The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research
THE MERGER CONTROL REVIEW

Sixth Edition

Editor
ILENE KNABLE GOTTS

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EDITOR’S PREFACE

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, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

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. China, for instance, in 2009 blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In Phonak/ReSound (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year’s edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. The intended
readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. 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, for instance, provides for a de minimis exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). 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, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of ‘competitively significant influence’. Although a few merger notification jurisdictions remain ‘voluntary’ (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. 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 and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. 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, India 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., Greece, Portugal, Ukraine and the US). 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 addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first ‘gun jumping’ fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the
pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

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 EU model than the US 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 Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to ‘stop the clock’ on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU 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 are to 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 EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality. The US 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, in that the Authority has the ability to
mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil’s CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

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 EU 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 UK 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 standalone 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. Multijurisdictional 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 US 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 environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. 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 EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping 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, 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
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Part I

General Papers
Chapter 1

ECONOMICS TOOLS USED IN MERGER CONTROL

S Murthy Kambhampaty and James A Langenfeld

I INTRODUCTION

Merger control is a growth industry. The very expansion in the number of countries covered in the state-specific sections of this review, and the increasing sophistication of merger control regimes, indicate that merger control is a priority in an increasing number of jurisdictions. Recent experience in merger control demonstrates a trend away from focusing on market definition and structural presumptions based on market shares toward more emphasis on using economic tools to predict the competitive effects of a merger. Safe-harbours based on structural criteria such as measures of concentration, market shares and the number of effective competitors are still used to screen out the vast majority of proposed mergers from further review. However, there has been an increased demand for rigorous economic analysis to inform decision-making regarding investigations of proposed mergers, reflecting the improved reliability and wide acceptance of economics tools for merger control.

For the vast majority of mergers, the initial screening is based on analysing the lines of business that each merging party is involved in, and geographic markets are tentatively defined as regional, national or global based on prevailing shipment patterns. Parties and agencies then calculate market shares based on tentative relevant market definitions and test market shares against established safe-harbours for post-merger concentration levels, and the change in concentration level associated with the merger. Combined shares may also be examined against thresholds for dominance used as informal screens or specified in merger guidelines. Where the exact boundaries of the relevant product and geographic

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1 Murthy Kambhampaty is a director and James Langenfeld is a managing director at Navigant Economics. The authors wish to thank Raleigh Richards for his help in preparing this chapter.
markets do not significantly affect market share and concentration or dominance tests, no further analysis is undertaken. The vast majority of mergers are cleared on this basis.\(^2\)

In the relatively small number of mergers that do not pass this informal screening approach, merger control authorities increasingly are turning to a structured analysis of market definition and competitive effects to determine investigation decisions. Unfortunately, despite notable efforts to simplify the information needs for testing mergers using theoretically consistent approaches for assessing potential anti-competitive effects, the tools available remain sensitive to data selection and the construction of relevant measures such as margins, elasticity and diversion measures, and potential efficiencies. As a result, available approaches to simplifying merger assessment come with difficult tradeoffs in terms of accuracy versus simplicity. Accordingly, only careful assessment of industry facts using the appropriate analysis tools, guided by stringent reliability standards, both by the merging parties on the one hand as well as the merger control authorities on the other, is likely to minimise potential customer harms, while clearing pro-competitive mergers, subject to available resources for merger control.

Below, we provide a broad review of the economics tools used for analysis of market definition and competitive effects from mergers, including in vertical mergers. Our objective is to provide the reader with some background and insight into a collection of broadly applied tools for analysing mergers, as well as a guide to the many excellent resources discussing specific applications. In particular, we note that along with the publication of merger guidelines, the US and European Commission merger control authorities now provide annual guidance on the use of economic analysis in merger reviews.\(^3\) Accordingly, we intend this chapter to provide a helpful bridge between the merger guidelines and annual review articles, as well as detailed discussion of specific tools or approaches for economic analysis of mergers.

II CRITICAL LOSS ANALYSIS

Although controversial, critical loss and critical demand elasticity analyses have often been used as a tool for defining relevant product or geographic markets as an initial step

\(^2\) For example, the latest Hart-Scott-Rodino Annual Report jointly published by the US Federal Trade Commission and Department of Justice shows that during the 10-year period from 2004 to 2013, fewer than 5 per cent of reported merger transactions received were investigated in detail (i.e., received a second request), and over 50 per cent of merger reviews in the US were terminated before the initial review period (i.e., were granted early termination). Report available online at www.ftc.gov/system/files/documents/reports/36th-report-fy2013/140521hsrreport.pdf.

in merger assessment. As typically practiced, critical loss analysis involves two distinct steps: the first step involves the calculation of the maximum volume of lost sales that a hypothetical monopolist in a putative relevant market could suffer before a specified price increase became unprofitable; the second step involves determination of the likely actual loss that the hypothetical monopolist would suffer if it actually did raise prices by the specified amount. If the predicted actual loss for a specified price increase, typically 5 per cent, is smaller than the estimated critical loss, the specified price increase can be inferred to be profitable and the relevant antitrust market is inferred to be no broader than the corresponding putative relevant market.

The critical loss analysis is only appropriate for analysing whether a hypothetical monopolist in the supply of goods in a candidate relevant market could profitably increase prices above actual prices, i.e., for implementing the small but significant non-transitory increase in price (SSNIP) test for market definition. While the break-even critical loss analysis approach has been controversial and may not exactly mirror the hypothetical monopolist test specified in the US Department of Justice (DOJ)/US Federal Trade Commission (FTC) Joint Horizontal Merger Guidelines issued in 2010 (US HMGs), assessment of the break-even critical loss analysis is widely used due to several advantages, such as it does not require knowledge or assumption of the shape of consumer demand curves over the relevant price increases; it is equivalent to the profit-maximising critical loss estimate for small changes in prices; and the likely actual loss can reliably be assessed with information from business documents, including surveys, elasticity estimates, and natural experiments – such as customers’ responses to price increases resulting from cost shocks or partial supply interruptions – that may be identified in ordinary course documents.

Profit-maximising critical-loss or critical-elasticity analysis is fully consistent with the hypothetical monopolist test, but requires knowledge or assumption regarding the mathematical form of consumer demand functions. Assuming that consumer preferences generate linear demand curves, for example, allows the estimation of the profit-maximising critical demand elasticity (the maximum elasticity that the hypothetical monopolist could face and still maximise profits at the target price increase). The critical demand elasticity can then be compared with estimated demand elasticities or with direct evidence on customer substitution patterns to test whether the actual aggregate demand elasticity for a given set of products in a given geographic area (i.e., the putative relevant market) is above or below the critical demand elasticity: if above, the putative

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5 Ibid.

market definition is too broad, and if below, the relevant market is no broader than the putative relevant market.7

Critical loss analysis is most apt as a tool for market definition in industries where products are homogenous, where the assumption of uniform price increases by the hypothetical monopolist is justified and where screens based on industry concentration measures are likely to provide a reliable assessment of whether a particular merger is likely to raise competitive concerns. Critical loss analysis has also been adapted to test potential coordinated effects and the likelihood of vertical foreclosure.8 In industries where products are differentiated, and where suppliers offer a number of differentiated products pre-merger, it is likely that the hypothetical monopolist would maximise its profits by imposing different levels of price increases relative to pre-merger levels. Critical loss analysis has been adapted for industries with multi-product firms,9 although the assumptions required are fairly restrictive and may not hold in all cases or even in many cases. Alternative tools such as diversion ratio-based merger screening and merger simulation are substantially more flexible than critical loss analysis, and thus more widely used in assessing the effects of mergers in differentiated products industries.10

### III SUBSTITUTION, DEMAND ELASTICITY AND DIVERSION RATIOS

Measuring customer responses to relative price changes is currently a central focus of economic analysis in merger control investigations, whether the issue being addressed is traditional market definition or an attempt to directly measure the competitive effects of a merger. The market definition exercise is based on customer choice among alternatives inside and outside the candidate relevant market,11 and the assessment of anti-competitive effects, net of efficiencies, involves the assessment of customer

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7 Langenfeld and Li discuss potential pitfalls in the application of critical loss and critical demand elasticity analysis.
responses to merger-induced changes in pricing, quality and product choice. Demand elasticities, and the related measures labelled diversion ratios,\(^\text{12}\) may be derived from an understanding of consumer preferences and utility maximisation, or from business customers’ technology and downstream competitive conditions.

Economists use a wide array of tools to assess customer substitution patterns, depending on the facts of the industry and the available data. In consumer products industries, where grocery store scanner data or other detailed purchasing data are commercially available, economists often estimate demand elasticities using appropriate econometric modelling techniques.\(^\text{13}\) However, where detailed, industry-wide transactions data are unavailable, and where the competitive effects of interest do not involve merely incremental changes to prices of existing products, economists may analyse evidence from business documents or rely on analysis of customers’ response to price shocks, switching costs, win/loss reports, discount requests and salespeople call reports, customer switching patterns or customer surveys to infer patterns of substitution, including diversion ratios.\(^\text{14}\) In instances where companies maintain win/loss reports of bid data, the information can be used to test the relative frequency of head-to-head bidding among the merging parties, as well as the rate at which each of the merging parties wins among the other’s losses.\(^\text{15}\)

Demand elasticities or diversion ratios are typically used, as discussed below, in merger screens based on gross upward pricing pressure index (GUPPI) calculations, or


\(^{13}\) Hausman, Leonard and Zona provide examples of demand elasticity estimation. See also Werden (1998). Consumer demand elasticity estimation requires assumptions regarding the mathematical form of consumer utility functions. Traditionally, economists specified (indirect) utility functions in terms of the (prices) quantities of various products consumed in the choice set, and solved necessary conditions for optimisation to derive a system of demand equations specifying the demand for each product in the choice set is determined by the price of the product, as well as the prices of all other products in the choice set, and a demand shifter. While this form of estimation gives rise to direct estimation of demand elasticities, it involves the estimation of a lot of unknown parameters, which presents significant challenges in most real-world mergers. An alternative approach, based on discrete choice modelling of the likelihood of purchase of each product in the choice set based on respective products’ price, other relevant product attributes and information about customers requires the estimation of far fewer parameters. However, identification of the relevant attributes for accurately estimating demand elasticities can be time consuming and even imprecise. Thus, elasticity estimation tends to require careful assessment of the available data, and interpretation of elasticity estimates must take account of data limitations and assumptions used.

\(^{14}\) Farrell and Shapiro (2010); US HMG, Sections 4.1.3 and 6.1.

\(^{15}\) US HMG.
in merger simulations. However, demand elasticities and other analyses of substitution patterns can, in certain cases, be used directly to infer the competitive effects of a merger. For example, when substitution patterns suggest that customer preferences are accurately reflected in the market shares of individual suppliers, agencies may infer likely competitive effects from the post-merger level of concentration, and the change in concentration levels from before the merger.\(^\text{16}\) In industries with negotiated prices, or structured auctions, mergers can have anti-competitive effects when they involve suppliers with a high relative frequency of head-to-head bidding, and a pattern where the one party often emerges as the runner-up in opportunities that the other wins, and vice versa. When the above fact pattern bears out, the merger can reduce customers’ ability to pit the suppliers against each other to obtain favourable terms.\(^\text{17}\)

**IV DIVERSION ANALYSIS, UPWARD PRICING PRESSURE (UPP) AND MERGER SIMULATION**

In differentiated products industries, unilateral competitive effects, rather than coordinated effects, typically are the focus of the merger control investigation. Moreover, the unilateral competitive effects of mergers in differentiated products industries are determined by the relative closeness of competition among the merging parties’ products rather than by the level of concentration in the industry.\(^\text{18}\) Economists use diversion ratios to measure the closeness of competition among differentiated products, and to derive the likely unilateral competitive effects, whether by merger screens or by merger simulation.\(^\text{19}\)

Merger screens involving UPP were adopted in the latest version of the US HMG, which were published in 2010. Advocates for UPP screens point to their theoretical consistency and computational simplicity as providing a useful approach for screening mergers based on limited information available during merger review. The information needed for quantifying the UPP index in a given merger are the diversion ratio and pre-merger margins. However, critics point out that UPP, including its many forms, does not quantify the likely effects of mergers on prices or consumer welfare, but only indicates whether prices are likely to rise; since antitrust policy is defined in terms of likely price and consumer welfare effects, UPP analysis is criticised as an insufficient basis for regulating mergers.\(^\text{20}\) Accordingly, we would argue that information on diversion ratios, margins, efficiencies and even pass-through rates, along with the underlying information used to calculate diversion ratios and margins, namely pre-merger prices and average incremental costs, be used to simulate the price effects of mergers. Merger simulation may build on the UPP analysis, adding information on pass-through rates.

\(^\text{16}\) US Submission to OECD on Economics Evidence in Merger Analysis.

\(^\text{17}\) US HMG.

\(^\text{18}\) Shapiro (1996).


to determine likely price effects.\textsuperscript{21} Merger simulations may also be based on solving first-order conditions for profit maximisation pre and post-merger to derive price-change predictions.\textsuperscript{22} Diversion ratio-based pricing-pressure indices, of which UPP is an example, when combined with empirically estimated pass-through rates, potentially give a more flexible approach to simulating the effects of mergers than merger simulations based on solving the Bertrand-Nash conditions for profit maximisation.\textsuperscript{23} On the other hand, assuming that suppliers maximise profits according to Bertrand-Nash pricing rules, merger simulation can be used to develop upper and lower-bounds for merger-induced priced effects under broadly applicable assumptions regarding the shape of consumer demand curves.\textsuperscript{24} Merger simulations can be adapted to take account of entry and repositioning, and also to take account of efficiencies. UPP analysis can also be adapted to take account of efficiencies, but the analysis of entry and repositioning is not as readily integrated into the UPP analysis.\textsuperscript{25}

Merger simulations based on econometric estimates of demand and cost relations are well established in the economics literature,\textsuperscript{26} but have not been used in litigated merger cases. Estimated price effects in at least some of these published merger simulations have not been borne out by retrospective analyses conducted by merger control authorities.\textsuperscript{27} Thus, while there is a broad consensus on the theoretical foundations for analysing likely competitive effects of mergers in differentiated products industries, there is not a lot of accumulated evidence that practical application of these methods leads to reliable merger enforcement decisions. Economists have turned to natural experiments to test hypotheses about price effects and other hypotheses related to competitive effects of


\textsuperscript{23} See Jaffe and Weyl (2011).

\textsuperscript{24} Hausman (2010).

\textsuperscript{25} However, if the UPP measures are based on estimation of the elasticity matrix, then the elasticity matrix can be recomputed under reasonable assumptions regarding the likely effects of entry or repositioning consumption patterns, and diversion ratios and UPP indexes can then be recalculated.


Economics Tools Used in Merger Control

mergers, combining direct evidence with empirical tests to inform assessment of the likely competitive effects of mergers.

V NATURAL EXPERIMENTS

Economists use the term ‘natural experiment’ to describe a broad array of study designs based on observed data. Analysis of natural experiments has been used to examine the effects of changes in market structure, entry or cost shocks to assess issues of market definition, competitive effects and other issues in guidelines analysis of mergers. While economists often use multiple regression analysis to obtain statistical tests of inferences regarding the effects of merger, graphical analysis has sometimes been used to analyse natural experiments and quantify the potential effect of merger. Natural experiments useful for testing hypotheses about the effect of a merger involve careful research design to construct a dataset and hypothesis tests regarding the effects of mergers and related events on economic outcomes relevant to consumer welfare, such as pricing, product choice, product quality or industry output. Consider an example from the literature:

Economists Christopher Taylor and Daniel Hosken at the FTC examined the effects of a merger among gasoline refiners on prices using the natural experiments approach. In studying the effects of a consummated merger among two regional gasoline suppliers, the authors had insufficient data to directly estimate the impact of the merger on prices in the areas affected by the merger. Hosken and Taylor investigated the effects of the merger using a natural experiment in which they defined the area experiencing the greatest change in concentration from the merger as the ‘treatment’ area, and several areas with otherwise similar characteristics but that did not experience a merger as ‘control’ areas. Using data for both control and treatment areas from before and after the merger, Hosken and Taylor tested whether the change in price post-merger in the treatment


Angrist and Pischke (2008).

area exceeded the change in price post-merger in the respective control areas, using multiple regression analysis.\textsuperscript{33} The change in price in the control area illustrates how prices would change absent the merger, thus providing a benchmark against which to test the post-merger price change in areas affected by the merger: a finding that the change (difference) in price in the treatment area is no different than the change (difference) in price in the control area supports the inference that the merger did not have an anti-competitive effect, whereas if the change in price in the area affected by the merger exceeded the change in price in the area unaffected by the merger, the merger is inferred to have had the anti-competitive effect of raising prices. Analysis of natural experiments using the above approach has been aptly labelled ‘difference-in-difference regression’. As is typically the case in the analysis of natural experiments, Taylor and Hosken faced a variety of issues that resulted in a complex analysis, which we do not attempt to summarise here, except to mention that they did not find an anti-competitive price increase from the merger analysed in their study. Analysis of natural experiments using difference-in-difference regressions has been used to assess the effects of consummated mergers in a variety of industries, including wholesale and retail gasoline\textsuperscript{34} and hospitals.\textsuperscript{35} While typically the economist analyses the effect of the merger on the post-merger conduct of the merged firm, some authors have proposed tests of whether rivals raised prices post-merger, to assess the effects of merger on competition.\textsuperscript{36}

\textsuperscript{33} Taylor and Hosken (2007) used multiple control areas to address differences in regulatory requirements for gasoline blends at the various control areas and the treatment area.


In contrast to analysis of consummated mergers, for analysis of a proposed merger, the natural experiment must carefully be chosen to identify a treatment that mimics the change in structure that results from the merger, such as a regulatory constraint imposed on a supplier in certain markets but not others, prior entry in selected markets, or a prior merger among suppliers present in certain geographic markets for a given product but not in other geographic markets for the same product. Alternatively, the natural experiment may be used to test key assumptions in the guidelines analysis, such as market definition or the likelihood of entry. 37

VI ANALYSIS OF HEALTH-CARE PROVIDER MERGERS

Over the past decade, the FTC has overhauled its approach to regulating hospital and physician group mergers based on an assessment of the effects of consummated mergers among hospitals. Analysis based on natural experiments involving mergers in the hospital industry, utilising the difference-in-difference regressions discussed above, demonstrated that hospital mergers had a high likelihood of resulting in higher prices and lower quality care. 38 Among the mergers that resulted in higher prices were ones in which the courts had denied FTC efforts to block the merger on the basis of flawed application of patient flow analysis to define geographic markets, and of flawed application of critical loss analysis. 39

As an alternative, economists working at the FTC collaborated with academic experts to produce a series of papers for testing the effects of health-care mergers and developing a merger simulation approach based on the potential effect of hospital mergers on the willingness to pay (WTP) for health plans by participants, which is related to the closeness of substitution between the merging hospitals; and the effect of an increase in WTP on hospitals’ ability to negotiate increases in the in-network price for the merged hospitals’ services with health plans, net of costly improvements in hospital service quality. 40 This WTP approach to simulating the effects of hospital mergers involves estimation of demand parameters from a rich set of patient discharge data, typically available from state agencies, and related data from managed care organisations.

37 Coate (2013).
39 Dranove and Sfekas (2009); Langenfeld and Li (2001).
and a regression-based approximation to merger simulation, to ease the computation of the price effects of the merger. The approach has been extended to analysis of physician group mergers, with the added innovation of deriving WTP from providers shares by patient segment or microsegment, rather than an econometric estimation of a choice model.  

VII ANALYSIS OF CONSUMMATED MERGERS

As is apparent from the discussion above regarding regulation of health-care mergers, US agencies have relied on analysis of consummated mergers to develop direct evidence on the anti-competitive effects of mergers, although in some recent cases the agencies have relied on structural presumptions to regulate the breakup of consummated mergers. Jurisdictions with voluntary notification regimes intrinsically have post-consummation review authority, while jurisdictions with mandatory merger control review may also have post-consummation merger control authority, as in the United States.

Recent transactions in which US merger control agencies have exercised post-consummation review authority include US v. BazaarVoice, Inc (DOJ) and In The Matter of Polypore International, Inc (FTC). In both of these cases, the finding was that the merger was likely to result in a substantial lessening of competition based on market share presumptions. Another recent post-consummation review, US and New York v. Twin America, LLC, involved concerns regarding a merger to monopoly in ‘hop-on, hop-off bus tours in New York City’, and the DOJ also found a substantial increase in post-merger prices as an anti-competitive effect of the merger. The remedies in the BazaarVoice and Polypore cases were asset sales and licence or intellectual property transfers sufficient for asset purchasers to compete vigorously; however, in TwinAmerica, the DOJ demanded that the acquiring party surrender all of the target’s bus stop authorisations to the relevant regulatory authority, and also to pay $7.5 million as disgorgement of profits flowing from the monopoly power acquired through an anti-competitive merger. Thus,

post-consummation merger review can result in substantial asset divestitures as well as significant financial penalties to the merged firm.

Where the agencies focus solely on evidence of post-merger price increases by the merged firms, the analysis may be incomplete and give misleading results regarding the welfare effects of the merger. In Evanston Northwestern Hospital Corp’s 2000 acquisition of Highland Park Hospital, the FTC found several years later that the merger led to higher prices for acute in-patient health-care services.47 Controversy over the FTC’s regulation of the Evanston/Highland Park merger involved both the FTC’s econometric analysis and the FTC’s interpretation of evidence on post-merger price increases.48 One issue with the interpretation of the FTC’s finding of post-merger price increases was whether the price increase flowed from anti-competitive conduct or from factors independent of the merger.49 Generally speaking, merging parties may enhance product quality or marketing post-merger, which may result in a price increase as well as offsetting customer benefits. Thus, analysis of industry and merging firms’ output, after adjusting for changes in quality as relevant, is helpful for more fully assessing whether any observed post-merger price increases are anti-competitive or are offset by accompanying customer benefits.

VIII VERTICAL MERGERS

Vertical mergers are receiving an increasing amount of regulatory scrutiny, and there have been a series of high profile cases involving vertical effects analysis in the US, including Comcast/NBCU, and the pair of mergers involving map data suppliers in TomTom/TeleAtlas and Nokia/NavTEQ. While the European Commission has released merger guidelines related to regulation of vertical mergers,50 merger control authorities in the US have not published guidelines on the regulation of vertical mergers since the 1984 US Merger Guidelines. While enforcement actions against certain mergers in the US have addressed concerns identified in the 1984 US Merger Guidelines, several others have identified potential anti-competitive effects from vertical mergers by applying economic principles and methods that differ substantially from those discussed in the

47 The FTC argued that ordering the breakup of the merged firm would be unduly costly to Highland Park.
49 Ibid.
US Merger Guidelines of 1984. Vertical effects of concern according to the 1984 US Merger Guidelines involve the creation of barriers to entry, the potential to increase coordination among upstream suppliers and elimination of a disruptive buyer. More recently, economists have applied transactions cost analysis to show that, in certain circumstances, vertical integration may increase upstream suppliers’ monopoly power, or allow integrated suppliers to raise the costs of either upstream or downstream rivals. Issues of input and customer foreclosure, as well as analysis of conditions of entry and the likely efficiencies from the merger, were the focus of the merger control investigation of the proposed merger between Comcast, an operator of cable television systems, and NBC Universal, a supplier of a wide variety of television programming including the NBC network and several specialised cable television channels, and feature films. The Federal Communications Commission, which reviewed the transaction along with the DOJ, undertook a series of analyses regarding the likelihood that the merged firm would foreclose rivals of the Comcast cable network from content of NBC Universal. These analyses included:

\[ a \] a financial assessment (vertical arithmetic) of whether, at pre-merger demand elasticities and margins, the merged firm would find it profitable to withhold content of NBC Universal from Comcast’s downstream rivals, making up for the lost profits from this action in profits from diverting dissatisfied customers of rival cable networks that switch to Comcast;

\[ b \] whether the merger would affect the bargaining power between the integrated firm and rivals of the Comcast cable and result in higher prices for bundles of programming;

\[ c \] an analysis of natural experiments to test whether past vertical integration has resulted in higher prices to consumers; and

\[ d \] a hypothesis test, based on a stylised economic model, of whether Comcast had previously foreclosed rival cable networks of content to disadvantage its rivals rather than merely for efficiency reasons.

An alternative to the vertical arithmetic is to perform merger simulations that assess the profit-maximising prices that the merged firm would charge, taking account of

53 Ibid.
the potential to divert customers lost to upstream and downstream rivals to its own upstream and downstream affiliates.\textsuperscript{56} Critical loss analysis and UPP indices have also been proposed to assess the potential anti-competitive effects of vertical mergers.

As in the Comcast/NBCU merger, enforcement action in purely vertical mergers involves conduct remedies that limit the likelihood of strategic anti-competitive conduct post-merger, thereby maximising the likely gains to consumer welfare.

\textbf{IX \hspace{1em} ANALYSIS OF ENTRY}

‘When entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk’\textsuperscript{57}. However, entry is only considered effectively to replace the competition lost due to merger if it would be timely, likely and sufficient. Although a two-year time frame had been considered as the typical duration for timely entry,\textsuperscript{58} merger control authorities may recognise the competitive constraints of entry over a shorter or longer duration. For example, in heavy industries where competitors qualify a product, or where product development involves extensive customer trials, entry may involve a longer period of time that may significantly restrain incumbents’ pricing.

The likelihood of entry can be assessed using a discounted cash flow analysis to assess whether a potential entrant would find profitable the investment needed to enter, in the sense that the aggregate margin earned from entry net of the terminal value of the assets of the entrant would exceed the initial investment needed to enter (i.e., whether the net present value of entry would be greater than zero).\textsuperscript{59} A break-even version of the analysis could be used to assess the level of output the firm must attain over a specified period in order to render the investment in entry profitable; if the break-even level is not very high relative to the size of the relevant market, and there are no impediments to the entrants achieving the break-even level of output, entry can be considered likely. Moreover, if entry is likely, and the entrant can be expected to attain the size of one of the merging parties, it can be expected to replace the competition lost due to the merger, and hence would be considered sufficient to prevent anti-competitive effects from the merger. Depending on demand elasticities and margins, and the oligopoly conduct of firms in the industry, further analysis of the pricing conduct of the merging firms may show that more limited entry could also effectively constrain the merged firms’ prices post-merger by cannibalising a sufficiently large share of the merged firms’ sales to render a price increase unprofitable.


\textsuperscript{57} EU HMG, Section VI; see also US HMG, Section 9.

\textsuperscript{58} EU HMG; note that in the 2010 version of the US HMG, the specification of a two-year time frame for assessing the timeliness of entry was deleted.

In practice, agencies typically require evidence of past entry, or documentary evidence of planned entry such as in corporate press releases or articles in the trade press, to consider entry. Past and current entry can be important in evaluating barriers to entry. A relatively large number of entrants may suggest ease of entry, at least through the period when that entry occurred. However, if many of these entrants have since exited the market and it appears the market conditions for entry have become more difficult, then that can be evidence of barriers to entry. Analysis of natural experiments can be effective for demonstrating pro-competitive effects of entry in similar products, or in other geographic markets involving the same relevant product. Analysis of natural experiments can also be used to test the likelihood of entry.

In differentiated products industries, repositioning and line extensions can result in adequate competitive constraints for the merged firm, despite entry not entirely replacing the competition lost due to the merger. Methods used for analysing repositioning and line extensions are similar to the analysis of entry; however, the additional effect of cannibalisation of existing products may need to be taken into account in analysing the likelihood of entry.

In vertical mergers, a showing that entry in either the upstream or the downstream market, or through backward or forward integration by market participants, typically alleviates concerns related to potential input foreclosure or customer foreclosure.

A demonstration that entry would be timely, likely and sufficient almost invariably results, as indicated in the quotation at the beginning of this section, in the merger being cleared by the merger control agency. In data from 1996 to 2011, the FTC reports that in all mergers with an affirmative showing on the ease of entry, the FTC closed the investigation with no further enforcement action.

X ANALYSIS OF EFFICIENCIES

Economic analysis of merger-induced efficiencies includes the identification of cost savings likely to result from the merger and passed on to consumers in lower prices, as well as output expansion and product introduction that would not be feasible absent the merger. In vertical mergers, efficiencies may be particularly likely to be merger-specific and substantial, such as investments in new product introduction or enhanced distribution from a merger with a downstream entity, as well as potential

60 US HMG, Section 9: ‘Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts’.


62 US HMG.


64 Joseph Farrell and Carl Shapiro, ‘Scale Economies and Synergies in Horizontal Merger Analysis’, Antitrust Law.
greater innovation resulting from eliminating transaction costs in sharing knowhow between the supplier and customer, while the elimination of double-marginalisation is potentially also an efficiency due to vertical merger.65

Evidence from merger data published by enforcement agencies and in review articles66 shows that a significant number of merger reviews include an analysis of efficiencies. However, merger control agencies tend to consider efficiencies as likely to overcome only moderate anti-competitive effects.67

Efficiencies analysis may include models showing cost reductions due to, *inter alia*, plant or route reorganisation by the merged firm, introduction of new products or services, and the combination of intellectual property with manufacturing and distribution.68 In order to be given due weight, efficiencies claims must be shown to be merger-specific, and sufficiently detailed and supported by data and analysis so as to be verifiable. While merger-induced cost savings may be expressed as a percentage of revenues, agencies typically assess efficiencies claims in detail rather than simply offsetting a percentage increase due to the anti-competitive effects of merger against the percentage cost savings. Among the issues analysed in assessing efficiency claims is whether the cost savings are likely to be passed through in lower prices, and the net effect of the cost-savings taking account of the pass-through rate; however, it has been shown that the pass-through rate is high when anti-competitive effects are most likely, and a finding of significant merger effects absent efficiencies is inconsistent with a finding of a low pass-through rate for merger-specific efficiencies.69 Where claimed efficiencies involve new products, evaluation of the net effects of the merger involves quantifying the welfare gains from new product introduction as well as the welfare loss from potential anti-competitive effects from the merger absent efficiencies, to quantify the net effect on consumer welfare.70

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65 ‘Other possible efficiencies of vertical integration are better coordination of design and production decisions, improved incentives for relationship-specific investments, and better provision of point of sale services’, Riordan (2008).


67 ‘In the Agencies’ experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.’ US HMG.


70 US Submission to OECD on Economics Evidence in Merger Analysis.
XI CONCLUSIONS

There is broad consensus regarding the need to base merger control on reliable economic evidence. Matching the economic analysis to the facts of the case, and relying on the appropriate tools for conducting the analysis, are critical to developing reliable economic evidence on which agencies base merger control decisions, and for parties to contribute to regulators’ review of proposed mergers.
Chapter 2

EU MERGER CONTROL IN THE PHARMACEUTICAL SECTOR

Pablo Figueroa and Alejandro Guerrero

I INTRODUCTION

The combination of relatively stagnant markets in the EU with the foreseen extraordinary growth in the emerging markets is likely to result in further consolidation in the pharmaceutical industry. Regulators will be crucial to this consolidation. This chapter summarises the approach of the European Commission to merger control in the pharmaceutical industry.

II MARKET DEFINITION

Defining the relevant market and the calculation of market shares is necessary to analyse market power and the potential impact of behaviour on competition. In the Commission’s words: ‘[m]arket definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face.’ The calculation of market shares, by reference to a previously defined market, is an exercise

1 Pablo Figueroa is a senior associate and Alejandro Guerrero is an associate at Gibson, Dunn & Crutcher LLP. The usual disclaimers apply.
2 According to a report by PricewaterhouseCoopers, the global pharmaceutical industry could be worth nearly $1.6 trillion by 2020 (see PwC, ‘The Global Pharmaceutical Market could be Worth Nearly $1.6 trillion by 2020’, available at www.pwc.com/gx/en/pharma-life-sciences/pharma2020/market-opportunities-and-outlook.jhtml).
that the Commission considers to provide ‘useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors’.\textsuperscript{4}

The principles set out in the Commission’s Notice on the Definition of the Relevant Market\textsuperscript{5} have been applied to the pharmaceutical sector by the European institutions.\textsuperscript{6}

\textbf{i Product market definition for finished dose pharmaceutical products}

The Commission has traditionally resorted to different parameters to define relevant markets for finished dose pharmaceuticals.

\textit{The European Pharmaceutical Market Research Association Anatomical Therapeutical Chemical Classification (EPhMRA’s ATC)}

In past years,\textsuperscript{7} the Commission has resorted to the EPhMRA’s ATC\textsuperscript{8} classification, which has been developed for marketing purposes and is the basis for the pharmaceutical sales Intercontinental Medical Statistics database (IMS Health), which provides data that are often used by global pharmaceutical and biotechnology companies for econometric market analysis.\textsuperscript{9}

The EPhMRA ATC classifies pharmaceutical products\textsuperscript{10} according to their indications and use,\textsuperscript{11} distinguishing the following four levels:

\begin{itemize}
  \item[a] the first level of the code indicates the anatomical main group (i.e., the part of the human body that the medicine intends to address);
  \item[b] the second level of the code indicates the therapeutic main group (i.e., the main disease groups that the medicine intends to address);
\end{itemize}


\textsuperscript{7} See Case COMP/M.5865 – Tev/TevaPharm; Case COMP/M.6613 – Watson/Actavis; Case COMP/M.6969 – Valeant Pharmaceutical International/Bausch & Lomb Holdings.

\textsuperscript{8} See ‘EphMRA/PBIRG Classification Committee; Who we are; What we do 2008’, available at www.ephmra.org/user_uploads/ephmra%20who%20we%20are%202015%20final.pdf.

\textsuperscript{9} IMS Health is a private entity that provides information and services for the health-care industry (see www.imshealth.com/portal/site).

\textsuperscript{10} This distinguishes it from the WHO classification system, which classifies substances according to the therapeutic or pharmaceutical aspects and in one class only. The main purpose of the WHO classification is for international drug utilisation research and for adverse drug reaction monitoring.

\textsuperscript{11} It is therefore possible to find the same compound in several classes, depending on the product, e.g., naproxen tablets can be classified in M1A (antirheumatic), N2B (analgesic) and G2C if indicated for gynaecological conditions only.
the third level of the code indicates the therapeutic and pharmacological subgroup (i.e., the different drug actions that will address the disease in question); and

d the fourth level of the code indicates the chemical subgroup.

The Commission starts its analysis at different levels, often depending on whether the transaction involves producers of originators or generics.

When it comes to originator companies, the Commission's analysis tends to begin at the ATC3 level, which, as indicated in (c) above, groups medicines according to their broad therapeutic and pharmacological indications.\textsuperscript{12}

By contrast, in many recent merger cases involving generic companies, the Commission has found classification by molecule (e.g., at ATC4 level) to be more accurate for the purposes of defining the relevant market.\textsuperscript{13}

\textit{Prescription medicines, over-the-counter (OTC) and dual-status medicines}

The Commission has usually defined separate markets for prescription medicines and for OTC or dual-status medicines.\textsuperscript{14} This is due to the fact that seriousness of disease (i.e., medical indications or dosage, or both, in some cases), strength of products (including possible side effects and harmfulness if misused), legal framework, marketing, distribution the medical indications (including their possible side effects), legal framework, marketing, distribution and rules on reimbursement of drugs all tend to differ between the two categories of medicines, even when the active ingredients are identical.

Certain variants of a drug with the same active ingredient or brand name are sometimes classified as both OTC and prescription-only, depending on the package size, dosage or ‘galenic’ form.\textsuperscript{15} In these cases, the price of the OTC medicine may be a factor determining whether the patient simply purchases this medicine at his or her own expense or visits a doctor to obtain a prescription for a reimbursable alternative.\textsuperscript{16} In

\textsuperscript{12} See, e.g., Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraphs 12 ff; Case COMP/M.5295 – Teva/Barr, at paragraphs 10 ff. In the context of originator products, the Commission has sometimes resorted to the EPhMRA ATC4 level (see Case COMP/M.3544 – Bayer Healthcare/ Roche (OTC Business), at paragraphs 15–20).

\textsuperscript{13} See Case COMP/M.6613 – Watson/Actavis, at paragraph 7; Case COMP/M.5295 – Teva/Barr, at paragraph 18; Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 12. However, the Commission has sometimes defined markets on the basis of the molecule level or group of molecules that are interchangeable for a wide range of applications (see Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 14).

\textsuperscript{14} Ibid, at paragraphs 22 ff.

\textsuperscript{15} Ibid.

