Concentration of 2002; and
d the Law on Protection against Unfair Competition of 1996, with its amendments.

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.

---

1 Igor Dykunskyy is the managing partner at DLF Attorneys-at-law.
Article 22 of 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; or 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 of 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 sanctioned (Russia-related) parties (in force since 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) are 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 at 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 (the 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 transactions, as well as countervailing factors (such as buyer power, market entry and the ‘failing firm’ defence).

II YEAR IN REVIEW

According to the published data, in 2019, the AMCU received 532 applications for economic concentration, 44 of which were declined mostly due to non-compliance with the requirements for submitting applications and supporting documents or application withdrawal. Out of 442 applications considered by the AMCU (compared with 453 in 2018), only three were closed without a decision on the merits. Hence, the AMCU approved economic concentration in the remaining 439 cases. Such a small percentage of dismissed applications for concentration suggests that 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 in the market concerned.

Applications by foreign investors or companies with foreign investors accounted for 34 per cent (181 applications) of those considered by the AMCU.

In the majority of cases, economic concentrations were implemented via share acquisition (68.3 per cent of cases). Other types of control acquisition accounted for 21.4 per cent of cases, whereas a new undertaking was established in only 3.4 per cent of cases. In terms of industries, agricultural production, the extractive industry, including raw materials processing, and the energy and utilities sectors held the top positions.

On 27 September 2019, the AMCU adopted the Guidelines on consideration of concentration via establishment of joint ventures, which to a large extent mirror the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004. The Guidelines specify the following criteria for a joint venture formation to be considered a concentration:

- the joint venture is newly established by two or more undertakings;
- the joint venture is fully functional (i.e., able to carry out its business activity independently of the parent undertakings);
- the joint venture is capable of operating on a lasting basis; and
- the creation of the joint venture does not result in coordination of competitive behaviour.

On 12 December 2019, the AMCU introduced a resolution with two amendments to the concentration legislation. The resolution provides for a revised definition of an integral property complex as all types of property that, when combined, enable a legal entity to carry out its business activity, including buildings, facilities, equipment, inventory, raw materials, produce, and rights to claims and debts, as well as rights to trademarks or similar and other rights, such as rights to land plots and the integral property complex itself. It is a rather broad definition, which means that more economic transactions will now be subject to merger clearance.

© 2020 Law Business Research Ltd
The second amendment is that acquisitions by a bank or other financial institution of assets in the form of an integral property complex or shares of a legal entity, provided that such an acquisition is carried out under a restructuring plan developed in accordance with the Law On Financial Restructuring, as a result of debt recovery, with further alienation of such assets within two years, will not be considered a concentration.

Also, as expected, the AMCU proposed that the impact on trade relations between Ukraine and the EU be added to the definition of 'state aid'. This would bring the definition of state aid in Ukraine in line with the Association Agreement. However, to date, the definition remains unchanged. Furthermore, on 31 May 2020, the Supreme Court of Ukraine upheld the first ever decision of the AMCU on the unlawfulness of state aid. The local authority, having provided the mentioned state aid, was appealing against the AMCU’s decision, claiming that the potential effect on the trade relations between Ukraine and the EU had not been taken into account. The Supreme Court ruled that until the Ukrainian legislation is amended, the AMCU is not entitled to consider this criterion.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Normally, the AMCU’s approval is granted within one to two months of 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 of the date of its receipt.

The AMCU or its administrative board shall consider the application for concentration approval within 30 days of 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 the applicant submitted the 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 anticompetitive 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 CMU (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 aims 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 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 CMU 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 CMU, 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 CMU 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 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 Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development and the International Competition Network. In particular, the OECD provides the AMCU with specific recommendations as to the improvement of diverse aspects of the AMCU-authorised activity.
V OUTLOOK AND CONCLUSIONS

Currently, several bills aiming to reform the AMCU, as well as the effective competition legislation, are awaiting parliament’s consideration. In general, the competition legislation in Ukraine requires substantial revision to both assimilate the EU standards and meet the requirements of the Ukrainian marketplace.

Some bills include similar amendments envisioning the establishment of a new body that will be entitled to consider claims as to violations of legislation on state aid, thereby enabling the AMCU to focus on competition protection, without the additional workload caused by consideration of cases on state aid. Another proposed change is the creation of a special court to handle competition-related cases. This, again, is aimed at increasing the AMCU’s efficiency, yet the proposed amendment raises concern that such a court may not retain full impartiality and so could become a means of eliminating competition. In addition, the introduction of the aforementioned changes conflicts with the Constitution of Ukraine; therefore, changes to the Constitution will be necessary.

Another bill, registered in 2017, addresses a range of issues, including authorising territorial offices to impose increased fines and revising the procedure for the enforcement of AMCU decisions, the fine collection procedure, etc. In particular, the bill stipulates abolition of the penalty incurred on late payment of fines, as this, in practice, does not facilitate timely collection of fines. The authors of the bill suggest that the penalty be replaced by a 50 per cent discount for timely payment.

Other potential changes include the proposed increase of the threshold for presumed market dominance of a single undertaking to 40 per cent from 35 per cent, the establishment of clearer time frames for application consideration and increased state duties.

With the announcement of six large state-owned enterprises and a long list of smaller businesses to be put up for privatisation in 2020, the AMCU recently made a statement urging potential bidders to take into account the competition protection legislation to avoid triggering concentration clearance, or if required, to apply for such clearance in a timely manner (i.e., either before the tender launch or within 30 days of the winner’s announcement).
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. 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. 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 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.

---

1 Jordan Ellison is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would like to thank Henry Llewellyn, associate at Slaughter and May, for his help in preparing this chapter.

2 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.
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.3 The CMA has published detailed non-binding guidelines on jurisdictional issues and its procedures for the review of mergers.4

The Competition Appeal Tribunal (CAT) may review decisions made by the CMA or the Secretary of State in connection with a reference, or possible reference, of a merger. An appeal lies, on a point of law only, from a decision of the CAT to the Court of Appeal and requires the leave of either the CAT or the Court of Appeal.

II YEAR IN REVIEW

i Workload

The number of Phase I merger decisions made by the CMA in the 2019–2020 financial year (63) was similar to the preceding financial year.5 Of the 63 cases decided during the year, 38 were cleared unconditionally, representing around 60 per cent of cases, significantly fewer than the 73 per cent in the preceding year. Thirteen cases were referred for Phase II review, which is around 20 per cent of cases, similar to the preceding year. Undertakings in lieu of a reference (UILs) were accepted in eight cases, an increase on the two acceptances in the preceding year, but fewer than the peak of 12 in the 2017–2018 financial year.

A total of five Phase II decisions were published by the CMA in the 2019–2020 financial year, down from eight published in the previous year. Two were unconditional clearances and one was granted clearance subject to divestiture remedies. The CMA prohibited two mergers during 2019–2020, an increase from the one case it prohibited in 2018–2019.6 Four cases were cancelled or abandoned, one more than in the preceding year.

Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 16 per cent of cases in the 2019–2020 financial year, which is around three times the rate of intervention from the European Commission over a similar period. The higher intervention rate can be explained by the voluntary nature of the UK merger control regime, which means that parties may elect not to notify transactions that do not give rise to significant competition issues.

ii Interim measures

The CMA has powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action, including in relation to anticipated mergers at Phase I (see Section III.vi). 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 in 19 Phase I cases in the 2019–2020 financial year.

---

3 See Section II.v for several recent public interest intervention notices.
4 See, for example Mergers: Guidance on the CMA’s jurisdiction and procedure (January 2014) CMA2.
5 For the CMA case directory, see www.gov.uk/cma-cases.
6 Sainsbury’s/ASDA and Tobii/Smartbox.
Interim orders were imposed in two Phase II cases in the financial year.\(^7\) The CMA granted a total of 70 derogations from initial enforcement orders in the financial year, an increase from the 51 derogations granted in the previous year.\(^8\) The CMA published new guidance on the use of interim measures in merger investigations in June 2019.\(^9\)

In February 2019, the CMA issued its first ever unwinding order in relation to the completed acquisition by Tobii AB of Smartbox Assisted Technologies and Sensory Software Limited, following the breach of an interim order issued to prevent pre-emptive integration during Phase II. In August 2019, the CMA issued its first unwinding order during a pre-notification period in relation to the acquisition by Bottomline Technologies of Experian’s Payments Gateway business.\(^10\) Two penalty notices were imposed for breaches of interim measures,\(^11\) and three penalties were imposed for incomplete responses to statutory information requests.\(^12\)

### 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 37 working days in the 2019–2020 financial year, up from 33 working days in the previous year and a 25 per cent increase over the past two years.\(^13\) The CMA has emphasised that pre-notification will be quicker the more complete the draft notification is, including draft annexes containing internal documents and contact details.

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 one Phase I case during the 2019–2020 financial year.\(^14\)

During the 2019–2020 financial year, the average length of Phase I was 37 working days, compared with 36 working days in the preceding year.\(^15\) The average length of a ‘significant’

---

\(^{7}\) Rentokil Initial/Cannon Hygiene and Tobii AB/Smartbox.

\(^{8}\) Mergers updates, Law Society Competition Section seminar, 10 March 2020. FY 2019–2020 figures taken from this seminar do not include data for March 2020.

\(^{9}\) Interim Measures in Merger Investigations, CMA108 (June 2019).

\(^{10}\) Bottomline/Experian, 6 August 2019.

\(^{11}\) PayPal/iZettle and Nicholls/DCC Energy Limited.

\(^{12}\) AL-KO Kober/Bankside Patterson, Rentokil/MITIE, Sabre.

\(^{13}\) Mergers updates, Law Society Competition Section seminar, 10 March 2020.

\(^{14}\) ibid.

\(^{15}\) ibid.
merger investigation by the CMA (defined as from deal announcement to either the Phase II decision or UIL acceptance) was just over nine months, which was significantly shorter than a comparable investigation by either the European Commission (15.6 months) or the US Federal Trade Commission (11.9 months) over a similar period.\footnote{Ibid.}

The covid-19 pandemic has placed significant pressure on the CMA’s ability to deal with its caseload. While the CMA intends to continue progressing its cases, it has announced that it may extend statutory time frames where necessary.

iv \hspace{1em} \textbf{An expansive approach to jurisdiction?}

In the 2019–2020 financial year, the CMA has asserted its jurisdiction based on the share of supply test in a number of high-profile foreign-to-foreign mergers. In two notable cases, the parties contested the CMA’s ability to assert jurisdiction on that basis. In \textit{Roche}/\textit{Spark Therapeutics}, the target company was not engaged in the commercial supply of any goods or services in the UK and did not generate any turnover in the UK. Nevertheless, the CMA asserted jurisdiction on the basis of the combined share of the parties of employees working on activities related to the development of certain novel treatments in the UK. In \textit{Sabre}/\textit{Farelogix}, although the CMA found that the target had ‘no material turnover in the UK’, it asserted its jurisdiction on the basis of the supply of certain services to British Airways that facilitated the indirect distribution of airline content to travel agents in the UK.\footnote{The CAT has confirmed that Sabre has lodged an appeal against the CMA’s decision in \textit{Sabre}/\textit{Farelogix}.}

The CMA specifies in its guidance that the share of supply test is not an economic assessment and that therefore the group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market, which can aggregate intra-group and third-party sales even if these might be treated differently in the substantive assessment. This guidance provides the CMA with considerable flexibility to assert its jurisdictions in mergers where a UK nexus may not be immediately apparent.

v \hspace{1em} \textbf{Public interest intervention notices}

As noted in Section I, where a merger raises a defined public interest consideration, the UK system allows the relevant Secretary of State to intervene in relation to mergers. To do so, the Secretary of State will issue a public interest intervention notice prior to the CMA issuing its decision on reference.

The 2019–2020 financial year saw intervention notices issued on national security grounds in respect of four transactions: \textit{Connect Bidco}/\textit{Inmarsat}, \textit{Advent International}/\textit{Cobham}, \textit{Aerostar}/\textit{Metis Aerospace} and \textit{Gardner Aerospace}/\textit{Impcross}. In the first two cases, the Secretary of State accepted undertakings from the parties in lieu of referring the merger to the CMA for a Phase II investigation. Both \textit{Aerostar}/\textit{Metis Aerospace} and \textit{Gardner Aerospace}/\textit{Impcross} were abandoned by the parties.

The 2019–2020 financial year also saw two intervention notices issued in respect of newspaper mergers. In June 2019, the Secretary of State for Digital, Culture, Media and Sport issued a notice in respect of an acquisition of a minority interest in the companies controlling the Evening Standard newspaper. However, the CAT upheld an application by the parties that the time limit for the Secretary of State to make a reference in respect of the transactions had in fact expired. In January 2020, the Secretary of State issued another public
interest notice in the case of *DMG Media/JPI Media*, which involved the acquisition of the *i* UK national newspaper and website. In March 2020, the Secretary of State announced that no concerns arose in that case and the CMA subsequently cleared the merger at Phase I.

**vi  Brexit**

The UK left the EU on 31 January 2020. Pursuant to the agreement governing the UK’s exit from the EU, a transition period is in place from that day until 11pm on 31 December 2020. During the transition period, the operation and functions of the CMA are largely unaffected. The CMA published guidance on the functions of the CMA under the Withdrawal Agreement, including its effect on merger control, in January 2020.18 See Section IV.ii for an explanation of how the UK and EU merger controls will interact during and beyond the transition period.

**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 Office of Fair Trading (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.19

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 UILs are under negotiation, where the parties are yet to comply with an information request from the CMA, or where a request has been

---

18 UK Exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement, CMA113 (January 2020).
19 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.
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 (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.

iii Counterfactuals

The CMA applies different approaches at Phase I and Phase II to assessing the merger counterfactual. At Phase I, the transaction is generally measured against the prevailing conditions of competition (unless it is unrealistic to do so or there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). At Phase II, the CMA will measure the transaction against the ‘most likely scenario’.

The most notable situation where the CMA may use a counterfactual different to the prevailing conditions of competition is in a failing firm scenario. However, in practice, it is often difficult to argue for its application, especially at Phase I. The CMA considered the failing firm test in two cases in the 2019–2020 financial year. The CMA rejected the defence at Phase I in Danspin/Lawton Yarns but accepted it in its Phase II provisional findings in respect of Amazon/Deliveroo in light of a deterioration in Deliveroo’s financial position as a result of covid-19.

21 Merger Assessment Guidelines (September 2010) OFT 1254, CC 2.
22 Good practice in the design and presentation of customer survey evidence in merger case (May 2018) CMA78.
iv The notification procedure
An application for clearance is made using the formal merger notice.23 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 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) 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 to ensure compliance with the interim orders.

The CMA guidance on the use of interim measures in merger investigations sets out the circumstances in which measures will typically be imposed; the form that the measures will typically take; the type of derogations that the CMA is likely to grant; and the timing for their

23 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.
implementation. The CMA will normally make an 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 19 interim enforcement orders imposed in the 2019–2020 financial year, only three were imposed in the context of anticipated mergers.

The CMA has stated that it would generally not expect to impose an order limiting the parties’ ability to complete an anticipated merger unless it had strong reasons to believe that completion will occur prior to the end of Phase I and the act of completion itself might amount to pre-emptive action that would be difficult or costly to reverse (e.g., where the act of completion would automatically lead to the loss of key staff or management capability for the acquired business). The CMA may also consider creating a tailored interim order in cases where this is likely to optimise procedural efficiency and avoid unnecessary disruption to the merging parties’ businesses. Therefore, absent exceptional circumstances, it is expected that parties will still be able to complete transactions prior to CMA clearance.

The CMA is willing to grant derogations from interim orders. The CMA advises parties to raise derogation requests as early in the process as possible, preferably in a single comprehensive request. The CMA will often grant the following types of derogation requests where sufficiently specified, reasoned and evidenced: (1) the provision of back-office support services by the acquirer to the target; (2) the exclusion from the scope of the interim order of parts of one party’s business that are not engaged in activities that are related to the other party’s business; (3) the exclusion from the scope of the interim order of parts of either parties’ business that have no relevance to the merging parties’ relevant activities in the United Kingdom; (4) the replacement of specified key staff at the target or substantive changes to the merging parties’ organisational or management structures; and (5) continued access to key staff members where integration is staggered.

The CMA will seek to release merging parties from some or all of the obligations incumbent in an interim order as early as is appropriate in the circumstances of the case, including during Phase II for parts of the business about which the CMA is no longer concerned. The CMA may also release interim orders following a state of play meeting if it is decided that the case will be cleared.

vii Exceptions to the duty to refer

As explained above, the CMA has a statutory duty to refer a relevant merger situation for a Phase II investigation where it believes that it is or may be the case that a merger has resulted or may be expected to result in a substantial lessening of competition in a UK market. The CMA has published guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase II investigation, and separate guidance on remedies.

---

24 Guidance on interim measures in merger investigations (June 2019), CMA108. This guidance replaces the September 2017 guidelines on initial enforcement orders (CMA60) and updates the relevant parts of the CMA’s existing guidance on jurisdiction and procedure (CMA2) that deals with interim measures.

25 Mergers updates, Law Society Competition Section seminar, 10 March 2020.

26 Mergers: Exceptions to the duty to refer (December 2018) CMA64, Merger remedies (December 2018) CMA87.
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.\(^{27}\) It is becoming increasingly common for the CMA to require an ‘upfront buyer’, in other words, for a buyer of the divestment assets to be identified and approved by the CMA before clearance is granted.

The merging parties have five working days from the issuance of a substantial lessening of competition decision (SLC decision) to offer undertakings to the CMA, although they may offer them in advance should they wish to do so. The CMA then has until the 10th working day after the SLC decision to decide whether the offered undertakings might, in principle, be acceptable as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might, in principle, be acceptable, a period of negotiation and third-party consultation follows. The CMA is required to decide formally whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

The CMA’s duty to refer may also be discharged in other circumstances, namely in respect of small markets (\textit{de minimis} mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced. In relation to \textit{de minimis} mergers, the guidance states that, for markets with an aggregate turnover exceeding £15 million, the benefits of an in-depth Phase II investigation may be expected to outweigh the costs. However, for markets with an aggregate turnover of less than £5 million, the CMA will generally not consider a reference to be cost-effective or justified provided that there is, in principle, no clear-cut UIL available (though this is not to be considered a ‘safe harbour’). For markets with an aggregate turnover 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 \textit{de minimis} exception where clear-cut UILs are available. The CMA applied the \textit{de minimis} exception in just one case during the 2019–2020 financial year.\(^ {28}\)

\(^{27}\) For example, in \textit{Mastercard/VocaLink}, the CMA accepted a network access remedy under which VocaLink agreed to make its connectivity infrastructure available to a new supplier of infrastructure services to the LINK ATM network. In addition, VocaLink agreed to transfer to LINK the intellectual property rights relating to a particular messaging standard and Mastercard agreed to contribute to LINK members’ switching costs.

\(^{28}\) Mergers updates, Law Society Competition Section seminar, 10 March 2020.
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.

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 2019.29 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 its premises in 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.30 In February 2020, the CAT upheld the CMA’s prohibition of the Tobii/Smartbox merger. The appeal addressed both the procedure and merits of the CMA’s decision, with the CAT dismissing the appeal on both

---

It affirmed the CMA’s view that the two parties were close rivals, and held that the CMA is not obliged to provide all the evidence received or disclosed to it prior to releasing its provisional findings.31

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 merger intelligence guidance explains when merging companies, that do not propose to notify their transaction, should submit a briefing note to the CMA.32 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 at 1 March 2020, the Committee had reviewed over 700 transactions during the 2019–2020 financial year. This is an increase on the previous years, during which 600 to 650 cases were reviewed. 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 investigation.

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 UILs. 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.

32 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 three occasions in the 2019–2020 financial year.

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.

The UK left the EU on 31 January 2020 following the results of the 2016 referendum. Pursuant to the UK–EU Withdrawal Agreement, a transition period will end on 31 December 2020, unless extended, during which time the UK will be treated for most purposes as if it were still an EU Member State. The EUMR continues to apply to the UK throughout the transition period, meaning that the UK turnover of the parties will be taken into account when establishing whether the transaction satisfies the EUMR thresholds. Where these thresholds are satisfied, the European Commission will continue to retain exclusive competence for the investigation of that merger, including in respect of any effects on any UK market. The CMA guidance on the Withdrawal Agreement sets out the scenarios in which the European Commission will retain jurisdiction over cases that it is reviewing but on which it has not yet made a decision towards the end of the transition period. In general, the European Commission will retain jurisdiction over cases formally notified or referred before 31 December 2020 (in practice, 23 December 2020). Merging parties have been encouraged to engage promptly with the CMA where a merger might not be formally notified to the European Commission before the end of the transition period.

After the end of the transition period, the one-stop-shop principle will no longer apply, meaning that the UK turnover will no longer be relevant to EUMR thresholds, and businesses may need to submit parallel notifications in the United Kingdom and European Union to obtain clearance for a deal.

iii Cross-border cooperation
Parties should be aware that the CMA is currently 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. In the 2019–2020 financial year, the CMA reviewed the Illumina/PacBio merger in parallel with the US Federal Trade Commission. Cooperation was made possible by the merging parties signing waivers for the sharing of information between authorities. The transaction was ultimately abandoned in January 2020.
V OUTLOOK AND CONCLUSIONS

The CMA has stated in its Annual Plan 2020/21 that it expects a 50 per cent increase in the number of merger cases and UK elements of international competition enforcement cases from January 2021, as it acquires jurisdiction over cases previously reserved to the European Commission.\(^{33}\) The CMA has therefore increased its workforce to address the increased case load. The CMA has also noted that it will have to work on cases (for example, by engaging in pre-notification discussions) from autumn 2020, to be ready for the increased caseload.