\textsuperscript{16} See Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraphs 58–59. For OTC products, the Commission has also recently taken into consideration the classification used in the IMS Consumer Health’s OTC Review Reports (see, e.g., Case COMP/M.6280 – Procter & Gamble/Teva OTC business, at paragraphs 9 and 11).
addition, the presence of a product or brand in both the prescription and OTC segments may result in it enjoying a stronger market position.¹⁷

**Originators and generics**

After the expiration of the relevant patent, originator pharmaceuticals may be subject to competition from generic producers. While the Commission's market investigations have often suggested that there may be differences in demand for originators versus generics, this phenomenon has not been found to justify the definition of two separate product markets.¹⁸ According to the Commission, a number of elements indicate that generic medicines based on the same molecule compete in the same product market as the branded originator medicines on which they are based.¹⁹ These elements include:

1. the fact that, in order to obtain regulatory approval to market its product, a generic drug manufacturer must demonstrate that its drug is bioequivalent to the originator drug²⁰ (i.e., the generic is bioequivalent in dosage form, safety, strength, route of administration, quality, performance characteristics and intended use, thus working in essentially the same way as the originator in the patient’s body);²¹
2. the fact that generic versions of originator medicines are often designed by generic producers to be copies of those originator medicines on which they are based based (indeed, only bioequivalence can ensure generics the fast route to the market, meaning that they main obtain a marketing authorisation by simply showing that they are bioequivalent to the originator drugs, which thus dispenses them from carrying on the full clinical trials that an originator product would have to do); and
3. the applicable regulatory framework, which encourages switching between originator and generic medicines.

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¹⁹ See Case COMP/M.5476 – Pfizer/Wyeth, at paragraph 19. However, generic companies might also compete with products based on other molecules (see Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 13).
²⁰ Bioequivalence is defined by the European Medicines Agency as the absence of a significant difference in the rate and extent to which the active ingredient or active moiety in pharmaceutical equivalents or pharmaceutical alternatives becomes available at the site of action when administered at the same molar dose under similar conditions in an appropriately designed study.
²¹ As regards competition between generic medicines, generic medicines developed to be bioequivalent of the same originator product, and based on the same molecule, may still have some differentiating elements from one another (e.g., inactive ingredients or impurities). However, these differences have not been found sufficient to define separate markets for two generics falling under the same molecule: see Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraph 26.
Galenic formulation

In recent cases that have involved generics, the Commission has investigated whether a difference in the ‘galenic’ formulation further limits substitutability within or across molecules. The Commission has found this to be the case in a number of cases, to the extent that the launch of a new ‘galenic’ form may take up to two or three years to appear in the market, a period that may exclude supply-side substitutability; and that different routes of administration for a medicine are, in general, designed to serve the needs of different patient groups, and are therefore not interchangeable. In these situations, the reference system for distinguishing between medicinal formulations is the typology of form code (also called the New Form Code (NFC)) used by IMS Health and EphMRA.

Bio-similar and small molecule traditional generics

The Commission has also reviewed in detail the distinction between bio-similar and small molecule traditional generics.

Broadly speaking, there are two types of generic pharmaceuticals: synthetic generics, synthesised by chemical processes; and bio-similar products of originator biological medicinal products (biopharmaceuticals).

The Commission has identified a number of differences between these types of generics, which has sometimes led to their individual assessment:

- the development of bio-similars tends to require considerably longer development periods than synthetic generics;
- the development of bio-similars tends to require higher upfront investments than those required for the development of other generics;
- the development of bio-similars entails a higher risk of failure for research and development (R&D);
- the development and manufacturing of bio-similars requires specific biotech know-how and facilities; and
- the R&D process for bio-similars is closer to the R&D of originator than of synthetic generic drugs requiring, for example, clinical trials.

22 See, e.g., Case COMP/M.5865 – Teva/Ratiopharm, at paragraphs 16–21 and 39–41: ‘[...] in this case, different routes of administration of a medicine are, in general, [...] not interchangeable. This may also be the case of the dosage and of the pharmaceutical form [...]’. Lack of substitutability was mainly found for oral syrups, rectal forms, and injectable or parenteral forms (see paragraphs 19, 118, 157, 184, 253–256, 267–268, 279, and 336–340).


26 Biopharmaceuticals are originator medicines whose active substance is made by or derived from living organisms.

27 See Case COMP/M. 5865 – Teva/Ratiopharm, at paragraph 29; Case COMP/M.5479 – Lonza/Teva /JV, at paragraph 7.
Product 'pipelines', innovation and R&D
In accordance with the Commission’s general guidance, R&D and product pipelines should be considered in markets and sectors, such as the pharmaceutical sector, where innovation is an important competitive force that may be driven or impeded depending on the particular circumstances of each case. 28 In such scenarios, a full competitive analysis requires that the relevant authority examine those products that have not as yet entered the market, but that are at an advanced stage of development (e.g., advanced R&D pipeline products in Phase III of clinical trials). 29 In a number of cases, the Commission has assessed the impact of transactions in ‘pipeline products’. 30 Patents and other IP rights also play an important role in the competitive assessment of current and future markets. 31

National registration and reimbursement rules
In certain cases, the Commission has taken into consideration the influence of national registration and national reimbursement rules on the prescription behaviour of physicians for the purposes of defining markets. 32

Other medicine characteristics
Further segmentation of product markets in the pharmaceutical sector may result from a number of characteristics of medicines (e.g., the medicine’s indications and contraindications, their efficacy and side effects, their frequency of administration and period of action). 33

28 See Guidelines on the Assessment of Horizontal Mergers at paragraph 38.
29 See, e.g., Case COMP/M.1403 – Astral/Zeneca, at paragraphs 43 and 44; Case IV/M.1846 – Glaxo Wellcome/Smithkline Beecham, at paragraphs 150–216; Case COMP/M.3354 – Sanofi-Synthélabo/Aventis, at paragraphs 324–330; COMP/M.5476 – Pfizer/Wyeth, at paragraphs 13, 34–38, 65, 87-95, and 99; and Case COMP/M.5999 – Sanofi-Aventis/Genzyme, at paragraphs 7, 21, 29, and 38–46. However, in Case COMP/M.7275 – Novartis/GlaxoSmithKline Oncology Business, the Commission analysed markets where the parties had ongoing clinical trials at earlier stages, including Phase I and Phase II.
Markets upstream and downstream from finished pharmaceuticals

In addition to the markets defined for finished pharmaceuticals set out above, the Commission has also identified the neighbouring markets, some of which are set out below.

Markets upstream from finished pharmaceuticals

Active pharmaceutical ingredients (API) markets

The Commission has identified separate markets for APIs. The Commission has generally found that API markets might be as narrow as each individual API (i.e., the relevant molecule). Sufficient supply-side substitutability may, however, justify the inclusion of a number of APIs in the same relevant product market. However, the following elements might lead to the opposite conclusion:

a demand-side substitutability is unlikely in practice, given that a generic company that produces a specific pharmaceutical product needs to buy the relevant API molecule and lacks the ability to use another alternative API; and

b switching to another API source might require variations in the relevant authorisations. Obtaining these can involve devoting significant resources.

Contract manufacturing of finished dose pharmaceuticals

The Commission has identified a separate upstream market for the contract manufacturing of finished dose pharmaceuticals on behalf of third-party pharmaceutical companies. In the past, the Commission has considered, but ultimately left open, the possibility that this market be further segmented by reference to the function of the pharmaceutical form (e.g., solids, powder, liquids, sterile liquids) or by reference to the conditions of manufacture (e.g., types of APIs involved, toxicity, involvement of a sterile environment, etc.).

Out-licensing

In the out-licensing market, one party (the licensor) out-licenses a pharmaceutical product to one or more third parties (the licensee or licensees). During the duration of the license, the licensee will generally buy the finished product (or ‘bulk’) from the licensor.
on an exclusive basis and will commercialise the product under its own name, using the marketing authorisation that was licensed to it by the licensor. The Commission has considered a possible narrower segmentation within the out-licensing market for the out-licensing of IPRs for particular APIs or pharmaceutical products, or both.

Other upstream markets
The Commission has identified other separate markets, such as input markets for substances required for the production of APIs; and dosage delivery mechanisms.

Markets downstream from finished pharmaceuticals
Pharmaceutical companies reach distributors and end users through different distribution channels characterised by very different competitive dynamics. The Commission has thus far defined the following separate markets in the pharmaceutical industry distribution value chain:

- pre-wholesale services;
- wholesale services;
- hospitals;
- pharmacy retail; and
- home care.

III GEOGRAPHIC MARKET DEFINITION

i Finished pharmaceuticals
The Commission has consistently found geographic markets for finished pharmaceutical products to be national. However, when the Commission has taken into consideration the future presence of a particular pharmaceutical company in a specific market by reference to its pipeline products, R&D or patents, the Commission has tended to find

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42 See Case COMP/M.6613 – Watson/Actavis, at paragraphs 118 ff.
43 Ibid, at paragraphs 120 and 121.
44 See Case IV/26.911 – Zojal/CSC-ICI.
45 See Case COMP/M.6044 – Alliance Boots/Andreae-Noris Zahn, at paragraphs 6 ff.
46 See Case COMP/M.4301 – Alliance Boots/Cardinal Health, at paragraphs 10 ff. This activity has been distinguished from the direct distribution of manufacturers to customers (e.g., retail pharmacies, hospitals); see Case COMP/M.5865 – Teva/Ratiopharm, at paragraphs 450–452.
47 See Case COMP/M.7323 – Nordic Capital/Ghd Verwaltung, at paragraph 39; Case COMP/M.5805 – 3i/Vedici Group; Case COMP/M.5548 – Barclays/RBS/Hillary; Case COMP/M. 4367 – APW/APS/Nordic Capital/Capio; Case COMP/M.4229 – APHL/L&DR/Netcare General Healthcare Group; Case COMP/M.4788 – Rozier/BHS.
48 See Case COMP/M.2432 – Angelini/Phoenix/JV; Case COMP/M.2573 – A&C/Grosspharma, at paragraphs 11 and 12; and Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 452.
49 See Case COMP/M.7323 – Nordic Capital/Ghd Verwaltung.
wider geographic markets (EEA-wide or worldwide). This is due to the fact that R&D tends to occur on a multinational and, often, global scale.\textsuperscript{50}

ii Markets upstream of finished pharmaceuticals
Upstream markets have generally been found to be at least EEA-wide or worldwide in scope, regardless of whether they concern the sale of APIs,\textsuperscript{51} contract manufacturing\textsuperscript{52} or out-licensing.\textsuperscript{53}

IV COMPETITIVE ANALYSIS IN THE PHARMACEUTICAL SECTOR

i Preliminary considerations
Whether the Commission considers that a transaction in the pharmaceutical industry raises competition concerns is likely to depend on the nature of the business activities and nature companies involved in the concentration. For example, mergers between two originators active in the same markets may raise traditional horizontal concerns. Mergers between originators and research firms might affect competition in the current and future relevant product markets, particularly if both companies have competing late-stage pipeline products or the transaction could result in a decrease in overall R&D.

Different competition concerns may arise when a concentration involves one or more generic producers. Generic companies not only compete among each other in the development of bio-similar and molecule generics of originator pharmaceuticals; they also compete with originator pharmaceuticals after the expiration of the relevant patent.

ii Key competitive drivers in the pharmaceutical markets
To date, competition concerns in notified cases have focused on potential restrictions arising from direct overlaps in the relevant market or markets. In addition, the competitive assessment is likely take into consideration innovation and other aspects of dynamic competition, the effects of regulation and reimbursement schemes on competition and the commercialisation stage of the relevant products. The Commission has focused its analysis on the different competitive drivers of the pharmaceutical markets.

\textit{Innovation and product differentiation}
The Commission tends to consider innovation to be of critical importance for the pharmaceutical sector. In the Commission Communication accompanying the

\textsuperscript{50} For future markets, see Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 422.
\textsuperscript{51} Ibid, at paragraph 396.
\textsuperscript{52} See Case COMP/M.6613 – Watson/Actavis, at paragraph 124; Case COMP/M.6278 – Takeda/Nycomed, at paragraphs 20 and 21.
\textsuperscript{53} See Case COMP/M.6613 – Watson/Actavis, at paragraphs 120 and 121; Case COMP/M.5865 – Teva/Ratiopharm, at paragraph 396; Case COMP/M.5295 – Teva/Barr, at paragraph 190; and COMP/M.6278 – Takeda/Nycomed, at paragraph 19.
Pharmaceutical Sector Inquiry, the Commission highlighted the significant R&D efforts of originator companies and other stakeholders (e.g., research companies) in order to innovate.\(^{54}\) Current Competition Commissioner Mme Margrethe Vestager seems to have embraced this by indicating that the Commission’s ‘focus on investment and innovation in merger control is also clear in the pharmaceutical sector’, although when pharmaceutical companies announce a merger the Commission needs to ‘carefully balance the benefits of pooling their resources with the potential negative impact of eliminating an innovator’.\(^{55}\)

In a number of cases, the Commission considered the potential risks that a concentration entails for the development of pharmaceuticals and innovation, both in relation to originators (e.g., when developing new pharmaceutical products or variants)\(^{56}\) and to generic manufacturers (e.g., when developing bio-similars).\(^{57}\) Similarly, the Commission also taken into account the potential impact of competition exerted by ‘pipeline’ products (i.e., the competition that products might face from other products not yet released on the market) when reviewing certain transactions.\(^{58}\) This is due to the fact that, if the adequate conditions are met (e.g., those regarding the pharmacological characteristics and therapeutic use), pipeline products might be actual or credible future competitors of existing products.

Intellectual property rights (IPRs) are also a key element in the promotion of innovation. The pharmaceutical industry invests heavily in R&D and tends to rely on IPRs to protect innovation, and to manufacture or distribute its products, or both (e.g., through out-licensing). In recent cases, the Commission analysed the potential effects of transactions on R&D, for example by decreasing the merging parties’ incentives to further investigate, or by obstructing the licensing of patents for R&D.\(^{59}\) Such an exercise presents the potential pitfall, from an analytical perspective, of the different approaches of economists to the relationship between market structure and innovation.\(^{60}\)

As occurs in other markets, product differentiation can also play an important role in determining the competitiveness or closeness of competition between different pharmaceuticals. For example, originators might enjoy a better position in the market as a result of the publication of clinical trial evidence (e.g., as regards the efficacy or safety

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56 See, e.g., Case COMP/M.5661 – Abbott/Solvay Pharmaceuticals, at paragraph 119; Case COMP/M.5502 – Merck/Schering-Plough, at paragraph 38.
58 See Case COMP/M.5502 – Merck/Schering-Plough, at paragraph 38.
59 See Case COMP/M.7275 – Novartis/GlaxoSmithKline Oncology Business, at paragraph 105; Case COMP/M.5476 – Pfizer/Wyeth, at paragraphs 91 and 93.
profile of a product) or where their products are well-known to end users (e.g., as a result of branding advertising).

**Authorisation, price and reimbursement conditions**

The Commission sometimes finds that pharmaceutical markets present rigid pricing and entry conditions.⁶¹

The sale of prescription medicines is generally regulated in the EU and is often subject to reimbursement conditions from the social security systems of the Member States. As a result, the use of prescription medicines may rely heavily upon the national authorisations and guidelines that doctors and medical staff use for their prescription; and upon the extent to which the financial burden is ultimately borne by the affected Member State (or private health insurances, or both) in question. In question.

As previously indicated, the impact that authorisation procedures, pricing and reimbursement conditions have on consumption levels for certain pharmaceutical products is such that these elements have been used in a number of Commission precedents to exclude products from the relevant market despite therapeutic indications being identical.⁶² In addition, price regulation and reimbursement schemes in the Member States are likely to be of crucial importance when analysing the ability of a merged entity to increase prices post-transaction in markets for prescription medicines.⁶³ Reimbursement schemes that encourage generic competition may also be taken into account when determining whether a transaction leads to competition concerns.⁶⁴

**Generic competition**

The existence of competitive constraints from generic manufacturers can be of great importance in determining whether a concentration will give rise to competition concerns. Broadly speaking, after the expiry of the relevant patent, generic pharmaceutical companies are in competition with one another and with originator companies.⁶⁵ In general, generic companies focus on price competition and tend to invest less in branding and advertising, given the limited importance attributed by them to differentiating their products from originator products. In addition, in a number of countries, regulatory substitution rules and mechanisms will ensure generic market penetration with limited promotional activities being needed. Finally, in a majority of countries in the EU, the entry of a generic product may trigger price reductions, as a result of which demand tends to shift away from originators.

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⁶¹See, e.g., Case COMP/M.7275 – Novartis/GlaxoSmithKline Oncology Business, at paragraph 62.

⁶²Ibid, at paragraphs 123–124; Case COMP/M.5865 – Teva/Rationpharm, at paragraph 90.

⁶³Ibid, at paragraph 65, where a number of factors were cited in support of the view that prices in all the affected countries for many medicines in mature generic markets were upwardly inflexible or could only be increased with difficulty.

⁶⁴See, e.g., Case COMP/M.5295 – Teva/Barr, at paragraphs 186 ff.

In assessing competition between originator and generic companies, the Commission considers, *inter alia*, the asymmetries in their respective product offerings or market focuses to assess whether the two products are closely competing.66

**Competitive dynamics for OTC products**

OTC medicines are subject to different competitive dynamics than those identified for prescription medicines. Indeed, the sale of OTC products is usually significantly less subject to reimbursement regulations or to the prescription guidance of doctors, which shifts the decision-making role to pharmacists and end users. As a result, the success of OTC medicines tends to rely on (consumer-focused) advertising, innovation (often in the form of customisation to suit user preferences) and branding strategies. Generic OTC medicines sometimes exert significant competitive constraints on branded OTC medicines, although the ultimate impact of such constraints will ultimately depend on the brands and products in question.67

**Non-horizontal effects**

Concentrations between pharmaceutical companies can lead to competition concerns where the parties are active in markets that are upstream, downstream or adjacent of one another (e.g., APIs and finished dose pharmaceuticals).68 As with other non-horizontal mergers, the importance of these will depend on the market presence and power of the merging parties in the relevant upstream and downstream markets, and their ability and incentive to leverage this presence into other markets to foreclose competing companies.69

**iii Remedies and commitments in merger control**

The history of EU merger control in the pharmaceutical sector is characterised by the absence of prohibition decisions. However, the Commission has accepted commitments proposed by the merging parties primarily during Phase I investigations. As regards Phase II investigations, cases have been completed with commitments decisions mainly in the related but separate medical devices industry.70

Where the Commission has identified concerns that result from the horizontal overlap created by a concentration, it has traditionally required the divestiture of entire

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66 See Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraph 484, regarding generic and generic differentiation; Case COMP/M.6258 – Teva/Cephalon, at paragraph 12, regarding originator and generic differentiation.
67 See Case COMP/M.6280 – P&G/Teva OTC Business, at paragraph 20; Case COMP/M.3751 – Novartis/Hexal.
68 For vertical concerns see, e.g., Case COMP/M.6258 – Teva/Cephalon, at paragraphs 133 ff and Case COMP/M. 3493 – Yamanouchi/Fujisawa. For conglomerate concerns see, e.g., COMP/M.5999 – Sanofi-Aventis/Genzyme, at Section 4.6.
69 See, e.g., Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraphs 511 ff; Case COMP/M.6258 – Teva/Cephalon, at paragraphs 133 ff.
70 See, e.g., Case COMP/M.3687 – Johnson & Johnson/Guidant; Case COMP/M.6266 – Johnson & Johnson/Synthes; and Case COMP/M.7265 – Zimmer/Biomet.
product lines or businesses, or both, to eliminate a significant part of the parties’ overlap in a problematic (geographic or product) market.\textsuperscript{71} The appropriateness and suitability of the assets, IPRs, licences, supplies, personnel, customer lists or proposed buyer will be key in determining the acceptance of any proposed divestitures, in particular where the divested business risks are not being considered as a stand-alone entity by the Commission but rather as part of a larger business that, when severed from the entity, could have limited viability, competitiveness and ability to innovate post-transaction.\textsuperscript{72} Where necessary, the Commission might require that the acquirer enter into agreements with the divestiture buyer prior to clearance in order to ensure that the latter will be committed to carrying out R&D investments and launches of pipeline products.\textsuperscript{73}

Given the complexity of the pharmaceutical sector, the Commission has sometimes required that the divestiture of product lines or businesses be supported with the provision of technical assistance in the production, sale and marketing of the pharmaceutical product.\textsuperscript{74} Sometimes, to facilitate the market entry and sustained competitiveness of third parties, the Commission has required the divestiture of a product line to be supplemented with the divestiture of a distribution business.\textsuperscript{75}

In other circumstances, however, the Commission has accepted licensing arrangements as an alternative to divestitures where, for instance, the proposed divestiture would hinder ongoing research or it would be impossible due to the nature of the business.\textsuperscript{76}

In addition, to the extent that the competitive concerns related to the grant of exclusive rights or licences to other competing entities, the Commission has accepted commitments to, dilute or remove altogether minority shareholding relationships

\textsuperscript{71} See, e.g., Case COMP/M.3544 – Bayer Healthcare/Roche (OTC business), at paragraphs 57 ff, regarding divestitures of product lines; Case COMP/M.3751 – Novartis/Hexal, at Section 6, regarding divestitures of sale and marketing rights; Case COMP/M.4314 – Johnson & Johnson/Pfizer Consumer Healthcare, at paragraphs 138 ff, regarding the divestiture of assets (e.g., inventories, clinical data, trademarks); Case COMP/M.4779 – Akzo/ICI, at paragraphs 53 ff, regarding the divestiture of a shareholding in a joint venture. See also Case COMP/M.5253 – Sanofi-Aventis/Zentiva, at paragraphs 550 ff; Case COMP/M.5295 – Teva/Barr, at paragraphs 205 ff.

\textsuperscript{72} See, e.g., Case COMP/M.6851 – Baxter International/Gambro, at paragraph 564 and 571 (where the merging parties proposed an up-front buyer). For the need to ensure supplies and licences in the medical devices sector, see Case COMP/M.7326 – Medtronic/Covidien and Case COMP/M.7265 – Zimmer/Biomet.

\textsuperscript{73} See Case COMP/M.7275 – Novartis/GlaxoSmithKline Oncology Business.

\textsuperscript{74} See, e.g., Case COMP/M.4314 – Johnson & Johnson/Pfizer Consumer Healthcare, at paragraphs 139 and 140.

\textsuperscript{75} See Case COMP/M.5778 – Novartis/Alcon, at paragraphs 291 ff.

and other contractual arrangements (e.g., turn exclusive licensing relationships into non-exclusive relationships, limiting supply agreements.

V CONCLUSIONS

While the substantive analysis of mergers in the pharmaceutical sector might not be fundamentally different from that carried out in other innovation-intensive regulated industries, it presents the following particularities:

a the market definition process is characterised by the use of a range of different analytical tools to identify relevant markets. The Commission has a well-established approach to market definition on the basis of the EPhMRA ATC classification, nuanced by reference to other competitive drivers such as the distinction between OTC and prescription drugs and, where applicable, between originators and generics;

b actual competition is analysed mainly on the basis of observed overlaps in the relevant market or markets. In addition, the competitive assessment becomes more complex as the Commission takes into consideration innovation and other aspects of dynamic competition, the impact of regulation and reimbursement schemes, and the commercialisation stage of the relevant products; and

c where concerns arise deriving from horizontal overlaps, the Commission is not reluctant to require divestitures, emphasising the need for the divested business to constitute a viable stand-alone business.
Chapter 3

HIGH-TECHNOLOGY ASPECTS IN EU AND US MERGER CONTROL

Paul McGeown and Victoria Luxardo Jeffries

I INTRODUCTION

For more than a decade, the gaze of the world’s leading antitrust agencies has been firmly set on household names in technology such as Microsoft, Intel, Google, Facebook, Samsung and Apple. Investigations have targeted the allegedly exclusionary conduct of these corporations: the bundling of Internet Explorer with Microsoft’s operating system, the operation of Intel’s rebate scheme, the distribution of e-books, and the exploitation of patent portfolios by Samsung and others. These conduct inquiries have often been long and unwieldy, and the European Commission (EC) has attempted to justify them to the business community as a legitimate means for it to explore in detail how technology markets function and where the antitrust touch points lie. Merger investigations in the technology industry pose a different set of challenges: on what basis can an agency take jurisdiction over a transaction? What antitrust markets are in fact affected? How is market power to be measured? Is market power in the technology space prone to be ephemeral? What standard of proof must an agency satisfy if it is to block a merger or make approval conditional on commitments in a nascent and volatile market?

The importance of the jurisdictional question for the development of the law should not be underestimated because, except in the United States, where the Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have extensive jurisdiction to scrutinise M&A transactions even when they are not reportable under the Hart-Scott-Rodino Antitrust Improvements Act, the competence of the world’s major merger control authorities to vet a deal is usually only triggered if the target has generated significant local sales in the preceding financial year to satisfy local nexus rules. As the targets for M&A activity in high-technology industries are frequently still in

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start-up mode or do not yet generate significant revenues, the thresholds for mandatory review may not be met and potentially important transactions may escape *ex ante* review altogether. This dearth of reportable transactions makes it difficult for even the most sophisticated agencies to develop a corpus of evidence-based decisions that accurately reflect antitrust policy.  

More challenging again is the eye-watering pace at which many technology markets are evolving. On the supply side, a near-constant feed of new and innovative products, or improved iterations of better-established products, means that competition is dynamic and unstable. As a result, at a technological level, defining the relevant market for merger control purposes is fraught with uncertainty. On the demand side, the fickle and sometimes faddish nature of many consumer markets, especially those driven by youth demand, means that there can be sudden, sizeable and unforeseen shifts in use. For those observing the industry – potential investors, market research organisations and antitrust agencies – robust data can be difficult to collect and test. In many instances, figures that are barely six or 12 months old may already be inaccurate, making it practically impossible in many cases for merger control agencies to predict how a market is likely to evolve.

While no criticism is intended, the fact is that it is sometimes difficult to discern a clear pattern in the decisional practice of certain merger control agencies. The purpose of this chapter is to highlight a handful of areas where the DOJ, the FTC and the EC have grappled with some of the thornier questions asked in high-technology merger cases:

- the role played by market shares in merger control analysis;
- whether the existence of network effects in the merging parties’ markets inevitably makes unconditional approval less likely;
- whether the wide-scale imposition of interoperability remedies is justified; and
- the relevance of standard essential patents (SEPs) acquisitions to competition analysis.

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2 The paucity of EC merger control decisions in the high-technology sector explains why some European decisions mentioned in this article (i.e., Facebook/Instagram and Motorola Mobility Holding (Google)/Waze) are cases handled by the competition agencies of the UK, which can take jurisdiction over mergers where the parties account for at least 25 per cent of the share of supply of a product or service in the UK, even if the target’s local sales are insignificant.

3 For a discussion of pre-2009 cases where the transient nature of market power in technology markets was considered, and where antitrust agencies examined the circumstances in which network effects and lock-in might lead to anti-competitive outcomes, see I Knable Gotts, SA Sher and M Lee, ‘Antitrust Merger Analysis in High-Technology Markets’, *European Competition Journal*, December 2008 at p. 463. For a review of recent US merger cases on content providers and database software, see JA Eisenach and I Knable Gotts, ‘In Search of a Competition Doctrine for Information Technology Markets’, in Fabrizio Cugia di Sant’Orsola, Rehman Noormohamed and Denis Alves Guimarães, eds, *Communications and Competition Law: Key Issues in the Telecoms, Media and Technology Sectors*, September 2014 at p. 69.
II VALUE OF MARKET SHARES

The building blocks of day-to-day merger control analysis are market definition and market shares.

Criticised by some as a blunt instrument in the hands of the world’s competition agencies, in many jurisdictions, ‘market share’ is a ubiquitous tool for market analysis. It is used to identify cases that are suitable for simplified treatment or early termination; in the European system, it is used to identify affected markets that are deemed to merit a closer look; and throughout the world, when the figure is high enough, it is used as a lever by the regulatory agencies to persuade purchasers to offer concessions (typically a commitment to divest a business to a suitable buyer) to secure approval for their transactions. This is true whether the transaction affects goods or services in the ‘old’ economy or in the ‘new’. Nonetheless, the dynamic nature of the technology industry and agencies’ fear of making Type I or Type II errors in merger enforcement can make outcomes harder to predict in this sector than in longer-established and better-documented areas of the economy.

i Measuring market share in nascent and dynamic markets

In mature markets, monitored by trusted market research organisations with tried and tested data-gathering and interviewing techniques, industry reports are often a reliable indicator of the shape and size of an industry:

- patterns will be discernible;
- the impact of earlier mergers will be observable;
- shocks in the data will have been tested and explained through interviews; and
- the growth of segments or niches within the market will quickly be picked up by market-savvy observers.

In the high-technology industry, however, levels of confidence in the quality of market research and in the pertinence of ‘market shares’ as a metric for assessing mergers are inevitably lower. For example:

- How are ‘sales’ monitored?
- If the product is offered free, what is a credible measure of market power?
- Are there tangible ‘sales’ to count, or is a record kept of product downloads?
- Which other products are captured by the researchers?
- How is ‘use’ measured?
- Will sales of the new product cannibalise sales of other products or services, or complement existing products?

These complications have featured in a number of European merger cases. In 2012, the UK’s competition agency (at the time, the Office of Fair Trading (OFT)) took jurisdiction over Facebook’s planned acquisition of Instagram. As Instagram had not generated any revenue since its creation, the OFT took jurisdiction on the basis that there was a

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4 OFT, ME/5525/12 – Facebook Inc/Instagram Inc, decision of 14 August 2012.
horizontal overlap between the parties’ activities in what was called ‘the supply of virtual social networking services’ and that, based on hit data, Facebook’s share of supply in this market exceeded 25 per cent. In their filings with the OFT, the parties also submitted download data showing that, at that time, Instagram had been downloaded more than 45 times more than Facebook Camera. The OFT conceded that downloads were ‘an imprecise measure of market share’, but relied on the figures as ‘some indication of the availability and popularity’ of various photo sharing apps. More recently in Google/Waze, the OFT took jurisdiction over the transaction on the basis of data provided by the parties as to the number of downloads of turn-by-turn navigation apps in 2012.

It is highly debatable whether download figures are a reasonable proxy for market power in relation to apps. This is particularly so given the number of apps that are downloaded but scarcely used. However, in the absence of reliable data based on a more reasonable or accurate metric, it is one of the devices that the UK competition authority has exploited to take jurisdiction over cases that would otherwise escape regulatory review in Europe.

A better – but still flawed – metric would appear to be ‘reach data’ of the type submitted by Facebook to the EC in Facebook/WhatsApp in 2014. Those figures, owned and generated by Facebook (and so not independent), recorded the percentage of panelled users that had used a specific app on iOS and Android smartphones at least once in the preceding 30 days. Third parties claimed that ‘minutes of use’ data would be the best metric, but this was rejected by the EC. Instead, the EC expressed a preference for use per month and day, and for number of messages data, only to be forced to concede that there was no realistic prospect of capturing such data. The Facebook and Google matters serve to illustrate the challenge in capturing or characterising market share even in markets where copious amounts of data are produced and tracked.

ii When a high market share is not indicative of market power

A second question that arises in relation to market shares in technology markets is whether a high post-transaction market share is genuinely indicative of ‘market power’ (and therefore likely to lead to an anti-competitive outcome). An issue that arises by extension is whether a merger control agency can in good conscience approve an acquisition where the new business will have a non-trivial market share.

In Europe, the leading case in this area is Microsoft/Skype. In that case, the EC approved the acquisition without conditions despite the fact that there was a significant horizontal overlap between the parties’ businesses in the market for consumer (as opposed to enterprise) communications video calls on Windows-based PCs (Windows Live Messenger, 30 to 40 per cent share; Skype, 40 to 50 per cent). In a key passage in

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5 OFT, ME/6167/13 – Motorola Mobility Holding (Google)/Waze, decision of 11 November 2013.
6 COMP/M.7217 – Facebook/WhatsApp, decision of 10 October 2014, at Section 97 and footnote 45.
7 COMP/M.6281 – Microsoft/Skype, decision of 7 October 2011.
8 Prior to Microsoft/Skype, there were a handful of technology cases where unconditional clearances had been granted in circumstances where the merged business would have a market
The EC’s decision was upheld on appeal to the General Court (GC) in Luxembourg. The EC observed that:

‘[…] the consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and therefore of lasting damage to competition which Regulation 139/2004 seeks to prevent.’

The GC gave weight to the submission that users expect video calls to be supported not only on PCs but also on other platforms (such as tablets and smartphones), where Microsoft was weaker. The GC also stressed that the fact that consumer communications services were received free of charge meant that:

‘[…] the potential for the new entity to set its pricing policy freely is significantly restricted. [...] Any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge.’

Philips/Agilent, for example, the parties’ combined market shares in several Member States were above 40 per cent and sometimes 50 per cent, but the market investigation confirmed what had been claimed by the parties in Form CO – that the market for cardiac ultrasound is ‘R&D intensive and largely driven by technological innovations which take place at relatively rapid pace’. New products could capture market share quickly and any individual supplier’s share was liable to fluctuation, said the EC. See COMP/M.2256 – Philips/Agilent, decision of 2 March 2001; see in particular Section 31.

HP/Compaq, the EC found that the merged business would bring together the first and second players in the market for personal digital assistants (the forerunner of the smartphone) running on Microsoft’s operating system, with a combined market share of more than 85 per cent, but that the market investigation suggested that ‘any market leading position is temporary as PDAs have a very short technological life cycle’, that the barriers to entry were low and that Microsoft had ‘every incentive to attract as many OEMs as possible to operate its OS’. See COMP/M.2609 – HP/Compaq, decision of January 31, 2002.

9 See Microsoft/Skype, at Section 69.
11 See Cisco Systems v. Commission, at Section 68.
12 See Cisco Systems v. Commission, at Section 73.
While there was no one EC case in 2014 where the findings of the Court in Microsoft/Skype could be said to be dispositive, the impact of the decision and the subsequent judgment can be seen in a handful of decisions.

In Dolby/Doremi, for instance, the EC examined a merger between the two leading suppliers of standalone digital servers (used to load, store, decrypt, decode and re-encrypt films for projection in theatres and cinemas). The parties were first-to-market in the period between 2006 and 2010; both developed and sold high-quality second-generation products; and early sales of Doremi’s third-generation server were promising. In the EEA, Doremi’s share of servers in the last calendar year was 50 to 60 per cent, the parties’ combined share exceeded 70 per cent, and their installed base in servers (which had a life span of eight to 10 years) exceeded 80 per cent. Among their competitors, only Sony (which offered customers a bundle integrating the server and a Sony projector) had a market share of more than 10 per cent. Notwithstanding the combined business’s high pro forma market share, the appreciable overlap in sales and high barriers to entry in the form of research and development (R&D) costs, the EC concluded that the operation did not raise concerns meriting concessions. Critically, the EC found that the parties’ high share of the installed base (globally and in the EEA) ‘can be considered to be mainly the reflection of a first-mover advantage, rather than a reflection of their actual market power’. The EC further noted that a ‘trend towards integrated solutions’ (second and third-generation solutions) of the type offered by Sony and latterly by two other competitors meant that a stand-alone supplier such as the merged entity ‘could have a potentially weaker position’ than its pro forma market share suggested.

iii When zero market share does not guarantee regulatory approval

A third and more controversial question is whether agencies can and should take enforcement action when the antitrust market does not yet exist and where the merged entity’s market share is therefore zero.

The EC has been careful not to pursue aggressively mergers where there is as yet no market to monopolise. By contrast, however, the US antitrust agencies have increasingly advanced merger theories of harm that are premised on future potential competition (even where the transaction would not eliminate current head-to-head competition). Although the agencies have previously pursued this theory in pharmaceutical mergers (e.g., in relation to pipeline products), they are now applying potential competition analysis to technology industries too. Two clear examples of this expanded approach are to be found in the DOJ conclusions regarding Applied Materials Inc’s proposed acquisition of Tokyo Electron Ltd, and in the FTC’s challenge of Nielsen Holding’s proposed acquisition of Arbitron Inc.

Applied Materials announced its proposed acquisition of Tokyo Electron for US$29 billion in September 2013. The combined firm would have had an approximately 33 per cent share in the overall market for semiconductor manufacturing equipment.

14 See Dolby/Doremi/Highlands, at Sections 65 and 66.
but, other than in silicon etching and depositing, the firms were not head-to-head competitors; instead, they supplied the industry at different levels of the manufacturing process. The parties publicly stated that, to address possible competition concerns around the scale of the merged business, they were prepared to divest assets that generated up to US$600 million in revenue to purchasers approved by the competition agencies. Nonetheless, after undergoing an astonishing 580 days of review and protracted negotiations at the DOJ, the parties decided to abandon the transaction after the DOJ rejected the parties’ proposed remedy. In its press release commenting on the abandonment of the deal, the DOJ asserted that the proposed merger ‘would have combined the two largest competitors with the necessary know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment’.15 As stated by Acting Assistant AG Renata Hesse, the DOJ had concluded that ‘the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors’.

The finding in Applied Materials/Tokyo Electron is particularly noteworthy, because the DOJ rejected the combination not due to the elimination of head-to-head competition between the parties, but rather because of the potential anti-competitive effect on future R&D efforts in the overall market for semiconductor manufacturing equipment.