The Department for Business, Energy and Industrial Strategy published the government’s Strategic Steer to the CMA in July 2019. This recognised the key role of the CMA in the government’s industrial strategy, and underlined the need for the CMA to champion consumers, make the most of the challenges and opportunities of the digital economy, continue its enforcement practices and ensure that it remains a strong and independent voice in the UK. The Digital Competition Expert Panel also carried out a wide-ranging review of digital markets in 2019.\(^{34}\) In response, the CMA noted in its Annual Plan that it would continue to prioritise activity in online areas and update the Merger Assessment Guidelines to reflect the function of digital markets.\(^{35}\)

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. It has stated its intention to consider further revision of its jurisdictional and procedural guidance, and to publish a revised draft of the guidelines for external consultation in its review of the Merger Assessment Guidelines in the second half of 2020. The CMA also intends to make changes to the Phase II process to facilitate a greater degree of international cooperation post-Brexit; for example, by reducing unnecessary duplication in evidence gathering, while preserving the independence of Phase II decision makers.  

\(^{33}\) CMA Annual Plan 2020/21 (March 2020).

\(^{34}\) The ‘Unlocking digital competition’ report published by the Digital Competition Expert Panel, as appointed by HM Treasury to examine competition in the digital economy.

\(^{35}\) CMA Annual Plan 2020/21 (March 2020).
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 2020, 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 US$94 million. Transactions in which holdings post-acquisition will be valued between US$94 million and US$376 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 US$188 million, and at least one other person must have total assets or annual net sales of US$18.8 million. Transactions valued over US$376 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 US$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, and even challenge, transactions, typically, but not always, in conjunction with the federal enforcement agency handling the transaction. Certain industries also require pre-merger approval from 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 utilities 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 2019. 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 4


For instance, in April 2020, the FTC challenged Altria’s 35 per cent investment in Juul, even though the HSR Act waiting period had expired over a year prior to commencement of the administrative action. Complaint, In the Matter of Altria Grp., Inc., FTC Docket No. 9393 (1 April 2020), available at www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf.

In the T-Mobile/Sprint transaction, 16 state attorneys general unsuccessfully challenged the combination despite the DOJ and Federal Communications Commission having approved the transaction after lengthy reviews and commitments. New York v. Deutsche Telekom AG, ___ F. Supp. 3d ___, No. 19 Civ. 5434 (VM), 2020 WL 635499 (S.D.N.Y. 11 February 2020).


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 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. Similarly, in the challenge of the September 2017, Otto Bock/Freedom Innovations transaction, the FTC brought its administrative challenge in December 2017, the administrative law judge ruled in May 2019 that the transaction violated the law, and the full Commission unanimously affirmed the decision on 30 December 2019. Otto Bock petitioned the DC Circuit to review the Commission’s decision.

During FY 2019, the FTC continued to be active with its litigated challenges. The FTC brought two preliminary injunction actions; the parties abandoned one transaction pretrial, and the FTC lost the other action on 3 February 2020. The administrative law judge held in favour of the FTC in another merger, which then resulted in a divestiture settlement. In addition, the Eighth Circuit affirmed the FTC’s win in a clinics merger challenge. During the first eight months of FY 2020, the FTC brought an additional seven challenges in administrative or district court: the parties abandoned their deals in three cases and the remaining four cases are pending trial.


13 FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019).


The FTC entered into 11 consents involving proposed mergers in FY 2019. In addition, the FTC reports that during 2019, parties abandoned eight transactions due to antitrust concerns. During the first eight months of FY 2020, the FTC entered into eight consents involving proposed mergers and the parties abandoned two transactions due to antitrust concerns.

At the beginning of FY 2019, the DOJ’s appeal of AT&T’s acquisition of Time Warner was pending in the DC Circuit. On 26 February 2019, the DC Circuit affirmed the district court’s decision.\(^\text{16}\) The DOJ brought three cases in FY 2019: the parties abandoned one prior to trial,\(^\text{17}\) the DOJ won one in arbitration on 9 March 2020,\(^\text{18}\) and the DOJ lost one in district court on 7 April 2020.\(^\text{19}\) The DOJ brought no new cases during the first eight months of FY 2020.

The DOJ also entered into seven consents involving proposed transactions in FY 2019; in addition, transaction parties abandoned one transaction because of antitrust concerns raised by the DOJ. In the first eight months of FY 2020, the DOJ entered into eight consents involving proposed transactions.

### 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 Act notification has 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 Act notifications, 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 Act notification 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 acquiring party may withdraw and refile its HSR notification

---

\(^{16}\) United States v. AT&T, 916 F.3d 1029 (D.C. Cir. 2019).


\(^{18}\) Press release, US Dept of Justice, ‘Justice Department Wins Historic Arbitration of a Merger Dispute’ (9 March 2020), available at www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute. This was the first time that the DOJ and transaction parties decided to refer a determinative issue – market definition – to arbitration.

(recommencing the waiting period), agree not to complete the transaction to grant the antitrust enforcement agency 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 regarding 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 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 will sometimes also require transaction parties to pay ‘attorneys’ fees’ for their review of the transaction as part of the settlement. In addition, 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 public 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.20

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 expiry of the HSR Act waiting periods. State attorneys general can bring challenges as well, on their own behalf or as parens patriae of their 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 Act 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. Although the T-Mobile/Sprint transaction provided an example of where some states may diverge with a federal antitrust agency, in a number of recent FTC challenges, state attorneys general joined with the FTC in the matter.

Similarly, many transactions meeting the jurisdictional thresholds of the HSR Act will also require notification in a number of other jurisdictions.21 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. Transaction 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

20 Antitrust Procedures and Penalties Act, 15 USC Sections 16(b)–(h) and 2(b).
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 reviewing merger cases. Section 13(b) of the FTC Act authorises the FTC in a 'proper case' to seek permanent injunctive relief against entities that have violated or threatened to violate any of the laws it administers. The statute provides that an injunction may be granted only 'upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest'. In contrast, under traditional equitable standards, a plaintiff must show a likelihood of success on the merits. The circuit courts have not reached an agreement on what the FTC’s burden of proof should be. Reference to a public interest criterion has resulted in some circuits relaxing the standard imposed on the FTC from the traditional equitable standards applicable to the DOJ and other plaintiffs in an injunctive proceeding. There is a bill pending in Congress that would conform the process and standard applied to the two agencies. There are also pending in Congress bills that would potentially radically reform the burdens of proof and standards applied in merger reviews; it is by no means clear that these bills will pass in Congress.

US antitrust enforcement continues unabated as at the time of writing. Despite the covid-19 pandemic, US antitrust agencies have continued to actively investigate and take enforcement actions – through consents and legal challenges – both proposed and consummated transactions. The matters include vertical mergers, minority interests and acquisitions of nascent or potential competitors. It is very likely that the agencies will be faced with many distress transactions in which flailing firm, failing firm and changed competitive dynamics will be raised. In addition, both in Congress and at the federal antitrust agencies, there is increased reflection on the adequacy and usage of the antitrust laws and enforcement to address broader industry and societal policy objectives. Antitrust has already been part of the political debate in the 2020 presidential elections, and will likely remain of interest post-election.

22 15 USC Section 53(b).
23 id.
Chapter 35

VIETNAM

John Hickin and Hannah Ha

I INTRODUCTION

The 2018 Law on Competition (Law No. 23/208/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. On 26 September 2019, the government issued Decree No. 75/2019/ND-CP on handling competition law violations, which became effective on 1 December 2019. On 24 March 2020, the government issued Decree No. 35/2020/ND-CP on detailed provisions guiding the implementation of the 2018 Law on Competition (Decree No. 35), which includes some material differences to what was set out in the draft decree issued in 2018. Decree No. 35 took effect on 15 May 2020. The last decree (in the set of three new decrees) to implement the 2018 Law on Competition, which will regulate the functions, tasks and organisational structure of the National Competition Commission (NCC), is in the process of being formulated (the NCC Draft Decree).²

The 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, and is intended to replace the existing Vietnam Competition and Consumer Authority and the Competition Council under the now-repealed 2004 Law on Competition once the NCC Draft Decree is promulgated.

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’.³ 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 South East Asian business

---

1 John Hickin and Hannah Ha are partners at Mayer Brown.
2 Vietnam Competition and Consumer Authority (VCCA), Annual Report 2019, p. 68.
3 Luu Huong Ly, ‘Competition Law in Vietnam’ (August 2015) 1 CPI Antitrust Chronicle.
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 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 was appealed by the Vietnam Competition and Consumer Authority, and is currently being reviewed by the Vietnam Competition Council, which has not yet issued an official decision. Importantly, the Vietnam regulator has prohibited no mergers 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 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 received and processed four additional merger notification applications. In 2019, the regulator reviewed two merger cases, assessed and responded to one merger notification application, and, additionally, received and processed five 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. 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

---

7 DFDL, Focus on Merger Activity by the VCCA (16 April 2014).
8 PaRR, Vietnam’s competition authority to remove market share threshold for merger reviews (17 July 2017).
9 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.
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 Decree No. 35 are set
at a relatively low level (e.g., value of transaction exceeding 1 trillion dong). Many more
transactions are expected to require filing, given these low thresholds.

Further, while the 2004 Law on Competition prohibited mergers that resulted 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
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 come 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 did 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 specified in Decree No. 35. Companies other than credit institutions, insurance companies and securities companies are subject to the following notification thresholds:

- total assets in the Vietnam market of either party (or group of affiliated companies of which such party is a member) exceeds 3 trillion dong in the preceding fiscal year;
- total turnover from sales or purchases in the Vietnam market of either party (or group of affiliated companies of which such party is a member) exceeds 3 trillion dong in the preceding fiscal year;
- value of the transaction exceeds 1 trillion dong (only applies to mergers in Vietnam); or
- combined market share of the combining entities in the relevant market is 20 per cent or more in the preceding fiscal year.

In addition, Decree No. 35 introduces separate and much higher notification thresholds for credit institutions, insurance companies and securities companies, which are as follows:

- total assets in the Vietnam market of either party (or group of affiliated companies of which such party is a member) in the preceding fiscal year (1) for insurance or securities companies, exceed 15 trillion dong, and (2) for credit institutions, exceed 20 per cent of the total assets of the credit institution system in the Vietnam market in the preceding fiscal year;
- total turnover from sales or purchases in the Vietnam market of either party (or the group of affiliated companies of which such party is a member) in the preceding fiscal year (1) for insurance companies, exceeds 10 trillion dong, (2) for securities companies, exceeds 3 trillion dong, and (3) for credit institutions, exceeds 20 per cent of the total turnover of the credit institution system in the preceding fiscal year;
- value of the transaction (1) for insurance or securities companies, exceeds 3 trillion dong, and (2) for credit institutions, exceeds 20 per cent of the total charter capital of the credit institution system in the preceding fiscal year (only applies to mergers in Vietnam); or
- combined market share of the combining entities in the relevant market is 20 per cent or more in the preceding fiscal year.

**ii Concept of ‘control’**

The concept of obtaining control under the 2018 Law on Competition is specifically defined in Decree No. 35. An enterprise that obtains more than 50 per cent\(^{10}\) of the charter capital (or voting shares) or acquires ownership in or the right to use more than 50 per cent of the assets of all or one business line of an acquired enterprise, or such other holding that

---

\(^{10}\) Under the Enterprise Law, major decisions (such as reorganisation, 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 are passed by 65 per cent of attending votes. Other decisions are passed by 51 per cent of attending votes.
is sufficient to enable the acquirer with the right to make decisions on amendment to the charter, appointment and dismissal of members of management (directly or indirectly), and important matters regarding the operations of the acquired enterprise such as organisational structure, business line, location, raising, utilising and allocating capital, 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 other things, the NCC will assess the merger’s impact by looking at:

a  the combined market shares of the enterprises participating in the merger in the relevant market before and after the merger;

b  the extent of mergers in the relevant market before and after the merger;

c  the relationship of the enterprises participating in the merger in the chains of production, distribution and supply of a specified type of goods or services or whose business lines provide mutual inputs and assistance;

d  competitive advantages brought by the merger in the relevant market;

e  the ability of an enterprise to significantly increase prices or rate of returns on sale post-merger;

f  the ability of an enterprise to exclude or hinder other enterprises from entering or expanding in the market post-merger; and

g  particular factors in the industry or sector in which the enterprises participating in the merger are operating.

The NCC will also take into account positive impacts by looking at whether the merger:

a  has a positive impact on the development of industries, sectors, and science and technology, in accordance with state strategies and master plans;

b  has a positive impact on the development of small and medium-sized enterprises; and

c  enhances the competitiveness of Vietnamese enterprises in the international market.

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. These factors have been further regulated in Decree No. 35, which facilitates the NCC in its assessment. In particular, Decree 35 provides the basis as well as criteria for considering and assessing each of these factors to determine whether a merger causes or is capable of causing the effect of significantly restricting competition in the Vietnamese market.

iv  Determination of market shares
The 2018 Law on Competition sets out 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, or the percentage of quantity of units of goods or services sold or purchased on a monthly, quarterly or annual basis. The turnover from sales or purchases of a specific type of good or service of a group of affiliated companies is determined on the basis of the total turnover from
sales or purchases of such type of good or service of all companies being members of such group, exclusive of the turnover from sales and purchases between the companies of the same group. The turnover used to determine market share is to be determined in accordance with Vietnamese accounting standards.

Market share information for the 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 of 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

e. 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 the 30-day period, 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 the 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.

IV 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.
V 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, circulars 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 is 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 will trigger notification requirements and attract liability for a breach of merger control rules. Decree No. 35 is expected to further assist companies in self-assessing the impact of their proposed mergers as well as facilitate regulators’ investigation, assessment and handling of competition cases in the context of the 2018 Law on Competition.
ABOUT THE AUTHORS

PETER ARMITAGE  
_Ashurst_

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.

AZMAN BIN OTHMAN LUK  
_Rahmat Lim & Partners_

Azman is the managing partner of Rahmat Lim & Partners, and head of the firm’s regulatory & compliance department. He concentrates primarily on banking and finance transactions, including syndicated and structured financing, securities regulation, debt capital markets, leveraged buyout transactions, strategic investments and restructurings. He also advises on financial and capital markets regulation.

Azman is consistently recognised as a leading individual in banking and finance by _Chambers Global, Chambers Asia-Pacific_ and _The Legal 500: Asia-Pacific_, and is a highly regarded lawyer in banking and capital markets in _IFLR1000_. In _Chambers Asia-Pacific_, Azman has been endorsed by peers and clients as being ‘very focused and client-friendly’, and is praised by sources as ‘one of the leading finance practitioners in Malaysia’, as well as being noted for the fluent structuring of Shariah-compliant transactions.
GAURAV BANSAL
AZB & Partners

Gaurav is a senior associate in the competition team at AZB & Partners and is based in Mumbai. He advises on cartel enforcement, abuse of dominance and merger control. He has represented clients in several antitrust investigations covering complex cartels, vertical restraints and abuse of dominance.

He has advised clients on several high-profile cross-border and domestic merger filings in India, including Tata Steel’s acquisition of Bhushan Steel Ltd – the first CCI approval in relation to the newly introduced insolvency regime; Reliance Industries Limited’s acquisition of Den and Hathaway; and Larsen & Toubro’s hostile takeover of Mindtree. Gaurav has also advised on the first ever green channel approval – a recent approval mechanism introduced by the CCI. On the behavioural side, Gaurav has represented InterGlobe Aviation Ltd and LafargeHolcim before the COMPAT, Tata Motors Ltd in proceedings before the Delhi High Court and Godrej & Boyce and Birla Tyres in proceedings before the CCI.

Prior to joining AZB & Partners, Gaurav previously worked in-house at one of India’s largest conglomerates and was associated with Tata Group Legal. He was recently recognised as a ‘Notable Practitioner’ by IFLR1000.

IZABELA BEBER
Law Firm Bekina, Škurla, Đurmiš and Spajić Ltd

Izabela Beber is a senior associate at Law Firm Bekina, Škurla, Đurmiš and Spajić Ltd. She graduated from the Law Faculty of the University of Zagreb in 2009 and was admitted to the Croatian Bar Association as an attorney in 2013. Izabela practises in areas of commercial, corporate, competition, concession and enforcement law, and acts for clients in dispute resolution. Izabela has participated in various due diligence projects for both domestic and foreign clients as well as in numerous regulatory compliance programmes. Izabela regularly advises clients from both the economic and banking sector.

OLIVIER BILLARD
Bredin Prat

Olivier Billard is a partner at Bredin Prat, specialising in antitrust law. His expertise covers all aspects of competition law, and focuses on merger control, state aid and antitrust and private damages litigation cases before French and EU authorities and courts. Prior to joining Bredin Prat in 2001, he practised for several years at well-known French firms in both Paris and Brussels. He is a member of the Paris and Brussels Bars.

PATRICK BOCK
Cleary Gottlieb Steen & Hamilton LLP

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 and 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.


Mr Bock is a member of the Illinois and Washington, DC Bars, and is also registered with the Cologne and Brussels Bars.

**MAXIM BOULBA**

*CMS Russia*

Maxim Boulba heads the competition group at CMS Russia and advises clients on competition law issues, such as merger control and antitrust behavioural and regulatory matters.

He has been practising competition law since 2000 and has handled a large number of difficult merger clearances in Russia and the other CIS countries.

As part of M&A transactions and corporate reorganisations, Maxim advises foreign investors on Russian merger control requirements and obtaining merger clearance in relation to the acquisition of companies and assets located in Russia and the CIS.

He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

Maxim is a member of the Association of Competition Law Experts in Russia.

He was chosen as one of the leading practitioners in Russia in the competition and antitrust sphere according to *Best Lawyers*, *GCR 100* and Client Choice Awards, and has been ranked by *Chambers and Partners* and *The Legal 500* since 2012.

**MAÏJA BROSSARD**

*UGGC Avocats*

Maïja Brossard is a senior associate and has been in the competition department of UGGC Avocats since 2006. Maïja holds postgraduate degrees in European law from the University of Paris II Panthéon-Assas and in economic globalisation law from the University of Paris I Panthéon-Sorbonne and the Paris Institute of Political Studies. Her areas of expertise cover all aspects of French, EU and Moroccan competition law.

Maïja regularly advises international and Moroccan clients on merger control in Morocco, and represents them before the Moroccan competition authorities.
CASSANDRA BROWN  
*Blake, Cassels & Graydon LLP*

Cassandra Brown is a partner in Blakes’ competition, antitrust and foreign investment group. Her practice focuses on all aspects of competition and foreign investment law, including advising domestic and foreign clients on competition issues in relation to mergers, joint ventures and competitor collaborations. She has provided competition law advice to clients in the energy, mining, technology, pharmaceutical, consumer products, agricultural, telecommunications, transportation, aviation, financial services, manufacturing, automotive and real estate industries.

Cassandra 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.

She has worked on some of Canada’s most complex and high-profile transactions, including WestJet/Onex, The Stars Group/Flutter Entertainment, 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, Synthes/Johnson & Johnson and Continental Airlines/United Airlines.

Cassandra is recognised as a leading competition lawyer in *The Legal 500: Canada* 2020 (‘next generation lawyer’ in competition and antitrust) and *Who’s Who Legal Future Leaders: Competition 2019*.

Cassandra obtained her joint BCL/LLB from McGill University in 2008 and holds a bachelor of commerce degree in economics and law from the University of Alberta.

RINO CAIAZZO  
*Caiazzo Donnini Pappalardo & Associati – CDP Studio Legale*

Rino Caiazzo is a founding partner of Caiazzo Donnini Pappalardo & Associati and head of the firm’s competition law and regulatory practice group.

He has an extensive background in competition, regulated industries and EU law.

He has been vice chair of the Committee for Competition and International Trade of the International Bar Association.

Mr Caiazzo teaches competition law at the Roma Tre University, and is a lecturer on competition and market regulations for the master’s programme at the Tor Vergata and La Sapienza Universities in Rome. He is the author of several publications on antitrust law, a topic on which he is a frequent speaker at both Italian and international seminars.

PEDRO CALLOL  
*Callol, Coca & Asociados*

Qualified English solicitor and attorney admitted to the Madrid and Barcelona Bars, Pedro Callol has over 20 years of antitrust and specialist litigation experience. Prior to founding his own expert law firm, he was a leading EU and competition partner in one of Spain’s large law firms. Before that he created and led the EU and competition practice of a London ‘magic circle’ law firm in Spain. Prior to that he worked with Arnold & Porter in Washington, DC and London. He has a law degree from the Complutense University (Madrid) and a business degree from San Pablo University (Madrid). He is a law graduate.
of the University of Chicago Law School (Fulbright – Banco Santander scholar). He holds a master's in European law from the College of Europe, Bruges (sponsored by the Spanish Ministry of Foreign Affairs).

Mr Callol is the president of the Fulbright Alumni Association of Spain, the secretary of the board of the Chicago Alumni Association of Spain and a member of the board of directors of the Spanish Competition Law Association and of the advisory board of the American Antitrust Institute, Washington, DC.