While unusual, a sortie of the type made by the DOJ in Applied Materials/Tokyo Electron is not unique in the US. In 2014, the FTC’s challenge in Nielsen/Arbitron was premised on a relevant market that did not exist at the time of the complaint – the prospective market for national syndicated cross-platform audience measurement services.16 The FTC alleged in its complaint that ‘Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service’, while simultaneously acknowledging that such as service is not ‘commercially available today’ and that ‘efforts to date have produced only custom projects or customer-sponsored beta-tests’.17 The parties settled the FTC’s allegations through a commitment by Nielsen to divest and license the ‘assets and intellectual property needed to develop national syndicated cross-platform audience measurement services’.18

17 Ibid.
These recent US cases clearly demonstrate that although market share analysis is usually the starting point for merger inquiries, it is not the end of the analysis. Indeed, the FTC’s action in Nielsen/Arbitron, when viewed together with its recent decision to close its investigation into Zillow Inc’s acquisition of Trulia Inc, suggests strongly that both US agencies are focusing on marketplace realities. In Zillow/Trulia, the FTC concluded that the economic evidence could not support a relevant market definition limited to online real estate portals because a significant portion of Zillow’s customers (for instance) would not switch to Trulia in the face of a small but significant increase in price, but rather to other means of real estate advertising.19 ‘The FTC further noted that the evidence in the case also did not support the notion that the ‘combined company would have a reduced incentive to innovate either on the consumer side or the advertiser side of its platform’.20

III WHEN NETWORK EFFECTS ARE A BARRIER TO ENTRY OR EXPANSION

A defining characteristic of network industries is that they involve products that are more valuable to customers the more widely they are used. A DVD player, for instance, is more valuable to the extent that it is in a widely used format for which a large number of films and television series are produced. This phenomenon, known as a ‘network effect’, can be critical to the functioning of many technology markets but need not necessarily be harmful to competition.

One lesson that can fairly be drawn from the EC’s decision in Microsoft/Skype is that, all else being equal, when the barriers to entry or expansion in a technology market are low, a high combined market share is not an insurmountable impediment to antitrust clearance. Where the relevant market is characterised by network effects, however, absent evidence of ease of consumer switching, the prospect of unconditional approval reduces.

Verisk Analytics’ proposed acquisition of EagleView Technology for US$650 million is a case in point. The deal concerned the market for rooftop aerial measurement products, where the merged entity’s pro forma market share would have been just short of 100 per cent. The market was new, and the mere existence of the acquiring company in the market proved that actual successful entry within less than two years was possible. Highlighting the fact that the market was characterised by network effects, in December 2014, the FTC unanimously voted out a complaint to block Verisk’s proposed acquisition, and the parties subsequently abandoned the merger. In its administrative complaint, the FTC alleged that the combination would eliminate Verisk’s ‘largest and most significant competitor for rooftop aerial measurement services

20 Ibid.
and reports [...] for insurance purposes.21 The FTC further alleged that the merging parties’ remaining fringe competitors would comprise only approximately 1 per cent of the total market.

The market for rooftop aerial measurement products for insurance carriers did not exist until 2008 when EagleView first entered. Prior to that time, insurance carriers had relied on insurance adjusters or contractors to climb up on to roofs and to take the necessary measurements to evaluate a claim for roof damage. The FTC contended that the traditional manner of measuring roofs did not exert a competitive constraint on the merging parties, and that therefore the transaction was effectively a merger-to-monopoly.22 The FTC conceded that Verisk had entered and taken share from EagleView in under two years, but asserted that barriers to entry were high and that the parties had failed to show cognisable efficiencies that could rebut the presumption of illegality given the combined entity’s very high market share. In its allegations related to entry, the FTC distinguished Verisk from other potential entrants as uniquely positioned to withstand EagleView’s aggressive patent litigation practices. Its complaint noted that ‘within the past three years, EagleView has eliminated almost all of these competitors, either by threatening and/or bringing intellectual property challenges or by acquisition’.23 Although the FTC acknowledged that EagleView’s patent infringement claims against competitors had yet to be litigated to completion, it concluded that ‘any competitor or new entrant must be prepared to defend its products from EagleView’s patent infringement claims, have access to a national library of high-resolution images and data, and be able to access insurance carriers through Claims Estimation Software’.24 The FTC’s allegations point not only to potential network effects as a barrier to successful new entry, but also to the important role of a firm’s patent portfolio – and the defensive possibilities therein – in its viability as a new entrant.

In Europe, the existence and impact of network effects in the technology industry was explored in some depth in Microsoft/Skype. In relation to consumer-oriented video services, the EC concluded, on the facts, that any harmful network effects that might be experienced as a result of that transaction would be mitigated by the fact that most consumers used video call services to contact a small group of family and friends, so that were the quality of the combined business’s service to deteriorate, any particular circle (or circles) of friends or colleagues could easily switch to a competing provider. Secondly, and more importantly perhaps for the treatment of later cases, the EC – confirmed by the GC on appeal – stressed that the phenomenon of multi-homing, whereby users download and regularly use a variety of complementary apps (often free) to interact with

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22 See FTC Complaint, Verisk Analytics/EagleView, at Section 26.
23 Ibid., at Section 44.
24 Ibid., at Section 45
professional colleagues, friends and family, meant that network effects were unlikely to harm competition.\textsuperscript{25}

2014 saw the notion of network effects put through its paces again, in \textit{Facebook/WhatsApp}.\textsuperscript{26} The primary focus of the EC's analysis was the overlap between the parties' consumer messaging services: between Facebook Messenger, which had more than 250 million users worldwide (more than 100 million of whom were in the EEA), and WhatsApp, which had approximately 600 million users worldwide (of whom between 50 and 150 million were in the EEA). The EC’s market investigation indicated that the size of the user base and the number of friends and relatives using the same consumer app was either ‘important’ or ‘of critical value’ to customers, and therefore that network effects exist and are an important feature of the market. The EC went on, however, to acknowledge that the ‘existence of network effects does not \textit{a priori} indicate a competition problem’ and that intervention would only be merited if those effects were to empower the merged entity to foreclose competitors or make it more difficult for them to expand their customer base. According to the EC, three factors mitigated harmful network effects in the market for consumer apps:

First, the EC characterised the market for consumer apps as having a long track record of entry by new players and low customer switching costs. It found that competing apps are able to establish themselves, and grow and manage shocks or other disturbances in the market,\textsuperscript{27} such that ‘any leading market position, even if assisted by network effects, is unlikely to be incontestable’.

Second, the EC noted that a consumer’s use of one app does not exclude the use by the same consumer of one or more other apps, and that, indeed, a majority of users had installed and regularly used two or more consumer apps. Multi-homing of this type is facilitated, observed the EC, by the ease with which apps can be downloaded, because most are free, and because they do not take up much capacity on a modern smartphone. The fact that a large number of users would be on the merged entity’s network would not, concluded the EC, preclude them from using or being on competitors’ apps.

Third, the EC concluded that neither Facebook nor WhatsApp has the ability to lock in users to their networks. While third parties had contended that the combined business’s ability to limit the portability of a user’s message history meant that users would be locked in to its product, the EC found instead that users retain access to their message history on their handsets even if they use another app.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{25} The GC noted that the products (apps) were free, that innovation cycles were short and that users were ‘easily portable’. The GC expressly observed that ‘the existence of network effects does not necessarily procure a competitive advantage for the new entity’, at Section 76.
  \item \textsuperscript{26} COMP/M.7217 – Facebook/WhatsApp, decision of 10 October 2014.
  \item \textsuperscript{27} The EC specifically mentioned in its decision the fact that, immediately following the announcement of the Facebook deal, thousands of WhatsApp users (some allegedly worried about the operation of Facebook's privacy policy) downloaded one or more new messaging apps (e.g., there was an almost-immediate surge, said the EC, in downloads of Telegram). See Facebook/WhatsApp, at footnote 79.
  \item \textsuperscript{28} See Facebook/WhatsApp, at Sections 132 to 134.
\end{itemize}
IV HOW FREQUENTLY ARE INTEROPERABILITY REMEDIES ACTUALLY NEEDED?

The EC is anxious to avoid the situation where the merging parties would be able, post-transaction, to use their intellectual property to reserve to themselves a significant time or technological advantage. In furtherance of this enforcement goal, the EC has made effective interoperability a precondition for the approval of a handful of mergers.

Cisco/Tandberg\textsuperscript{29} concerned two suppliers of video communications services. In that matter, the EC feared that the grant of a licence of Cisco’s proprietary TIP video screen protocol to smaller rivals might be delayed or that Cisco would otherwise degrade the interoperability of the merged entity’s products and those of its competitors. The EC conditioned the merger by requiring Cisco to divest the rights attached to its proprietary protocol TIP to an independent industry body. The condition was designed to ensure interoperability with Cisco’s solutions and to allow other vendors to participate in the development and in the updates of the protocol.

In Intel/McAfee,\textsuperscript{30} the EC analysed the likely effect of a conglomerate merger between the world’s largest computer chip firm (Intel) and the second-largest supplier of IT security software used to protect internet-connected devices from malicious content or malware. Unlike at the EC, the transaction was approved without conditions by the FTC. The EC, for its part, concluded that, post-transaction, the merged business would have both the ability and the incentive to degrade the interoperability of Intel CPUs and the products marketed by security software vendors competing with McAfee, and McAfee’s security products and the CPUs of Intel’s competitors (notably AMD). EC staff were particularly concerned by complainants’ allegations that Intel would reserve for the exclusive use of McAfee certain performance-related parameters, allowing McAfee to develop better security solutions faster than its rivals, ultimately ‘leading to the exit or at least significant weakening of McAfee’s main competitors within the next two to five years’.\textsuperscript{31} The transaction was only approved once Intel had committed to make instruction, interoperability and optimisation information available for use on a royalty-free basis by third-party security software vendors, and to dedicate no fewer than 10 full-time software engineers to assist McAfee’s competitors in implementing Intel technological changes into their security software. All of these measures were subject to oversight by a monitoring trustee.

In the wake of the Intel/McAfee decision, a senior EC official was reported as stating that the release of information by Intel to its competitors was likely to set the tone for future mergers in the technology space, and that the Intel/McAfee package would likely serve as a benchmark for the construction of commitments packages. The term ‘interoperability’ remains a buzzword used in informed conversation about high-technology mergers subject to review by the EC. But the reality is that, since Intel/ McAfee, the European mergers that have cleared subject to interoperability commitments have been few and far between.

\textsuperscript{29} COMP/M.5669 – Cisco/Tandberg, decision of 29 March 2010.
\textsuperscript{30} COMP/M.5984 – Intel/McAfee, decision of 26 January 2011.
\textsuperscript{31} See Cisco/McAfee, at Sections 130 and 125.
The dearth of interoperability cases may reflect the fact that, in absolute terms, the number of problematic high-technology cases up for review is modest. The better view probably is that, having put technology businesses on notice that well-founded and properly articulated non-horizontal concerns could lead to the imposition of an interoperability commitment, the EC has concluded later investigations in one of two ways. In some cases, the EC has been able to satisfy itself that, while all manner of technical options might be available to the merged entity to enable it to take action to foreclose an upstream or downstream rival, the commercial or financial incentive to do so is weak. Alternatively, in other matters, the EC has concluded it had insufficient evidence that the anti-competitive effects of an implemented foreclosure strategy would occur within the two-to-five year time frame mentioned in Intel/McAfee.

In Microsoft/Skype, announced less than four months after the conditional approval of Intel/McAfee, the EC’s conglomerate concern centred on enterprise communications, and specifically on the fear expressed by telecommunications operators and by Skype’s other competitors that the merger would create a preferential link between Lync (Microsoft’s system) and Skype’s larger user base. The parties’ rivals alleged that the combined entity could accomplish this either by degrading Skype’s interoperability with rivals’ operating systems, or by degrading the interoperability of Microsoft’s Windows operating system with video services competing with Skype. The EC gave short shrift to these allegations. First, it dismissed the ability of the merged business to degrade the interoperability of Skype with other operating systems. Second, the EC found that, assuming the integration of Lync and Skype could be successfully completed, any possible negative effects were ‘unlikely in the next three years’ time frame relevant for this assessment’. Against this backdrop of uncertainty, in a market characterised by relatively short innovation cycles, the EC was unable to assert that it harboured serious doubts sufficient to warrant intervention.

The EC’s track record since Intel/McAfee indicates that it may be the high watermark for remedies enforcement in Europe, and that contrary to expectations in 2011, there is no EC ‘policy’ of seeking interoperability commitments (less still a divestiture of the type seen in Cisco/Tandberg) in technology mergers.

V IMPACT OF INHERITED LIABILITIES ON ABILITY TO FORECLOSE

One last published decision from 2014 that merits mention is Lenovo’s purchase of Motorola Mobility. The acquisition included 100 per cent of the shares in Motorola Mobility, the assignment of more than 2,000 design patents relating to the ornamental appearance of Motorola Mobility products and components, more than 100 patents and patent applications for infrastructure network and mobile handsets, and a broad licence to Google-retained patents. In its description of the transaction, the EC noted that in

32 See Microsoft/Skype, at Sections 204 to 208.
33 Ibid., at Section 221.
34 COMP/M.7202 – Lenovo/Motorola Mobility, decision of 26 June 2014.
April 2014, more than two months after it had agreed to acquire Motorola Mobility but before notification, Lenovo had also acquired around 110 patents from Unwired Planet Inc. The Unwired Planet transaction included seven European and 14 US patents that had been declared standard essential to the operation of smart mobile devices.

While the acquisition of the Unwired Planet assets was not subject to the EC’s jurisdiction, the EC had regard to the impact of the SEPs in its substantive assessment. The EC considered whether, as a result of the transaction, Lenovo would have the ability and incentive to foreclose rival suppliers of smart mobile devices from the market by restricting access to the patents recently acquired from Unwired Planet.

Lenovo submitted that it would continue to be constrained by the fair, reasonable, and non-discriminatory (FRAND) commitments that Unwired Planet had made in relation to the SEPs, and that those commitments ‘substantially reduce[d] its ability to engage in input foreclosure by threatening injunctive relief against willing potential licensees’. Lenovo added that its ability to foreclose was further impeded by the fact that the SEPs that it had acquired had already been widely licensed to a large number of corporations, representing a ‘significant proportion of competing suppliers of smart mobile devices’.

Having secured confirmation from Lenovo that the burden of the FRAND commitments was transferred to Lenovo in its patent purchase agreement with Unwired Planet, the EC concluded that it was ‘unlikely that Lenovo would be able to engage in an input foreclosure strategy’.

VI OUTLOOK AND CONCLUSIONS

In the same way that unstable market shares make it more difficult for an antitrust agency to allege that a firm enjoys market power, the different approaches that have been taken by the EC and by US agencies to recent high-technology mergers indicate that regulators – despite their best efforts – are still coming to terms with the issues in this dynamic area of the global economy.

The different positions taken by the FTC and the EC on Intel/McAfee (following on the heels of the divestment of intellectual property rights to an industry association in Cisco/Tandberg) had sent a strong signal to dealmakers that the EC might take a harder line in enforcing the merger rules than its counterpart agencies in the US. Four years on, however, and the pendulum has swung. The EC’s analysis of the ability and incentives of the merging parties to profitably pursue a foreclosure strategy has become more sophisticated, and the EC has not seen fit to seek commitments ‘as a matter of

36 Ibid., at Section 41.
37 Ibid., at Section 47.
course’ as might have been understood. 38 At the same time, both the DOJ and the FTC have begun to explore theories of harm that focus not on the positions that the merging businesses have secured but on their unique ability to leverage their know-how and technical expertise to monopolise future markets.

38 This is not to say that the EC does not seek commitments in appropriate cases. Indeed at the end of 2014, it secured an extensive access commitment from IMS Health to ensure that post-transaction, the combined business would continue IMS’s then-current practice of entering into third-party access agreements that enable pharmaceutical companies to share information about IMS’s IP-protected ‘brick structure’ with providers of health-care professional databases and customer relationship management and master data management software. COMP/M.7337 – IMS Health/Cegedim Business, decision of 19 December 2014.
Chapter 4

INTERNATIONAL MERGER REMEDIES

John Ratliff, Frédéric Louis and Cormac O’ Daly

I INTRODUCTION

When planning an acquisition or merger involving companies operating on a global scale, the days when the merging parties could focus their strategy on obtaining merger approvals in North America and Europe are over.

Previously, parties were aware of the need to notify in other countries. However, often these jurisdictions were treated as lower priority for two main reasons: due to the belief that they would follow the lead provided by the US and EU authorities; and because, if a problem arose in a smaller jurisdiction, the parties would argue that this could be addressed by a local ‘hold-separate’, while the merger could proceed elsewhere.

That model is now out of date. As the economic importance of BRIC and other countries has grown, more competition authorities are asserting their views on worldwide cases and remedies. Now, not only may the US and EU require broad remedies with a transnational impact, but remedies may also be required in at least Australia, Brazil, China, Japan, Korea and South Africa. 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 rose to 65 in 2014.2

In practice, therefore, the group of countries that should be in the ‘primary focus group’ for merger review has grown. Other authorities may not be expected just to defer to the more established authorities’ positions. Where they see specific local concerns, they may also impose remedies.

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Some local interventions remain pragmatic rather than strict, because a competition authority in a small 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 may just withdraw from the local market. However, even then, such a situation may still lead to behavioural remedies in that country.

Further, the trend is for parties to face fines when they close transactions early, leaving a local ‘hold-separate’ in a smaller country, where the authorities seek to emphasise that their concerns also must be met.

With this in mind, merger planning should cover coordinating filings and remedy assessment and design worldwide, dealing with any jurisdiction where substantial lessening of competition or dominance issues could arise. Such review should also assess where other national economic or public interest factors could apply.

Below we highlight some prominent cases that illustrate well the diverse issues being raised by international merger remedies today: the Seagate/Samsung and Western Digital/Viviti cases, Glencore/Xstrata, and Microsoft/Nokia, as well as two examples of effective cooperation between agencies, namely Cisco/Tandberg and UTC/Goodrich (see Section II, infra). We then outline some of the key background to international merger remedies, frequently drawing on very useful OECD studies on the topic (see Section III, infra). Finally, we offer some practical conclusions for companies and their advisers (see Section IV, infra).

3 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.

4 See, for example, the European Union and Australian contributions to the OECD report, 2011, p. 153 and p. 105 respectively.

5 Other notable recent transactions that required review and remedies in numerous jurisdictions include: Thermo Fisher Scientific Inc/Life Technologies, in which Australia, the EU, New Zealand and the US required divestitures and in which China imposed additional divestiture and behavioural remedies; Merck/AZ Electronic, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction; the Holcim/Lafarge merger, which involves divestitures in multiple countries; and the series of GSK/Novartis deals. It may also be of interest to note that Archer Daniels Midland/GrainCorp, which involved Archer Daniels Midland’s planned acquisition of GrainCorp, was prevented by the Australian Treasury, notwithstanding the fact that the Australian Competition and Consumer Commission (ACCC) and other competition authorities had cleared the acquisition: see http://resources.news.com.au/files/2013/11/29/1226771/015541-131129-joe-hockey.pdf.

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

These two global mergers continue to be particularly interesting in terms of international merger remedies. Ultimately, most jurisdictions decided to clear these transactions in the sector for hard disk drives for storage of digital data (HDDs) on condition that Western Digital (WD) sell some production assets to Toshiba. However, while China’s MOFCOM allowed the transactions to go through, importantly, it imposed materially different remedies (which had worldwide impact) compared with those required by other competition authorities. MOFCOM required:

a Seagate to hold the Samsung business separate and to run the two businesses separately, with the ability to apply for review in one year; and

b WD to hold separate the Viviti business remaining after the divestiture to Toshiba and run the two businesses separately, with the ability to apply for review in two years.

The key issue was that, with both transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater. In general, the competition authorities around the world agreed on the central issues. However, their conclusions and approaches differed. The main points were as follows:

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

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

Third, the EU, US, Japanese and Korean authorities diverged from China on what remedies were required in WD/Viviti. The EU required WD/Viviti to divest certain production assets, including a production plant, to an approved third party before

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7 See the EC’s decisions in Case COMP/M.6214, Seagate/HDD Business of Samsung: http://ec.europa.eu/competition/mergers/cases/decisions/m6214_20111019_20682_2390485_EN.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.

closing the deal.\textsuperscript{9} The US did the same, requiring a named upfront buyer, Toshiba.\textsuperscript{10} The Japanese and Korean authorities also required similar divestitures.\textsuperscript{11} However, in addition to this divestiture, MOFCOM required WD and Viviti to be held as separate businesses until approved, allowing WD to apply for such approval in two years (a ‘fix-it-first’ remedy).\textsuperscript{12} In effect, MOFCOM therefore cleared the Seagate/Samsung and WD/Viviti transactions only in the sense that the equity transfers could occur, but denied approval to the business mergers.

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. MOFCOM also required that the companies would not require TDK (China) to supply HDD heads exclusively to Seagate or its affiliates, or restrict TDK supplying other producers.

Fifth, it appears that there was widespread cooperation between competition authorities. For example, the FTC states that its staff cooperated with authorities in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore and Turkey, including working closely on potential remedies.\textsuperscript{13} Since many of these authorities do 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 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.

\textit{Comment}

MOFCOM’s approach raises a number of points.

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

Second, in both decisions MOFCOM emphasised its concern to allow large computer manufacturers to keep their ‘procurement model’, in which they divide their demand among two to four manufacturers.\textsuperscript{14} MOFCOM also noted that when WD lost HDD production capacity because of floods in Thailand in 2011 and raised selling prices

12 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.
13 Federal Register, op. cit. 9, p. 14,525, column 3.
14 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.
of HDDs, other HDD manufacturers followed, with some product prices rising over 100 per cent. MOFCOM thus saw real competitive implications of reduced or more concentrated supply, or both, in China.

Third, arguably what MOFCOM did was to be diplomatic to its US and EU counterparts when it was not comfortable with the level of concentration if the two transactions went through. Rather than outright prohibitions, the hold-separates appeared to give opportunities to see if things might change in the future and, in particular, to see whether Toshiba, with its new assets, could develop to become a third force in HDD. In short, MOFCOM’s approach appeared to give scope for phased and proportionate review over time, albeit that it reflected a more cautious approach than that taken in the EU and the US.

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 (and, at the time of writing, still face) considerable uncertainty as to what the future holds. In short: when, if at all, would they be able to fully integrate, or would they later face an order to divest? That said, recently it has been reported that MOFCOM is expected to conclude a review of the hold separate remedies in these two cases in 2015. It will be interesting to see what happens.

Fourth, such hold separate remedies 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.

As such, these cases remain important in illustrating the differences in assessment approach that can occur in a worldwide deal.

ii Glencore/Xstrata
The Glencore trading and production group’s acquisition of Xstrata’s mining business is also a useful case that raised diverse merger remedies issues.

In October 2012, the South African Competition Commission (SACC) recommended clearance, with remedies, after close scrutiny of the acquisition’s implications for coal supply in South Africa. The SACC found that there was no substantial lessening of competition. However, in the public interest, conditions were imposed regarding proposed job losses, limiting such to 80 employees initially, with a further loss of 100 lower-level employees only a year later with a financial contribution towards their retraining.

In November 2012, the EC cleared the acquisition at the end of a Phase 1 review, with remedies, the focus in Europe being on zinc supply. Glencore agreed to divest a minority shareholding and to behavioural remedies.

15 MOFCOM Seagate/Samsung and WD/Viviti decisions, paragraph 2.6.
In April 2013, MOFCOM cleared the acquisition, subject to different remedies.\(^\text{19}\) The review took over a year, going into Phase 2, the notification being withdrawn and re-notified, and then again going into Phase 2. MOFCOM’s review focused on possible negative effects in the copper, zinc and lead markets. In particular, MOFCOM considered the potential impact on trading patterns (spot contracts versus long-term agreed quantity and price contracts, especially for copper concentrate), vertical integration (from mine to trading house) and market entry barriers in a heavily resource-focused and capital-intensive industry.

Interestingly, part of the Chinese concern was the way Glencore would be able to transform Xstrata’s annually negotiated mine contracts into trading or spot contracts. This type of concern, about the migration from annual negotiated prices (between Chinese producers and the three big producers) to spot prices, was also a factor in China’s opposition in the seaborne iron ore market.

These concerns were raised, despite market share levels on a worldwide or Chinese basis that generally would not raise concern in other jurisdictions. Even in copper, for which China was 68.5 per cent dependent on imports in 2011, Glencore’s worldwide market shares post-merger would be only 7 per cent in production, 9.3 per cent in supply and 9.5 per cent in trading. Looking at China alone, the post-merger entity’s market share in supply would only rise from 13.3 per cent to 17.8 per cent.

Nevertheless, MOFCOM imposed structural and behavioural remedies, apparently after consultations with other governmental departments. Glencore agreed:
\begin{itemize}
  \item[a] to dispose of Xstrata’s Las Bambas copper mine project in Peru by June 2015;\(^\text{20}\)
  \item[b] to guarantee a minimum supply of copper concentrate to Chinese companies until 2020, including pre-defined volumes at negotiated prices; and
  \item[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.
\end{itemize}


\(^{\text{20}}\) 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 Department of Justice (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.
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.\(^{21}\)

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

iii Microsoft/Nokia

Microsoft’s acquisition of Nokia’s devices and services business was completed in April 2014.\(^{22}\) Among the 16 authorities that reviewed the transaction, the EC unconditionally cleared it and the FTC announced early termination of its investigation. MOFCOM engaged in a longer review resulting in a conditional clearance, while the acquisition was also delayed by the Indian Supreme Court freezing Nokia’s assets there as part of a tax dispute.\(^{23}\)

 Competitors and licensees had expressed concern regarding the parties’ post-transaction conduct, since Nokia would retain ownership of its patents, some of which were standards essential patents (SEPs). The EC decided that assessing post-transaction behaviour was outside the scope of the EU Merger Regulation,\(^{24}\) but

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\(^{21}\) 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/201304/2013040100376.shtml (Chinese text). For further discussion on this case, see the 2014 edition of this book at p. 496.

\(^{22}\) See Microsoft press release ‘Microsoft looks to remake the mobile market with acquisition of Nokia Devices and Services business’ of 25 April 2014, available at http://blogs.technet.com/b/microsoft_blog/archive/2014/04/25/microsoft-looks-to-remake-the-mobile-market-with-acquisition-of-nokia-devices-and-services-business.aspx. It is reported that the original deal was restructured to make it non-reportable in Korea, but the Korean Fair Trade Commission (KFTC) nonetheless continued to review it. In May 2015, the KFTC announced the terms of a proposed consent order. If approved, this would be the KFTC’s first merger consent order; see Global Competition Review, 19 May 2015.


\(^{24}\) Microsoft/Nokia, paragraph 224. A related issue is the threshold question of what constitutes a transaction reviewable under merger control rules. A recent example of diverging approaches to this was the proposed P3 Shipping Alliance, which MOFCOM reviewed and blocked, using merger control, whereas in the EC the proposed cooperation was not reviewable under merger control, but instead was reviewed under behavioural competition laws. See www.maersk.com/en/the-maersk-group/press-room/press-release-archive/2014/6/the-p3-network-will-not-be-implemented-following-decision-by-the-ministry-of-commerce-in-china.
also that, in any event, the transaction would not give rise to any serious competition issues.\textsuperscript{25}

MOFCOM, after a seven-month review, completed in an extended Phase 2, required extensive behavioural commitments from both Microsoft and Nokia in relation to SEPs and non-SEPs.\textsuperscript{26} The commitments were effective for eight years (with the conditions relating to SEPs indefinite unless MOFCOM agrees to modify or terminate them).\textsuperscript{27} It appears that MOFCOM wanted to pre-empt the risk of Nokia using its patents against Chinese smartphone manufacturers.\textsuperscript{28}

\textit{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 good examples of effective cooperation between the EC and the US 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.\textsuperscript{29} The EC accepted that the remedies would address the concerns that it had identified during its investigation and cleared the acquisition in Phase 1. The DoJ’s press release, announcing that it would not challenge Cisco’s acquisition, expressly noted the commitment entered into with the EC. Assistant Attorney General Christine Varney noted: ‘This investigation was a model of international cooperation between the United States and the European Commission. The parties should be commended for making every effort to facilitate the close working relationship between the Department of Justice and the European Commission.’\textsuperscript{30}

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.\textsuperscript{31} The CCB noted that these remedies ‘appear to sufficiently mitigate the potential anti-competitive effects in Canada’

\textsuperscript{25} Microsoft/Nokia, paragraph 238.
\textsuperscript{27} Microsoft’s commitments to MOFCOM differ from the decision of the Taiwanese Fair Trade Commission, which required Microsoft not to engage in unfair pricing and discrimination.
\textsuperscript{28} In the EU, the EC brought a behavioural enforcement action against Motorola for having abused its SEPs, while not having objected to Google’s acquisition of Motorola in early 2012. See http://europa.eu/rapid/press-release_IP-14-489_en.htm.
\textsuperscript{29} See the EC’s decision in Case No. COMP/M.5669, Cisco/Tandberg, available at: http://ec.europa.eu/competition/mergers/cases.decisions/M5669_20100329_20212_253140_EN.pdf.
and, in particular since no Canadian assets were involved, decided not to impose any remedies.\textsuperscript{32} 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.\textsuperscript{33} The DoJ’s press release also noted its discussions with the Federal Competition Commission in Mexico and the Administrative Council for Economic Defence in Brazil.

Clearly, EC and US cooperation is highly developed.\textsuperscript{34} The EC and DoJ cooperation has developed from their first cooperation agreement in 1991.\textsuperscript{35} Their formal cooperation agreements have been amended since, most recently by the 2011 Best Practices on Cooperation in Merger Investigations.\textsuperscript{36}

### III KEY BACKGROUND

There are a number of facets of competition authority practice 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, since the competition authorities work with their particular laws and from their different regional or national perspectives, and often with different approaches and inputs (e.g., in terms of market testing), there is the potential for conflict both in substantive assessments and remedies.

\textsuperscript{32} See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html and OECD 2013 Roundtable at p. 36.


\textsuperscript{34} The US contribution to the OECD 2013 Roundtable also highlights the cooperation between the EC and the FTC in the General Electric/Avio investigation at p. 85. Regarding the EU contribution, the interesting example of Pfizer/Wyeth is also highlighted, including the close coordination between the EU and US authorities on the setup of two different EU and US divestment packages to two purchasers; the cooperation between two trustees, where one sub-contracted to the other on an ad hoc basis on some issues; and the transitional supply of a product divested in the EU package by manufacturing in the premises divested in the US package (see p. 43).


Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD\textsuperscript{37} and the ICN.\textsuperscript{38} The work of these organisations, which at times has been conducted in parallel,\textsuperscript{39} is not case-specific, but rather provides a forum for regular discussions and a network of contacts between individuals, so that authorities can notify each other and discuss broadly what they are doing about a particular case. Nevertheless, many of the examples discussed and quoted in these reports are very revealing as to the nature of cooperation on merger remedies (and, in some cases, the limits of that cooperation).

In October 2013, the OECD Competition Committee held a Roundtable on Remedies in Cross-Border Merger cases. The Secretariat noted that lack of cooperation and communication between enforcers reviewing the same transaction might lead to a ‘chilling effect’, where businesses restrict their merger activity to transactions acceptable in all jurisdictions in which they are notifiable.\textsuperscript{40} The Secretariat also 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.\textsuperscript{41} The Roundtable report emphasises 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.\textsuperscript{42} The Roundtable report also highlights the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.\textsuperscript{43}

There is also an ICN initiative to improve cooperation between competition authorities on mergers. After the Japanese Fair Trade Commission proposed establishing a non-binding ICN Framework for Merger Review Cooperation,\textsuperscript{44} the ICN Merger Working Group presented a Practical Guide to International Enforcement Cooperation at the ICN 2015 Annual Conference in Sydney. The purpose of this Guide is to facilitate effective and efficient cooperation between agencies through identifying agency liaisons and possible approaches for information exchange. The guidelines create a voluntary and flexible framework for inter-agency cooperation in merger investigations and provide practical guidance for agencies willing to engage in international cooperation, as well as

\begin{itemize}
\item\textsuperscript{37} 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.
\item\textsuperscript{38} 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.
\item\textsuperscript{40} See OECD 2013 Roundtable at p. 10.
\item\textsuperscript{41} Id.
\item\textsuperscript{42} Id. at, \textit{inter alia}, pp. 5 and 6.
\item\textsuperscript{43} Id. at, \textit{inter alia}, p. 6.
\item\textsuperscript{44} www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf.
\end{itemize}
for parties and third parties seeking to facilitate such cooperation. In September 2015, the Merger Working Group will discuss the implementation and dissemination of the Practical Guide at a workshop hosted by the EC.\footnote{See the Summary of ICN Work Product 2014-2015, Presented at the 14th Annual Conference of the ICN in Sydney (Australia) (29 April – 1 May 2015), at p. 9, available at www.internationalcompetitionnetwork.org/uploads/library/doc1029.pdf.}

There are also other layers of cooperation based on specific bilateral agreements, such as those between the EU and US authorities noted above, between the EU and Switzerland\footnote{http://europa.eu/rapid/press-release_IP-13-444_en.htm. This 2013 agreement envisages an ‘an advanced form of cooperation’ in the form of information sharing.} and between Australia and New Zealand\footnote{See the OECD report, 2011, pp. 102, 404. The OECD 2013 Roundtable notes how, following a change in its laws, the Brazilian authority has built informal relationships with multiple agencies to promote cooperation; see p. 28.}, which can be case-specific, where supported by appropriate waivers of confidentiality.\footnote{Antitrust authorities from the five BRICS countries are reportedly concluding an agreement to enable easier information exchange between them. See MLex report of 12 May 2015.} Recently, the US DoJ and FTC also concluded a general ‘best practice’ agreement with the CCB\footnote{www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03704.html.} and the ACCC signed a Memorandum of Understanding with MOFCOM to enhance communication on merger review cases.\footnote{See www.accc.gov.au/media-release/australia-and-china-to-increase-cooperation-on-mergers-regulation.}

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.\footnote{See the US, EU and UK contributions to the OECD report, 2011, at p. 296, p. 153 and pp. 288–9 respectively.} For example, the ICN recently published two presentations on cooperation between competition authorities.\footnote{See presentations at www.internationalcompetitionnetwork.org/uploads/library/doc940.pdf and www.internationalcompetitionnetwork.org/uploads/library/doc943.pdf.} 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.\footnote{See www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf at p. 6, which gives examples of ‘joint investigative tools’ including joint calls, meetings, interviews and requests for information.} Cooperation often led to coordination of remedies. Essentially, the theme is that the authorities will communicate with each other if they have common problems to solve.

Third, while in many cases a competition authority may decide to defer to review by established jurisdictions, many also consider that reliance on a foreign authority
might not deal adequately with local concerns. 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.55

In the Unilever/Sara Lee case, the South African Commission 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 Commission 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. Interestingly, the Commission 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. The Commission therefore appears to have shown sensitivity for the impact of other jurisdictions’ remedies internationally, while also showing that such remedies still do not ‘trump’ 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, while both the US and EU authorities may find worldwide markets and recognise worldwide dynamics, the US decision concerns the perceived effect on US commerce and the EU decision is based on the perceived compatibility of the transaction with the (EU) common market. Even if contacted by and cooperating with other competition authorities, the US and EU competition authorities are not ruling on the effects in, for instance, Brazil, Korea or Singapore. 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.58

55 See the Singapore contribution to the OECD report, 2011, p. 249.
57 See, for example, the United States contribution to the OECD report, 2011, p. 296.
58 See the Korea contribution to the OECD report, 2011, p. 170.
Fifth, a competition authority may consider that it cannot just rely on another jurisdiction’s remedy to ensure enforcement. An authority may need its own order, albeit modelled generally on a remedy accepted in other jurisdictions. For example, in Agilent Technologies/Varian, the ACCC required Agilent to comply with its commitments to the EC to divest itself of a number of businesses and accepted the two proposed purchasers. In so doing the ACCC noted, however, that the purchasers had ‘established and effective Australian distribution arrangements’. In other words, the ACCC checked that the EC remedy also worked in Australia.

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

Seventh, managing timing as far as possible is a major issue in achieving cohesive remedies. Competition authorities do not like it when a favourable review in one jurisdiction is then used to pressurise them to follow suit. They also do not like being a ‘non-priority’ jurisdiction that is only contacted late in the day. Unsurprisingly, therefore, they are increasingly advocating simultaneous contacts to facilitate simultaneous reviews of the same transaction. Practitioners also tend to emphasise the need to ‘work from the end’ and see how best 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, writing of a case where time was lost dealing with the unique concern of an agency brought into the process late on. It appears that an upfront buyer had been agreed on by all the reviewing authorities previously, ‘but then a new agency was brought in at the last minute and was unable to approve the potential buyer. We had to locate and approve another buyer that satisfied all agencies, adding months to the process and delaying the deal’.

Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required, 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.