He was twice acknowledged as one of the ‘top 40 under 40’ by Iberian Lawyer and he is a specialist currently recognised by Chambers and Partners, Global Competition Review, Best Lawyers, The Legal 500 and Who’s Who Legal. He is the author of many specialist publications and is the Spanish correspondent of the European Competition Law Review. He lectures on competition law matters in the San Pablo Law School in Madrid.

His working languages are English, Spanish, French, German, Italian and Catalan.

HUGUES CALVET

Bredin Prat

Hugues Calvet is a partner at Bredin Prat, specialising in antitrust law. His practice covers both transactional and litigation matters. He represents French and international companies before European and French courts and antitrust agencies. He has been involved in many landmark antitrust cases during the past 20 years. He is a former law clerk of the European Court of Justice in Luxembourg.

VICTOR I CHANG

LCS & Partners

Victor I Chang has extensive cross-border experience in mergers and acquisitions, private equity fund formations and corporate transactions of all types. He has been recognised as a leading attorney in mergers and acquisitions, private equity transactions and general corporate matters by Chambers Asia-Pacific, IFLR1000, The Legal 500, Asian Legal Business and Asialaw.

MARQUARD CHRISTEN

CMS von Erlach Poncet Ltd

Marquard Christen is a partner at CMS von Erlach Poncet Ltd, specialising in competition law (antitrust law). He advises on all matters related to Swiss and EU competition law and represents companies in investigations of competition authorities and in court proceedings. Marquard is a member of the five-headed steering committee of the global CMS Competition Group consisting of more than 190 competition lawyers. In addition to competition law, Marquard practises in the field of public procurement law and heads CMS Switzerland's public procurement group.

Apart from merger control proceedings (including the coordination of multi-jurisdictional filings), Marquard’s relevant experience includes representing clients in investigations of the Swiss Competition Commission and in appeal proceedings related to, inter alia, horizontal price-fixing, bid rigging, information exchange, vertical allocation of territories, resale price maintenance and abuse of dominance, advising on complex cooperation projects related to technology transfer, specialisation and joint R&D (recently in the payment, telecommunications, electricity and retail sectors), developing and implementing
antitrust compliance programmes and supporting companies in the (re)organisation of their
distribution systems. Owing to his other practice area of public procurement law, Marquard
is particularly experienced in competition law matters related to public tenders such as
bid rigging.

Marquard graduated from the universities of Fribourg (summa cum laude) and Leuven,
Belgium (EU law) and completed postgraduate studies in Sydney and Geneva (international
law). He was admitted to the Bar in 2003.

Marquard regularly lectures and publishes on competition law. His publications
include a contribution to a commentary on so-far unpublished legal opinions provided by
the Secretariat of the Competition Commission to companies under Article 23(2) of the
Federal Act on Cartels and Other Restraints of Competition. Most recently, he published an
article on the impact of the covid-19 situation on the assessment of cooperation agreements
among competitors.

A recognised expert in competition law by all major legal directories, Marquard
is recommended in the current editions of Chambers and Partners, The Legal 500 and
Who’s Who Legal. He is fluent in German, English and French, and also speaks Spanish
and Dutch.

FRANCESCA COSTANTINI
Caiazzo Donnini Pappalardo & Associati – CDP Studio Legale

Francesca Costantini is a senior associate in Caiazzo Donnini Pappalardo & Associati’s
competition law and regulatory practice group.

She practises in the areas of competition law, telecommunications and energy law, and
EU law. She graduated in law from the University Luiss Guido Carli in Rome in 2004 and
was admitted to the Italian Bar in 2007.

STEPHEN CROSSWELL
Baker McKenzie

Stephen Crosswell is the current chair of Baker McKenzie’s competition and antitrust practice
in Asia. Stephen’s practice covers a broad range of competition law issues in mainland China,
Hong Kong and throughout Asia-Pacific, including competition audits and compliance,
competition litigation, competition-related judicial review proceedings, access claims,
multi-jurisdictional cartel investigations, merger clearance, collaboration and joint ventures,
and antitrust advisory. Stephen regularly advises on competition policy matters, including
regulated industry negotiations with governments and regulators, deregulation, privatisation
and state-owned enterprises reform. He is consistently recognised as a leading lawyer for
competition and antitrust by Chambers Asia-Pacific and other leading directories.

KEN DAI
Dentons

Ken Dai specialises in antitrust investigation, antitrust compliance, merger filing and private
antitrust litigation. Ken earned his LLB and LLM, respectively, from the China University of
Political Science and Law and the University of Bristol in the United Kingdom.

Ken was one of the first lawyers to practice antitrust law in China. He has advised
numerous multinational and domestic companies on establishing antitrust law manuals and
About the Authors

Ken Du is a partner in the anti-trust and competition practice at Dentons. He has extensive experience in handling antitrust and competition law matters, including merger control, anti-trust litigation, and compliance programmes, and has advised on the application of the PRC Anti-Monopoly Law (AML) and merger filings before the State Administration for Market Regulation and the Ministry of Commerce of the PRC. Furthermore, he has regularly assisted and represented certain enterprises in completing and bringing private antitrust litigation in China. Ken has rich experience advising companies in handling legal issues between intellectual property rights and antitrust laws. He has written numerous articles on the AML, including ‘A Great Leap Forward for Definition of the Relevant Market and Merger Control in China: Perspective of Substantive Assessment’, and translated ‘EU Merger Control: A Legal and Economic Analysis’.

Currently, Ken is vice chair of the Competition & Antitrust Committee of the Shanghai Bar Association and a member of the Asian Competition Association, the International Bar Association and the Inter-Pacific Bar Association. Moreover, he is an adjunct professor at Koguan School of Law at Shanghai Jiaotong University and a columnist of Forbes China.

MARGARET SEGALL D’AMICO
Cravath, Swaine & Moore LLP

Maggie Segall D’Amico is a partner in Cravath’s litigation department and a member of the firm’s antitrust practice, where her practice focuses on transactional matters, antitrust regulatory approval, government investigations and general antitrust counselling. She has advised a wide variety of clients in diverse industries, including pharmaceuticals, aerospace and aviation, life sciences, consumer products, media, manufacturing and technology.

ENRIQUE DE LA PEÑA FAJARDO
Valdes Abascal Abogados SC

Enrique de la Peña Fajardo obtained his law degree from the Mexico Autonomous Institute of Technology. He has also studied public and private international law at The Hague Academy of International Law.

His practice in Valdes Abascal Abogados SC focuses mainly on merger control, litigation and counselling in competition law. Prior to joining the firm, he worked in the areas of litigation (civil, commercial and administrative law), commercial arbitration and corporate law. In the federal government, he served in the areas of budget law and consultancy.

He is a member of the antitrust section of the American Bar Association and of the International Competition Network Merger Working Group. He is ranked as a rising star in competition and antitrust in Mexico by The Legal 500 and as leading lawyer by Who’s Who Legal and Best Lawyers.

JET DENG
Dentons

Jet Deng specialises in antitrust. He received his PhD degree in international economic law from the University of International Business and Economics (UIBE).

Since 2004, Dr Deng has participated in China’s antitrust legislation and provided legal services to domestic and foreign clients. As an antitrust lawyer with extensive hands-on experience, Dr Deng has handled more than 100 antitrust filings for domestic and cross-border M&A transactions.
Dr Deng has been consecutively recognised by *Chambers and Partners* as one of the ‘Leading Lawyers for Antitrust Practice in Asia-Pacific’ for seven years (2014 to 2020), and was simultaneously recognised as ‘China’s top antitrust lawyer’ by *Global Competition Review*, *China Business Law Journal*, *IFLR1000* and *Asialaw*.

Dr Deng is a legal associate of the Competition and Regulation European Summer School, a member of the Antitrust Committee of All China Lawyers Association, and a member of the Competition Law and Antitrust Professional Committee of Beijing Lawyers Association. He is also a member of the China Consumers Association’s lawyer group, an external research supervisor at UIBE and Beijing Foreign Studies University, and a researcher of the Competition Law and Industrial Development Research Center at Jinan University.

**LEONARDO MANIGLIA DUARTE**  
*Veirano Advogados*

Leonardo Maniglia Duarte is a partner at Veirano Advogados and co-head of its antitrust and competition law department. He focuses his practice in the areas of competition and regulatory law in Brazil. Leonardo holds an LLM degree in comparative law, with a concentration in antitrust law and mergers and acquisitions from the University of Miami School of Law, and a specialisation degree in competition law and regulatory law from the University of Lisbon.

**GORAN DURMIŠ**  
*Law Firm Bekina, Škurla, Durmiš and Spajić Ltd*

Goran Durmiš is a partner of Law Firm Bekina, Škurla, Durmiš and Spajić Ltd. He graduated from the Law Faculty of the University of Zagreb in 2002 with merits. He was admitted to the Croatian Bar Association as an attorney in 2006. He provides legal support to a large base of international clients in various commercial and company law matters. Goran Durmiš has extensive experience in litigation and also advises clients in infrastructure projects and arbitration. Advising domestic and foreign clients in mergers and acquisitions constitutes an area of his special professional interest.

**IGOR DYKUNSKYY**  
*DLF Attorneys-at-law*

Igor Dykunskyy has been advising international, mainly German-speaking, commercial enterprises in Ukraine for almost 15 years. In addition to providing ongoing legal advice, he is responsible for business acquisitions and greenfield investments.

Igor has managed a significant number of M&A transactions and has guided numerous clients through due diligence, merger applications and the subsequent structuring of the transactions. His other practice areas include labour law and renewable energy law. Here, he can draw on his extensive experience, particularly in the implementation of solar energy projects in Ukraine.

Igor also boasts distinct expertise in developing distribution structures, as well as in asserting and enforcing creditors’ claims.

He regularly publishes in professional periodicals, and lectures on legal aspects of market entry as well as investment protection in Ukraine.
JORDAN ELLISON  
*Slaughter and May*

Jordan Ellison joined Slaughter and May in 2005 and became a partner in 2014. He has significant experience of UK merger cases, including Phase II references, in sectors ranging from consumer goods to telecommunications. He previously worked on secondment in the mergers division of the Office of Fair Trading. He also has substantial experience representing clients before the European Commission in merger and antitrust cases.

MARIA ERMOLAEVA  
*CMS Russia*

Maria Ermolaeva is an associate in CMS Russia’s competition team. Her practice focuses on competition law.

Maria advises clients on a broad range of anti-monopoly matters such as anticompetitive agreements, concerted actions, distribution structuring and obtaining merger clearances. Her experience also includes advising on general competition compliance and industry-specific anti-monopoly issues.

GUILLAUME FABRE  
*Bredin Prat*

Guillaume Fabre is a counsel at Bredin Prat, specialising in antitrust law. He has recently been involved in significant merger cases before the French Competition Authority (as well as before the EU Commission).