IV CONCLUSIONS FOR COMPANIES AND THEIR ADVISERS

In light of all of the above, companies and their legal advisers should think and plan on a global scale, including as regards remedies, and 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. Even apparently worldwide markets are often more limited in scope, which may well mean that varied effects must be catered for. Nor should they 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 do so in their cases. Whether because of concerns about local effects or through a desire to have a locally enforceable remedy, other authorities may intervene.

In light of 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 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.

Parties should also consider how to involve all relevant competition authorities, and have those authorities conduct their investigations in parallel and in consultation with each other, taking into account each other’s possible demands (e.g., upfront buyer or not) and the practicalities of different timings for the approval of such remedies.66

That may mean:

a talking to the authorities concerned prior to filing, and filing earlier in one jurisdiction than another, or accepting a ‘stop-the-clock’ solution to allow an authority to catch up;

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66 Id, p. 22.
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
c talking to less-involved 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.67

As illustrated in some of the case studies in Section II, supra, MOFCOM often takes longer than other agencies to review complicated transactions. As such, early contact with MOFCOM is often advisable.68

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, ingenuity and patience. In some cases, counsel should also be active to facilitate and assist cooperation in the interests of seeing the deal through.

67 Case IV/M.269, EC decisions of 8 June 1994 and 24 April 1996; FTC File 941 0043, press release, 1 June 1995. More generally, the OECD 2013 Roundtable notes the potential need to consult with other authorities if an authority revises a remedy after clearance; see p. 7.
68 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.
Chapter 5

PHARMACEUTICAL ASPECTS OF US MERGER REVIEW

Claudia R Higgins and Saul P Morgenstern

I INTRODUCTION

Mergers involving pharmaceutical products and biologics\(^2\) are reviewed by US antitrust authorities at the Federal Trade Commission (FTC) under the same statutory provisions and policies that govern other industries. Primarily, the reviews are conducted pursuant to Section 7 of the Clayton Act, which prohibits acquisitions that may substantially lessen competition in US commerce, and Section 5 of the Federal Trade Commission Act, which makes illegal unfair methods of competition. In addition, the FTC and the Department of Justice (DoJ) have issued, and periodically revise, guidance, such as the Horizontal Merger Guidelines, which outline how the agencies evaluate the likely competitive impact of mergers, as well as possible remedies for competitive concerns. These statutes and the agency guidance apply to pharmaceutical mergers and acquisitions. Nonetheless, responding to a period of increased merger activity in the industry, the government’s review process and substantive analysis has since the 1980s developed a number of specialised characteristics in response to the pharmaceutical industry’s unique structure.

The particular characteristics of pharmaceutical merger reviews are largely the result of several factors. First, pharmaceuticals developed, marketed and sold are highly regulated by the US Food and Drug Administration (FDA) in a regulatory scheme that may be the most complex of any in this country. Second, development of branded pharmaceuticals (as opposed to generic drugs) is expensive and high risk, with many projects failing, and those that survive development, testing and FDA approval are protected by highly valuable intellectual property rights. Third, the ‘purchasing’ decision

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1 Claudia Higgins and Saul Morgenstern are partners at Kaye Scholer LLP.
2 Throughout this chapter, the terms ‘pharmaceuticals’ and ‘drugs’ are used interchangeably and include biologics. The issues raised here will also often affect medical devices.
with respect to prescription pharmaceuticals is more complicated than it is for most other goods, as it is affected by prescriber judgments, third-party payor interests, patient preferences and, importantly, the presence or absence of generic alternatives either for the product prescribed or for other products available to treat the same condition. These factors combine to make any analysis of competition among existing pharmaceuticals quite complex; adding in the role of the innovation ‘pipeline’ makes it more so. As a result, these factors have shaped merger reviews conducted in this industry, making such reviews more complex and, in some respects, different from merger reviews in other industries, even though the economic principles and statutory framework remain the same.3

II SPECIFIC PROCEDURAL ISSUES UNDER HSR REGULATIONS FOR PHARMACEUTICALS

Pursuant to Section 7A of the Hart-Scott-Rodino Act, pre-merger filings are generally required for transactions that have a value of approximately US$76 million or more (a figure that is adjusted annually) where the size of the parties to the transaction also meet or exceed certain additional thresholds. For specific information related to these reporting requirements, see the United States chapter. Pharmaceutical transactions, however, often raise specialised HSR reporting issues, such as those that are related to how to value the transactions or the types of patent licensing agreements that they may include.4

i FTC reviews of pharmaceutical mergers

Although both the DoJ and the FTC have statutory jurisdiction to review pharmaceutical mergers, the FTC consistently conducts reviews for transactions in this industry. Over the years, the FTC has developed particular expertise in the industry. Because two agencies have concurrent authority for transactions under Section 7 of the Clayton Act, and to avoid duplicative efforts for both the parties to a transaction and for the agencies themselves, the agencies have developed a ‘clearance process’ whereby the agency with greater expertise in the industry affected by a transaction will be fully in charge of any investigation and enforcement action needed. Once a matter is ‘cleared’ to one agency or

3 Note that a number of the factors and issues discussed will apply only to drugs dispensed by prescription and may not apply to over-the-counter (OTC) drugs. Many OTC pharmaceuticals began as prescription drugs, but the regulatory constraints on these products are somewhat more relaxed by the time the FDA allows them to be marketed as OTC drugs. In addition, third-party payors do not pay for or reimburse consumers’ purchases of OTC drugs, which means that the demand characteristics for these products is more like other consumer products than prescription drugs.

4 Another specialised reporting requirement for pharmaceuticals was established by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, pursuant to which companies must provide to the FTC and the DoJ agreements between brand-name pharmaceutical and generic drug manufacturers. This requirement, however, does not apply to mergers and acquisitions, so we do not discuss it further here.
the other, only the ‘cleared’ agency will be involved in any investigation or enforcement action related to that transaction, and the other agency will refrain from any involvement. While in most industries these agency clearances are determined on a case-by-case basis, for pharmaceuticals, the FTC is routinely the agency that obtains clearance. Despite this clear understanding, the FTC nonetheless takes the internal procedural steps required to obtain DoJ clearance for each matter.

Pharmaceuticals and medical devices are the purview of the Mergers I ‘shop’ within the Bureau of Competition at the FTC. Similarly, a number of economists in the Bureau of Economics are well versed in the pharmaceutical industry, and most often one or more of these experienced economists will be part of the merger review team.

Mergers I staff and the economists working with them have developed significant expertise over the past 35 years in the industry, and in some instances, they have also devised a number of standardised procedures for its reviews. For example, when a pharmaceutical merger involves generic drugs, the staff provides parties with a chart that is to be completed with specific information about each of the companies’ products and pending FDA approvals. Armed with this information, both the agency and the parties can begin substantive discussions early in an investigation, but the merging parties should be aware that providing this charted information is only part of the process. The FTC will still request and require other documents and information from the companies to determine what, if any, additional issues may be raised. If companies decide to discuss settlement with the FTC, the investigating team of attorneys from Mergers I and economists will contact the Compliance Division, which also includes individual staff with experience in the pharmaceutical industry. The groups will work closely together in developing and negotiating appropriate settlement terms, obtaining approvals from Bureau directors and putting a negotiated settlement before the full Commission for a vote once it is agreed to by the parties.

ii Difficult-to-value transactions
Pharmaceutical transactions that involve products still under research and development (R&D) often raise questions about how to value contingent payments in deciding whether the transaction exceeds the HSR reporting thresholds and requires a pre-merger filing. The contingent payments are typically based on milestones in a drug’s development, such as beginning certain types of clinical trials in humans or filing a new drug application (NDA) or receiving approval of an NDA. At the time a transaction agreement is signed, neither party is likely to know whether or when such milestones will be reached. This raises questions about just how to value the transaction for purposes of determining whether an HSR filing is required.

For asset acquisitions, the HSR rules state that the value of the assets to be acquired is greater of the acquisition price, if that price is considered to be ‘determined’, or the fair market value of the assets.5 When future payments are contingent upon milestones being reached, the purchase price may be considered ‘undetermined’ unless the purchaser is able to determine that the sum is likely to be paid. If the value cannot be determined, as

5 16 CFR Section 801.10.
will often be the case for pharmaceutical milestone payments, the transaction value will be its fair market value based upon the acquirer's good faith evaluation calculated on a commercially reasonable basis. The fair market value calculation is the responsibility of the board of directors of the acquirer, or its designee, based on a good faith determination of what a third party would pay in an arm's-length transaction (i.e., what a willing buyer would pay to a willing seller to acquire the assets). The value for HSR purposes will take into account only those monies attributable to the United States, and will exclude value that would be derived from non-exclusive licences (as opposed to exclusive licences, which do add to the HSR transaction value). 6

iii Additional HSR reporting requirements for pharmaceuticals

Although the HSR rules are generally applied across industries, since late 2013, transactions involving pharmaceuticals and other similar types of products have been subject to an additional requirement related to 'exclusive licences'. In other industries, the FTC generally requires that a transfer to another company of the right to 'make, use and sell' a product via an exclusive patent licence will be considered a transfer of assets under the HSR Act, but a patent licence transferring less than the right to 'make, use and sell' – such as when the patent holder retains the right to manufacture under its patent – is generally not interpreted to be an HSR-reportable transfer of assets.

As of late 2013, however, the rules for HSR reporting requirements of patent licences were changed for those transactions involving pharmaceuticals and other similar industries – medical and botanical manufacturing, pharmaceutical preparation manufacturing, in vitro diagnostic substance manufacturing and biological product (except diagnostic) manufacturing. 7 In these industries, the recently adopted rules define as HSR-reportable any transaction that transfers 'all commercially significant rights' to a patent within 'any therapeutic area (or a specific indication within a therapeutic area)'. Thus, for example, when a patent holder licenses to another company the exclusive right to sell its drug used to treat migraines in children, even when the patent holder retains the right to manufacture for itself and to sell its product to treat migraines in adults, that transaction may fall within the new HSR reporting requirements for pharmaceuticals. In addition, the FTC also defined a new term, 'co-rights', which formalises the agency's longstanding position that an exclusive licence where the patent holder reserves 'co-rights' will be subject to HSR reporting requirements. 'Co-rights' include rights to co-develop, co-promote, co-market or co-commercialise, and to assist the licensee in developing a commercialising the product. 8

6 16 CFR Section 801.10(c)(3).
7 In Pharm Research & Mfg of Am v. FTC, DC Cir, No. 14-5182, 6/9/15, the Court upheld a challenge to the legality of singling out the pharma industry for reporting certain patent right transfers.
8 The FTC continues to take the position that agreements that merely convey distribution rights will not constitute asset acquisitions that would be required to be reported under the HSR Act.
III  SUBSTANTIVE MERGER REVIEW

i  Relevant geographic market

As a general rule, the relevant geographic market for prescription pharmaceuticals is the United States as a whole. This is largely because of the regulatory requirements that pharmaceuticals must meet. The FDA carefully oversees the research, development and marketing of pharmaceuticals on a nationwide basis, and its regulatory framework closely controls virtually every aspect of the pharmaceutical industry, from the early R&D stages and throughout the time period that the products are sold in the US. New prescription pharmaceutical drugs may only be sold in the US under the auspices of an approved NDA, and generic equivalents to these brand-name pharmaceuticals may only be marketed when authorised via an abbreviated new drug application (ANDA). Biologics are similarly regulated, albeit under separate statutory provisions developed to address these products’ special characteristics. The FDA regulates not only each molecule or chemical that is used to treat diseases but also the methods of delivery for each of these drugs, such that different dosage forms (tablets, capsules, patches, injectable, and the like) must each be approved separately along with each respective dosage strength. Only upon obtaining necessary approvals from the FDA may pharmaceutical companies market and sell their products in the United States. And when these approvals are obtained, the products may be marketed across the entire country without impediment from particular state regulations. Thus, the FDA regulatory barriers to entry are sufficient to establish a nationwide geographic market.

ii  Issues raised by relevant product market analysis

The question for market analysis is to determine the ‘reasonable interchangeability of use of the cross-elasticity of demand between the product itself and substitutes for it’. However, prescription drugs raise complicated questions for product market definition that are not present for other types of consumer products or even for OTC drugs.

Demand considerations

The ultimate consumer for prescription pharmaceuticals is the patient, but a patient with insurance coverage usually pays for only a portion of the prescription. Doctors or other health-care providers decide which prescriptions are appropriate for a particular patient, but these prescribers do not purchase the drugs. Insurance companies try to influence choices of pharmaceuticals to manage costs, through formularies and the like, but the decision about which drug will be purchased rests with a physician or other health-care

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9  Food, Drug and Cosmetic Act, 21 USC Section 355(j).
10  21 USC Section 262.
11  Differences do exist among the states related to certain aspects of pharmacies' dispensing of prescription drugs, such as those that exist related to generic substitution, but these differences are not significant for purposes of defining the relevant geographic market for pharmaceuticals.
provider who is not bearing the costs. Thus, demand for prescription pharmaceuticals is split among three parties when the patient is insured and between two parties when the patient is not insured. This split decision-making greatly affects demand, and this factor is directly reflected in the FTC’s relevant product market analysis as it determines which drugs compete with one another sufficiently to be considered interchangeable and part of the same product market.

**Price considerations**

Normally, product market analysis is based to some degree on price – at what difference in price will the customer switch from one product to another. This is not always an appropriate consideration in the context of health care. Generally, patients and their doctors are more concerned with resolving the health issue than with the cost of a treatment, particularly where the bulk of the cost is covered by private or public insurance. Thus, when the FTC staff review a merger file, they look first to doctors and health-care providers to describe when and in what manner these professionals decide upon a particular drug in a particular circumstance. Which drugs are interchangeable for a particular condition? Which drugs are best for certain groups of patients based on potential side effects? How do formularies developed by managed care and insurance companies affect prescribing patterns? Are there generics that provide effective substitutes for brand name drugs for this condition? The presence of generics can elevate the role of price in the analysis, because – absent affirmative action by a prescriber to prevent generic substitution – which generic version of the prescribed drug will be dispensed is most often a price-driven decision.  

To define the relevant product market, therefore, the FTC turns to health-care providers to understand prescribing patterns – what is considered a legitimate substitute and in what circumstances. In addition, the agency examines the options that are placed on insurance companies’ formularies to determine how these affect choices between categories of drugs. In a general sense, the FTC begins with each particular drug of the two companies where there may be overlapping therapeutic uses for the drugs. It looks first to the FDA approvals, which carry advice to prescribers about the conditions (or ‘indications’) for which the drug has been approved. Then, through company documents related to the products and interviews with merging company officials, prescribing physicians and researchers outside the merging parties, and insurance companies or other managed care entities, the FTC staff develop an approximation of the extent to which products are actually substituted for one another. In addition, although the FDA approval may state that a drug is ‘indicated’ for prescribing to patients with certain conditions, when providers prescribe these drugs for other indications (called ‘off-label’

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13 Where there are several generic versions of a drug on the market, the FTC has since the early 2000s taken the position that the branded drug does not significantly constrain a generic’s price. See, for example, *In re Mylan Labs, Inc*, FTC File No. 071-0164 (27 September 2007).
uses),\textsuperscript{14} the FTC will treat and analyse these uses in the same manner as those that are officially indicated by the FDA labelling for that drug.

Because the FTC’s enforcement actions in this area have been the subject of settlement agreements rather than litigations, neither federal court nor administrative litigations provide precedent that examines the agency’s relevant market determinations. The patterns found among the agency’s numerous settlements, therefore, provide the best predictor of how the agency will respond to a particular prescription drug market.\textsuperscript{15}

\textbf{iii} Generic drugs further complicate competition analysis

In 1984, Congress passed the Drug Price Competition and Patent Term Restoration Act, which is commonly known as the Hatch-Waxman Act\textsuperscript{16} to, \textit{inter alia}, speed up the approval pathway for generic drugs while making it possible for branded companies to enforce patents in advance of generic entry. Previously, the approval process for generic drugs was essentially the same as (and as time-consuming as) the process required for a wholly new drug. Given that the profit margins on generic drugs are substantially lower than on branded drugs, a long and expensive process can be a significant disincentive to develop them. The Hatch-Waxman Act authorised the FDA to approve a generic

\begin{itemize}
  \item \textsuperscript{14} While pharmaceutical manufacturers are prohibited from promoting their products for off-label uses (21 USC Section 352(n)), once a drug is approved by the FDA for any indication, physicians are free to exercise their independent medical judgment (which may or may not be affected by third-party payors’ willingness or unwillingness to pay for an off-label use) to prescribe it for any condition for which they believe it will be helpful. See 21 USC Section 396, \textit{Buckman Co v. Plaintiff’s Legal Comm} 531 US 341, 350 (2001).
  \item \textsuperscript{15} One administrative law judge’s initial decision in a non-merger Hatch-Waxman litigation does include findings related to the relevant product market for a pharmaceutical product, K-Dur, but these were not adopted by the full Commission in its decision, and on appeal to the 11th Circuit, the FTC decision was set aside and vacated by the Circuit Court without reaching matters related to relevant market definition. Based upon the administrative hearing, the Administrative Law Judge in \textit{In re Schering-Plough Corporation} determined that the product market for K-Dur should include that drug as well as those drugs that were ‘therapeutically equivalent’ (i.e., were used to treat the same condition). On appeal to the Commission, the FTC determined that no finding regarding relevant market was necessary for the case because the competitive effects were evident even without proof of the relevant market (\textit{FTC v. Indiana Fed’n of Dentists}, 476 US 447, 460-61 (1986)). Ultimately, the Eleventh Circuit set aside the FTC’s decision and vacated the Commission’s order, but the Circuit decision also did not require consideration of the relevant market. \textit{In re Schering-Plough Corp}, FTC Dkt No. 9297, 136 FTC 956 (2003), vacated and set aside; \textit{Schering-Plough Corp v. FTC}, 402 F3d, 1056 (11th Cir 2005).
  \item \textsuperscript{16} 21 USC Section 355 (2001). While providing for generic competition, the Act also provides a number of provisions designed to preserve continued innovation by research-based pharmaceutical companies, such as those that modify the risks and incentives in patent litigation.
\end{itemize}
drug if its active ingredient is chemically identical to that of an approved branded drug; its formulation, when tested in a limited number of patients, is ‘bioequivalent’ to the branded formulation; and the labelling is the same as that of the approved branded drug. Once approved with what is called an ‘AB’ rating, the generic may be substituted by a pharmacist for the branded prescription without the prescriber’s specific permission (unless the prescriber expressly forbids substitution on the prescription form). In many states, substitution is required by law, and virtually all third-party payors mandate it for their covered patients. Thus, with easy substitutability at the pharmacy level and with managed care incentives, generics rapidly replace brand name drugs upon patent expiration. Once there are multiple generic versions of a drug, the generic products compete aggressively with one another on price. Although some brand manufacturers have attempted to compete on price with generics, most keep the branded prescription drug at or above its pre-generic entry level in order to earn as much as possible from the diminished volume of sales, which is limited to those patients and prescribers who insist on using the branded product.

iv Robust innovation competition to develop new drugs
Pharmaceutical companies vigorously compete not only for the sale of approved drugs but also to develop new products that can be the first drug on the market to treat a particular condition. This competition forms an important part of a pharmaceutical merger review. By being the first to market for an otherwise unmet medical need, a company can most often enjoy substantial profits, along with the longer-standing reputational benefits of being the first mover whose brand is best known among health-care practitioners. This race to be the first on the market sets up competition among the innovators as they work through the various stages of drug development, which are regulated by the FDA. Once a new drug has been launched on the market, those companies still in the FDA development pipeline for the same condition will nonetheless continue development to become competitors on the market. They have significant investment already committed to the market, which may only be recouped by achieving an NDA to compete with the already approved product on the market.

v Horizontal merger types that may raise competitive concerns
Mergers between companies that both have a branded drug used to treat the same condition will be carefully scrutinised by the FTC, as will mergers between two companies where one has a branded drug and the other has a generic version of the same drug, and mergers where the two companies have generic versions of the same drug. In each situation,

the FTC will seek information to understand the breadth of competition between the overlapping products. Where, for example, both companies have a branded drug that is used in a broad therapeutic category – such as beta blockers – and where physicians have demonstrated that they will exchange one for another to an extent that the pricing decisions for the products affect one another closely, the two branded products may be considered single product market. Where, however, the two branded products are both serving a general therapeutic category, but because of different side-effect profiles they are used for different classes of patients, these two may be found to be in separate product markets. Over time, third-party payors sometimes influence these prescribing patterns, through formularies and other incentives, so that close substitutes will in fact be substituted and therefore create some price competition where it did not otherwise exist.

In each instance, whether the overlapping products are brand-to-brand, brand-to-generic or generic-to-generic, the critical question about whether the merger may have anti-competitive effects is how many other competitors – other than the merging parties – are in the market. As a general rule, practitioners know that in a market involving a generic drug overlap or a branded drug and its own generic drug, the FTC will closely examine those mergers with six or fewer companies in the current market for any particular drug, and will seek remedies where the circumstances and competitive viability of those remaining post-merger would be too few to sustain vigorous competition.

Similar considerations apply to R&D projects being worked through the FDA pipeline. The FTC views its role in preserving incentives to innovate as quite important, and the pharmaceutical industry has played a key role in the agency’s development of theories regarding ‘innovation markets’. If a merger involves two companies with R&D projects underway for the same medical condition, the agency will carefully examine whether other companies are similarly situated such that the merger will not be likely to reduce the merging parties’ incentives to continue their development. Often, however, R&D projects will be aimed at different patient populations or have different side-effect profiles, and these may be considered by the FTC to be in different product markets. In addition, the FTC will look closely at a merger that involves a company currently marketing a branded drug with a company that is engaged in R&D for the same condition or therapeutic area. The potential competitive effect of such a transaction will be evaluated in much the same manner.

IV REMEDIES AND SETTLEMENTS

Competitive concerns related to pharmaceutical transactions are commonly resolved by settlement. If the FTC determines that, despite considering the parties’ arguments, the transaction raises competitive concerns regarding particular products or R&D projects,\(^\text{18}\)

\(^{18}\) Under its statutory authority, the FTC will only negotiate settlements where it has reason to believe that the transaction raises competitive issues sufficient to violate the antitrust laws – for example, Section 7 of the Clayton Act (likely to harm competition in a particular market or markets) or Section Five of the FTC Act (an unfair method of competition) – and where it has found that its enforcement action is in the public interest.
the parties will be provided specific information about the competitive issues. The parties then have three choices:

\(a\) they can decide to abandon their transaction altogether;

\(b\) they may decide to litigate the case against the Commission (which typically involves both an administrative litigation in the FTC’s own tribunal as well as a federal court injunction proceeding to block the transaction pending the final decision of the administrative litigation and any appeal thereof); or

\(c\) they may decide to negotiate a settlement with the FTC, agreeing to cleave off assets related to the product or products that create the competitive issues.

Parties in pharmaceutical cases generally choose to settle rather than litigate the cases. While the Commission has wide discretion as to the manner in which it will settle merger cases, the most common remedy is a structural remedy, which would include divesting one of the competitive overlap products and all assets related to it, including its intellectual property. As is the case with merger settlements outside the pharmaceutical industry, two overarching principles govern the FTC divestiture remedy: it should replace competition lost as a result of the proposed transaction by requiring the divestiture of assets sufficient to keep competition at the same level as it would have been without the transaction; and it should include elements to ensure that the market post-divestiture will require little or no ongoing oversight or monitoring by the FTC.

Almost without exception, pharmaceutical settlements will include the licensing of intellectual property (IP), which the FTC will require to be licensed royalty-free. Whether the FTC will seek an exclusive licence or a non-exclusive licence to the IP will depend on the factual circumstances of the transaction itself. For example, if the IP related to the divestiture product can only be used for that product alone, the FTC likely will require an exclusive licence. If the IP is used both for the divestiture product and another product that is not part of the competitive concern, the FTC may allow the licence to be exclusive for purposes of the divestiture product but non-exclusive for other applications.

The FTC typically requires that the merging parties identify the purchaser for the divested assets and negotiate the divestiture agreement before the merger partners close their primary deal. This ‘up-front’ buyer will be carefully vetted by the FTC staff to ensure that it is fully capable of carrying on the competitive viability of the assets it is acquiring, and the negotiated agreement between this buyer and the merger partner selling the assets will be carefully examined by the FTC staff, who often suggest that additional assets or protections be inserted to provide the buyer adequate means to compete. In circumstances where more than one product or R&D project must be divested, the parties may request that they be allowed to divest to several parties.

Most pharmaceutical settlements also include an interim monitor. This individual, who is provided for by the terms of the FTC settlement and named therein, will have duties to oversee the appropriate transfer of the divestiture assets and to oversee the buyer’s conduct in setting up its new business. The monitor is selected by the Commission, to whom he or she makes regular reports, but the monitor’s contract is negotiated with, and his or her fees are paid by, the merging parties. Monitors must be well versed in FDA procedures and requirements for pharmaceuticals, from R&D to manufacturing, marketing and sales, so that the transition of the fully functioning and approved product can be seamlessly accomplished.
V CONCLUSION

Unlike many industries, pharmaceutical manufacturers often compete in multiple distinct but interrelated markets (branded, generic, innovation) for the attention of different but interrelated ‘customers’ (prescribers, patients, payors). Because of this complexity, and because the choice of which drug a patient may take can be influenced by multiple market participants (prescribers, payors, pharmacists, patients and, sometimes, caregivers), any analysis of competition is likely to be more complicated than in many other markets. In addition, understanding the choices sometimes requires at least a rudimentary understanding of how the products work – in other words, the science. The FTC has responded to this complexity by developing an institutional understanding of the unique factors affecting competition in the industry and a process aimed at isolating the particular factors relevant to a specific deal in order to make the analysis workable. The effective outside counsel owes it to him or herself to understand that process and the industry in order to efficiently direct the client’s efforts to seek approval for any transaction.
Part II

JURISDICTIONS
I INTRODUCTION

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

The core of Australia’s merger control regime is contained in Section 50 of the Competition and Consumer Act (Cth) 2010 (CCA) (previously known as the Trade Practices Act), which prohibits any direct or indirect acquisition of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.\(^1\) 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 anti-competitive acquisition of shares or assets, and it may seek an injunction from

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1 Peter Armitage is a senior partner and Ross Zaurrini is a partner 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.
the Federal Court of Australia (Federal Court) blocking a proposed acquisition. In addition, post-closing, the ACCC (or any other interested person) can apply to the court for a divestiture order; or, if the vendor is involved in the contravention, 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. 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, the ACCC provides guidance as to when it would be prudent for the merger parties to seek clearance. It ‘encourages’ merger parties to notify a proposed merger in advance of completing it where the products of the merger parties are either substitutes or complements; and the merged entity will have a post-merger market share of greater than 20 per cent in the relevant market or markets. The ACCC adds that, as market shares are an imprecise indicator of likely competition effects, a proposed merger that does not meet these thresholds may still raise competition concerns and be subject to an investigation.

The ACCC can investigate transactions, even if informal clearance is not sought. The circumstances in which there is a heightened risk that the ACCC may commence an investigation on its own initiative include, in particular, where there are substantial

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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.

5 To date, however, a divestiture order has never been made in Australia.

6 The maximum penalty for corporations per contravention is the greater of A$10 million; three times the total value of the benefits that have been obtained by the contravention; or, if the court cannot determine the total value of those benefits, 10 per cent of the annual group turnover referable to activities in Australia. Penalties totalling A$4.8 million were imposed in 1996 on Pioneer International Limited and others for contravening Section 50.
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, a proposed merger raises competition concerns in other jurisdictions, particularly where it is subject to a second-phase investigation in the EU or the US.

II YEAR IN REVIEW

The ACCC has considered, in recent years, on average between 300 and 400 merger proposals each year. As the following table indicates, the vast majority of transactions either did not require a review, or were reviewed and cleared.

<table>
<thead>
<tr>
<th>Matters assessed – no review required</th>
<th>2011 financial year (FY) (to 30 June)</th>
<th>2012 FY (to 30 June)</th>
<th>2013 FY (to 30 June)</th>
<th>2014 FY (to 30 June)</th>
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<tr>
<td>Reviews undertaken</td>
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<td>250</td>
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<td>242</td>
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<td>Not opposed</td>
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<td>140</td>
<td>90</td>
<td>76</td>
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<td>Finished – no decision (including withdrawn)</td>
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<td>5</td>
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<tr>
<td>Resolved through remedies</td>
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<td>6</td>
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<td>Total matters assessed and reviews undertaken</td>
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<td>340</td>
<td>289</td>
<td>297</td>
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</table>

i Closeness of competition

The ACCC continues to focus on closeness of competition between merger parties and between merger parties and their competitors. In most of its recent decisions, the ACCC has opposed a merger or cleared it subject to remedies when it had concerns

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7 For example, the ACCC’s decisions in Thermo Fisher Scientific, Inc’s proposed acquisition of Life Technologies Corporation (public competition assessment of 25 February 2014); Gallagher Group’s proposed acquisition of Country Electronics Pty Ltd (trading as Thunderbird) (PCA of 14 July 2014); BlueScope Steel Ltd’s proposed acquisition of the OneSteel Sheet & Coil business (PCA of 4 August 2014); and HealthScope Limited’s proposed acquisition of the Brunswick Private Hospital (PCA of 27 August 2014).

8 Ibid.
relating (at least in part) to the closeness of competition of the merger parties’ products (e.g., Thermo Fisher and Gallagher Group).

The ACCC’s analysis of closeness of competition goes beyond the process of determining the range of available or potentially available substitutes in each relevant market. The ACCC endeavours to ascertain the relative intensity of rivalry between different products and suppliers within the relevant markets.

If the merger parties are each other’s closest competitors (and there would be no other equally close competitors to the merged entity), the ACCC will explore the ability and incentives of rivals to become close competitors to the merged entity by entering into the merged entity’s (product or geographical) ‘space’. This requires an assessment of factors similar to those that are relevant in the context of assessing barriers to entry or expansion (e.g., cost of introducing a new type of product, brand loyalty to the products of the merged entity and profitability of entry targeting the products of the merged entity).

In analysing closeness of competition, the ACCC does not routinely utilise economic techniques such as cross-elasticity of demand for relevant products (and substitutes) and diversion ratios. Instead, it generally prefers to rely on anecdotal evidence from the parties and market participants. Although the ACCC has recently indicated that its use of quantitative information is gradually increasing, parties relying on such information should proceed with caution.

The key implication of the ACCC’s emphasis on closeness of competition is that parties seeking informal clearance should provide the ACCC with factual evidence concerning their behaviour and the behaviour and views of customers. Natural experiment-type evidence concerning customer behaviour in circumstances when the product of one of the merging parties was not available would be very useful. If the parties are each other’s closest competitors, it will be important to understand why this is the case and to consider the implications it will have on the transaction. In some cases, a divestiture undertaking may be required to obtain clearance from the ACCC for a merger of close competitors. In others, clearance without divestiture may be possible where other, persuasive factors are present (e.g., evidence of low barriers to entry and expansion in the relevant markets).

ii Coordinated effects

A review of the ACCC’s public competition assessments (PCAs) over the past four years indicates that the ACCC’s competition concerns are usually derived from the unilateral effects of the proposed transaction. Only occasionally do the ACCC’s concerns arise from the increased risk of coordinated effects.

The ACCC’s stated approach to the assessment of coordinated effects, as set out in its Merger Guidelines, is uncontroversial. In some instances, the actual approach taken by the ACCC is similarly uncontroversial. For example, in its assessment of the proposed acquisition of Newreg, a share registry provider, by Link Market Services, which also provided, inter alia, share registry services, the ACCC concluded that the transaction would have been likely to increase the ability and incentive of Link and the only other major supplier of registry services to engage in coordinated conduct. This was because, inter alia, changes in the providers of share registry services are highly visible, the barriers
to entry and expansion in this activity are high, and the customised nature of the services and the stickiness of customers (because of the perceived risks of switching) were, in combination, likely to give rise to a real chance of muted competition or tacit market sharing post-acquisition.9

On the other hand, the ACCC’s discussion of coordinated effects has, in some transactions, been less rigorous, and as a consequence less predictable. For example, in its controversial refusal to clear the acquisition of the petrol retail assets of Mobil Oil Australia by Caltex Australia Limited, the ACCC focused on the weekly price cycle in retail petrol markets. It concluded that the proposed acquisition would substantially lessen competition by creating a greater risk of more stable and more effective coordinated pricing behaviour in the restoration phase of those cycles when compared with any likely counterfactual. Regular weekly cycles are a feature of retail petrol pricing in Australian cities. There is typically a period of discounting followed by a price-restoration phase. The ACCC considered Caltex to be a leader in the price-restoration phase, and concluded that its proposed acquisition of Mobil’s retail outlets would significantly increase the likelihood that the restoration process would be effective. The ACCC assumed, as part of its counterfactual analysis, that other, smaller purchasers of the Mobil outlets would have less incentive to participate promptly in the restoration phase. This view seemed to be based on the presumption that the behaviour of a small participant in a market was a reliable indicator as to how it would behave once it became a much larger participant in the market. The ACCC’s approach in this transaction highlights the complex interaction of coordinated effects analysis and the proper identification of the relevant counterfactual.10

### iii Conglomerate effects

The ACCC has also investigated conglomerate effects theories more frequently in recent years. For example, in Pfizer/Wyeth,11 it was concerned that, post-acquisition, the merged entity would have the ability and incentive to bundle its range of vaccine products to leverage its strong position in the supply of animal health vaccines into other animal health markets. Pfizer was able to allay these concerns by providing a court-enforceable undertaking to divest a range of sheep and cattle-worming products.

The ACCC has considered conglomerate effects in a number of other recent merger proposals in various industries, including rigid packaging products,12 plastic household

9 Link Market Services Limited – proposed acquisition of Newreg Pty Ltd. See www.accc.gov.au/content/index.phtml/itemId/920335/fromItemId/751043.
10 Caltex Australia Ltd – proposed acquisition of the retail assets of Mobil Oil Australia Pty Ltd. See www.accc.gov.au/content/index.phtml/itemId/904294/fromItemId/751043.
11 Pfizer Inc’s proposed acquisition of Wyeth Corporation (PCA of 18 November 2009). See http://transition.accc.gov.au/content/index.phtml/itemId/895088/fromItemId/751043.
12 Pact Group Pty Ltd’s proposed acquisition of certain assets Huhtamaki Australia Pty Ltd, 15 September 2009. See www.accc.gov.au/content/index.phtml/itemId/892945/fromItemId/751043.
and industrial products,\textsuperscript{13} packaging products,\textsuperscript{14} hardware,\textsuperscript{15} mining equipment\textsuperscript{16} and banking.\textsuperscript{17}

\textbf{iv Vertical effects}

The ACCC continues to focus significantly on the vertical effects of transactions, notwithstanding statements in its Merger Guidelines to the effect that ‘it is often the case that vertical mergers will promote efficiency’ and that ‘in the majority of cases [vertical] mergers will raise no competition concerns’. This focus is perhaps due to the weight the ACCC places on the third-party views that it obtains through its public market enquiry 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 transactions. For example, in its assessment of AGL Energy Limited’s proposed acquisition of the Loy Yang A Power Station, the ACCC carefully considered the vertical effects of combining AGL’s electricity retail business with the Loy Yang A Power Station, but ultimately concluded that the acquisition would not lead to a substantial lessening of competition. In contrast to this fairly detailed analysis, in its consideration of the proposed acquisition of Trading Post assets by Carsales.com, the ACCC noted that the existing vertical integration of Carsales had the potential to exacerbate the extent of various horizontal competition concerns. The ACCC’s Statement of Issues makes no reference to the risk of foreclosure, and otherwise gives no indication of the basis for this comment.

Recently the ACCC has been more demanding of opponents to transactions if the opposition is based on potential vertical effects. The ACCC has requested data and

\textsuperscript{13} Transpacific Superior Pak Pty Ltd’s acquisition of Nylex Materials Handling Division, 30 September 2009 (conglomerate effects between supply of garbage bins and waste collection services). See www.accc.gov.au/content/index.phtml/itemId/895201/fromItemId/751043.

\textsuperscript{14} Amcor Limited’s proposed acquisition of certain businesses of Alcan Packaging from Rio Tinto, 20 October 2009 (bundling of screwcap wine closures with other packaging products). See www.accc.gov.au/content/index.phtml/itemId/898200/fromItemId/751043.

\textsuperscript{15} Metcash Ltd’s proposed acquisition of a 50.1 per cent interest in Mitre 10, 2 February 2010 (bundling of hardware products with grocery and liquor products). See www.accc.gov.au/content/index.phtml/itemId/912377/fromItemId/751046.

\textsuperscript{16} Bucyrus International Inc’s proposed acquisition of the mining equipment business of Terex Corporation, 12 February 2010. See www.accc.gov.au/content/index.phtml/itemId/914002/fromItemId/751046.