PASCAL G FAVRE  
*CMS von Erlach Poncet Ltd*

Dr Pascal Favre is the head of the competition practice group in Geneva. Dr Favre specialises in Swiss competition and distribution laws, in addition to corporate/M&A. He handles on behalf of corporate clients all competition and antitrust aspects of their business operations in Switzerland. He routinely advises national and multinational corporations in merger control proceedings and concentration notifications, including in parallel multi-jurisdictional filings. Dr Favre also represents companies in investigations by the competition authorities, as well as in administrative and court proceedings, including appeals before the Federal Supreme Court. In addition to assisting clients in investigations and searches, he provides advice on antitrust compliance and leniency programmes.

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 has also 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 antitrust and competition law practitioner recognised by both clients and ranking publications. He was identified in the area of competition in *The Legal 500 EMEA* 2019 editorial and in the 18th edition of *GCR 100*, in which his representation of SNCF Mobilités was highlighted.

Pascal Favre is fluent in French, English and German.

**PETER FLYNN**

*Blake, Cassels & Graydon LLP*

Peter Flynn is an associate in Blakes’ competition, antitrust and foreign investment group. His practice focuses on all aspects of competition law, including merger review, joint ventures and strategic alliances, criminal and civil investigations, and regulatory compliance matters. He also advises on foreign investment merger review under the Investment Canada Act. Peter has worked with clients in a number of Canada’s key industries, including fintech, energy, telecommunications, consumer products and life sciences.

He has worked on a number of complex and high-profile transactions, including Google/Fitbit, PayPal/Hyperwallet, Thermo Fisher/Partheon, Washington Companies/Dominion Diamond, HNA/Ingram Micro, Bell Canada/Manitoba Telecom, Superior Plus/Canexus Corporation and Staples/Office Depot.

Peter first joined Blakes as a summer law student in 2013 and subsequently articled with the firm. He obtained his JD/MA in economics from the University of Toronto in 2014 and holds a joint honours bachelor of arts degree in economics and political science from the University of Ottawa.

**ADITI GOPALAKRISHNAN**

*AZB & Partners*

Aditi is a partner in the competition practice, based in the firm’s New Delhi office. She has been involved in behavioural investigations and merger control proceedings in all competition law forums in India and in her previous role, before the European Commission and the UK’s (erstwhile) Office of Fair Trading.

Aditi routinely advises clients in various sectors on contentious and non-contentious antitrust cases and compliance mandates. Her key highlights over the past year were: securing the maximum reduction in fine to a second leniency applicant for JTEKT Corporation (a Japanese auto parts company) in the CCI’s first international cartel decision; representing Google in the Android platform investigation; and receiving the first green channel approval from the CCI (a new regime where CCI approval is received on filing), a development that was widely covered by the legal press. Other important mandates over the past year were securing Phase I approvals for Total SA’s acquisition of Adani Gas Limited (both leading oil and gas companies) and for RA Hospitality Holdings (Cayman) (a company held by Ritesh Agarwal, founder of OYO) in its acquisition of equity securities of OYO, and representing Syngenta AG in its compliance with behavioural commitments to the CCI.

Aditi is also actively involved in the merger control working group of the Competition Law Review Committee, including in discussions with the CCI on amendments to merger regulations. (A key success from 2019 was that as a result of continued advocacy with
About the Authors

respect to its approach to public bids, the CCI has proposed certain amendments to its merger regulations.) She has also represented the CCI as a non-governmental agency in the International Competition Network workshop on merger control held in Tokyo.

She has been recognised as ‘Rising Star’ in competition and antitrust by Euromoney’s Expert Guides (2019). Prior to joining the firm, Aditi worked with Khaitan & Co in New Delhi and with Linklaters LLP in London where she was a member of the competition law practice.

ILENE KNABLE GOTTS
Wachtell, Lipton, Rosen & Katz

A member of Wachtell, Lipton, Rosen & Katz’s antitrust department, Ilene Knable Gotts represents and counsels clients on a range of antitrust matters, particularly those relating to mergers and acquisitions. Ms Gotts began her career as a staff attorney at the Bureau of Competition of the Federal Trade Commission in conduct and merger investigations.

In 1995, Ms Gotts served as the president of the Washington Council of Lawyers. She was the chair of the antitrust and trade regulation section of the Federal Bar Association from 1995 to 1997 and the chair of the antitrust section of the New York State Bar Association from 2005 to 2006.

Ms Gotts has been an active leader of the American Bar Association (ABA) 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 to 2020 editions of Who’s Who Legal as one of the top 15 global competition lawyers, in the first-tier ranking of Chambers Global and Chambers USA, 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 Council’s Counsel 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 200 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 15 years.

Hannah has an active practice guiding clients through investigations conducted by the Hong Kong Competition 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 on making 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 (2009–2020) and IFLR1000 (2011–2020). She was also recognised in Expert Guides: Women in Business Law (2012, 2014 and 2016) 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, and 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, the Department of Justice and the Commerce and Economic Development Bureau.
About the Authors

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 to 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.

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 Securities and Futures Commission investigations and Independent Commission Against Corruption 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-Pacific, The Legal 500: Asia Pacific and IFLR1000 (2018–2020) have recognised John as a leading individual in this practice area in their rankings for China/Hong Kong antitrust and competition lawyers.

John also worked in Vietnam for three years between 2000 and 2003, and handled a range of matters for Vietnamese and foreign invested entities, and during which time he was chair of the British Business Group in Hanoi.

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, with a focus on merger control.
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 M&A 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 Law Firm Bekina, Škurla, Durmiš and Spajić the same year. Tea has passed the exam for certified court interpreters for the English language and was admitted to the Croatian Bar Association as an attorney in 2018. Within the firm’s legal practice, Tea’s main points of interest are commercial and corporate law. Her professional work also includes 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 mainland 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.
VANGELIS KALOGIANNIS
*Bernitsas Law Firm*

Vangelis is a junior associate with the firm, which he joined as a trainee in 2017. Vangelis advises on EU and competition law matters, including cartels, merger control and damages actions. He also acts in data protection projects, such as reviewing and drafting data processing agreements. Vangelis advises on the regulatory requirements under EU and Greek telecommunications rules and liaises with the National Regulatory Authority.

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, the Université libre de Bruxelles and the College of Europe. Ms Kelly is a visiting lecturer at Lille Catholic University.

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 Avocats*

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.

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), Lufthansa/Brussels Airlines and Danaher/GE Healthcare Life Sciences Biopharma. 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.

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, and 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 was 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 in-house counsel in the legal department of an international automotive group.

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 Catholic University of Louvain-la-Neuve. Afterwards, she complemented her master of laws with an LLM in international law, international relations and foreign trade
at the Higher Institute of Law and Economics 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 Comillas Pontifical University in Spain.

**PRANAV MODY**

*AZB & Partners*

Pranav Mody is an associate in the competition practice at AZB & Partners and is based in New Delhi. He has advised on some of the most complex merger control proceedings in various industries in India, such as fast-moving consumer goods, mutual funds, insurance, and oil and natural gas. These include GSK Consumer Healthcare in its merger with Unilever’s HUL and Shell’s acquisition of Total’s stake in Hazira LNG and Port Ventures. He has also been involved in investigations into abuse of dominance issues in the passive telecoms infrastructure sector.

Prior to joining AZB & Partners, Pranav worked with the Competition Commission of India.

**KENICHI NAKABAYASHI**

*Anderson Mōri & Tomotsune*

Kenichi Nakabayashi is an associate at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A and other corporate legal affairs.

Mr Nakabayashi is a graduate of the University of Tokyo (LLB, 2015), and is admitted to the Bar in Japan.

**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 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 was previously 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 publications.
MARIO NAVARRETE-SERRANO

Pérez Bustamante & Ponce

Mario Navarrete-Serrano was admitted to practise in 2012 and is a senior associate at Pérez Bustamante & Ponce. He obtained a JD at the University of San Francisco, Quito, a master’s degree 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 University of San Francisco, Quito, where he directs the master’s degree on the law and economics of competition and heads the Centre for Investigation of Competition Law.

XOLANI NYALI

Bowmans

Xolani Nyali is a partner in the Cape Town office’s corporate department and a member of the competition practice. He advises clients on a variety of competition law matters, including merger notifications and 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), pharmaceuticals, transport (air, road and sea) and the motor vehicle industry. He 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 behavioural matters in diverse jurisdictions, including Botswana, Kenya, Namibia, Tanzania and the Common Market for Eastern and Southern Africa (COMESA).

He 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 and Nigeria.

Xolani has BCom 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/Tandberg, Halliburton/Baker Hughes and GE/Baker Hughes.
EDGAR ODIO
Facio & Cañas

Edgar Odio has been a partner at Facio & Cañas since February 2020. 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 competition law, consumer protection, mergers and acquisitions and foreign investment. 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 a member of COPROCOM, the local competition authority. He served as senior adviser in competition for UNCTAD in Geneva, Switzerland, and was 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 law course at the University of La Salle and a postgraduate course on competition and intellectual property at UNED, a distance learning university. He is regularly invited to workshops and training sessions by local and multinational companies, and continuously offers advice on competition matters to local and foreign clients.

GERRIT OOSTERHUIS
Houthoff

Gerrit Oosterhuis is a 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 sector, such as FrieslandCampina/Zijerveld, and major Dutch cases such as Euretco/Intres, Shanks/Van Gansewinkel and Kidsfoundation/Partou. 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 is a senior associate at Law Firm Bekina, Škurla, Durmiš and Spajić Ltd. She 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, enforcement 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. She is a certified English language court interpreter.
DONALD PAN
Baker McKenzie
Donald Pan is a senior associate in Baker McKenzie’s antitrust and competition practice in Hong Kong and mainland China. He has considerable experience advising local and multinational clients on a broad range of Hong Kong and mainland China 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. Donald has been recognised as a Future Leader by Who’s Who Legal.

TANIA PATSALIA
Bernitsas Law Firm
Tania is a senior 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.

DIEGO PÉREZ-ORDÓÑEZ
Pérez Bustamante & Ponce
Diego Pérez-Ordóñez was admitted to practise in 1996 and holds a doctor of law degree 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 at Pérez Bustamante & Ponce, and a member of its M&A antitrust practice. On the academic front, he has been professor of constitutional law at the University of San Francisco, Quito since 1999.
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 in _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.

JOHN RATLIFF

_Wilmer Cutler Pickering Hale and Dorr LLP_

John Ratliff is a partner in WilmerHale’s Brussels office. He has been practising EU competition law for more than 30 years, dealing with all aspects. In the mergers field, he has been involved in some 40 cases, some with remedies, including Phase II and complex Phase I EU procedures such as _Boeing/McDonnell Douglas, Unilever/Bestfoods, Statoil/Hydro, StatoilHydro/ConocoPhillips (JET), Halliburton/Baker Hughes, GE/Baker Hughes and Danaher/GE Healthcare Life Sciences Biopharma_. He has handled numerous worldwide filings with local counsel. In April 2015, he chaired the panel at the ABA Spring Meeting on international merger remedies: ‘Cross-Border Remedies – Still safe in Antarctica?’. Mr Ratliff has also represented companies before the European courts in competition law cases and works in other EU law areas.

ALEXANDER RINNE

_Milbank LLP_

Alexander Rinne is a partner at Milbank. He joined Milbank in 2010 to establish the firm’s German and European antitrust practice.

For more than two decades Alexander has focused on both German and European competition law. He specialises in merger control procedures and has broad experience in applying merger control regulations to complex private equity and hedge fund structures, as well as in the strategic planning and subsequent implementation of acquisitions by companies that are already market leaders in their respective areas.

In addition, Alexander regularly represents leading market players in cartel investigations and dominance cases before the relevant antitrust authorities. He also has extensive expertise in antitrust litigation before German and European courts where he represents clients particularly in the context of antitrust damages cases, refusal to supply actions and cases in relation to merger control decisions. Furthermore, Alexander regularly advises clients in relation to foreign investment issues.

Prior to joining Milbank, Alexander was head of the German antitrust practice of a major international law firm and head of its Munich office.
MICHAEL SCHAPER
Debevoise & Plimpton LLP

Michael Schaper, a litigation partner in the New York office of Debevoise & Plimpton, focuses primarily on antitrust litigation, merger review and other antitrust counselling, as well as other types of complex civil and intellectual property litigation.

Mr Schaper joined the firm in 2001 and became a partner in 2011. He received a JD in 2001 from the University of Chicago Law School, where he received the Edwin F Mandel Award for outstanding contribution to the school’s clinical education programme. He received a BA magna cum laude from Tufts University in 1998. Mr Schaper is admitted to appear in numerous courts, including the Southern and Eastern Districts of New York and the Second Circuit Court of Appeals.

Mr Schaper is a member of the Antitrust Section of the American Bar Association and the Association of the Bar of the City of New York. Mr Schaper also serves on the Board of Directors of Volunteer Lawyers for the Arts.

JULIE A SOLOWAY
Blake, Cassels & Graydon LLP

Julie A Soloway is a partner in Blakes’ competition, antitrust and foreign investment group. She advises both domestic and foreign clients on all aspects of competition law, with a particular emphasis on multi-jurisdictional mergers and acquisitions. She has advised many foreign investors, including state-owned investors, on the Investment Canada Act (including the State-Owned Enterprise Guidelines), which regulates the acquisition of foreign control of Canadian businesses.

She has worked in a leading capacity on some of Canada’s most complex and high-profile transactions, including Kinder Morgan/Pembina Pipeline, Kinder Morgan/Trans Mountain Pipeline/Government of Canada, Digital Colony/Zayo Group, Stewart/Fidelity, Washington Companies/Dominion Diamond, Nevsun Resources/Zijin Mining Group, Maple Leaf/Viau Foods, Thermo Fisher/Patheon, Staples/Office Depot, Koch/Infor and Intact/AXA.

Julie is co-founder of Canadian Women in Competition Law – the only group of its kind in Canada – and co-author of Leading the Way: Canadian Women in the Law. Twice in her career, Global Competition Review has named Julie one of the top 100 ‘Women in Antitrust’ globally.

Julie has a strong international background, including a diploma in European competition law from King’s College London, a doctorate in international trade law (Toronto) and a degree in international, European and comparative law (Brussels).

TAKESHI SUZUKI
Anderson Mōri & Tomotsune

Takeshi Suzuki is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A transactions and other corporate legal affairs.

Mr Suzuki is a graduate of Kyoto University (LLB, 2006), and is admitted to the Bar in Japan. Prior to joining Anderson Mōri & Tomotsune, he engaged in cross-border M&A transaction matters as well as Japan and EU competition law in Tokyo and Brussels for approximately four years at a leading UK firm. Mr Suzuki then worked for the merger
investigation division of the Japan Fair Trade Commission as a chief case handler of merger filings for approximately two years. At Anderson Mōri & Tomotsune, his practice focuses on Japan and international competition law with a particular emphasis on merger control.

AMANDA TESVIC
Ashurst
Amanda Tesvic is a senior associate in the competition and consumer protection team. She advises on all aspects of competition law in Australia.

VARUN THAKUR
AZB & Partners
Varun Thakur is an associate in the competition team at AZB & Partners and is based in Mumbai. He has advised on some of the most complex merger control proceedings in various industries in India, such as power distribution and non-bank financial companies. These include Brookfield Group’s investment in IndoStar Capital Finance and Qatar Investment Authority’s investment in Adani Transmission. He has also been involved in investigations into cartels concerning the automobile sector and agricultural commodities sector, and abuse of dominance issues in the textiles sector.

RAFAEL VALDES ABASCAL
Valdes Abascal Abogados SC
Rafael Valdes Abascal obtained his law degree from the Panamerican University Law School, where he has the chair as competition law professor and has been a 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 as, among other things, 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 and has been appointed by the competition authority as non-governmental adviser for the International Competition Network.

He is ranked as a leading lawyer in competition and antitrust in Mexico by Chambers and Partners, The Legal 500, Who’s Who Legal, Best Lawyers and Expert Guides, among other publications.
CARMEN VERDONCK  
ALTIUS

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 position 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 University of 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 Belgian Association for the Study of Competition Law, a member of the legal committee of the Belgian Franchising Federation and a member of the Women’s Competition Network. Ms Verdonck has been assessor in the Belgian Competition Authority since 2013. She is also maître de conferences at the University of Liège and lectures on Belgian competition law in the LLM programme in European competition and IP law. She has written numerous articles and other publications on competition law.

WEYER VERLOREN VAN THEMAAT  
Houthoff

Weyer VerLoren van Themaat has been assisting international clients for over 25 years in the most challenging and complex cases related to merger control and cartel defence litigation, and leads Houthoff’s competition practice group. In the field of merger control, he has acted, inter alia, in European cases such as TomTom/TeleAtlas. He has a substantial healthcare practice. He was involved in almost all Dutch Phase II hospital mergers and received assignments for litigating merger fines from, inter alia, Singapore Airlines.

He was resident partner at Houthoff’s Brussels office from 1997 to 2005, after which he returned to Amsterdam. He is chair emeritus of Lex Mundi’s Antitrust Competition and Trade Group and a non-governmental adviser to the Dutch Authority for Consumers and Markets. 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.)
MARIANA VILLELA

Veirano Advogados

Mariana Villela is the co-head of Veirano Advogados’ antitrust and competition law and corporate integrity practices. She holds a master’s degree in commercial law, with an emphasis on competition law (2008), for which she presented a dissertation on exclusive dealing and competition law, and a doctorate degree in commercial law, with an emphasis on competition law (2012), for which she presented a thesis on abuse of dominance and distribution relations, both from the Law School of the University of São Paulo.

MARY H WALSER

Paul Hastings LLP

Mary Hamner Walser is an associate in the litigation practice of Paul Hastings and is based in the firm’s Washington, DC office. She represents clients in antitrust and competition-related matters, including merger and acquisition approval under the Hart-Scott-Rodino Act and state and federal antitrust litigation matters. Ms Walser has represented clients in numerous industries, including healthcare, information technology, agriculture, transportation, telecommunications and media.

PAUL WALTER

Slaughter and May

Paul Walter is a special adviser in the Slaughter and May competition group focusing on marketing and business development. He has represented clients in respect of a broad range of competition cases in front of the UK competition authorities, the European Commission and other competition regulators around the world.

MICHAEL S WISE

Paul Hastings LLP

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 to minimise risks of future litigation under the antitrust laws, including developing internal compliance policies and assisting with internal audits.
PENNY WONG
*Rahmat Lim & Partners*

Penny is a principal associate at Rahmat Lim & Partners. She mainly advises on competition law and data protection matters. Her experience includes advising on compliance with the Competition Act 2010, providing competition law training, reviewing business practices and agreements and drafting competition compliance and dawn raid manuals. She has also been actively involved in investigations by the Malaysia Competition Commission and has appeared before the Competition Appeal Tribunal. Her clients include government-linked companies and multinational companies in sectors such as pharmaceutical, property, insurance, hospitality, plantation, construction and fast-moving consumer goods. Apart from practising competition law, she has also been actively involved in various personal data protection compliance programmes for clients, including reviewing business practices, providing advice on personal data protection-related matters and drafting relevant documentation and compliance manuals.

SHAKTI WOOD
*Bowmans*

Shakti Wood is a partner in the firm’s 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 the Common Market for Eastern and Southern Africa, Tanzania and Kenya. 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.

KIYOKO YAGAMI
*Anderson Mōri & Tomotsune*

Kiyoko Yagami is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A, international dispute resolutions and other corporate legal affairs.

Ms Yagami is a graduate of Chuo University (LLB, 2000), Temple University Beasley School of Law (LLM, 2001), China University of Political Science and Law (LLM, 2002) and Waseda Law School (JD, 2007), and is admitted to the Bar in Japan and New York. Prior to joining Anderson Mōri & Tomotsune in 2009, she worked in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of Foreign Affairs of Japan.
YEO SUE MAY

*Rahmat Lim & Partners*

Sue May is an associate in Rahmat Lim & Partners’ regulatory & compliance department. Her experience includes assisting clients with investigations commenced by the Malaysia Competition Commission relating to the abuse of dominant position in Malaysia. Sue May is also involved in various competition compliance programmes and provides related advice for clients on sectors ranging from e-hailing to the pet food industry. She also advises clients on licensing, regulatory and compliance requirements for e-commerce businesses, money lending and co-working spaces. Sue May also assists clients from various industries, including food production, healthcare and education, on compliance with personal data protection laws.

Sue May graduated with an LLB degree from the University of Leicester in the United Kingdom in 2016, and was admitted as an advocate and solicitor of the High Court of Malaya in 2018.

K KORHAN YILDIRIM

*ELIG Gürkaynak Attorneys-at-Law*

Mr K Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006. He has been working with ELIG Gürkaynak 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. He has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conferences and symposia. He is fluent in English and French.

DIETER ZANDLER

*CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH*

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 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.
ALEXANDER ZYREWITZ

Milbank LLP

Alexander Zyrewitz is an associate at Milbank and a member of the firm’s German and European antitrust practice. He specialises in both German and European competition law with a particular focus on multi-jurisdictional merger filings and cartel investigations. He also has broad experience in foreign investment proceedings, both in Germany and globally.