\textsuperscript{17} National Australia Bank Ltd’s proposed acquisition of AXA Asia Pacific Holdings, 19 April 2010. See www.accc.gov.au/content/index.phtml/itemId/924341/fromItemId/751043.
objective evidence to support the proposition that, as a result of the acquisition, the acquirer’s incentives to engage in vertical foreclosure have altered.\footnote{BlueScope Steel Ltd’s proposed acquisition of Fielder’s Australia (PCA of 4 August 2014).}

v Barriers to entry and expansion

Unsurprisingly, the absence of barriers to entry or expansion is a key factor in many of the ACCC’s decisions not to oppose proposed acquisitions. The basis of the ACCC’s conclusions is, however, not always clear. In many of the short notes on acquisitions it has cleared, the ACCC states that barriers to entry or expansion are low, without supplying facts. While this is understandable, it makes it difficult to predict the outcome of the ACCC’s assessment of this issue in other transactions. This unpredictability is of particular significance in sectors that are undergoing dynamic change. In a recent decision to oppose a proposed acquisition, the ACCC concluded that the barriers to entry for the supply of online automotive classified advertising were high. It is unclear, however, why the ACCC reached that conclusion. The acquirer itself was a relatively recent and successful entrant, and the impediments to entry by others are not obvious.

In more static markets, the ACCC’s analysis of barriers to entry and expansion has been more rigorous. It requires convincing evidence of the likelihood of new entry or expansion and that it will provide a sufficient and timely competitive constraint on the merged entity. For example, in Cargill/Goodman Fielder Fats & Oils, the ACCC concluded that new entry (or the threat of new entry) would not constrain the merged firm because of high barriers such as significant (sunk) capital costs, the need to obtain sufficient scale to compete, overcapacity at the refining level and difficulty of access to inputs, together with the likelihood that even if entry was possible, it would not be sufficiently timely.\footnote{Cargill Australia Ltd’s proposed acquisition of Goodman Fielder’s commercial edible fats and oils business, PCA of 11 May 2010. See http://registers.accc.gov.au/content/index.phtml/itemId/921353/fromItemId/751043.}

vi Merger remedies

The ACCC has a strong preference for ‘fix-it-first’ remedies. In its Merger Guidelines of November 2008, it states that ‘wherever practicable, divestiture should occur on or before the completion date of the merger, particularly in cases where there are risks in identifying a (suitable) purchaser or asset-deterioration risks’. It is seeking 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, the remedies accepted by it in the past 48 months have been predominantly post-closing divestitures. In cases where the ACCC allows divestiture after completion, the merger parties will be required to agree to detailed and increasingly 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; 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. One example is the remedy package offered by InvoCare Limited in relation to the acquisition of Bledisloe Group Holdings Pty Ltd in the form of a court-enforceable undertaking.

A corollary of the fact that the ACCC has accepted post-closing divestitures is that it is seeking to insert itself more deeply into the divestiture process. In the undertakings accepted in InvoCare/Bledisloe Holdings, the ACCC has set a new high standard for its supervision of the business to be divested post-completion. In that undertaking, the ACCC required, inter alia, the parties to seek its approval of the following aspects of the divestiture:

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

We expect that the requirement for the ACCC to provide approval of these aspects of the divestiture process will now be treated by the ACCC as the benchmark for future undertakings.

Notwithstanding the ACCC’s preference for divestiture remedies it will, in some circumstances, clear transactions on the basis of behavioural remedies. The ACCC reviewed the acquisition of Austar United Communications Limited by Foxtel Management Pty Limited, which would bring together the two market participants in Australia that had a substantial customer base in subscription television and extend Telstra’s 50 per cent ownership from one of those participants (Foxtel) to both of them.

20 The proposed acquisition by Novartis AG of Alcon Laboratories (PCA of 31 August 2010) was a post-closing divestiture, but the divestiture took place only 10 days following closing, as an approved purchaser had been identified.

21 See www.accc.gov.au/content/index.phtml/itemId/991798.
The ACCC concluded that, in the absence of the proposed remedies, the proposed acquisition would have:

- foreclosed potential future competition between Foxtel and Austar in the supply of subscription television services;
- foreclosed potential future competition between Telstra and Austar in the supply of telecommunication services; and
- allowed the merged entity to leverage its substantial customer base in the national market for retail supply of subscription television services to acquire IP TV rights on an exclusive basis and to constrain competitive entry or expansion by other parties.

Despite these conclusions about the likely effects on competition, the ACCC cleared the transaction on the basis of a suite of undertakings offered by Foxtel. The core undertaking is that Foxtel will not acquire certain distribution rights to specified categories of independent content on an exclusive basis. The distribution rights include IP TV and some mobile distribution rights, but do not include most satellite and cable distribution rights.

It remains to be seen whether the ACCC, in policing the very detailed undertakings given by Foxtel, encounters any of the problems that historically it has cited as the reason for its strong preference for structural remedies rather than behavioural remedies.

vii Merger authorisation

As described in more detail below, there is currently an alternative merger clearance route that involves the Australian Competition Tribunal (Tribunal) assessing the public detriments and public benefits likely to result from an acquisition and authorising the acquisition (immunising it from challenge on competition law grounds) if the transaction is likely to result in such a benefit to the public that it should be allowed to take place.

This mechanism was introduced in 2007, but until late 2013 it had not been used. In late 2013, Murray Goulburn Cooperative Company Limited sought authorisation of its proposed acquisition of Warrnambool Cheese Co. The Tribunal was not required to make a decision on this transaction, because Warrnambool Cheese accepted an offer from a rival bidder, Saputo. The Tribunal did, however, make it clear that it would seek to render its decisions in merger authorisations as quickly as possible.

On 24 March 2014, AGL Energy Limited sought authorisation of the proposed acquisition by one of its subsidiaries of the assets of Macquarie Generation. Macquarie Generation is presently owned by the state of New South Wales and the proposed acquisition involved the acquisition of a number of electricity generation plants in that state.

The application for authorisation followed consideration of the proposed acquisition by the ACCC under its informal clearance process. At the conclusion of the informal clearance process, in early March 2014, the ACCC indicated that it would oppose the proposed acquisition because it considered it likely to result in a substantial lessening of competition in the market for the retail supply of electricity in New South Wales.
AGL then applied for authorisation. On 25 June 2014, the Tribunal granted authorisation to AGL to make the acquisition. Authorisation has the effect of immunising the authorised acquisition from the general prohibition on acquisitions set out above.

The Tribunal carefully considered material submitted by the ACCC, AGL and other interested parties and concluded that the acquisition is not likely to result in a significant detriment to competition in any relevant market. The Tribunal also concluded that the acquisition would give rise to some significant public benefits. These public benefits included a substantial net payment to the state of New South Wales for the purchase of the generation assets, which would be used by the state for funding infrastructure improvements in New South Wales and that AGL would be likely to make substantial investments in the efficient operation of the electricity generation assets so as to increase their capacity and longevity and to generate more and cheaper electricity in the wholesale market.

Most transactions are not suited to an adjudicative procedure, such as authorisation, and, although the Tribunal’s ability to manage its procedure so that a decision was delivered within three months of an application being made, could encourage other parties in some transactions to consider this pathway to merger clearance, the current reform proposals, if adopted, would result in direct access to the Tribunal no longer being available.

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 anti-competitive acquisitions and, on the other, the desire of the ACCC to engage with merger parties in relation to transactions rather than in litigation. Over the years, dissatisfaction with some aspects of the informal clearance process has resulted in statutory amendments giving merger parties alternatives to the informal clearance process. Those alternative processes and the informal clearance process are outlined below.

There are currently three processes available for parties who wish to seek clearance for a proposed merger: the formal clearance process, as set out in the ACCC’s Formal Merger Review Process Guidelines of June 2008; the authorisation process in accordance with Part VII (Division 3, subdivision C) of the CCA; and the informal clearance process as set out in the ACCC’s Merger Review Process Guidelines of July 2006. The recently concluded Harper Review of Australia’s competition policy and law has recommended that authorisation no longer be granted initially by the Tribunal. If this recommendation is accepted by the government and the necessary legislation is passed, the ACCC will make the initial decision and that decision will be subject to merits review by the Tribunal.

i Formal clearance

The formal merger review process was introduced in January 2007. If an application for formal clearance is made, the ACCC must decide within 40 business days whether to
clear the transaction. The ACCC must give the applicant notice of its decision and the reasons for it in writing. The decision can be appealed to the Tribunal, which must make a decision within 30 days. Formal clearance exempts the transaction from challenge by any person under Section 50 of the CCA.

In some transactions, the formal process may provide some advantages. For example, where the extent of competition concerns is controversial as between the ACCC and the parties and there are no commercially viable merger remedies available to allay the ACCC’s concerns, it may be advantageous to use the formal process, which provides for fixed statutory review periods and, importantly, access to a merits review by the Tribunal, which is a specialist appellate body. The formal process has some disadvantages: the application form is very complex and data intensive; the review process is inflexible, which means that changes to a transaction cannot readily be addressed; there is only limited opportunity for claiming confidentiality; and there is an application fee of A$25,000.

To date, no applications for formal clearance have been made. There is a sense among practitioners that, for most transactions, the advantages of the formal process are materially outweighed by the disadvantages.

The Harper Review has recommended that this process is simplified so as to remove or reduce some of its unattractive features.

ii Authorisation

Direct authorisation of an acquisition by the Tribunal was also introduced in January 2007. It is a highly unusual process with few, if any, equivalents in other jurisdictions. Authorisation of an acquisition provides immunity for the acquisition from challenge by the ACCC or third parties.

The Tribunal may authorise an acquisition if it is satisfied that the transaction would result in such a benefit to the public that it should be allowed to take place. Benefits to the public include a wide range of matters, but the Tribunal must regard a significant increase in the real value of exports from Australia and a significant substitution of domestic products for imported goods as public benefits. The Tribunal must also take into account all matters that relate to the international competitiveness of any relevant Australian industry. The authorisation process is a public, quasi-adversarial process in which the ACCC must provide a report concerning the transaction to the Tribunal and may otherwise assist the Tribunal, which must make a determination within three months of receiving an application or it is deemed to have refused to grant the authorisation.

The disadvantages of this process are similar to those of the formal clearance process. Although 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) that this process entails there will be some for which having a decision-maker other than the ACCC is an important consideration. This advantage will, however, be removed if the Harper Review recommendations are adapted by the government.
iii  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 anti-competitive 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 (followed by a more comprehensive public competition assessment). 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.

There are no statutory time periods for the informal review process. According to ACCC practice, the initial review period of the informal process is typically six to eight weeks, during which the ACCC will conduct public market inquiries and assess the information and arguments submitted to it by the merger parties and interested third parties. 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 within two to four months of the beginning of the second round of market inquiries. The ACCC will usually issue a public competition assessment for all merger proposals that were subject to a second stage investigation.22

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

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22 The ACCC’s practice is to issue a 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.
a public announcement unless they have received an indication from the ACCC that obtaining clearance for the proposal may be a real possibility.

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 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 increasingly 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 increasing significance in global transactions, because the ACCC is statutorily entitled to disclose such information to overseas regulators.

ii Acquisitions of minority interests

Australia’s merger control regime applies to any acquisition of shares in a corporation, irrespective of the level of shareholding involved. That is, even an acquisition of a minority interest (e.g., of less than 20 per cent) would be prohibited if it is likely to result in a substantial lessening of competition in a market in Australia. There is also no particular shareholding level at which it is customary to seek clearance from the ACCC. Whether it may be advisable to seek clearance from the ACCC for an acquisition of a minority interest depends on the circumstances of each individual case and, in particular, on the substantive competition effects the acquisition is likely to have in Australia. In determining the appropriate ACCC strategy, merger parties should note that there have been a number of cases in recent years where the ACCC has challenged proposed acquisitions that involved minority shareholdings of 20 or 30 per cent on the basis that the minority shareholding would give the acquirer the ability to ‘exert a high degree of influence’ over the target company.23

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

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

\( b \) a level of shareholding that is less than a controlling interest may give rise to competition concerns where it alters the commercial incentives of the parties involved. In horizontal mergers, the ACCC’s main concern is the resulting interdependence between the rivals that may result in muted competition or coordinated effects. In vertical and conglomerate mergers, it is particularly concerned about foreclosure effects. A further significant concern that may arise in any of the three types of mergers is gaining access to commercially sensitive confidential information of competitors.

In late 2010, the ACCC commenced a review of Consolidated Press Holdings Ltd and Illyria Nominees Television Pty Ltd’s acquisition of a 8.94 per cent shareholding (each) in Ten Network Holdings Ltd. CPH has a 25 per cent interest in Foxtel and a 50 per

Australia

cent interest in Fox Sports, and Illyria is associated with News Ltd, which indirectly has a 25 per cent interest in Foxtel, the major subscription television operator in Australia. The ACCC stated, in relation to its review of these acquisitions, that it is less concerned in relation to the percentage share that is acquired and is more interested in whether and to what extent the acquisitions would give CPH and Illyria control over the company’s affairs (when acting together with other shareholders). The ACCC, after an extensive review, concluded that these acquisitions were not likely to have the effect of substantially lessening competition in a market.

While not strictly involving the acquisition of a minority shareholding, the ACCC’s consideration of the acquisition of Country Electronics Pty Ltd by Gallagher Group provides insights into the ACCC’s approach to this issue. Gallagher Group, Country Electronics Pty Ltd and Tru-Test Limited supplied animal electric fence energisers in Australia. Gallagher Group had a 12 per cent interest in Tru-Test Limited. The ACCC required Gallagher Group to divest that interest as a condition of clearing the acquisition of Country Electronics Pty Ltd. The ACCC considered that Gallagher’s incentives to increase the prices post-merger would include receiving a share of that increase in the form of dividends from Tru-Test Limited. The ACCC also considered that the shareholding increased the likelihood of coordinated conduct between Gallagher Group and Tru-Test Limited.

iii Options if the ACCC does not clear the transaction

There is no appeal avenue against an informal clearance decision by the ACCC. Essentially, 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.

In 2003, AGL, one of Australia’s leading energy companies, chose to seek a court declaration in relation to its proposed acquisition of a 35 per cent interest in the Loy Yang A power station. In this case, the ACCC had refused to grant clearance for AGL’s proposed acquisition, even after the company had offered a court-enforceable undertaking that it would limit its interest in Loy Yang A to 35 per cent and not be involved in the marketing activities of the business so as to avoid the risk of a contravention of the Trade Practices Act (as it then was). The court was satisfied that the undertaking was sufficient to protect the electricity market from any potential anti-competitive effects that may otherwise have arisen as a result of the acquisition, and concluded that the proposed acquisition was not likely to result in a substantial lessening of competition in any relevant market. The ACCC has indicated that, following this case, its practice will be to seek an injunction to prevent a transaction proceeding rather than permit a merger party to seek a declaration of non-contravention.

The ACCC followed that approach in 2004 when it commenced proceedings in the Federal Court to block Boral Ltd’s proposed acquisition of Adelaide Brighton Ltd. The ACCC had refused to clear the transaction because it was concerned that the acquisition would result in a substantial lessening of competition in the cement and concrete markets in Australia. Boral did not accept this view and announced that it would continue with the takeover. The ACCC then sought an injunction from the
court to prevent Boral from taking steps to acquire or exert control over the business of Adelaide Brighton. After some months of pretrial preparations, Boral withdrew its takeover offer and provided an undertaking to the court that it would not acquire any interest in Adelaide Brighton for one year without prior written consent from the ACCC.

The ACCC also commenced proceedings in the Federal Court in February 2006 against Toll Holdings Limited, seeking an injunction to prevent its proposed acquisition of Patrick Corporation Limited. The ACCC alleged that the proposed acquisition would be likely to have the effect of substantially lessening competition in a number of markets in Australia, including rail, freight forwarding, shipping and integrated logistics services markets. The ACCC had earlier refused informal clearance of the transaction, finding that an undertaking offered by Toll Holdings did not adequately address the ACCC’s competition concerns. Shortly thereafter, the ACCC announced that it would institute proceedings against Toll Holdings on the basis that Toll Holdings' bid had not been withdrawn and it had not confirmed that it would not proceed with the transaction. There was some uncertainty, however, as to whether Toll Holdings would in fact proceed with the transaction or allow its then current bid to lapse. The ACCC pressed Toll Holdings for confirmation of its intention in the event that the ACCC commenced proceedings (as any such proceedings could not be sustained if the bid was allowed to lapse). The proceedings were discontinued on 11 March 2006 when the ACCC accepted revised remedies from Toll Holdings.

In December 2010, the ACCC again confirmed its expressed preference for commencing proceedings for an injunction in merger cases when it sought, in the Federal Court, to prevent the acquisition by Metcash Trading Limited of Pick n Pay Retailers (Pty) Ltd’s Australian supermarket business, Franklins. In that case, following an extensive review of the proposed acquisition under the ACCC’s informal merger clearance process, in mid-November 2010 the ACCC opposed the transaction on the basis that it would remove Metcash’s closest and only genuine competitor in the market for the wholesale supply of packaged groceries to independent supermarkets in New South Wales, being a market in which the major supermarket chains – Coles and Woolworths – did not compete (or otherwise exercise sufficient competitive constraint on Metcash).

The parties to the transaction publicly disputed the ACCC’s findings, and by 23 November 2010 had notified the ACCC of their intention to close the transaction in any event within five days. The ACCC responded by commencing court proceedings seeking an interlocutory order to prevent the parties from closing the transaction, pending the outcome of a final hearing for a permanent injunction to prevent the transaction. By 26 November 2010, however, the parties had agreed to proceed directly to an urgent final hearing on an expedited basis, given the natural desire to achieve certainty as quickly as possible. The final hearing was conducted in March and April 2011, and the Federal Court delivered its judgment on 25 August 2011. The ACCC’s application for an injunction was dismissed. The trial judge held, inter alia, that the counterfactuals to the proposed merger must be proved on the balance of probabilities. The ACCC had argued that it was sufficient to establish that there was a real chance of the counterfactuals occurring.

The ACCC appealed the Federal Court’s decision. The transaction was, however, completed by the parties, following an unsuccessful application by the ACCC for a temporary injunction to prevent completion pending the outcome of its appeal. The Full
Federal Court dismissed the ACCC’s appeal unanimously. On the important issue of the standard of proof for the counterfactual, the position is now quite unclear. Two of the three judges did not express a concluded view on the applicable test but indicated some reservations about requiring proof on the balance of probabilities. The third appeal judge strongly supported the trial judge’s position.

V OUTLOOK AND CONCLUSIONS

The ACCC is subject to intense political pressure in relation to aspects of its merger review activities. The grocery retail sector in Australia is dominated by Woolworths and Wesfarmers. These companies (or their corporate groups) are also increasingly active in liquor retailing, petrol retailing and hardware retailing. Small business advocates are strongly opposed to the expansion of the businesses of Wesfarmers and Woolworths in any of these retail sectors. Many politicians are receptive to these arguments and criticise the ACCC for failing to prevent the expansion of Wesfarmers and Woolworths in these sectors. Unsurprisingly, a substantial amount of the ACCC’s time and resources are devoted to the consideration of the acquisition of single liquor or hardware retail outlets by either Wesfarmers or Woolworths.

The amount of time and resources devoted to these transactions appears to be out of proportion to the likelihood of competitive harm. For example, the ACCC recently devoted almost 12 months to considering and then opposing the acquisition by Woolworths of a supermarket site in the outer suburbs of Sydney.

Concerns about major retailers in part drove the impetus for the Harper Review of Australia’s competition policy and law. As previously mentioned, the Harper Review has delivered its final report to the government. The government will announce its responses to the recommendations in July 2015. As noted above, the changes in relation to merger control are procedural and, even if adopted, will have limited impact on merger control in Australia.
Chapter 2

AUSTRIA

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I INTRODUCTION

The main statutes governing merger review in Austria are the Austrian Cartel Act, which contains the main substantive body of rules, and the Austrian Competition Act, which establishes and determines the investigatory powers of the Federal Competition Authority (FCA).

In Austria, mergers have to be notified to the official parties, namely the FCA and the Federal Cartel Prosecutor (FCP). The FCA is an independent body that administratively belongs to the Ministry of Economics, while the FCP reports to the Federal Minister of Justice.

In cases where either (or both) of the official parties request an in-depth Phase II examination, jurisdiction over the merger devolves to the Cartel Court.

While most European merger control regimes (currently) only cover transactions that give rise to a change in a firm’s control structure, Austrian merger control also catches transactions that do not give rise to a change of control. Pursuant to Section 7 of the Cartel Act, the following types of transactions are notifiable:

- the acquisition of an undertaking or of a part of an undertaking;
- the acquisition of rights with regard to the business of other undertakings (such as certain contracts for the lease or management of the business);
- the direct or indirect acquisition of 25 per cent or more or 50 per cent or more of the shares or voting rights in an undertaking;

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1 Heinrich Kühnert and Gerhard Fussenegger are partners at bpv Hügel Rechtsanwälte OG.
3 Austrian Competition Act 2002, as amended.
cross-directorships: acts that bring about the identity of at least half of the members of the executive board or the supervisory board in two or more undertakings;

e any achievement of a direct or indirect controlling influence over another undertaking; and

f the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Internal reorganisations however are not notifiable. In addition, the Cartel Act provides for certain exceptions in the case of acquisitions by credit institutions and investment funds.

A transaction of the above type will be notifiable if the parties meet the jurisdictional thresholds of Austrian merger control. Like most European regimes, jurisdiction is determined based on the turnover achieved by the undertakings concerned (usually acquirer and target) in the last business year. The Austrian competition authorities have jurisdiction over a transaction if:

a the undertakings concerned achieved a combined global turnover of more than €300 million;

b the undertakings concerned achieved a combined turnover of more than €30 million in Austria; and

c at least two of the undertakings concerned each had a global turnover of more than €5 million.

If only one of the undertakings concerned had an Austrian turnover of more than €5 million, and the combined worldwide turnover of the other undertakings concerned did not exceed €30 million, the transaction will be exempt from the filing requirement. While this exemption excludes some transactions (notably, acquisitions by Austrian firms of small foreign businesses) from the otherwise very broad filing requirement, Austrian merger control nevertheless catches many transactions that are incapable of producing effects on competition in Austria. The Austrian Supreme Court has, however, held that Austrian merger jurisdiction is based on the effects principle, and thus does not apply in certain cases where the lack of effects in Austria is particularly clear-cut.4

Special turnover calculation rules apply in the media sector. Depending on the activities of the undertakings concerned (e.g., newspaper, publisher, news agency), the respective turnover must be multiplied by a factor of 20 or 200.

II YEAR IN REVIEW

With 331 filings received by the FCA, the number of mergers notified to the FCA rose by about 10 per cent in 2014. This is the first year following the financial crises during which the number of merger cases dealt with by the Austrian competition authorities reached pre-crisis levels. By contrast, the number of in-depth investigations was particularly low.

4 Austrian Supreme Court, Case No. 16 Ok 49/05 Česká spořitelna, decision of 27 February 2005.
in 2014: only two transactions were referred to the Cartel Court for investigation in Phase II. In addition, one case that had been notified in 2013 received unconditional Phase II clearance in 2014. What is noteworthy is that this relative paucity of Phase II cases did not go hand in hand with an increase in Phase I remedies: in fact, unlike previous years, 2014 did not see any Phase I clearances based on remedies offered by the parties.

Conditional clearance in Phase II

Austrian practice remains more flexible than that of many other countries when it comes to the acceptance of non-structural remedies. In fact, both of the cases referred to the Cartel Court in 2014 were cleared based on behavioural remedies.

The first case concerned the acquisition, by voestalpine, of a 49 per cent interest in WS Service GmbH (WS), a subsidiary of ÖBB-Infrastruktur AG, the operator of the Austrian railway infrastructure. voestalpine is an Austrian steel technology group that, *inter alia*, is active in the production of railway turnouts. The target company’s sole activity is the maintenance and repair of turnouts, and it services approximately 30 per cent of the turnouts installed in Austria. While the case concerned services that hitherto had been captive (as they had been provided by ÖBB-Infrastruktur AG itself), the FCA and the FCP nevertheless considered that the transaction could give rise to vertical foreclosure due to the strong positions enjoyed by voestalpine and ÖBB-Infrastruktur AG, respectively, in the production and maintenance of turnouts.

The FCA and the FCP, however, withdrew their Phase II requests based on a set of remedies proposed by the parties, which led to the case being cleared without a reasoned clearance decision by the Cartel Court. The remedies comprised, in particular, an obligation on ÖBB-Infrastruktur AG not to contract directly with WS for the maintenance and repair of turnouts. Rather, any such services will have to be awarded based on tenders in line with the rules of Austrian Public Procurement Law (this obligation even applies below the value thresholds at which tenders are required under statutory law). In addition, voestalpine committed to supply other potential providers of maintenance and repair services with spare parts for its turnouts on a non-discriminatory basis. Finally, the package also contains a somewhat unorthodox requirement regarding WS’ business with third-party customers: business with such customers is capped at an annual revenue threshold. Like the other remedies, this cap applies for a period of eight years from clearance.5

The second case concerned the brewing industry. Brau Union, Austria’s leading brewing company, and part of the Heineken group, intended to increase its shareholding in VKB, a regional brewer in the south of Austria, from 50 to 100 per cent. While Brau Union had already held joint control prior to the transaction, the FCA and the FCP nevertheless initiated Phase II, due to the high concentration of the beer market in the relevant region. The remedies accepted in this case involve commitments by Brau Union

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5 Austrian Cartel Court, Joint Cases No. 25 Kt 49, 50/14 – *voestalpine Weichensysteme GmbH/ WS Service GmbH*; case summary and remedies published by the FCA are available at www.bwb.gv.at/Aktuell/archiv2014/Seiten/BWB-Z-2308.aspx (last viewed on 11 June 2014).
to continue the operation of VKB’s brewery and to maintain a separate sales team for 
VKB. By contrast, Brau Union remains free to integrate other business functions (such as 
purchasing, storage and bottling). In addition, Brau Union has committed not to acquire 
breweries or wholesalers in the relevant region for a period of eight years. 6

ii Unconditional clearance in Phase II

Full Phase II investigations remain the exception in Austria, as most cases are cleared 
before expiry of the deadline by means of remedies. The acquisition by Otis of Jeitler-Fida, 
a local Austrian elevator company, constitutes an exception to this unwritten rule. After 
a full Phase II investigation, it was cleared unconditionally by the Cartel Court in 
January 2014. The concerns in this case focused in particular on the ability of small 
elevator maintenance firms to service modern elevators. The Cartel Court, however, 
held that it did not need to decide on whether the market was actually characterised 
by foreclosure, as the transaction would in any event not give rise to an appreciable 
increase in the number of foreclosed units. 7 In separate proceedings, the case also gave 
rise to a clarification of the law regarding the publication of merger decisions. Pursuant 
to Austrian law, the Cartel Court is required to publish the ‘integral reasoning’ of its 
decisions. The Supreme Court clarified that, within its discretion, the Cartel Court was 
free to publish the decision in its entirety (excluding business secrets). 8

iii Fines for gun jumping and failure to notify

The FCA and the FCP continued to pursue violations of the standstill obligation, and 
obtained fines for such violations in two cases. However, in line with practice in recent 
years, the fines remained very moderate, and considerably below the Austrian record 
€1.5 million fine for failure to file. 9

The first case involved the acquisition of Ankerbrot, a traditional Austrian bakery 
in financial difficulties, by a consortium of investors. The case was notified to the FCA 
on 7 April 2014, and received clearance on 4 July 2014. However, the parties closed the 
transaction on 1 May 2014. Furthermore, the Cartel Court found that the shareholders 
of Ankerbrot had already appointed one of the two representatives of the main 
acquisition vehicle (through which the investors acquired a 60 per cent shareholding) as 
as a new board member in February. As Ankerbrot previously had had a one-person board, 
this appointment gave rise to an overlap of 50 per cent in the management boards of 
Ankerbrot and the acquisition vehicle, and thus constituted a notifiable cross-directorship

6 Austrian Cartel Court, decision of 24 February 2015 – Braun Union/Vereinigte Kärtner 
Brauereien, not yet published; case summary and remedies published by the FCA are available 
at www.bwb.gv.at/Aktuell/Seiten/Z-2495-Braun-Union---Vereinigte-K%C3%A4rtner-Br 
uereien.aspx, viewed on 11 June 2014.
7 Austrian Cartel Court, Case No. 26 Kt 103/13 – Otis/Jeitler-Fida, decision of 
15 January 2014.
8 Austrian Supreme Court, Case No. 16Ok6/14i – Otis/Jeitler-Fida, decision of 
21 January 2015.
9 Austrian Cartel Court, Case No. 27 Kt 245/04 – Lenzing/Tencel, decision of 7 June 2005.
under Austrian merger control. What is notable about the case is that the Cartel Court imposed a fine on the target, Ankerbrot, rather than on the acquirers. In doing so, it considered that the legal implications of the board nomination had been difficult to spot. It also noted that, unlike acquisitions of control, the notifiability of cross-directorships related only to formal corporate acts. With a view to this, and to the short duration of the infringement, it imposed a fine of only €20,000. It is arguable that the fine might have been higher had the appointment been attributable to the acquirers as an acquisition of control.

The second case related to the acquisition, by an Austrian wholesaler of automotive spare parts, of a 74 per cent interest in another parts wholesaler based in Germany. The acquirer failed to notify the transaction before closing in 2010, and only did so with a delay of more than three years. The FCA nevertheless applied for a moderate fine of only €23,000, which the Cartel Court imposed on the acquirer (under Austrian law, the Cartel Court may not impose a higher fine than applied for by the official parties). In doing so, it considered that the acquirer had voluntarily submitted the late notification, that the acquisition had been made under significant time pressure due to financial difficulties of the target and that the law firm advising the acquirer had failed to make it aware of the notification requirement.

These cases indicate that the official parties continue to be willing to bring violations of the standstill obligation to court. The low amount of the fines appears to indicate, in particular, a relatively favourable attitude of the Austrian authorities towards late notifications that are submitted voluntarily by acquirers, in particular in cases that did not give rise to competition concerns.

III THE MERGER CONTROL REGIME

Procedure

Austrian merger control is mandatory and suspensory. Transactions that meet the jurisdictional test have to be notified to the FCA, and may not be put into effect before clearance. Unlike EU merger control, the Austrian regime does not provide for an exception to the standstill obligation for public tender offers. Austrian case law and legal writing, however, lend some support to the notion that shares may nevertheless be acquired, as long as the control rights resulting from such shares are not exercised. In practice, it may be prudent to provide for contractual restrictions on the exercise of voting rights (e.g., by means of hold-separate arrangements), to convince the Austrian authorities that this is indeed not the case.

Merger proceedings follow the typical division into a preliminary (Phase I) and an in-depth (Phase II) review. The Austrian system, however, differs from the EU model in that the reviewing authority changes if Phase II is initiated. After notification to the

10 Austrian Cartel Court, Joint Cases No. 27 Kt 65/14 and 27 Kt 67/14 – Ankerbrot, decision of 27 January 2015.

11 Austrian Cartel Court, Case No. 29 Kt 16/14 – Stahlgruber/Neimcke, decision of 19 May 2014.
FCA, a Phase I review is carried out by the FCA and the FCP. Either of these authorities may file an application with the Cartel Court to initiate Phase II. Once a Phase II application has been filed, jurisdiction over the transaction devolves to the Cartel Court. Austrian Phase II proceedings thus are court proceedings, with the requesting authority (FCA, FCP, or both) in the role of the applicant, and the notifying party in the role of the defendant.

**Pre-notification timing**

Austrian law does not provide for a filing deadline. Notifications may even be submitted prior to signing, provided the parties can demonstrate a good faith intention to enter into the transaction, and there is basic agreement as to the transaction’s structure and timing.

There is no specific legal guidance with regard to pre-notification contacts. In cases that do not give rise to competition concerns, notifications are typically submitted without prior consultation of the FCA or the FCP. However, the authorities are open to pre-notification discussions if requested by the parties. Such contacts may well be helpful in complex cases or notifications where undertakings with high market shares are involved. In particular, given the fact that Phase I in Austria is comparatively short, pre-notification contacts can be useful to avoid the risk that the official parties request a Phase II investigation simply because they did not receive, or have time to process, all necessary information in time. On its website, the FCA indicates that pre-notification talks may be helpful in particular if the parties intend to offer remedies.

**Phase I**

Upon notification, the FCA publishes a short summary of the transaction on its website. The waiting period in Phase I is four weeks from notification. This period may be extended by an additional two weeks upon request by the notifying party. By contrast, the Austrian authorities do not have the power to extend the deadline without the notifying party’s consent (no ‘stop the clock’ mechanism).

The great majority of transactions are cleared in Phase I. Unlike in other jurisdictions, there are no reasoned Phase I clearance decisions in Austria. Rather, cases are cleared by expiry of the review deadline. On the working day following the expiry of the deadline, the FCA provides the notifying party with a written confirmation that the transaction is no longer subject to the standstill obligation of Austrian merger control.

Phase I may be accelerated by up to one-and-a-half weeks upon express request by the notifying party. The FCA and the FCP have a wide discretion in granting requests for expedited treatment. They will generally only accept such requests if the transaction does not give rise to competition concerns, and if the parties are able to demonstrate an urgent need to have the transaction cleared before the statutory deadline.

**Phase II**

If initiated, the deadline for Phase II is five months from the date of the Phase II request. The waiting period may be extended by one additional month upon request by the notifying party.
ii Substantive assessment

Unlike most European states, Austrian merger control still relies on the ‘dominance test’: the Cartel Court may only prohibit a transaction if it is to be expected that the transaction will create or strengthen a dominant position. Given the recent switch by Germany from the dominance to the SIEC test, however, it is not unlikely that Austria may follow suit in the medium term.

In practice, the dominance test is able to catch most economic theories of harm. The Cartel Court has investigated horizontal, vertical and conglomerate mergers. Given that the Cartel Act explicitly enshrines the concept of a ‘collective dominant position’, which corresponds to the economic model of tacit collusion, the dominance test also captures mergers that lead to an overall softening of competition on the market, even if the merged entity may not be the market leader.

Austrian law provides for a number of market share thresholds that, if met, will give rise to a rebuttable presumption of a dominant position. Most importantly, an undertaking will be presumed to hold a single dominant position if it holds a market share of (only) 30 per cent. Further presumptions exist for the existence of a collective dominant position. While these presumptions are of some importance in the early stages of merger proceedings, their practical relevance decreases in Phase II investigations, which are almost always led by an economic expert appointed by the Cartel Court.

Mergers that create or strengthen a dominant position will nevertheless be cleared if they give rise to efficiencies that outweigh their detrimental effects, or if they are ‘economically justified’ on industrial policy grounds.

The parties may address concerns voiced by the authorities by offering commitments. Often, such commitments do not result in a conditional clearance decision by the Cartel Court. Rather, the parties may offer commitments to convince the FCA or the FCP, or both, not to initiate Phase II, or to withdraw their applications after Phase II has been initiated. Under Austrian competition law, failure to comply with such commitments will be considered as a violation of the standstill obligation, which may be subject to significant fines of up to 10 per cent of group turnover.

iii Third-party rights

Third parties are granted very limited rights in Austrian merger control. While they are entitled to submit observations to the FCA or the FCP, or both, during Phase I, and to the Cartel Court in Phase II, they do not gain any procedural rights by making such submissions. In particular, third parties are not granted access to the file, nor are they entitled to appeal against the Cartel Court’s decisions.

The only case in which third parties have a right to directly apply to the Cartel Court is after a transaction has received conditional clearance. Third parties may enforce compliance with obligations attached to a clearance decision by applying to the Cartel Court for remedial measures.

iv Judicial review

Decisions by the Cartel Court may be appealed to the Supreme Cartel Court, a division of the Austrian Supreme Court. Appeal lies on points of law only, which greatly limits its effectiveness, given that merger decisions usually turn on the facts of the case. Appeals
by the FCA or the FCP, or both, against clearance decisions nevertheless may have detrimental effects on the parties, as the standstill obligation continues to apply until clearance has become final. Such appeals can delay the transaction by an additional period of up to four months.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions
Austria is a Member State of the EU. The competition authorities of the EU and the European Economic Area (Norway, Iceland and Liechtenstein) share information on notifications received via an electronic system. In addition, they may coordinate on the steps of the investigation. The Austrian FCA regularly engages in informal consultations in particular with the German Federal Cartel Office when both authorities have jurisdiction over the same transaction. As a practical matter, it is therefore important to make sure that German and Austrian proceedings are closely aligned.

ii Minority ownership interests
Unlike most European merger control systems, the Austrian merger regime also applies to acquisitions of non-controlling minority shareholdings. Provided the turnover thresholds are met, acquisitions of a 25 per cent capital or voting interest will be notifiable to the FCA. In addition, the Austrian courts have held that 'circumventions' of the 25 per cent thresholds also give rise to a notification requirement. This applies, in particular, if the acquirer's stake remains just short of 25 per cent, but it is granted rights similar to those of a 25 per cent shareholder.12

iii Turnover calculation
While there is an economic argument for making the acquisition of non-controlling minority shareholdings reviewable, it is much more difficult to see why Austrian law also takes them into account for purposes of turnover calculation. When determining 'group-wide' turnover for the purposes of assessing Austrian jurisdiction, undertakings need to take into account not only companies that are controlled by the same ultimate parent but also companies that are linked to them by means of shareholdings of 25 per cent or more, irrespective of whether these are controlling shareholdings.13 The turnover of these companies has to be included in full (i.e., not just pro rata).

12 Austrian Cartel Court, Case No. 26 Kt 132/04 – Morawa/Mediaprint, decision of 5 August 2004.
13 However, the attribution of turnover in that case only extends to the company in which the non-controlling minority shareholding exists, as well as any company that is under mutual control with that company: Austrian Cartel Court, Case No. 25 Kt 435/96, decision of 13 November 1996.
iv Financial distress and insolvency

The fact that a company may be in distress does not relieve the parties to a notifiable transaction of the filing obligation. Even purchases of assets of an already insolvent company may be notifiable if the acquired assets allow the purchaser to carry on, in full or in part, the business of the insolvent seller.14

The waiting periods of Austrian merger control typically also apply in cases of financial distress. During the course of the recent economic crisis, however, the Austrian authorities have shown flexibility in clearing bank rescue transactions even before the expiry of the statutory two-week period for third-party comments.15

The Austrian courts have not yet had to decide on whether mergers that otherwise would have to be blocked should be cleared in cases of distress (failing company defence). In an obiter dictum, however, the Austrian Supreme Court referred to the recognition of the failing company defence in the European Commission’s Horizontal Merger Guidelines.16 Furthermore, given that Austrian Phase II investigations are driven by economic experts appointed by the Cartel Court, it is not unlikely that the Austrian authorities would take distress situations into account when considering the counterfactual absent the merger.

V OUTLOOK AND CONCLUSIONS

On 22 September 2014, the Austrian Federal Chamber of Commerce and the Federal Chamber of Labour published their joint report on the state of Austrian competition law. Both chambers are influential stakeholders in the Austrian legislative process, not least in the field of competition law. Their report, however, focuses on antitrust enforcement, and does not propose far-reaching changes to the Austrian merger control regime. In particular, the chambers recommend not changing the institutional setup (i.e., keeping separate reviewing authorities in Phase I (the FCA, the FCP) and Phase II (the Cartel Court)). As regards the substantive test, the report also states that there is no need to change from a dominance to a SIEC test at this stage.

The most significant recommendations are of a procedural nature, in particular as regards access to file. Under current Austrian law, there is no access to the FCA’s files, and the rules on access to file in Cartel Court proceedings are in need of reform as they have been found to be incompatible with EU law.17 In this regard, the report proposes granting third parties access to both the FCA’s and the Cartel Court’s files, excluding business secrets. While the aim of this recommendation is clearly to strengthen private claimants’ access in antitrust damages litigation, it is not unlikely that any such changes would also strengthen third-party access in merger proceedings.

Since the report’s publication, the government has launched a consultation process with regard to potential amendments to the Austrian competition rules. However, a draft bill may still be some time in the making.

14 Austrian Supreme Court, Case No. 16 Ok 6/10, decision of 4 October 2010.
15 For example, Case No. BWB/Z-1099 Republic of Austria/Hypo Alpe Adria.
16 Austrian Supreme Court, Case No. 16 Ok 6/10, decision of 4 October 2010.
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 Belgian Competition Authority’s structure. The Competition Authority’s former tripartite structure was changed to a single administrative body that investigates and decides upon competition law infringements. Within this newly created administrative body, a distinction was made between the College of Competition Prosecutors (headed by the Prosecutor-General), which holds the Belgian Competition Authority’s investigative powers, and the Competition College, which holds the Competition Authority’s decision-making powers. The Competition College consists of two assessors (appointed in alphabetical order from the relevant (native Dutch or French-speaking) list of 20 nominated assessors) and the President of the Belgian Competition Authority, who presides over the Competition College. In merger control cases, the Competition College will decide whether to authorise a concentration in regular proceedings, whereas the Prosecutor will, in the first instance, decide whether to authorise mergers filed under the simplified merger procedure.

Regarding the substantive law on merger control, Book IV of the Code of Economic Law did not make any significant changes. Nevertheless, some deadlines
for the Competition Authority to reach a decision on a proposed merger have been shortened; the possibility for the Competition Authority to make preliminary references to the Supreme Court in merger control procedures was abolished; and Book IV of the Code of Economic Law no longer allows the Council of Ministers to overturn decisions of the Competition Authority.

Under Book IV of the Code of Economic Law, a pre-merger notification and approval for all concentrations above the legally established thresholds remain. 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 control rules and case law are substantially influenced by European merger control rules and case law. The Belgian courts and Competition Authority have repeatedly stated that Belgian competition law should be interpreted in light of the European courts’ jurisprudence and the decisions and guidelines of the European Commission, to which reference is often made.

II YEAR IN REVIEW

In 2005, the notification thresholds were substantially increased and in 2006 a simplified procedure was formally introduced into Belgian competition law. These changes resulted in a significant decrease in the number of notifications and a substantial increase in the number of mergers filed under the simplified procedure. In 2008 and 2009, the number of concentrations further declined as a consequence of the financial and economic crisis. From 2010, the number of notifications increased again. In 2014, 18 final decisions were issued, of which 16 were issued under the simplified procedure.

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5 Article IV.7, Section 1 Code of Economic Law.
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.
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.

In January 2014, the Belgian Competition Authority for the first time published its preliminary opinion regarding a proposed concentration in a press release. In particular, Pro League and Telenet had expressed their intention to form a joint venture to which the football clubs would transfer the broadcasting rights on Jupiler Pro League games via an exclusive licensing agreement for a period of six years (with the potential of extension). With these broadcasting rights, the joint venture would then constitute one or more sport channels that would be offered to the different distribution platforms on a non-exclusive basis. In its provisional opinion, the Belgian Competition Authority commented both on the requirement of notification of the joint venture and the potential effects on competition. First, the College of Competition Prosecutors concluded that the formation of the joint venture could be considered a concentration exceeding the notification thresholds, and therefore had to be notified. Second, the College of Prosecutors noted that the joint venture would potentially eliminate competition between platforms or television channels for content, thereby fixing the current market positions both on a wholesale and a retail level. Furthermore, the College of Competition Prosecutors voiced concerns regarding the duration of the transfer of broadcasting rights and the conditions under which the respective sport channel or channels would be made available to other distribution platforms. Finally, the College of Competition Prosecutors noted that the impact on the markets for the acquisition of content and the production of television programmes should be further investigated. Following this preliminary opinion, Pro League and Telenet decided to abandon the transaction.

In the Tecteo case, the Competition College had to evaluate the proposed acquisition by Tecteo Services Group SA, an operator and service provider of a cable television network and pay-TV services in Wallonia, of 100 per cent of the shares in the press groups Les Editions de l’Avenir SA and L’Avenir Advertising SA, which are active in the paper, digital and online magazine and advertising sectors in Wallonia. According to the Prosecutor, one of the main competition concerns that potentially arose from the proposed transaction was that Tecteo would have access to its competitors’ commercially sensitive information through its competitors’ advertising space reservations with one of the target companies. The Competition College shared this point of view. To remedy this concern, Tecteo proposed commitments that were subsequently supplemented by additional commitments suggested by the Prosecutor. As such, Tecteo committed, inter alia, not to change the deadline for submitting advertising material to L’Avenir; and to ensure that the information provided by advertising companies active in the market for

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8 Decision No. ABC-2014-C/C-03 of 26 March 2014 in Case CONC-C/C-13/0030, Tecteo/EDA – Avenir Advertising.
Belgium

electronic communications would only be processed by a limited number of employees and would never be communicated to an undertaking belonging to the Tecteo group, and to provide the Belgian Competition Authority with copies of the confidentiality agreements concluded with the employees of L’Avenir in this regard. On the understanding that these commitments would be complied with, the proposed transaction was approved by the Competition College. The commitments will in principle be valid for five years. In this decision, the Belgian Competition Authority for the first time also appointed a monitoring trustee. An appeal against this decision has been made to the Brussels Court of Appeal.

On 10 June 2014, the Competition College cleared without conditions the proposed transaction by virtue of which ZuidNederlandse Uitgeverij NV and its subsidiary Standaard Boekhandel NV, which is active in book publishing, and the wholesale and retail trade of books, newspapers, magazines and stationery, sought to acquire sole control of Club NV, active in the retail trade of books, newspapers and stationery. As the activities of Standaard Boekhandel NV were mainly focused in Dutch-speaking Flanders and the activities of Club NV were mainly in French-speaking Wallonia, the Prosecutor found only a limited horizontal overlap between the parties’ activities concerning book sales to consumers in the Dutch-speaking part of Belgium (i.e., the only market in which one or both parties had a market share of more than 25 per cent). The Prosecutor considered that a limited increase of Standaard Boekhandel’s market share (i.e., not more than 5 per cent) in the Dutch-speaking part of Belgium would not give rise to significant anti-competitive effects. The Prosecutor also took into account that the sector was subject to strong price pressure from internet sales and sales through other retail channels, and that no third parties had formulated any competition concerns. Therefore, the Prosecutor decided that the concentration did not give rise to any significant competition impediment. The Competition College fully agreed with the Prosecutor’s reasoning and cleared the proposed concentration without any commitments.

In October 2013, the Competition College approved the creation of Mediahuis, a joint venture that sought to bring together Corelio NV and Concentra NV’s activities concerning the publication of Flemish newspapers (with the exception of business newspapers) and digital news and advertising, subject to the notifying parties respecting commitments for five years. The Competition College’s decision, however, was appealed to the Brussels Court of Appeal by De Persgroep NV, a competitor of Corelio and Concentra in the publishing sector, and a third party in relation to the merger filing. During these appeal proceedings, De Persgroep requested several preliminary measures that sought the Belgian Competition Authority to be ordered to submit to the Court of Appeal the confidential and non-confidential versions of the contested decision and the erratum regarding the contested decision, and the inventory of the investigation and procedural file, in order for the Court to be able to give De Persgroep access to the non-confidential versions of the contested decision and the erratum, and to the inventory.

9 Decision No. BMA-2014-C/C-09 of 10 June 2014 in Case No. MEDE-C/C-14/0007, Club NV and Club Luxembourg SA/ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV.

10 Decision No. BMA-2013-C/C-03 of 25 October 2013 in Case No. MEDE-C/C-13/0020, Mediahuis/Corelio NV and Concentra NV.
De Persgroep wanted to use these documents to file specific requests for access to certain documents later on during the appeal proceedings. In its second interlocutory decision in this case on 19 November 2014, the Court decided to partially grant the preliminary measures requested on the basis that the effectiveness of the appeal proceedings and the Court’s exercise of its full jurisdiction required that the pleas could be substantiated by factual information from the concentration file, and that the assessment of the pleas put forward by De Persgroep could not be made properly if De Persgroep was not given access to or informed of the documents’ content in the procedural file supporting the contested decision. Therefore, the Court ordered that the Belgian Competition Authority should give access to the concentration file that was submitted to the Competition College and that, according to the Court, consists of:

- **a** all the documents submitted to the Competition College by the Prosecutors;
- **b** all the documents supporting the Prosecutor’s draft decision;
- **c** all submissions made by the notifying parties and interested third parties to the Competition College;
- **d** the adopted decisions and their amendments, modifications and implementing acts;
- **e** all correspondence and e-mails exchanged by the Competition College; and
- **f** an inventory describing the documents that formed part of the concentration file (i.e., items (a) to (e)).

De Persgroep was then given access to the inventory, and was invited to identify (and justify) the documents that it felt needed to be accessible or at least related to which information should be made available. No access was, however, granted to the investigation file. Subsequently, the appeal was withdrawn by De Persgroep and the proceedings before the Court of Appeal have been terminated.

Finally, the Brussels Court of Appeal confirmed the Competition College’s conditional clearance decision of October 2013 in the *Touring/Autoveiligheid* case. In this decision, the Competition Council had ordered Touring Club to take all the necessary measures to ensure the operational and structural separation of its commercial activities and the target companies’ regulated activities. This conditional clearance decision was contested before the Court of Appeal because the appellants believed that the imposed commitments should have been structural rather than behavioural, and that the commitments could not be monitored. The Court of Appeal dismissed the appeal by, *inter alia*, noting that the imposed commitments were at least partially structural, and were sufficiently concrete to be implemented by Touring Club and monitored by the Belgian Competition Authority, even if such monitoring was not explicitly stated in the conditional clearance decision.

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11 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.


13 Decision No. BMA-2013-C/C-02 of 24 October 2013 in Case No. MEDE-C/C-13/0023, **Koninklijke Belgische Touring Club/Autoveiligheid and Bureau voor Technische Controle**.
III THE MERGER CONTROL REGIME

As mentioned in Section I, supra, concentrations must be notified in Belgium if the undertakings concerned, taken together, have a total turnover of more than €100 million in Belgium,\(^{14}\) 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’\(^ {15}\) 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.\(^ {16}\) The parties must obtain approval for the proposed concentration before it can be implemented.\(^ {17}\)

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.\(^ {18}\)

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 recommended\(^ {19}\) and has become standard practice. These contacts can take place via telephone or e-mail, or in face-to-face meetings. The discussions usually take place based on a draft notification. These contacts have several purposes, including:

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

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

\(c\) the Prosecutor can, at the parties’ request, exempt the notifying parties from providing certain information,\(^ {20}\) which can make the notification less onerous; and

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\(^{14}\) Article IV.7, Section 1 Code of Economic Law.

\(^{15}\) Article IV.11 Code of Economic Law.

\(^{16}\) Article IV.8 Code of Economic Law.

\(^{17}\) Article IV.10, Section 5 Code of Economic Law.

\(^{18}\) Article IV.61, Section 2, 2° Code of Economic Law.

\(^{19}\) 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, supra). Until further notice, these Rules remain applicable also after the entry into force of Book IV of the Code of Economic Law.

\(^{20}\) Article 5, Section 4 of the Royal Decree on the notification of concentrations.
they allow the parties to understand the Prosecutor's point of view on, for example, the market definition, and to more accurately estimate whether Phase I clearance is likely to be granted.

For the notification itself, the parties must use the ‘CONC C/C form’. By completing this form, the parties provide a wide range of information on, *inter alia*, the concentration, the parties, their economic activities, the relevant markets and the effects of the concentration on the relevant markets. The information provided must be correct and complete; otherwise the notification cannot have any effect. In general, the notification obligation falls on the party acquiring control through the concentration. In the case of a merger between two formerly independent companies, the obligation falls on both parties. The concentration must be notified after the agreement’s conclusion and before its implementation. Nevertheless, the parties can notify a draft agreement if they declare that it will not significantly differ from the proposed agreement on all relevant points from a competition law perspective.

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

As is the case in European merger control, the parties must suspend the implementation of the merger until it has been cleared. Failure to respect this

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21 Annexed to the Royal Decree on the notification of concentrations. For the simplified procedure, form CONC C/C-V/S is used, which is annexed to the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.
22 Article 4, Section 1 of the Royal Decree on the notification of concentrations.
23 Article 5, Section 2 of the Royal Decree on the notification of concentrations.
24 Article IV.10, Section 2 Code of Economic Law.
25 Ibid.
26 Article IV.10, Section 1 Code of Economic Law. In Case No. 98-C/C-11 of the Competition Council of 28 July 1998, *Promedia CV/Belgacom Directory Services NV*, Belgian Official Gazette 18 September 1998, p. 30,441, the Council ruled that an agreement that had not yet been approved by the works council was not sufficiently binding to be notified.
27 Article IV.10, Section 3 Code of Economic Law.
28 Article 3, Section 4 of the Royal Decree on the notification of concentrations.
29 Article 3, Section 2 of the Royal Decree on the notification of concentrations.
30 Article IV.10, Section 5 Code of Economic Law.
standstill obligation can result in fines of up to 10 per cent of the notifying parties’ annual turnover.\textsuperscript{31} In exceptional circumstances, the President can permit the parties to implement the merger before it has been approved.\textsuperscript{32} Failure to notify a merger can result in fines of up to 1 per cent of the notifying parties’ respective annual turnovers.\textsuperscript{33} The same fines apply if incorrect or incomplete information is provided in a notification or a request for information, if the information is not provided on time or if the notifying parties hinder the investigation.\textsuperscript{34}

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

\textbf{i} \hspace{1em} \textbf{Simplified procedure}

On 1 October 2006, the simplified merger procedure was introduced into 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.\textsuperscript{35}

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

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

The parties can choose the simplified procedure for the following categories of concentrations:\textsuperscript{36}

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

\begin{itemize}
  \item[31] Article IV.70, Section 1 and Article IV.72 Code of Economic Law.
  \item[32] Article IV.10, Section 7 Code of Economic Law.
  \item[33] Article IV.71, Section 2 Code of Economic Law.
  \item[34] Article IV.71, Section 1 Code of Economic Law.
  \item[35] Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations on 8 June 2007.
  \item[36] 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.
\end{itemize}
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; 

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 

a party acquires sole control over an undertaking over which it already exercises joint control. 37

As mentioned above, the Prosecutor has only 15 working days from the notification 38 to decide whether the conditions for the simplified merger procedure apply and whether the concentration raises any objections 39 or doubts as to its permissibility. 40 If the Prosecutor fails to come to a decision before the deadline, the merger is deemed to have been approved. 41 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. 42 Moreover, the timetable for the regular proceedings will only

37 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. 

38 Article IV.63, Section 6 Code of Economic Law. Please note that Article I.1 Code of Economic Law defines working days as all calendar days with the exception of Sundays and statutory holidays. This means that Saturdays are in principle to be considered as working days. In comparison with what was the case under the former Competition Act, where the Prosecutor was given 20 working days to come to a decision and Saturdays were not considered to be working days, the deadline has thus been substantially shortened by the entry into force of Book IV of the Code of Economic Law. 

39 Article IV.63, Section 3 Code of Economic Law. This criterion was widely interpreted in case law. In the Belgian Airports/Brussels South Charleroi Airport case, the Prosecutor refused the application of the simplified procedure merely because a third party voiced an objection against the concentration (Case No. 2009-C/C-27 of 4 November 2009, Belgian Official Gazette 22 January 2010). 

40 Article IV.63, Section 5 Code of Economic Law. Strangely, this paragraph (‘doubts as to the permissibility’) does not use the same criterion as paragraph 3 (‘no objection’). 

41 Article IV.63, Section 6 Code of Economic Law. 

42 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.
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.\(^{43}\)

Even though the simplified procedure is formally included in Book IV of the Code of Economic Law, it still entails some uncertainty for the parties. First, there is uncertainty as to timing. As set out above, a ruling that the simplified procedure cannot be used means that the parties have to start regular proceedings from scratch. Even if the Prosecutor during the pre-notification contacts indicates that the concentration qualifies for the simplified procedure, nothing is certain, especially given the wide interpretation of the 'no objection' criteria, which can allow third parties to force the notifying parties into a regular notification by filing objections. This uncertainty is increased by the absence of any right to appeal against a Prosecutor's decision to revert to the regular procedure.

\section*{ii Regular procedure}

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

Book IV of the Code of Economic Law contains fixed time frames for both the decision and the investigation. Once the concentration has been notified, the Prosecutor must submit a reasoned draft decision to the Competition College within 25 working days of the day after the notification.\(^{44}\) 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.\(^{45}\) If the file is incomplete, the time period only starts when the complete information is received. If commitments are presented, the time limit is extended by five working days.

No less than 10 working days after the communication of the Prosecutor's reasoned draft decision, the Competition College organises a hearing during which the parties and any interested third parties are heard.\(^{46}\) From the moment the Prosecutor's draft decision is submitted, the parties must be given full access to the file, except for

\(^{43}\) Article IV.63, Sections 3 and 4 Code of Economic Law.

\(^{44}\) Article IV.58, Section 4 Code of Economic Law.

\(^{45}\) Ibid.

\(^{46}\) Article IV.60, Sections 1 and 2 Code of Economic Law.
Belgium confidential submissions from third parties. Third parties, on the other hand, only have a right of access to the file in limited circumstances. The Competition College must decide whether to approve the merger within 40 working days from the day after the notification.47 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.48 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.49 Furthermore, the Prosecutor must submit its revised draft decision within 30 working days of the decision.50 The parties may submit their written observations within 10 working days of the submission of the revised draft decision. If the parties submit written observations, the Prosecutor may submit an additional draft decision within five working days.51 A hearing must be held no less than 10 working days after the submission.52 The Competition College must decide whether to approve the merger within 60 working days of initiating the Phase II procedure.53 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.54 However, the Supreme Court55 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. Nevertheless, in the Mediahuis decision, the Brussels Court of Appeal confirmed that the Belgian Competition Authority is obliged to give access to the concentration file that was submitted to the Competition College during the appeal proceedings (see Section II, supra).56

47 Article IV.61, Section 2 Code of Economic Law.
48 Article IV.61, Section 3 Code of Economic Law.
49 Article IV.62, Section 1 Code of Economic Law.
50 Article IV.62, Section 2 Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any.
51 Article IV.62, Sections 3 and 4 Code of Economic Law.
52 Article IV.62, Section 5 and Article IV.60 Code of Economic Law.
53 Article IV.62, Section 6 Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any.
54 Article IV.62, Section 5 and Article IV.60 Code of Economic Law.
56 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.
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. Appeals cannot be lodged against decisions by the Competition College to refer a case to the Prosecutor.

The appeal could be lodged by the parties, by interested third parties who have requested to be heard by the Competition College and by the Minister of Economic Affairs. The appeal must be lodged within 30 days of the notification of the decision. Before the Court of Appeal, the parties present their arguments in writing and at a hearing. The Minister of Economic Affairs can also submit written arguments to the Court of Appeal. Since the entry into force of Book IV of the Code of Economic Law, the Belgian Competition Authority, represented by the President, can also intervene as a party in the proceedings and submit written arguments. At any time, the Court of Appeal can call the parties to the case before the Competition College when there is a risk that the appeal may 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

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57 Article IV.66, Section 2 Code of Economic Law.
58 Article 65 Code of Economic Law.
59 Article IV.79, Section 1 Code of Economic Law.
60 Article IV.79, Sections 3 and 4 Code of Economic Law.
61 Article IV.79, Section 5 Code of Economic Law.
62 Article IV.79, Section 2 Code of Economic Law. This was recently 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.
63 Article IV.79, Section 2 Code of Economic Law.
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. This practice appeared to work, even in cases where such objections are based on rather weak arguments.

With respect to timing, it should be noted that the deadline imposed on the Prosecutors to issue decisions in simplified merger filings has been shortened from 20 to 15 working days, it being understood that Saturdays are now also considered as working days. It therefore became even more important to start pre-notification talks well before the actual merger filing. In the case of a simplified procedure, it is also advisable to start a pre-notification to get as much certainty as possible about the Prosecutor’s preliminary view on whether the conditions for a simplified procedure have been fulfilled and on the extent of the information that should be provided to convince the Belgian Competition Authority that the conditions of the simplified procedure indeed apply.

**V OUTLOOK AND CONCLUSIONS**

To date, only four merger control decisions have been taken under the regular merger control procedure since the entry into force of Book IV of the Code of Economic Law, three of which have been appealed against. It therefore remains to be seen what exact effect the entry into force of Book IV of the Code of Economic Law and of the restructuring of the Belgian Competition Authority will have on Belgian merger control procedures. Three decisions issued under the regular procedure by the new Competition Authority are decisions of admissibility, provided certain conditions or commitments are respected. Within this framework it should be noted that, as is the case under European competition law, both behavioural and structural remedies can be accepted. However, the Belgian Competition Authority seems more inclined to impose behavioural remedies.

Seven concentrations have already been filed under the regular merger control procedure in 2015, suggesting that a number of substantial merger control issues will probably be dealt with during the course of the year.

Finally, a legislative proposal is currently pending to amend the Belgian competition legislation regarding, *inter alia*, a provision that would change the treatment of Saturdays as working days, implying that the Belgian Competition Authority in the future will have longer to reach a decision in merger control proceedings. In the same respect, there also have been calls to introduce a ‘stop the clock’ mechanism into the Belgian merger proceedings. The amendments to the Belgian competition legislation are expected to be adopted in the last quarter of 2015.
I INTRODUCTION

Before 2009, the Bosnian merger control regime was well known for being very diligent in imposing fines for late merger filings (even if a filing was only a few days late). These fines often reached hundreds of thousands of euros. The jurisdiction was also known for being a frequent ‘rest of the world’ jurisdiction for a large number of European deals, as well as for its relatively long review periods. However, following amendments to the merger control regime in 2009, and the resulting higher turnover thresholds, there has been a sharp decrease in the number of filings made each year. Under the 2005 regime, on average the Competition Council processed around 60 to 80 merger notifications each year; in 2013, under the new regime, 23 filings were made in Bosnia and Herzegovina.

The main regulation concerning antitrust matters in Bosnia and Herzegovina is the Competition Law. The Law was initially enacted by the Parliamentary Assembly of Bosnia and Herzegovina on 29 June 2005, but was significantly amended on 1 October 2009. Together with the law governing general administrative procedures, the implementing regulations (e.g., the Regulation on Form and Content of Merger Notifications, the Regulation on Criteria for Assessment of Relevant Markets, the Fee Tariff Regulation – 11 regulations in total) and non-binding opinions issued by the Competition Council pertaining to specific matters, these constitute the bulk of competition law in Bosnia and Herzegovina.

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

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The first competition law in Bosnia and Herzegovina was enacted in 2001. However, it did not follow the relevant solutions and achievements of the modern EU *acquis communautaire*, and this led to the enactment of the Competition Law of 2005. The first members of the competition authority in Bosnia and Herzegovina were appointed on 1 May 2004, pursuant to the Law of 2001.

Since 16 June 2008, when the stabilisation and association agreement between the EU Member States and Bosnia and Herzegovina (SAA) was signed, the Bosnian competition rules have been formally exposed to the influence and case law of the European Union. The SAA came into force in Bosnia and Herzegovina on 1 June 2015.

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

The Central European Free Trade Agreement (CEFTA), similarly to the SAA, envisions the application of EU competition law principles and rules to all matters in which trade among the member countries may be affected. Therefore, while normally Bosnian competition law would not apply to sales outside Bosnia and Herzegovina, the CEFTA rules will, together with the laws of Bosnia and Herzegovina and the laws of the EU, which the national authorities are obliged to follow. While the Competition Council considers the CEFTA area to be a free-trade zone in its merger review practice, there has been no case law so far regarding competition infringements in cross-border trade between member countries.

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

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

The Competition Council consists of six members who are appointed to reflect the structure of Bosnia and Herzegovina’s nationalities. The Head of the Council is appointed annually by the Council of Ministers of Bosnia and Herzegovina from among the members of the Council. Council members are appointed by three governmental bodies: three members (one from each of the three constituent nations) are appointed by the Council of Ministers of Bosnia and Herzegovina, two members are appointed by the Government of the Federation of Bosnia and Herzegovina and one member is appointed by the Government of the Republic of Srpska.

Of the Council’s current members, four are lawyers and two are economists.
The quorum for decision-making is three members of the Council, and at least one member from each of the constitutional nations of Bosnia and Herzegovina must vote for the decision (i.e., two members with the same ethnicity can veto any decision).

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

II YEAR IN REVIEW

Compared with the period before the 2009 amendments to the Competition Law, the merger control aspect of the Competition Council’s activities has been somewhat diminished in favour of restrictive agreements and abuse of dominance cases, which now, when combined, represent more than a half of its practice. Besides the increase of the merger control thresholds, this might simply be due to market structure and activity, or to an intentional emphasis on these issues by the Council. In 2013, the Council decided on six restrictive agreement cases (seven more cases remain to be decided) and seven abuses of dominance (six more cases remain to be decided).

According to the Competition Council’s 2013 annual report, the Council issued 16 decisions on merger procedures in 2013. This is a significant drop compared with 41 merger clearances in 2009. The Council did, however, remain consistent in its policy of imposing severe fines for late notifications or implementations contrary to clearance.

According to the Competition Council’s 2013 Annual Report, in 2013 the Council imposed fines totalling approximately €723,000. This figure includes fines for late filings as well as fines for abuses of dominant position and entering into restrictive agreements.

III THE MERger CONTROL REGIME

i Definition of concentration

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

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

b acquisition of direct or indirect control by one or more undertakings over another undertaking or part of an undertaking. This includes the ability or possible ability to exert a material influence on the business of an undertaking by way of rights, agreement or any other legal or factual means, and in particular:

• ownership or right of use of some or all of the property of an undertaking; or
• the ability (arising from an agreement or otherwise) to have a determinable influence on the composition, work or decision making of another undertaking; and
c full-function joint ventures, where full functionality is interpreted similarly to the EUMR’s interpretation (creation of a new undertaking by two or more independent undertakings that will exercise joint control over the new undertaking, but that will be independent from its shareholders and have full access to the market).

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

The following are not concentrations:

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

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

c cooperative joint ventures; and

d acquisition of control by a bankruptcy administrator.

ii Merger control thresholds

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

a the total annual turnover of all the parties to the concentration in the world market in the previous accounting year exceeds 100 million convertible marks; and

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

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

Intra-group turnover is not taken into account, and the turnover is normally calculated in line with the Competition Council’s guidelines and the European Commission’s Consolidated Jurisdictional Notice.

The Competition Law also applies to foreign-to-foreign mergers. There is therefore no local effects doctrine prescribed under the Competition Law. The Competition Council has in many cases thus far examined and issued clearances in foreign-to-foreign transactions. The Council has taken a very strict and formalistic approach in this respect, and it requires mandatory filing whenever either of the two above-mentioned thresholds is met. Normally, foreign-to-foreign mergers without any competition concerns in the local Bosnian market will be processed through fast-track proceedings.

iii Procedure

Filing deadline

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

**Pre-notification discussions**
The Competition Law does not provide for pre-notification discussions with the Competition Council. Furthermore, members of the Council and case handlers are very reluctant to enter into any verbal discussions with applicants.

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

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

**Length of review**
The Competition Council has to review the completeness of the notification and to issue a declaration to this effect. If the Competition Council considers a notification to be incomplete, it will ask the notifying party to complete it within eight days. After the notification is declared complete and the Council issues the certificate of completeness, the Competition Council then has 30 days to render a decision in fast-track proceedings (Phase I). If it determines that the merger implementation might have significant negative effects on competition, in-depth proceedings (Phase II) shall be initiated. In this phase, the Council has three months to render a final decision (as of the date of the commencement of the Phase II proceedings). However, if the Council decides that additional evidence or analysis is necessary, or the concentration concerns especially sensitive markets or industries, it has the right to extend the Phase II time frame for another three months. If the transaction is not cleared (conditionally or unconditionally) or prohibited within the above prescribed deadlines, the merger is considered to be cleared.

**Confidential information**
Information regarding the merger control proceedings may be classified as confidential and shall not be published by the Council if the party proves that it shall suffer substantial damage due to publication of such information. The decisions of the Council (including the whole reasoning of the clearance decision), apart from information classified as confidential, are regularly published on the Council’s website.
**Standstill obligation**
The law prescribes a standstill obligation (i.e., the parties must suspend the implementation of the transaction before the clearance is issued, or before the statutory deadlines have expired). Mandatory stay of the concentration does not prevent the implementation of a takeover notified to the relevant authority pursuant to the law regulating the takeover of joint-stock companies.

**Merger clearances with commitments**
Even though the law clearly entitles the Competition Council to issue conditional clearances, the Council has not issued a conditional clearance (i.e., a merger clearance with conditions and commitments or obligations) since its establishment in 2004. There have been instances where the applicants have offered commitments to the Competition Council and the Competition Council could theoretically have issued conditional clearances, but as far as we are aware, in all these cases, the Competition Council failed to issue its decision within the prescribed deadlines and, as a result, the mergers were deemed cleared due to the lapse of time.

**In-depth merger control procedure**
It is a general rule that the Competition Council may initiate an in-depth procedure (i.e., Phase II or inquiry proceedings) when it finds that the concentration in question raises serious competition concerns. In other words, if the concentration leads to a significant prevention, limitation or distortion of competition on the relevant market, the Competition Council is entitled to initiate an in-depth procedure. Besides that general rule, the Council could formally commence an in-depth procedure if the parties have not submitted all the relevant data and documents that are mandatory under the respective merger control regulation.

The Council has a deadline of 30 days from receipt of the complete filing to decide where it will initiate the Phase II procedure. The statutory deadline for issuance of the clearance in Phase II is three months.

When the Competition Council commences an in-depth (Phase II) procedure, the applicant still cannot know what direction the Council’s enquiries during the Phase II procedure will take. It is common for the authority to contact the parties’ main competitors, their largest suppliers and buyers in order to assess what their expectations of the concentration in question are (i.e., whether the competitors, suppliers and buyers estimate that their position will be degraded or perhaps improved by the implementation of the concentration).

**Prohibited concentrations**
To our knowledge, the Competition Council has decided to dismiss a merger filing (i.e., to not clear the concentration) in only one case; in 2009, the Council decided to prohibit a merger in the market for the production of bread, fresh pastry goods and cakes. The main reason for the prohibiting decision was the creation of a dominant position. This remains the only prohibited merger in Bosnia and Herzegovina.

The main reason for not allowing a merger is assumed creation or strengthening of the acquirer’s dominant position in the relevant market. However, even though such mergers can raise serious competition concerns, it can be the case that the competition...
authority does not prohibit the transaction at all, but will rather decide to clear the merger with acquirer commitments (conditional clearance) or even without any commitment whatsoever. Such clearance will depend on the case in question and on the competition authority itself, and will be based on various reasons (such as political reasons or even protection of the national champion) that lead the competition authority to decide to clear the transaction even when it should clearly be prohibited. Nevertheless, as stated above, the Competition Council has never issued a conditional clearance.

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

**Fees and penalties**

Concerning merger control, there are two fees that are most relevant in Bosnia and Herzegovina: the filing fee and the clearance fee. The initial fee for filing the merger notification is 2,000 convertible marks. The fee for issuance of the decision will vary depending on whether the Competition Council issued the decision in the summary proceedings, in which case the clearance fee is 2,500 convertible marks, or in the inquiry proceedings (Phase II), in which case the clearance fee is 25,000 convertible marks.

There are also a number of connected fees: an initial fee of 2,000 convertible marks for filing a request for re-examination of a final conclusion on a concentration, and a subsequent fee of 2,500 convertible marks for the issuance of this act. If the concentration is cleared because the authority did not render a decision within the prescribed deadlines, a fee of 2,500 convertible marks applies for requesting the issuance of a special act confirming this. Rejection of the merger notification on procedural grounds can net a fee of 1,000 convertible marks, the same amount that has to be paid for filing a request that the Council determines a concentration not to have been notified or to have been implemented contrary to its decision.

The fine for failure to notify within the 15-day filing deadline is up to 1 per cent of the concerned undertaking’s annual worldwide turnover realised in the previous accounting year. The responsible person within the company can also be fined an amount of between 5,000 and 15,000 convertible marks. The statute of limitations for failure to notify is three years. In practice, fines have mostly ranged between €95,000 and €200,000.

In the case of the implementation of a concentration without clearance, the Competition Council could fine the filing party up to 10 per cent of its annual worldwide turnover from the previous accounting year. The responsible person within the company can also be fined an amount of between 15,000 and 50,000 convertible marks. The statute of limitations for such an infringement is five years. In practice, the Court of Bosnia and Herzegovina (as the second instance) has usually validated fines imposed by the Competition Council for both late filings and mergers either lacking or contrary to the clearance received.
The Competition Council can order a reversal (demerger) of an already implemented concentration if it has been un-notified or implemented contrary to the clearance received. This can be effected by way of a split-off, sale of shares, restriction of voting rights or performance of any other action that would lead to restitution of the prior status. As far as we are aware, the Competition Council has not implemented any demerger decision to date.

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

Judicial review
Resolutions of the Competition Council are final in administrative proceedings. The party to the proceedings or a third party with a legal interest are eligible to challenge the decision before the Court of Bosnia and Herzegovina by initiating an administrative dispute through filing a claim within 30 days of receipt of the decision. The appeal does not preclude the enforcement of the decision.

The Court of Bosnia and Herzegovina may confirm the decision, annul the decision and return it to the Competition Council for revision, or decide on the case itself. There is no deadline for the Court to decide on the administrative dispute. According to the Competition Council’s 2013 annual report, in 2013 the Court decided in five cases, and in three cases the Court upheld the Competition Council’s decisions, but in two cases the Court annulled the decisions and returned them to the Competition Council for re-examination.

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

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

\(a\) the structure of the relevant market;

\(b\) actual and potential competitors;

\(c\) the market position of the parties and their economic and financial power;

\(d\) the possibility to choose suppliers and customers;

\(e\) legal and other barriers to entry in the relevant market;

\(f\) the level of competitiveness of parties;

\(g\) supply and demand trends for relevant goods or services;

\(h\) technical and economic development trends; and

\(i\) the interests of consumers.
The Competition Council applies the SIEC test in combination with the dominance test, based on wording that has been transposed from the EUMR. Most often, the authority will analyse the level of concentration of the market by relying on the Herfindahl–Hirschman Index index, and assess the parties’ market power based on the market share information.