Prior to joining Milbank, Alexander gained practical experience with international law firms in Hamburg, a major technology group in Munich and the German Embassy in Washington, DC.
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ALTUIS
Avenue du Port 86C
Box 414
1000 Brussels
Belgium
Tel: +32 2 426 14 14
Fax: +32 2 426 20 30
carmen.verdonck@altius.com
nina.methens@altius.com
www.altius.com

ANDERSON MÔRI & TOMOTSUNE
Otemachi Park Building
1-1-1 Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1000
Fax: +81 3 6775 2049
yusuke.nakano@amt-law.com
takeshi.suzuki@amt-law.com
kiyoko.yagami@amt-law.com
kenichi.nakabayashi@amt-law.com
www.amt-law.com

AZB & PARTNERS
AZB House, Peninsula Corporate Park
Ganpatrao Kadam Marg
Lower Parel
Mumbai 400013
India
Tel: +91 22 4072 9999
Fax: +91 22 6639 6888
gaurav.bansal@azbpartners.com
varun.thakur@azbpartners.com

AZB House, Plot No. A-8
Sector 4
Noida 201301
India
Tel: +91 120 417 9999
Fax: +91 120 417 9900
aditi.gopalakrishnan@azbpartners.com
pranav.mody@azbpartners.com
www.azbpartners.com

ASHURST
Level 11, 5 Martin Place
Sydney, NSW 2000
Australia
Tel: +61 2 9258 6000
Fax: +61 2 9258 6999
peter.armitage@ashurst.com
amanda.tesvic@ashurst.com
www.ashurst.com

BAKER MCKENZIE
14th Floor, One Taikoo Place
979 King’s Road, Quarry Bay
Hong Kong
Tel: +852 2846 1888
Fax: +852 2845 0476
stephen.crosswell@bakermckenzie.com
tom.jenkins@bakermckenzie.com
donald.pan@bakermckenzie.com
www.bakermckenzie.com
BERNITSAS LAW FIRM
5 Lykavittou Street
106 72 Athens
Greece
Tel: +30 210 339 2950
Fax: +30 210 364 0805
tpatsalia@bernitsaslaw.com
vkalogiannis@bernitsaslaw.com
www.bernitsaslaw.com

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto
Ontario M5L 1A9
Canada
Tel: +1 416 863 3327
Fax: +1 416 863 2653
julie.soloway@blakes.com
cassandra.brown@blakes.com
peter.flynn@blakes.com
www.blakes.com

BOWMANS
22 Bree Street
Cape Town, 8001
South Africa
Tel: +27 21 480 7904
Fax: +27 21 480 3200
xolani.nyali@bowmanslaw.com
11 Alice Lane, Sandton
Johannesburg, 2199
South Africa
Tel: +27 11 669 9256
Fax: +27 11 669 9001
shakti.wood@bowmanslaw.com
www.bowmanslaw.com

BREDIN PRAT
53 quai d’Orsay
75007 Paris
France
Tel: +33 1 44 35 35 35
Fax: +33 1 42 89 10 73
huguescalvet@bredinprat.com
olivierbillard@bredinprat.com
guillaumefabre@bredinprat.com
www.bredinprat.fr

CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE
Via Ludovisi, 35
00187 Rome
Italy
Tel: +39 06 4522 401
Fax: +39 06 4522 4044
rino.caiazzo@cdplex.it
francesca.costantini@cdplex.it
www.cdplex.it

CALLOL, COCA & ASOCIADOS
Calle Don Ramón de la Cruz, 17
28001 Madrid
Spain
Tel: +34 917 376 768
Fax: +34 911 412 139
pedro.callol@callolcoca.com
www.callolcoca.com
Contributors' Contact Details

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Rue de la Loi 57
1040 Brussels
Belgium
Tel: +32 2 287 2000
Fax: +32 2 231 1661
nlevy@cgsh.com
pbock@cgsh.com
ekelly@cgsh.com
www.clearygottlieb.com

CMS
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Gauermanngasse 2
1010 Vienna
Austria
Tel: +43 1 40443 0
Fax: +43 1 40443 90000
dieter.zandler@cms-rrh.com
linda.martrerer@cms-rrh.com
vanessa.horaceck@cms-rrh.com

CMS Russia
10 Presnenskaya Naberezhnaya, Block C
123112 Moscow
Russia
Tel: +7 495 786 4000
Fax: +7 495 786 4001
maxim.boulba@cmslegal.ru
maria.ermolaeva@cmslegal.ru

CMS von Erlach Poncet Ltd
Rue Bovy-Lysberg 2
PO Box 5824
1211 Geneva 11
Switzerland
Tel: +41 22 311 00 10
Fax: +41 22 311 00 20
pascal.favre@cms-vep.com

Dreikönigstrasse 7
PO Box
8022 Zurich
Switzerland
Tel: +41 44 285 11 11
Fax: +41 44 285 11 22
marquard.christen@cms-vep.com
www.cms.law

CRAVATH, SWaine & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
United States
Tel: +1 212 474 1000
Fax: +1 212 474 3700
mdamico@cravath.com
mkhan@cravath.com
www.cravath.com

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
United States
Tel: +212 909 6000
Fax: +1 212 909 6836
mschaper@debevoise.com

801 Pennsylvania Avenue NW
Washington, DC 20004
United States
Tel: +1 202 383 8000
Fax: +1 202 383 8118
thassi@debevoise.com
www.debevoise.com
Contributors' Contact Details

DENTONS
7th Floor, Building D
Parkview Green FangCaoDi
9 Dongdaqiao Road
Chaoyang District
Beijing 100020
China
Tel: +86 10 5813 7799
Fax: +86 10 5813 7788
zhisong.deng@dentons.cn

15th/16th Floor, Shanghai Tower
501 Yincheng Road M
Pudong New Area
Shanghai 200120
China
Tel: +86 21 5878 5888
Fax: +86 21 5878 6866
jianmin.dai@dentons.cn

www.dentons.com

DLF ATTORNEYS-AT-LAW
IQ Business Centre
13–15 Bolsunovska Street, 8th Floor
01014 Kyiv
Ukraine
Tel: +380 44 384 24 54
Fax: +380 44 384 24 55
igor.dykunskyy@dlf.ua
www.dlf.ua

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW
Çitlenbik Sokak No. 12
Yildiz Mahallesi
Besiktas 34349
Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
korhan.yildirim@elig.com
www.elig.com

FACIO & CAÑAS
Sabana Business Center Building, Floor 11
Rohrmoser Boulevard and 68th Street
10108 San José
Costa Rica
Tel: +506 2105 3600
Fax: +506 2105 3610
eodio@fayca.com
info@fayca.com
www.fayca.com

HOUTHOFF
Boulevard de l’Empereur 5
1000 Brussels
Belgium
Tel: +32 2 507 98 13
g.oosterhuis@houthoff.com

Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands
Tel: +31 20 605 61 13 / 63 26
Fax: +31 20 605 67 00
w.verloren@houthoff.com
www.houthoff.com

LAW FIRM BEKINA, ŠKURLA, DURMİŞ AND SPAJIĆ LTD
Preradovićeva 24
10000 Zagreb
Croatia
Tel: +385 1 48 54 094
Fax: +385 1 48 54 372
goran.durmis@bsds.hr
ivana.ostojic@bsds.hr
tea.ivancic@bsds.hr
izabela.beber@bsds.hr
www.bsds.hr
Contributors' Contact Details

**LCS & PARTNERS**
5F, No. 8
Sec 5, Sinyi Road
Taipei City 110
Taiwan
Tel: +886 2 2729 8000
Fax: +886 2 2722 6677
victorchang@lcs.com.tw
margarethuang@lcs.com.tw
arielhuang@lcs.com.tw
www.lcs.com.tw

**MAYER BROWN**
18/F, Prince’s Building
10 Chater Road
Central
Hong Kong
Tel: +852 2843 2211
Fax: +852 2845 9121
john.hickin@mayerbrown.com
hannah.ha@mayerbrown.com
www.mayerbrown.com

**MILBANK LLP**
Maximilianstraße 15
80539 Munich
Germany
Tel: +49 89 25559 3600
Fax: +49 89 25559 3700
arinne@milbank.com
azyrewitz@milbank.com
www.milbank.com

**PAUL HASTINGS LLP**
2050 M Street NW
Washington, DC 20036
United States
Tel: +1 202 551 1700
michaelwise@paulhastings.com
noahpinegar@paulhastings.com
marywalser@paulhastings.com
www.paulhastings.com

**PÉREZ BUSTAMANTE & PONCE**
Av República de El Salvador
N36-140, Edificio Mansión Blanca
Torre Londres, Floor 9
Quito, Pichincha
Ecuador
Tel: +593 2 382 7640
Fax: +593 2 224 4462
dperez@pbplaw.com
mnavarrete@pbplaw.com
www.pbplaw.com

**RAHMAT LIM & PARTNERS**
Suite 33.01, The Gardens North Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur
Malaysia
Tel: +60 3 2299 3888
Fax: +60 3 2287 1278
azman.luk@rahmatlim.com
penny.wong@rahmatlim.com
yeo.suemay@rahmatlim.com
www.rahmatlim.com

**SLAUGHTER AND MAY**
Square de Meeûs 40
1000 Brussels
Belgium
Tel: +32 2 737 94 00
Fax: +32 2 737 94 01
jordan.ellison@slaughterandmay.com
One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
paul.walter@slaughterandmay.com
www.slaughterandmay.com

© 2020 Law Business Research Ltd
UGGC AVOCATS
47 rue de Monceau
75008 Paris
France
Tel: +33 1 56 69 70 00
Fax: +33 1 56 69 70 71
ckhayat@uggc.com
mbrossard@uggc.com
www.uggc.com

VALDES ABASCAL ABOGADOS SC
Guillermo Gonzalez Camarena 1450
5th Floor
Santa Fe
01210 Mexico City
Mexico
Tel: +52 55 5950 1580
Fax: +52 55 5950 1589
rafael.valdes@vaasc.com
enrique.delapena@vaasc.com
www.vaasc.com

VEIRANO ADVOGADOS
Av Presidente Wilson, 231, 25th Floor
20030-021 Rio de Janeiro
Brazil
Tel: +55 21 3824 4747
mariana.villela@veirano.com.br

SCS Qd 9 Lt C Ed Corporate
Financial Centre
Tower A, 12th Floor (1203)
70308-200 Brasília
Brazil
Tel: +55 61 2106 6600
leandrod.duarte@veirano.com.br
www.veirano.com.br

WACHTEĽL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
United States
Tel: +1 212 403 1247
Fax: +1 212 403 2247
ikgotts@wlrk.com
www.wlrk.com

WILMER CUTLER PICKERING HALE AND DORR LLP
Bastion Tower
Place du Champ de Mars 5
1050 Brussels
Belgium
Tel: +32 2 285 49 00
Fax: +32 2 285 49 49
john.ratliff@wilmerhale.com
frederic.louis@wilmerhale.com

49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 207 872 1000
cormac.odaly@wilmerhale.com
www.wilmerhale.com