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

IV OTHER STRATEGIC CONSIDERATIONS

i Acquisition of minority shareholdings
Similarly to the EU regime, an acquisition of a minority shareholding may trigger the filing requirement provided that the minority shareholder would be able to exercise certain controlling rights that fall outside the scope of ordinary rights attributed to a minority shareholder. However, while the European Commission would normally rely on its own guidelines (the Consolidated Jurisdictional Notice), the Competition Council has enacted no such guidelines. Parties normally refer to the Consolidated Jurisdictional Notice, although it has been evident that in certain cases the Competition Council would use a wider interpretation of control than that found in the European Commission’s Notice.

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

V OUTLOOK AND CONCLUSIONS

Following the amendments in 2009 to the merger control regime and the increase in turnover thresholds, all the conditions were met to enable the Competition Council to focus on general antitrust matters (cartels, restrictive practices, dominance), as well as on more complex merger cases. Measures should therefore be put in place to ensure that more straightforward merger cases are not unnecessarily delayed.

In addition, in the past, the Competition Council has focused on the formal aspects of merger control rather than the substantive review. We hope that its experiences in dealing with general antitrust matters have built its capacity to perform more thorough analyses in merger control cases.
Finally, the Competition Council has dealt with only a few difficult cases; due to this, and its current level of staff numbers, it remains to be seen how it will handle remedies, and in particular structural remedies.
I INTRODUCTION

Since the introduction of the pre-merger control regime in Brazil in 2012, the Brazilian merger review process has become more sophisticated. The Administrative Council for Economic Defence (CADE)\(^1\) has increased the use of economic analysis in more complex matters, expanded the cooperation with foreign authorities in the review of transactions with an international component, and introduced new tools and mechanisms that were

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\(^1\) Lauro Celidonio Neto, Amadeu Ribeiro and Marcio Dias Soares are partners at Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados. The authors thank Andreia Saad and Carolina Cury Ricciardi for their assistance in the preparation of this chapter.

\(^2\) The structure of the CADE is as follows:

a the Administrative Tribunal for Economic Defence (Tribunal), which comprises seven commissioners (one of whom acts as chair) and is responsible for issuing final decisions on merger review cases and antitrust investigations;

b the General Superintendence (GS), which comprises a general superintendent and two deputy superintendents who coordinate and oversee the work of case handlers organised in review units. The GS is responsible for the initial review of merger cases and can issue final clearance in cases that do not raise competition concerns. In the event the GS concludes that a given transaction should be either blocked or approved subject to restrictions or remedies, the GS has to file an opposition to the case with the Tribunal. The GS is also responsible for investigations regarding anti-competitive conduct. Upon conclusion of such investigations, the GS will issue an opinion recommending the Tribunal to either close the investigation or impose fines and other applicable sanctions on the companies or individuals, or both, concerned; and

c the Department of Economic Studies, which provides necessary economic support to the GS and the Tribunal.
not commonly seen in remedies negotiations in Brazil. A number of complex transactions were reviewed by CADE in 2014, and, in addition to a growing number of remedies negotiations, CADE issued its first prohibition.

In terms of policy, Brazil has experienced significant changes to its merger review rules, in a clear move by CADE to try to ensure more transparency and legal certainty regarding certain procedures. Formal guidelines on gun-jumping were released by CADE in May 2015 (see Section III.ii, infra), and additional guidelines on compliance, horizontal mergers and remedies are expected to be published soon. CADE is also expected to issue guidelines governing the proceeding for CADE to request notification of transactions that do not trigger a mandatory merger filing in Brazil.

II BASIC RULES

i Filing thresholds
Pursuant to the Brazilian Competition Law, filing with CADE is mandatory if the parties meet the following turnover thresholds:\(^5\)

\begin{align*}
a & \text{ at least one of the groups involved recorded gross revenues in Brazil equal to or in excess of } 750 \text{ million reais in the fiscal year immediately prior to the transaction; and} \\
b & \text{ at least one of the other groups involved recorded gross revenues in Brazil equal to or in excess of } 75 \text{ million reais in the fiscal year immediately prior to the transaction.}
\end{align*}

CADE’s precedents\(^6\) have established that, in cases involving the acquisition of shares, both the buyer and the seller must meet at least one of the above-mentioned turnover thresholds.

The general definition of ‘economic group’ that applies to companies and individuals for the purposes of calculating revenues in Brazil encompasses the following:

\begin{align*}
a & \text{ the controlling entity;} \\
b & \text{ all entities subject to common control; and} \\
c & \text{ all entities in which any of the companies subject to common control holds, either directly or indirectly, } 20 \text{ per cent or more of the total share or voting capital.}
\end{align*}

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3 As noted by CADE Chairman, Commissioner Vinícius Marques de Carvalho, at the American Bar Association 63rd Antitrust Spring Meeting held in Washington, DC, in April 2015.
4 See Public Consultation No. 6, of 29 October 2014.
5 Article 88, items I and II of Law 12,529/2011.
With respect to investment funds, a new definition of ‘economic group’ was introduced by CADE by virtue of Resolution No. 9, issued in October 2014. This new definition sets forth that the following entities and groups shall be considered a single ‘economic group’ for the purposes of calculating revenues in Brazil when the transaction is done by an investment fund:

- the fund directly involved in the transaction;
- the economic group of each investor holding, directly or indirectly, 50 per cent or more of the fund directly involved in the transaction, either individually or by means of an agreement with other investors; and
- the portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund holds, directly or indirectly, 20 per cent or more of the total share or voting capital.

**ii Potentially covered transactions**

According to Article 90 of the Brazilian Competition Law, a ‘concentration’ means:

- the merger of two or more previously independent firms;
- the acquisition of direct or indirect control over the whole or parts of one or more firms, whether through the purchase of shares or assets, or any other means; and
- association agreements, consortia and joint ventures, except if created for the purpose of a given tender process launched by the public administration.

With regard to acquisitions of shareholdings, Resolution No. 2, issued by CADE on 29 May 2012 (Resolution No. 2/2012), as amended by Resolution No. 9/2014, provides that the following transactions shall also amount to a ‘concentration’ under the Brazilian Competition Law:

- the purchase of shares by means of which the purchaser acquires sole or joint control over the target company;
- in the case of transactions in which the purchaser’s group and the target are not engaged in activities that are horizontally or vertically related:
  - the acquisition of 20 per cent or more of the total share or voting capital of the target; or
  - the acquisition of an additional 20 per cent stake in the total share or voting capital of the target from a single shareholder when the purchaser already holds an interest of at least 20 per cent in the target; and
- in the case of transactions in which the purchaser’s group and the target are engaged in activities that are horizontally or vertically related:
  - the acquisition of 5 per cent or more of the total share or voting capital of the target; or
  - the acquisition (through one or multiple transactions) of an additional 5 per cent stake in the total share or voting capital of the target when the purchaser already holds an interest of at least 5 per cent in the target.

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7 Resolution No. 9 was published in the Brazilian Official Gazette on 7 October 2014 as the result of Public Consultation No. 1/2014 of February 2014.
By virtue of Resolution No. 9/2014, an acquisition of an additional stake in the target by a company or individual who already exercises sole control over the target can no longer amount to a ‘concentration’ that could be subject to a merger control filing in Brazil.

The amendments to Resolution No. 2/2012 have also introduced new rules governing the filing requirements for the acquisition of convertible bonds.

The acquisition of convertible bonds shall be subject to mandatory notification whenever:

a) the future conversion into shares will result in the acquisition of control over the target company, or of a minority stake sufficient to trigger one of the minority acquisition rules set forth in Resolution No. 2/2012, as described above; and

b) the convertible bonds being acquired already confer upon the purchaser the right to participate in the management or supervisory bodies of the target company, or provide voting or veto rights regarding matters that are relevant from a competition law perspective.

If the above criteria are not met, notification is not mandatory at the time of the subscription or acquisition of the convertible bonds, but it may be required upon their conversion into shares, provided that the other applicable thresholds are met at the time of the conversion. The new rules also make it clear that if the parties notify the subscription or acquisition of convertible bonds, there is no need to proceed with a new notification upon their conversion into shares. The same amendments clarify that in a public offer of convertible bonds, their subscription does not require CADE’s prior approval to be completed, but the acquirer is prohibited from exercising voting rights attached to such bonds until the final approval by CADE.

In parallel, Resolution No. 8, also issued in October 2014 (Resolution No. 8/2014), amended Resolution No. 1/2012 to make it clear that transactions done via the stock exchange can benefit from the same exemption applicable to public tender offers, according to which the transaction can be completed before getting CADE clearance. The exercise of voting rights attached to the shares being acquired via the stock exchange, however, is suspended until the parties get the final clearance, unless CADE expressly authorises such an exercise to enable the acquirer to protect the full value of the investment.

As regards ‘associative agreements’, in October 2014, with the aim of providing more clarity about this concept, CADE published Resolution No. 10 (Resolution No. 10/2014), providing guidelines on what types of agreements shall fall within the concept of ‘associative agreements’ for the purposes of merger control in Brazil. According to Resolution No. 10/2014, an agreement shall be considered as an

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8 Resolution No. 8 was published in the Brazilian Official Gazette on 7 October 2014 as the result of Public Consultation No. 2/2014 of February 2014.

9 Resolution No. 10 was published in the Brazilian Official Gazette on 4 November 2014 as the result of Public Consultation No. 3/2014 of February 2014.
‘associative agreement’ in nature and therefore be subject to merger control review in Brazil if the agreement:

- shall last for two years or more;
- gives rise to a ‘horizontal cooperation’ between the contracting parties or their respective groups in relation to the subject matter of the agreement, and their combined market share in the relevant market affected by that specific agreement is equal to or in excess of 20 per cent; or
- gives rise to a vertical link between the contracting parties or their respective groups in relation to the subject matter of the agreement, and at least one of them holds 30 per cent or more of a vertically related relevant market affected by that specific agreement, and provided that the agreement contains a profit or loss-sharing clause, or exclusivity obligations arise from the agreement.

Agreements lasting less than two years will also be caught by this regulation whenever they meet the criteria discussed above and, upon renewal, the two-year period is exceeded.

Note that the Brazilian Competition Law also allows CADE to request the notification of transactions that do not fall under either the concept of ‘concentration’ or that do not meet the revenues thresholds discussed above within one year after their consummation. Although CADE, until May 2015, had not made use of this authority, CADE has already gone after companies and individuals to establish why a given transaction was not submitted to CADE’s prior approval.

### iii Effects test

There is an ‘effects test’ under the Brazilian Competition Law pursuant to which a concentration shall only be subject to mandatory filing if, in addition to meeting the applicable turnover thresholds, it has actual or potential effects in Brazil. A concentration is usually considered to have actual or potential effects in Brazil if it takes place in Brazil or if the target has assets in Brazil or export sales to Brazil.

The effects test has already been addressed in some CADE decisions: for example, in a case concerning the acquisition of sole control by Bosch of a joint venture active in the household appliances industry that was previously controlled by both Bosch and Siemens, CADE concluded that no filing in Brazil was required based on the features of the joint venture and the market in which it was active. According to CADE, even though the groups involved did meet the applicable revenues thresholds, the notified transaction was not able to affect the Brazilian market given that the joint venture did not have activities or revenues in Brazil. CADE also noted that the Brazilian market for household appliances had a national scope and, therefore, it could not be served by companies based outside Brazil. As such, CADE concluded that the transaction did not have actual or potential effects in Brazil.

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10 Article 88, paragraph 7 of Law 12,529/2011.
11 Article 2 of Law 12,529/2011.
In another case regarding the creation of a greenfield joint venture by Bosch, Knorr-Bremse and ZF, which would operate as a system centre to provide full-service offerings to multi-brand commercial vehicle workshops in Europe, CADE also concluded that no filing was required, because even though the groups involved did meet the applicable turnover thresholds, the notified transaction would not affect the Brazilian market. According to CADE, the planned joint venture would focus on the European market and its services would be designed to meet the requirements of its target customers in Europe. CADE also noted that the geographic scope of the market affected by the transaction was national, and thus that it could not be served by companies based outside Brazil. As such, CADE concluded that the transaction did not have actual or potential effects in Brazil.

In conclusion, if the parties to a given transaction are not active and do not have concrete plans to be active in Brazil, no filing with the Brazilian competition authority is likely to be required. That said, it is always important to run this analysis on a case-by-case basis, taking into account the specific features of both the transaction and the markets concerned.

III YEAR IN REVIEW

i Review period
From January 2014 to May 2015, CADE cleared approximately 538 non-complex transactions under the summary proceeding, with an average total review period of approximately 23 calendar days counted from the date of the formal submission to CADE. As to more complex cases notified under the long form, CADE cleared 86 transactions with total review periods ranging from 20 to 295 calendar days. The filing of seven transactions was not accepted by the GS, as the transactions at issue did not constitute ‘concentrations’ under the new Competition Law No. 12,529/2011, or did not meet the applicable de minimis rules set forth in the merger regulation for minority acquisitions. CADE also negotiated remedies with parties in 11 transactions in such period, having blocked only one transaction. 15, 16

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14 CADE’s General Superintendent expressly stated in the decision: 

[F]rom a legal perspective, in order for the Brazilian Competition Law to apply [the conduct/transaction] must have actual or potential effects in the country […] In the present case […] the notified transaction does not have any impact in Brazil, not even potentially. Therefore, the notified transaction does not fall under Article 2 of Law No. 12,529/2011 and, as a consequence, it is not subject to mandatory filing in Brazil.
16 All the figures in this paragraph represent Mattos Filho’s internal records of CADE decisions during 2014 and until May 2015.
ii New rules and guidelines

In 2014, significant changes were experienced in terms of the policy related to merger control in Brazil. These changes are summarised below:

a Resolution No. 8/2014: on 7 October 2014, CADE published important amendments to Resolution No. 1/2012, setting out that transactions done via the stock exchange can benefit from the exemption applicable to tender offers, as explained above. This new regulation also introduced rules governing the procedure for the Tribunal to request a case that has been approved by the GS for a second review.

b Resolution No. 9/2014: on 7 October 2014, CADE published important amendments to Resolution No. 2/2012 that changed the definition of ‘economic group’ applicable to investment funds, as well as the list of transactions that are eligible for the summary proceeding. These amendments also set forth the rules governing the notification of the acquisition of convertible securities, as explained in Section I, supra.

c Resolution No. 10/2014: on 29 October 2014, CADE approved a new regulation providing guidelines on what types of transactions shall be viewed as ‘associative agreements’ that shall be subject to mandatory merger control review in Brazil, as explained above.

d Resolution No. 12/2015: on 17 March 2015, CADE published new guidelines governing the proceeding for consultations with the authority. By virtue of such proceeding, upon the payment of a fee, market players may request CADE’s position with respect to:

• the interpretation of the merger control rules and their application to specific transactions;
• the compatibility of agreements, business strategies and conducts currently being practiced by the consulting party with the Brazilian Competition Law and related regulations; and
• the compatibility of agreements, business strategies and conducts that are planned to be adopted in the future by the consulting party with the Brazilian Competition Law and its regulations.

CADE shall be bound by its findings and conclusions in relation to the parties and the matter object of the proceeding for up to five years.

e Guidelines on gun jumping (Guidelines): on 20 May 2015, CADE issued the Guidelines. Although the Guidelines are not binding upon parties involved in transactions that require prior antitrust approval in Brazil, they will serve as important guidance for companies and individuals to avoid discussions of potential gun jumping.
iii Economic analysis of complex transactions and remedies negotiations

Experience shows that a more rigorous and sophisticated approach is being taken by CADE, in particular in the context of more complex transactions. These have been facing in-depth investigations that will usually involve substantial market tests in the form of both questionnaires and discussions with customers, competitors and suppliers, specific economic analysis led by CADE’s Chief Economist team and, when appropriate, coordination with foreign antitrust authorities, in particular those in Europe and the United States.

This more sophisticated approach has also been seen in the context of remedies negotiations, with parties being required to carefully assess the most appropriate stage of the process to approach the authority with a remedy proposal, taking into consideration several variables that come into play, including, but not limited to, timing constraints relative to the notified transaction, types of remedies appropriate to address the concerns expressed by the authority and with whom to start the negotiation (i.e., the GS or the Tribunal directly).

The lack of a formal procedure in the regulation or guidelines for negotiations of remedies may create uncertainties, but experience shows that, in general, CADE is prepared to move quickly and engage in constructive dialogue towards a negotiated outcome.18

CADE is open to both structural and behavioural remedies, but precedents show a growing preference for structural remedies, many times coupled with behavioural commitments,19 rather than simple stand-alone behavioural remedies.20 There is also a

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18 There is only one provision in CADE’s internal regulation dealing with the matter, but such provision is limited to basic procedural steps and does not discuss substance to any extent. In view of the lack of specific regulation or guidelines, when engaging in remedy discussions, both CADE and the notifying parties tend to rely on past remedy packages that have been accepted by CADE and international experience. For example, in Case No. 08700.000436/2014-27 (Braskem SA and Solvay SA), Reporting Commissioner Gilvandro Araújo mentioned an OECD recommendation to reinforce the importance of structural remedies in Brazil.


20 This does not mean that CADE will not regard stand-alone behavioural remedies as sufficient to address competitive concerns identified in connection with a given transaction. In three recent cases, CADE only required behavioural remedies: the Innova/Videolar, Estácio/TCA and ALL/Rumo cases. Case No. 08700.009924/2013-19, Innova SA, Videolar SA and others, decision of 2 October 2014; Case No. 08700.009198/2013-34, Estácio Participações SA and TCA Investimento em Participações Ltda, decision of 14 May 2014; and Case No. 08700.005719/2014-65, América Latina Logística SA and Rumo Logística Operadora Multimodal SA, decision of 11 February 2015.
growing trend towards enhancing enforcement mechanisms, with CADE making use of mechanisms such as suitable buyer requirements and prior approval, and determining the use of monitoring and divestiture trustees (influenced in particular by the European Commission’s practice in this respect), as well as provisions regulating the situations under which CADE may determine that the notified transaction shall be unwound.

Pursuant to the Brazilian Competition Law, remedies must be negotiated and approved under a merger control agreement (ACC). Since the entering into force of Law 12,529/2011, and up to May 2015, 13 transactions had been approved by CADE subject to the signing of an ACC.

iv Fines for gun jumping

Under the Brazilian merger control regime, transactions that are subject to mandatory filing in Brazil cannot be closed or implemented before obtaining clearance from CADE. Thus, the parties must remain independent from each other until they are able to obtain CADE’s final approval.

In addition, in contrast to other suspensory regimes around the world, the Brazilian merger control regime does not allow the parties to close or implement the

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notified transaction immediately after publication of the clearance decision: within 15 days counted from publication of the clearance decision issued by the GS, third parties and regulatory agencies are allowed to challenge the decision in the Tribunal, as are any members of CADE's Tribunal, who can request that the case be subject to a complementary review by the Tribunal. For this reason, the parties are only allowed to close or implement the notified transaction once the 15-day period following publication of the clearance decision issued by the GS elapses. On the other hand, decisions issued by the Tribunal become effective on the date of their publication and are only subject to the usual judicial review.

Failure to comply with this standstill obligation exposes the parties to fines ranging from 60,000 reais to 60 million reais, as well as a formal investigation into their behaviour prior to obtaining CADE's approval. CADE may also seek administrative or judicial remedies, or both, to have acts implemented in violation of the standstill obligation declared null and void.

In 2014, CADE ruled on two gun-jumping cases in the oil and gas sector.24 Similarly to the OGX/Petrobras case,25 while CADE ultimately approved the transactions on the merits, it concluded that the parties engaged in gun jumping. The proposed settlements with CADE required the parties to acknowledge that they engaged in gun jumping and provided for pecuniary contributions of 60,000 reais in both cases. Outside the oil and gas sector, in May 2014, CADE ruled on a fourth case of gun jumping in Brazil, which concerned the consolidation of control by Fiat SpA over Chrysler Group LLC. Fiat's settlement with CADE also required the company to acknowledge that it engaged in gun jumping and to pay a pecuniary contribution of 600,000 reais.26

More recently, on 22 April 2015, the food companies Goiás Verde Alimentos and Brasfrigo Alimentos entered into a settlement agreement with CADE through which they agreed to pay a pecuniary contribution of 3 million reais for closing a transaction before getting antitrust clearance from CADE.27 In addition to imposing pecuniary sanctions, the Brazilian authority also decided to suspend one of the parties' brands

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24 See Case No. 08700.008292/2013-76, Petróleo SA and UTC Óleo e Gás SA, decision approving the ACC of 5 February 2014; and Case No. 08700.008289/2013-52 Aurizônia Petróleo SA and UTC Óleo e Gás SA, decision approving the ACC of 5 February 2014.
25 See Case No. 08700.005775/2013-19, decision approving the ACC of 28 August 2013. This was the first gun-jumping case in Brazil. The case involved the assignment to OGX Petróleo e Gás SA of the rights and obligations held by Petróleo Brasileiro S/A – Petrobras in a concession agreement for the exploration, development and production of oil and gas in a block located in the Santos Basin. Although the case was approved on the merits, CADE ruled that the parties engaged in gun jumping. To resolve this issue, OGX and CADE reached a settlement pursuant to which OGX agreed to acknowledge that it engaged in gun jumping and to pay a pecuniary contribution of 3 million reais.
26 See Case No. 08700.002285/2014-41, decision approving the ACC of 14 May 2014.
for two years. According to the Tribunal, this measure was necessary since – unlike previous gun jumping cases – the unlawful acts were not merely administrative and encompassed the actual transfer of assets. CADE learned about the Goiás Verde/Brasfrigo deal in 2012 through notes published by the press, and decided to launch a confidential investigation to assess if the transaction triggered a mandatory antitrust filing in Brazil.

Following the investigation, CADE concluded that the Goiás Verde/Brasfrigo deal should had been filed with the authority and requested the parties to proceed with the formal submission of the transaction. Further, CADE concluded that the companies jumped the gun since relevant assets, such as trademarks and equipment, had been transferred before antitrust clearance was obtained from CADE. At the hearing, the Reporting Commissioner, Ana Frazão, said that the parties’ acts in violation of the standstill obligation would be significant enough to lead CADE to seek the relevant administrative and judicial measures to have those acts declared null and void. However, she concluded that this would result in significant social losses since the transaction was concluded in 2012 and Brasfrigo was no longer operating in the market.

As discussed above, CADE has recently delivered new guidelines addressing gun jumping. Although the Guidelines are not binding upon parties involved in transactions that require prior antitrust approval in Brazil, they serve as important guidance for companies and individuals to avoid discussions on potential gun jumping. The guidelines set out, *inter alia*, what types of pre-merger coordination activities may raise gun-jumping concerns, suggest measures to mitigate the risk of acts in violation to the standstill obligation, and clarify the elements that will be considered by CADE when imposing sanctions against gun jumping. From a substantive standpoint, the Guidelines largely consolidate CADE’s precedents on gun-jumping matters so far, while holding to the idea that every transaction raises unique issues that must be evaluated on a case-by-case basis. CADE has not yet ruled on any case on the basis of the Guidelines.

### IV THE MERGER CONTROL REGIME

#### i Exemption from the standstill obligation

Under the provisions of Law No. 12,529/2011, there are two possible exemptions from the standstill obligation under the Brazilian merger control regime.

The first exemption applies to tender offers. According to Resolution No. 1/2012, tender offers may be notified to CADE as from the date of their announcement and do not require CADE’s approval to be completed. However, the buyer cannot exercise the voting rights attached to the shares being acquired before obtaining CADE’s clearance. CADE may authorise the exercise of such voting rights if necessary to maintain the full value of the investment. As previously noted, Resolution No. 8/2014 amended Resolution No. 1/2012 so as to expand this exemption to cover also transactions done via the stock exchange.

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28. CADE decided to suspend the Goiás Verde’s brand Jurema for canned vegetables and tomato sauce.

Resolution No. 2/2012, as amended by Resolution No. 9/2014, also sets out that, in the case of a tender offer to acquire convertible bonds, their subscription does not require CADE’s prior approval to be completed; however, as mentioned above, the acquirer is prohibited from exercising any political rights related to the acquired convertible bonds until the final approval by CADE is obtained.

Another exemption seems to be based on the derogation available under the EU merger control regulation. This exemption may in practice be available for financial distress cases only, as the regulation sets forth that CADE may authorise the parties to close a notified transaction before clearance if:

a) there would be no irreparable harm to competition resulting from such a derogation;

b) the situation would be easily reversible in the future if the authority concludes that the notified transaction harms competition; and

c) the target company will face serious financial losses in the absence of the requested derogation.

CADE has up to 60 calendar days to decide the request for derogation, which may create disincentives for the notifying parties in a large number of cases. For instance, in a scenario under which a given transaction qualifies for summary proceedings, it may be more efficient for the parties to make the filing and engage with the GS so as to expedite the review. This was the case in some transactions involving targets facing financial problems, and each was cleared by CADE in approximately 10 to 30 calendar days.30

Until May 2015, CADE had not granted such a derogation in practice in the content of an actual transaction.

ii Review proceedings and process

There are two review proceedings under the Brazilian merger control regime: the summary proceeding and the regular proceeding. According to Resolution No. 2/2012, the summary proceeding applies to non-complex cases that are less capable of harming competition. Until October 2014, the list of transactions that were eligible for the summary proceeding included transactions that do not result in any actual or potential horizontal overlap or vertical link; transactions resulting in only minor horizontal overlaps, with combined market shares below 20 per cent; and transactions resulting in vertical integration where the parties or their groups hold shares of 20 per cent or less in their respective markets.31

30 See Case No. 08700.005200/2012-15, Canabrava Bioenergia Participações SA and Companhia Brasileira de Açúcar e Álcool, decision of 30 July 2012; Case No. 08700.008212/2012-00, Equatorial Energia SA and Centrais Elétricas do Páli SA, decision of 10 October 2012; Case No. 08700.006204/2013-00, GSO Capital Partners LP and Eastman Kodak Company, decision of 22 July 2013; and Case No. 08700.007347/2013-20, Whirlpool SA and Mabe Brasil Eletrodomésticos Ltda, decision of 9 September 2013.

31 Transactions regarding the consolidation of control were also eligible for the summary proceeding, but as mentioned above, they are no longer subject to mandatory notification in Brazil.
By virtue of Resolution No. 9/2014 and its amendments to Resolution No. 2/2012, CADE has expanded the list of transactions that may be reviewed under the summary proceeding by raising from 20 to 30 per cent the applicable threshold for transactions that result in vertical integration and including transactions resulting in combined market shares in excess of 20 per cent if the increment in the market share that is caused by the transaction is not relevant. Cases that qualify for the summary proceeding must be filed on the basis of a short form, which requires a rather limited amount of corporate and market information.

The long form applies to transactions that are not eligible for the summary proceeding. It requires a much greater volume of information and supporting documentation than that required under the short form.

The list of documents requested by the complete filing form includes:

a) market studies, research, reports, forecasts and any other documents prepared by either a third party or otherwise that are related to the market position of the party and its competitors; supply and demand conditions; disputes for clients; strategic behaviour (e.g., price, sales, launching of new products and services, innovation and competitors entering or leaving the market); complaints of anti-competitive behaviour of competitors in the relevant market; effects on the supply, demand, costs, prices or features of the product or service caused by direct competitive constraints imposed by a different product or service; and sector reviews, market reviews, etc.;

b) marketing report, commercial report, plans and strategies for the marketing of a brand, reports on the positioning of the product and any other similar reports; and

c) strategic planning, business plan, expansion or retraction plan and any other similar plans.

Following submission of the filing form, the merger review process begins at the level of the GS. The first step in the GS’s analysis is the publication of the summary of the notified transaction in Brazil’s Official Gazette. This publication confirms that the filing was declared complete and that the GS’s formal review period has begun.

Concluding its analysis, the GS can either clear the transaction without restrictions or oppose the transaction before the Tribunal, putting forward the reasons upon which the GS believes that the transaction should be blocked or approved subject to remedies.

The decision issued by the GS may be subject to appeal to CADE’s Tribunal by third parties or, with regard to regulated markets, by the respective regulatory agency. Likewise, upon the request of any Tribunal commissioner, the Tribunal may submit the

32 The new rules establish that this minor increase should be demonstrated through the Herfindahl–Hirschmann Index (HHI), which is calculated on the basis of the market shares of the companies with activities in the relevant market. The new rules consider that minor increases can be demonstrated if the difference between the HHI before and after the notified transaction is less than 200, and if the combined market share of the notifying parties is less than 50 per cent.
case to a complementary review. Both the appeal and the request for submission of the case to a complementary review shall be submitted within 15 days from the publication of the GS decision in the Official Gazette. By virtue of Resolution No. 8/2014, a request for a second review by any of the Tribunal’s commissioners must be reasoned and confirmed by the Tribunal at the first hearing session immediately following the date on which the request is made.

At the Tribunal, the case will be assigned to one of the commissioners, who will be responsible for reviewing and presenting the case to the panel. By means of a final decision, the Tribunal is not bound to the GS decision and can clear the transaction without restrictions; approve the transaction subject to restrictions or remedies negotiated with the notifying parties (signing of an ACC); or block the transaction.

### iii Timing
CADE has up to 330 days to issue its final decision on notified transactions: the formal review period can take up to 240 days, counting from the date upon which the filing is declared complete. The 240-day period may be extended for an additional period of 60 days, if requested by the parties, or for an additional period of 90 days by means of a reasoned order issued by the Tribunal. The GS may present a request to the Tribunal for an extension of up to 90 days if it declares the case to be ‘complex’. In the note issued by the GS that classifies the case as ‘complex’, the GS must present the reasons for the case being viewed as such, and must specify what additional investigation it intends to undertake before concluding the review.

According to CADE’s Internal Rules, if the review period established by the Brazilian antitrust law elapses before a final decision has been issued, the transaction shall be automatically approved.

### V OTHER STRATEGIC CONSIDERATIONS

#### i Pre-notification discussions
In more complex cases, CADE encourages notifying parties to engage in pre-notification discussions with the GS before formally submitting the transaction. These discussions are mainly focused on the scope of the analysis and the level of information to be presented by the notifying parties pursuant to the filing.

#### ii Multi-jurisdictional filings

##### Waivers
In more complex cross-border transactions that are simultaneously being reviewed by foreign competition agencies outside Brazil, the GS will likely ask the parties to allow them to discuss the merits of the case and exchange confidential information with the foreign competition authority.

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33 See Resolution No. 1/2012.
34 Article 133 of Resolution No. 1/2012.
VI OUTLOOK AND CONCLUSIONS

The first three years of the new Brazilian merger control regime have been promising, with companies benefiting from more objective criteria and clearer guidelines on the types of transactions subject to filing obligations, review proceedings, timetables and applicable penalties. The new rules published by CADE in 2014 and in the beginning of 2015 represent another step forward in terms of transparency and predictability of the merger control regime in Brazil. The announcement by CADE’s officials of new rules and guidelines, in particular those on horizontal mergers and remedies, are most welcome, and shall further increase transparency and predictability regarding Brazilian merger control review.
I INTRODUCTION

2014 was an interesting year for merger enforcement in Canada, with significantly higher merger activity. This chapter provides an overview of the merger control regime and insights into the year ahead, and highlights noteworthy developments.

Over the past year, four major themes emerged in the Competition Bureau's (Bureau) review of key transactions. First, the Bureau employed creative behavioural remedies to address competition concerns, signalling more flexibility in its approach to remedies. Second, the Bureau increasingly obtained information from third parties through compulsory Section 11 court disclosure orders. Third, the Bureau took enforcement action in three non-notifiable mergers following complaints from stakeholders, highlighting the importance of considering competition issues in all transactions regardless of their size. Fourth, the Bureau continued to pursue new avenues of international cooperation and made significant inroads in its coordination efforts with the United States.

Retail mergers were particularly active, with the Bureau reviewing the merger of Burger King Worldwide, Inc and Tim Hortons Inc, Canadian Tire Corporation Limited (Canadian Tire) and Pro Hockey Life Sporting Goods Inc (Pro Hockey Life), and Loblaw Corporation Limited (Loblaw) and Shoppers Drug Mart Corporation (Shoppers). Other key sectors reviewed by the Bureau included media, manufacturing, telecommunications, pharmaceutical and water heaters. The most notable mergers include the following:

\[ \begin{align*}
\text{a} & \quad \text{On 14 July 2013, Canada’s largest grocery chain, Loblaw, announced its plan to acquire all of the outstanding common shares of Shoppers, Canada’s largest drugstore chain. On 21 March 2014, the Bureau concluded a consent agreement with Loblaw after an extensive review, requiring divestitures in 27 local markets and prohibiting certain contracting practices.}
\end{align*} \]

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1 Dany H Assaf is practice co-chair and Rebecca Moskowitz and Marina Chernenko are associates at Torys LLP.
b On 12 August 2013, Canadian Tire completed its acquisition of Pro Hockey Life through its wholly-owned affiliate, FGL Sports Ltd, pursuant to an agreement announced on 28 November 2012 and following the Bureau's use of Section 11 orders to compel testimony and evidence from third-party hockey equipment providers.

c On 4 September 2013, Louisiana-Pacific Corporation (LP) entered into an agreement to acquire all outstanding common shares of Ainsworth Lumber Co Ltd (Ainsworth) and, through extensive cooperation with the United States Department of Justice (US DOJ), the Bureau determined that consumers in the province of British Columbia (BC) paid more for orient strand board product than consumers in other North American markets. The parties abandoned the transaction due to competition concerns.

d On 17 January 2014, Garda World Securities Corporation (GardaWorld) completed its acquisition of G4S Cash Solutions (Canada) Ltd (G4S) pursuant to an agreement announced on 28 August 2013 and following the Bureau's use of a Section 11 order that compelled information from Brinks Canada, the only other significant competitor in the relevant market.

e On 4 April 2014, Bell Aliant Regional Communications Inc (Bell Aliant) announced its proposed non-notifiable acquisition of ON Tel Inc (Ontera), which came to the Bureau's attention via several complainants. After an extensive investigation and market testing, the Bureau required Bell Aliant to lease strands of its fibre optic telecommunication transmission lines to a third party.

f On 28 May 2014, the Bureau reached a consent agreement with Transcontinental Inc (Transcontinental) regarding its proposed acquisition of Quebecor Media Inc’s (Quebecor) 74 community newspapers in Quebec, as well as regional offices and pre-press hubs, which tested the parties’ arguments regarding the financial distress of many of the newspapers.

g On 17 November 2014, the Bureau approved Reliance Comfort Limited Partnership's (Reliance) acquisition of National Energy Corporation (National) after an extensive review, which included the issuance of a supplementary information request (SIR). Prior to the merger, Reliance and National were two of the top three water heater rental providers in Ontario and were each involved in ongoing proceedings with the Bureau relating to contraventions of the civil provisions of the Competition Act (CA). The consent agreement signed with Reliance on 4 November 2014 provided the Bureau with a remedy to address its concerns about barriers to entry and competitor expansion into the market.

h On 26 November 2014, the Bureau announced that it had concluded a consent agreement with Medtronic Inc (Medtronic) and Covidien plc (Covidien) permitting the proposed acquisition of all of Covidien's shares by Medtronic following the divestiture of Covidien's drug-coated balloon catheter business. In reaching this agreement, the Bureau worked extensively with the United States Federal Trade Commission and approved a proposed purchaser before the agreement was signed.
In addition, a precedent-setting case was decided by Canada’s highest court, establishing the test for prevention of competition and the efficiencies defence. These developments are all discussed in further detail below.

II YEAR IN REVIEW

In 2014, the Bureau reviewed a total of 233 mergers. Approximately 45 per cent of the reviews resulted in the issuance of a no-action letter (NAL) and approximately 54 per cent of the reviews received an advance ruling certificate (ARC), both of which are brief notices to the parties that their deal may proceed as planned. In the case of a NAL, the Commissioner of Competition (Commissioner) retains the right to challenge the merger within one year of closing. In the case of an ARC, the Commissioner may challenge the merger if it is not substantially completed with one year after the ARC is issued or new information arises that differs substantively from the information provided in the ARC. These numbers are up from the previous year; in 2013, the Bureau reviewed 215 mergers, approximately 54 per cent of which resulted in a NAL and approximately 45 per cent of which received an ARC. The Bureau cleared mergers through consent agreements in three cases in 2014, compared with two cases in the previous year.

The major merger control developments and themes that emerged in 2014 are discussed in further detail below.

i Use of behavioural remedies
Historically, the Bureau has preferred structural to behavioural remedies. In 2014, however, the Bureau increased its use of behavioural remedies as a means of resolving market concerns, particularly where structural remedies are either insufficient or inefficient. For example, the Commissioner imposed a combination of structural and behavioural remedies in Loblaw’s acquisition of Shoppers, requiring both divestitures and prohibitions on certain contracting practices. The Commissioner also issued a qualified NAL to GardaWorld in its acquisition of cash solutions service provider, G4S, which required GardaWorld to alter some of its contracting practices and reiterated the Commissioner’s intention to monitor the post-transaction dynamics of the industry. In addition, the Bureau obtained a commitment from TELUS Health to change certain contracting practices for five years, such as not including terms that make it difficult for pharmacists to switch service providers.

ii Third-party information
The Bureau regularly obtains information on an informal basis from competitors, market participants and other stakeholders when investigating the potential anti-competitive effects of a merger. However, voluntary disclosure is not always possible due to

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3 The current Commissioner of Competition is John Pecman.
confidentiality and other concerns raised by third parties. Under these circumstances, Section 11 of the CA gives the Commissioner the power to compel production of documents and information from third parties through a court order.

In 2014, the Bureau used Section 11 orders to compel information and documents in its review of numerous mergers, including from hockey equipment suppliers in Canadian Tire’s acquisition of Pro Hockey Life and from Brinks Canada, a key competitor in GardaWorld’s acquisition of G4S. The Bureau has indicated its intention to use Section 11 to obtain information from parties to a transaction where:

a. the transaction is non-notifiable (and therefore the information is not otherwise available to the Bureau);

b. information provided to the Bureau through the SIR process is ‘stale’ and the Bureau requires fresh information (although these are less common as review times are now shorter);

c. information is required post-closing; and

d. in hostile transactions where a target has no incentive to provide information on a voluntary basis or to cooperate with the review.

iii Non-notifiable mergers

In 2014, the Bureau took enforcement action in three non-notifiable mergers. On 4 April 2014, Bell Aliant announced its proposed acquisition of Ontera. The transaction was a non-notifiable merger but was brought to the Bureau’s attention by several complainants. Following an investigation, the Bureau determined that the transaction was likely to substantially lessen or prevent competition, or both, in the sale of wireline telecommunications services in up to 16 communities throughout Northern Ontario. The Bureau raised its concerns with the parties, and Bell Aliant agreed to provide Bragg Communications Inc (Eastlink), a third-party telecommunications provider, with a 20-year lease of between two and four strands of fibre on Ontera’s backhaul network.

In a separate transaction involving Eastlink, the company’s proposed acquisition of Bruce Telecom was reviewed by the Bureau as a result of stakeholder complaints. The proposed merger was ultimately abandoned.

Finally, the Bureau also investigated TELUS Health’s non-notifiable acquisition of XD³ Solutions (XD³), ultimately imposing a behavioural remedy. These transactions demonstrate the need to consider and address competition concerns regardless of the size of the transaction, especially where customer or significant competitor complaints (or both) are likely.

iv International cooperation

The Commissioner has repeatedly emphasised his goal of creating a ‘Bureau without borders’ to facilitate the sharing of expertise. In 2014, the Bureau undertook three major initiatives in support of its commitment to international cooperation. First, the Bureau published a paper titled ‘Best Practices on Cooperation in Merger Investigations’, which was prepared through the Canada–US Merger Working Group. In July 2014, for the first time, the US District Court of Maryland ordered a company located in the United
States, Aegis Mobile LLC, to produce documents to the United States Federal Trade Commission (US FTC) on behalf of the Bureau.\(^4\)

Second, the Bureau signed a memorandum of understanding (MOU) with the Competition Commission of India, making India the 11th foreign competition authority with which Canada has a cooperation instrument. Similar discussions were being pursued with the Chinese competition authorities and, in 2015, they resulted in MOUs with China’s State Administration for Industry and Commerce and the Ministry of Commerce of the People's Republic of China. Third, the Bureau launched a new web portal that provides information on the Bureau's efforts to address international anti-competitive conduct.

Several key mergers involved international cooperation in the past year. For example, the Bureau worked extensively with the US FTC in Medtronic’s acquisition of Covidien to develop a remedy that addressed the competition concerns in both countries, including the Bureau’s approval of an up-front buyer. This approval ensured a timely divestiture and avoided the need for a hold-separate provision in the consent agreement. In LP’s proposed acquisition of all outstanding common shares of Ainsworth, the Bureau cooperated with the US DOJ in determining that consumers in the province of BC paid more for orient strand board product than consumers in other North American markets. These mergers are practical examples of the Bureau’s prioritisation of international cooperation.

v Increased transparency

The Commissioner again reiterated the Bureau’s commitment to transparency, noting the importance of increasing dialogue with parties under investigation. The Bureau issued 18 position statements in 2014, compared with 13 in 2013, which summarise the Bureau’s findings in key mergers and provide stakeholders with valuable guidance on the Bureau’s approach to merger review.

The Bureau also issued two pre-merger notification (PMN) interpretation guidelines. One deals with the requirement to submit a new PMN, ARC application, or both, when a proposed transaction is subsequently amended. The second addresses the Bureau’s approach to duplication when calculating assets and sales between affiliates. The Bureau also released a bulletin describing when and how it communicates with parties under investigation and with industry participants, complainants and the general public, and introduced quarterly reports that present statistics and information regarding the Bureau’s activities.

The Bureau also released a document outlining the common economic tools it uses in analysing retail mergers. The Bureau identified qualitative evidence of substitutability across stores, including any consumer switching studies that the parties may have commissioned during the normal course of business, as a useful tool in reviews. In recent retail merger investigations, the Bureau has defined the relevant geographic market to be as small as a one-kilometre radius circle around a retail location (or as large as an

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\(^4\) Although this information was for a different civil matter than mergers, it is indicative of the trend towards more cooperation between international competition agencies.
entire metropolitan area). The Bureau will also consider non-price effects such as impacts on innovation, service, quality, product variety, store formats or hours of operation. Overall, the Bureau’s ongoing release of these documents demonstrates its commitment to enhancing the transparency and predictability of Canada’s merger review regime.

III THE MERGER CONTROL REGIME

The Bureau, headed by the Commissioner, is an independent government agency responsible for the enforcement of the CA. All mergers, whether notifiable or not, are reviewable by the Commissioner to determine their competitive impact, but only those that exceed the thresholds require notification to the Commissioner. These thresholds include a ‘size-of-parties’ test and a ‘size-of-transaction’ test, both of which must be satisfied to trigger the PMN requirement, as well as a third test that applies in respect of a proposed acquisition of any of the assets in Canada of an operating business or in respect of an acquisition of voting shares.

If exceeded, the parties to the transaction must then adhere to the PMN framework set out in the CA, which requires parties to notify the Commissioner prior to completing the merger, to provide specified information and to wait a specified period of time before completing the transaction. In addition, there are non-binding policies that the Bureau generally follows, such as merger review timelines, and certain practices that parties are encouraged to follow, such as cooperation and transparency.

i Thresholds

Section 109 of the CA sets out the ‘size-of-parties’ test, which requires that the aggregate Canadian assets of the parties to the transaction (together with their affiliates) exceed C$400 million or that the aggregate Canadian turnover of the parties exceed C$400 million. Section 110 of the CA sets out the ‘size-of-transaction’ test, which changes yearly and which, in 2015, requires the Canadian assets or revenues, or both, of the target (together with its affiliates) to exceed C$86 million. Section 110 of the CA also sets out the third component of the test that triggers the PMN requirement, and it describes the acquisition event, generally, as the acquisition of assets, or the acquisition of 20 per cent of the voting shares of a publicly traded company or 35 per cent of the voting shares of a privately held company (or more than 50 per cent if the acquirer already owns between 20 and 50 per cent).

Irrespective of whether a transaction triggers the requirement to notify or if the Commissioner has issued a NAL, the Commissioner retains the statutory authority to challenge a merger. In the case of a non-notifiable transaction or where a NAL has been issued under Section 114 of the CA, Section 97 of the CA provides that the Commissioner may bring a challenge within one year after the transaction has been substantially completed if it raises competition concerns. In the case of an ARC, Section 103 of the CA provides that the Commissioner may not challenge a merger based on the same facts if the merger is substantially completed with one year after the ARC is issued.
ii Exemptions

Section 111 provides for several narrow exemptions from the PMN requirement, the applicability of which must be assessed on a case-by-case basis. Parties can be exempted from the PMN requirement if the Commissioner issues an ARC pursuant to Section 102 of the CA or where, for example, the parties to the transaction are all affiliates. A number of other exemptions to the requirement to notify are also provided for in the CA, including certain types of joint ventures and acquisitions of:

\[a\] real property or goods in the ordinary course of business;

\[b\] shares or interests for the purpose of underwriting;

\[c\] receivables (or an acquisition forming a part of any debt work-out); and

\[d\] Canadian resource property.

iii PMN forms and ARC applications

Subsection 114(1) of the CA provides that parties to a notifiable transaction are required to notify the Commissioner and supply the prescribed information set out in Section 16 of the Regulations and reflected in the Bureau's template form (PMN form). For a PMN form to be complete, each party is required to certify under oath or solemn affirmation that the information it has supplied is correct and complete in all material respects pursuant to Section 118 of the CA, and explain if information cannot be supplied.

In straightforward transactions, the merger parties can request an exemption from filing the PMN form by applying for an ARC, which is a letter describing the transaction and the parties and explaining why there are no substantive competition law concerns. Most ARC applications are processed within the Bureau's two week 'non-complex' service standard period. Parties can close with relative comfort by receiving either an ARC (typically, for non-complex matters) or a NAL (typically, for complex matters).

iv Filing fee and non-compliance

Section 65(2) of the CA imposes a C$50,000 fee for an ARC application and a PMN (the fee is the same whether one or both are filed). Failure to comply with the PMN requirement ‘without good and sufficient cause’ is a criminal offence that carries a C$50,000 fine. Parties would also be in contravention of Section 123 of the CA, which prohibits completing a merger before the expiry of the applicable statutory waiting period. The Commissioner could respond to such breach by seeking an order to prohibit the implementation of a merger or requiring the dissolution of a completed merger, as well as imposing a monetary fine of up to C$10,000 for each day that the parties are in breach of the waiting period.

v Non-notifiable mergers

A merger can be reviewed by the Bureau under Part VIII of the CA even if it is not notifiable under Part IX of the CA. The Bureau monitors non-notifiable transactions to ensure compliance with substantive competition laws. Non-notifiable mergers that are reviewed are detected mainly through complaints from market stakeholders (e.g., customers, suppliers and competitors) or market monitoring (e.g., media sources and mergers and acquisitions databases). Under Section 9 of the CA, the Bureau can
be compelled to conduct an inquiry into a merger if six Canadian residents initiate a complaint, although the Commissioner retains the discretion to decide whether to commence a challenge before the Competition Tribunal (Tribunal). Additionally, parties themselves may voluntarily notify the Bureau by way of an ARC request to have written confirmation that the Commissioner will not take action with respect to an upcoming merger.

vi Statutory waiting period
Under Part IX of the CA, once parties to a proposed transaction have submitted completed PMN filings, an initial statutory 30-day waiting period commences during which time the parties are prohibited from closing. The Commissioner has discretion to effectively terminate the waiting period early if he does not intend to make an application to the Tribunal by issuing an ARC or NAL.

Conversely, the waiting period can be extended where the Bureau requires more information to review the proposed transaction. In such circumstances, the Bureau issues a SIR under Section 114(2) of the CA. The waiting period is suspended upon the issuance of a SIR, and a new 30-day waiting period commences from the date the SIR is certified complete. The Commissioner can seek to prevent a transaction from closing by applying to the Tribunal for an order to that effect, if he chooses to challenge it.

vii Cooperation and collaboration
Regular and open dialogue and cooperation with the Bureau can help expedite the merger review process. Voluntarily providing additional information that is requested, supplying competitive analyses and working proactively with the Bureau to resolve any potential concerns will generally provide for a more efficient review. For example, in transactions involving purchasers that are private equity funds, counsel can expedite the process by confirming whether the fund holds an interest of 10 per cent or more in a competing business. In complex matters, parties may agree to an additional 30-day waiting period upfront to give the Bureau case team additional time, particularly in a document-heavy file. This will assist the Bureau case team and potentially avoid a SIR issuance.

viii Merger review policies
Once a filing is received, the Bureau designates the case as ‘non-complex’ or ‘complex’. Over the past two years, approximately 78 per cent of mergers were designated ‘non-complex’ while the remaining approximately 22 per cent were deemed complex.5 In non-complex cases, the Bureau aims to complete its review within 14 days of receiving the filing and provide an ARC or NAL that effectively terminates or waives the waiting period. For complex cases, the period is 45 days. However, where a SIR is issued, the service standard is an additional 30 days from the date on which the Commissioner has received a complete response to the SIR from all recipients. This results in overall review periods in the range of four months or longer where SIRs have been issued.

While these are not statutory timelines, the Bureau has generally met its service standard in over 90 per cent of concluded matters. Unless the Commissioner issues a SIR, parties are legally permitted to close their transaction without comfort and at their own risk once the initial 30-day waiting period has expired. In such circumstances, parties would continue to be subject to the risk that their transaction could be challenged by the Commissioner, who maintains the right to seek a court injunction to prevent closing and, within one year following closing, to challenge it under Section 97.

SIRs are only issued in a minority of matters, as most matters are dealt with through informal information requests, questions and dialogue during the review process. In fiscal 2013/2014, the Bureau issued 10 SIRS, the same number as the previous year. In three-quarters of fiscal 2014/2015, nine SIRs have been issued. The volume of documents produced has ranged from less than 5,000 to over 1 million. Post-issuance discussions with the Bureau may narrow the scope of the requested information and, for electronic searches, identify and limit the custodians and search terms to what is required for the SIR’s satisfaction.

In 2012, the Bureau introduced a publicly available online merger registry that lists the names of the parties and other information relating to concluded transactions, despite concerns raised by the Canadian Bar Association about publicly identifying merger parties in non-public cases. In exceptional cases, where the publication may result in material harm, parties may request that the information be kept private, and the Bureau may oblige on a case-by-case basis.

The MEGs provide helpful guidance in determining what information should be provided to the Bureau to assist in its review of a merger. The objective of the MEGs is to set out current Bureau practice as well as its legal and economic thinking.

IV OTHER STRATEGIC CONSIDERATIONS

Prevention of competition and the efficiencies defence
On 22 January 2015, the Supreme Court of Canada (Supreme Court) provided guidance on the test for prevention of competition and the efficiencies defence in the case of...
**Commissioner of Competition v. Tervita Corporation.** This was the Supreme Court’s first decision on the prevention of competition test and its first merger case since 1997. This decision stems from a non-notifiable transaction that was challenged by the Bureau as a result of competitor complaints.

The Supreme Court confirmed that the test for assessing whether a merger prevents (or substantially lessens) competition is to compare the likely competitive effects of the merger to the likely competitive environment ‘but for’ the merger. The Supreme Court warned, however, that the Commissioner and courts should not ‘make future business decisions for companies’ and that any such determinations must be grounded in more than speculation. The further into the future the Tribunal must look, the less likely that the Commissioner will be able to meet the necessary standard.

The Supreme Court also provided guidance on the efficiencies defence, requiring that the assessment of the defence be as objective as possible by placing a burden on the Commissioner to quantify all quantifiable effects of a merger. The Supreme Court stated that quantified merger efficiencies must be weighed against those quantified effects and that quantitative efficiencies must then be considered against qualitative effects. Potentially ‘small degrees’ of net efficiencies are sufficient for the defence to apply.

As a result, the Bureau has signalled that it may revise its merger review information-gathering process to ensure that it has sufficient information to meet the efficiencies test established by the Supreme Court, which could mean increased issuances of Section 11 orders and SIRs.

**ii The increasing role of consent agreements**

Consent agreements are used to resolve the Bureau’s competition concerns in the approximately 3 to 5 per cent of mergers that are challenged by the Bureau. For example, the 2014 acquisition of National by Reliance, both primarily water heater rental providers, was facilitated by a consent agreement with the Bureau. Pre-merger, the companies were recognised as being among the top three industry players, and each was being pursued separately by the Bureau for alleged contraventions of the CA (Reliance for abuse of dominance, and National for false and misleading advertising and deceptive marketing practices). On 17 November 2014, the Bureau cleared Reliance’s acquisition of National. In its public statement, the Bureau recognised that the consent agreement signed with Reliance to settle its abuse of dominance case had the additional effect of remedying its market entry barrier concerns and generally strengthening competition and consumer choice in Ontario’s residential water heater industry.

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8 Tervita Corp. v. Canada (Commissioner of Competition) 2015 SCC 3.
9 Ibid. at paragraph 147.
iii  Failing firm analysis

In the recent merger of Transcontinental and Quebecor, the parties argued that many of the newspapers being purchased through the transaction were experiencing serious financial difficulty and, as a result, should not be considered vigorous or effective competitors. In an unusual step, the Bureau decided to use a consent agreement to ‘shop’ the relevant assets after the merger closed and test whether a viable alternative to the merger existed. Out of 33 newspapers, only 14 newspapers were purchased, 18 newspapers were shut down and one newspaper continued its operations. It is unclear whether the Bureau will use this approach in the future, but it should be considered as a possibility by merging parties.

iv  Role of market participants

Market participants play an important role in the Bureau’s assessment of a merger and may influence which mergers are reviewed. In conducting an investigation, it is standard practice for the Bureau to contact market participants to obtain information, even in non-complex mergers. In addition, as noted above, the Bureau will obtain a Section 11 order if it requires information or documents from a third party that cannot cooperate due to confidentiality concerns or other legal obligations.

v  Cooperation with the Bureau and other competition agencies

The Bureau encourages open and collaborative dialogue with merger parties. This can be seen in many of the mergers reviewed. For example, in TELUS Health’s proposed acquisition of XD, the Bureau noted in its press release that TELUS Health ‘worked cooperatively and constructively with the Bureau to address [its] concerns’ and ultimately reached an agreement whereby a behavioural remedy was sufficient to address the Bureau’s concerns.

A merger can greatly benefit from conducting an early competition analysis so that, inter alia, the parties can notify the appropriate agencies and have them coordinate their reviews, timelines and remedies (in the case of international mergers), and also so that the parties can propose solutions, such as a potential buyer, in the case of mergers requiring divestitures. Parties are encouraged to provide voluntary waivers permitting the sharing of information among competition authorities in order to improve merger review time frames.


V OUTLOOK AND CONCLUSIONS

On 1 April 2015, the Bureau implemented a new organisational structure designed to better focus resources on complex high priority cases. The restructuring is part of a broader strategic plan that will guide the Bureau’s enforcement and competition promotion activities until 2018.15

Several mergers are being or have recently been investigated by the Bureau in the early part of 2015. After failing to reach an agreement with the parties, the Bureau is challenging Parkland’s acquisition of Pioneer gas stations in 14 communities where the Bureau concluded that the parties’ post-merger market share would be between 39 and 100 per cent.16 This will be an interesting case to follow as it will shed light on the Bureau’s current approach to mergers that it finds competitively problematic. In addition, the Bureau recently concluded three transactions by way of consent agreement. In Holcim Ltd’s acquisition of Lafarge SA, the Bureau reached an agreement where it has the sole discretion to approve a buyer for assets to be divested and will only do so if it concludes that the buyer, in a global transaction, will provide effective competition in Canada.17 In BCE and Rogers’ acquisition of Glentel, the Bureau reached an agreement whereby the parties, as the two largest players in the telecommunications industry, must install firewalls to prevent the sharing of competitively sensitive information.18 Finally, in Kingspan Group Limited’s proposed acquisition of rival Vicwest Inc, the Bureau required the divestiture of Vicwest’s manufacturing facility in Hamilton, Ontario, with the discretion to approve the buyer.19

A proposed amendment to the CA was introduced in 2014 and, if enacted, would expand the concept of affiliation to include a broader range of organisations. This will potentially increase the number of transactions for which PMN requirements apply.

All of these developments reflect continuing vigilant enforcement by the Bureau, but in a flexible and transparent environment that should lead to more predictable outcomes for merging parties.

Chapter 7

CHINA

Susan Ning and Hazel Yin

I INTRODUCTION

The following authorities deal with mergers:

a the Anti-monopoly Bureau within the Chinese Ministry of Commerce (MOFCOM) is responsible for reviewing and clearing merger filings; and

b the Anti-monopoly Commission (a division of the State Council) is responsible for formulating and issuing merger guidelines (it is also the coordinating government agency between MOFCOM and the two other antitrust enforcement agencies, the National Development and Reform Commission and the State Administration for Industry and Commerce).

In China, pre-merger notification is required when the entities participating in the merger possess a certain amount of turnover. Specifically, pre-merger notification is mandatory when, during the previous fiscal year:

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

b the total turnover within China of all the business operators exceeded 2 billion yuan, and at least two of these operators each had a turnover of more than 400 million yuan within China.

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1 Susan Ning is a senior partner and Hazel Yin is a partner at King & Wood Mallesons. The authors would also like to recognise Yang Yang (associate), Jia Menglin (associate) and Xu Ying (associate) for their contributions to this chapter.
II YEAR IN REVIEW

i Legislation

The Anti-monopoly Law (AML) is the primary antitrust legislation that governs the merger control regime. Since the AML was enacted in August 2008, a number of regulations and guidelines relating to the merger control regime have been promulgated, including:

a the Interim Provisions on the Standards for Simple Cases of Concentration of Operators (Interim Provisions on the Standards for Simple Cases), which were released on 11 February 2014 and came into effect on 12 February 2014;

b the Guidelines for the Notification of Simple Cases of Concentration of Operators (for Trial Implementation) (Guidelines for the Notification of Simple Cases), which were released on 18 April 2014 and came into effect on 18 April 2014;

c the Guiding Opinions on Declaration of Concentration of Undertakings (revised) (Guiding Opinions), which were released on 6 June 2014 and came into effect on 6 June 2014; and

d the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (Provisions on Imposing Restrictive Conditions), which were released on 4 December 2014 and came into effect on 5 January 2015.

Article 3 of the Guiding Opinions provides specific guidance on the concept of ‘control’ or ‘decisive influence’. The Guiding Opinions stipulate that control includes sole and joint control as well as direct control and indirect control. MOFCOM will review all the relevant legal and factual factors comprehensively to assess whether a company has acquired control over a target.

ii Enforcement

Administrative clearances of merger control filings

In 2014, MOFCOM reviewed 238 cases, of which 233 were cleared without conditions (including 66 simple cases cleared without conditions), four were cleared with conditions and one was blocked.

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2 The Interim Provisions on the Standards for Simple Cases set forth the substantive criteria for determining which cases may be treated as a simple case.

3 The Guidelines for the Notification of Simple Cases set forth the notification process for a simple case, including the public announcement procedure, and the materials to be submitted for a simple case.

4 The Guiding Opinions set forth the factors that MOFCOM would consider when determining whether ‘control’ of the target company is acquired and the scope of companies whose turnover shall be included when calculating the operator to the concentration’s turnover.

5 The Provisions on Imposing Restrictive Conditions set forth the determination, implementation and supervision regime for restrictive conditions.
As can be seen from above, the vast majority of merger filings were cleared without conditions. Below is a brief description of the four mergers that were cleared with conditions in 2014.

**Acquisition of Life Technology Co, Ltd (Life Technology) by Thermo Fisher Scientific Co, Ltd (Thermo Fisher)**

On 15 January 2013, MOFCOM approved the proposed acquisition of Life Technology by Thermo Fisher with conditions. In this case, MOFCOM investigated 59 relevant products in the field of biotechnology. It employed market concentration degree analysis, price increase forecast tools and other economic methods, as well as market research and other empirical methods to analyse the effects on competition. After a comprehensive assessment, MOFCOM concluded that the concentration might exclude or restrain competition in the markets of cell culture products, SSP kits, SDS-PAGE precision plus protein and siRNA reagents. Therefore, MOFCOM required divestment of the notifying parties’ related businesses and assets, as well as conduct remedies such as compulsorily controlled prices.

**Acquisition of Nokia’s devices and services business by Microsoft**

On 8 April 2014, MOFCOM approved Microsoft’s acquisition of Nokia’s devices and services business with conditions. In this case, MOFCOM was very concerned about market entrance barriers caused by intellectual property rights. MOFCOM mainly focused on standard-essential patents (SEP) and their licences, and concluded that Microsoft might use its Android licensing programme to exclude and restrict competition in the downstream smartphone market, and that the acquisition might result in Nokia’s abuse of patents.

In its decision, MOFCOM imposed conditions on both Microsoft and Nokia. It also distinguished between SEP and non-SEP in the conditions. For example, for SEPs, MOFCOM required both Microsoft and Nokia to license their respective SEPs in compliance with the FRAND (fair, reasonable and non-discriminatory) principle. For non-SEPs, Microsoft must continue to make available non-exclusive licences under its existing Android patent licensing programme to smartphone manufacturers within the territory of China that include coverage for smartphones that are manufactured, used or sold in China. This is the first case in which MOFCOM has imposed additional restrictive conditions on the seller.

**Acquisition of AZ Electronic Materials Ltd (AZ) by Merck KGaA**

On 30 April 2014, MOFCOM approved Merck KGaA’s acquisition of AZ with conditions.

The two companies in this case do not have any horizontally overlapping products or services, but MOFCOM defined the liquid crystal market and photoresist market as complementary markets. According to MOFCOM’s announcement, it believed that Merck would have the capacity to bundle or cross-subsidise liquid crystal and photoresist sales, which might harm competition. After the concentration, the potential bundling of sales of liquid crystal and photoresist products, given the high market shares, might reinforce market power, which would harm competition. It would be difficult for
competitors and new entrants to break through the numerous Merck KGaA-held patents that create technical barriers.

Therefore, MOFCOM imposed conditions on Merck KGaA, requiring that, *inter alia*, Merck not engage in bundling, and requiring it to license patents in liquid crystal on a non-exclusive basis following the commercially reasonable and non-discriminatory principle.

**Proposed establishment of a joint venture by Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho**

On 2 July 2014, MOFCOM approved the proposed establishment of a joint venture by Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho with conditions.

MOFCOM’s main concern in this case was the high market shares of Corun and PEVE in the global market of vehicle NiMH batteries. Meanwhile, Toyota, which is both a party to the joint venture and controller of PEVE, has substantial power in the downstream vehicle NiMH batteries market and the hybrid vehicles market. Therefore, MOFCOM considered that the exclusive distribution arrangements of the joint venture might restrict the supply balance both upstream and downstream, and may exclude or restrain competition in the vehicle NiMH batteries and the hybrid vehicles markets.

Based on the above analysis, MOFCOM imposed conditions on the transaction parties and the proposed joint venture (Corun PEVE), including that Corun PEVE must sell its products to an extensive range of third parties under FRAND principles; and that Corun PEVE must start selling products to external parties within three years after commencing manufacturing, given that there is demand in the market.

**Administrative prohibition decision**

MOFCOM blocked one merger in 2014: the concentration of Maersk, MSC and CMA CGM by the establishment of a network centre. The following is a brief description of this prohibited merger.

On 17 June 2014, MOFCOM prohibited a concentration of the business operators of Maersk, MSC and CMA CGM in the form of the establishment of a network centre.

After evaluating the relevant factors, MOFCOM concluded that the proposed transaction would have adverse impact in the container liner transport services market along the Asia-Europe route. For example, MOFCOM considered that the proposed transaction would result in a closely knit alliance that would be substantively different from a traditional loose shipping alliance, and that it would significantly enhance the market power of the transaction parties while eliminating effective competition among major competitors in the relevant market.

The case involved the large-scale cooperation of the top three container shipping enterprises in the global market, and would have had a significant impact on the container liner business along the Asia-Europe, Trans-Atlantic and Trans-Pacific routes. This is the second case in which MOFCOM has prohibited a concentration between business operators (the first being the concentration between Coca-Cola and Huiyuan).
Administrative penalty decisions
On 2 December 2014, MOFCOM published administrative penalty decisions imposed against Western Digital and Tsinghua Unigroup on its website. Western Digital was fined a total of 600,000 yuan for failure to abide by MOFCOM’s decision in its acquisition of ViViti Technologies in 2011. Tsinghua Unigroup was fined 300,000 yuan for failure to notify the authority of its acquisition of RDA Microelectronics, which reached the notification threshold under the AML.

III THE MERGER CONTROL REGIME

i Fast-track process

The Interim Provisions on the Standards for Simple Cases set forth the substantive criteria for determining which cases may be treated as a simple case. For example, the market share threshold for horizontal mergers is 15 per cent, and for other mergers, including vertical mergers and those that are neither horizontal nor vertical, it is 25 per cent. For notifications involving joint ventures or where the acquisition targets are located offshore, mergers will qualify for the simplified procedure if the joint venture or acquisition target does not engage in business operations in China.

Despite meeting the above criteria, a notification may still be ineligible for a simplified procedure due to reasons such as the relevant market being difficult to define, or if the concentration may adversely affect market entry, technology development, consumers or national economic development.

It is worth noting that MOFCOM may cancel the application of the simplified procedures under certain circumstances.

In accordance with the Guidelines for the Notification of Simple Cases, after the official acceptance of a case filed under simplified procedures, MOFCOM must publish an announcement of the simple case on its website for a period of 10 days. Any entity or individual (third party) may lodge an objection with MOFCOM, and provide any relevant evidence during the announcement period. Where the Anti-monopoly Bureau finds a case should not be qualified for simplified procedures, it shall require the notifying party to withdraw the case and re-file under normal procedures.

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

Pre-acceptance phase
When entities submit a merger filing to MOFCOM, a ‘pre-acceptance’ case handler within MOFCOM will determine whether MOFCOM is able to formally accept the filing. This case handler will review the filing for completeness, and may also seek clarifications or ask for more details in respect of the filing if certain aspects of the filing are unclear or need to be supplemented. From our experience, this pre-acceptance period
generally takes six to eight weeks. In some cases (for instance, in the WD/Hitachi case), this phase may even ‘stretch’ to two or three months.

**Formal review phase**

Pursuant to the AML, there are two phases within the formal review phase: Phase I (the preliminary review period) and Phase II (the further review period).

Phase I lasts 30 calendar days. During this phase, MOFCOM will attempt to review the merger filing and make a decision as to whether the filing should be cleared.

Phase II lasts 90 calendar days. If MOFCOM has made a decision that a merger filing warrants further review, it will inform the parties (in writing) before or at the expiry of Phase I that the review period is being extended into Phase II.

Furthermore, MOFCOM may extend the Phase II period by another 60 calendar days at the most, provided that the merging parties agree to extend the time limit for the review; the documents submitted by the parties are inaccurate and require further verification; or the circumstances relating to the filing have significantly changed after notification by the parties.

If MOFCOM fails to make a decision upon the expiry of each set time period as stated above, the parties may execute the transaction.

The following table summarises the various waiting periods as described above and possible outcomes of the review (i.e., approved, approved with conditions or prohibited).

<table>
<thead>
<tr>
<th>Phases</th>
<th>Duration</th>
<th>Possible results</th>
<th>Clearance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase I (preliminary review)</td>
<td>30 days</td>
<td>Decision for further review</td>
<td>Pending</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Decision for no further review</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Attachment of restrictive conditions</td>
<td>Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No restrictive conditions</td>
<td>Obtained</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>Obtained</td>
</tr>
<tr>
<td>Phase II (further review)</td>
<td>90 days (plus possibly 60 days)</td>
<td>Decision of prohibition</td>
<td>Denied</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Decision of not prohibiting the transaction</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Attachment restrictive conditions</td>
<td>Obtained conditionally</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No restrictive conditions</td>
<td>Obtained</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No decision</td>
<td>Obtained</td>
</tr>
</tbody>
</table>

iii Parties’ ability to accelerate the review procedure

Most mergers are time-sensitive, and as a result, most merging entities generally wish for the merger review period and procedures to be as swift as possible. To assist MOFCOM in clearing merger filings smoothly and efficiently, we recommend the following approach: first, articulate why the merger is time-sensitive (e.g., one entity is a failing firm); second, ensure that the merger filing report is complete (according to the MOFCOM requirements) and accurate; and third, if MOFCOM asks any supplementary questions or asks for clarifications, respond to these further questions swiftly.
iv Third-party access to the file and rights to challenge mergers

Third parties do not possess a statutory right to access merger control files, but they do possess a right to challenge mergers in the process of review.

In its review process, MOFCOM may seek opinions from third parties (including government agencies, industry associations and other entities) in respect of the proposed acquisition, and third parties may voice their opinions through these consultations.

In addition, pursuant to Articles 6 to 8 of MOFCOM’s Measures for Inspecting Concentration of Business Operators, third parties may be involved in the merger control review process if MOFCOM decides to conduct hearings. Participants in these hearings may include entities involved in the filing; competitors; representatives of upstream and downstream entities (and other related entities); experts; representatives of industry associations; representatives of relevant government authorities; and consumers. Third parties may therefore express their opinions on the proposed merger or acquisition through these hearings.

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

Pursuant to Article 29 of the AML, MOFCOM has the right to impose conditions in respect of mergers to alleviate the negative impact of a merger on competition. This gives MOFCOM wide discretion to impose a variety of conditions, including structural and behavioural conditions.

Further, according to the Provisions on Imposing Restrictive Conditions, the notifying party can propose restrictive conditions either before or after competition concerns are raised by MOFCOM. MOFCOM will then consult with the notifying parties in respect of such restrictive conditions, seeking relevant opinions and conducting an evaluation before making a decision.

Pursuant to Article 53 of the AML, entities that are not satisfied with a MOFCOM decision in respect of merger control may seek a review of the decision (i.e., administrative reconsideration). We understand that this review process and decision will be undertaken by the Treaty and Law Department of MOFCOM.

Entities who are dissatisfied with the decision of the Treaty and Law Department of MOFCOM may then seek a further review of the Treaty and Law Department’s decision by the State Council of the People’s Republic of China, or bring administrative proceedings before the courts (i.e., judicial review). In the former case, the administrative decision of the State Council will be the final and binding decision.

Entities may only seek a review of MOFCOM’s decisions based on an error of law (including because administrative procedures are in violation of the law, administrative discretionary power has been abused or the result of the merger control review is unjust).

vi Effect of regulatory review

MOFCOM is the sole authority formally in charge of reviewing mergers. Therefore, it is not obligated by law to consult with or seek the opinions of other authorities or regulators.

However, MOFCOM does consult with other government agencies on certain mergers. For instance, MOFCOM may consult with the State Administration of Radio,
China

Film and Television (SARFT) and obtain SARFT’s opinions in respect of a merger within the broadcasting industry; with respect to a merger within the semiconductor industry, MOFCOM may consult the Ministry of Industry and Information Technology for its opinions. Such consultation procedures will take time, and this is a factor that entities must consider when submitting a merger filing. MOFCOM may consider that such consultations are important, and a merger filing may therefore lapse into Phase II if MOFCOM is awaiting responses from other government agencies.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions

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

On 27 July 2011, MOFCOM signed an antitrust memorandum of understanding (MoU) with its US counterparts (i.e., the US Federal Trade Commission and Department of Justice). The MoU lists several specific areas for cooperation, including exchanging experiences on competition law enforcement, when appropriate; and seeking information or advice from one another regarding matters of competition law enforcement and policy.

Since 2008, MOFCOM has also signed antitrust MoUs with competition authorities in the EU, the UK, Korea, Russia, Australia and Kenya.

We understand that MOFCOM regularly consults with the competition authorities from more experienced jurisdictions such as the United States and European Union. The competition authorities from these jurisdictions also conduct capacity building or technical assistance programmes for MOFCOM officials.

In practice (in the context of multi-jurisdictional filings), MOFCOM monitors the progress of merger control reviews in other jurisdictions closely. MOFCOM may also ask the entities involved in the proposed transaction to provide information on the status of their filings in other jurisdictions.

ii Special situations

Financial distress and insolvency

Previously, foreign entities that wished to purchase domestic entities in financial distress or insolvency could apply to MOFCOM for an exemption (in respect of notification or review). Despite the fact that there are no statutory exemptions (pursuant to the AML or in related regulations and rules) in respect of acquiring entities in financial distress or insolvency, MOFCOM will take this factor into consideration when undertaking the merger review (in particular, in terms of allocating a time frame for the review). In accordance with Article 12 of the Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition, whether the business operator concerned is an enterprise on the brink of bankruptcy is one of the factors to be considered in assessing the impact of concentration.

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6 Under Article 54(2) of the now-repealed Acquisition of Domestic Enterprises by Foreign Investors Provisions.
**Hostile transactions**

The AML (nor its related regulations or rules) does not clearly address the manner in which a hostile transaction shall be reviewed. The acquiring party may be faced with some practical problems. First, most of the parties do not sign any formal transaction agreements in the case of public tenders, which are normally required by MOFCOM to be part of the filing materials. However, in recent practice, MOFCOM may accept the public tender offer in lieu of signed transaction agreement pursuant to Article 14 of the Guiding Opinions. Secondly, in a hostile transaction, the acquired target may not be cooperative in providing the information required in the filing, meaning that some non-public information, including the market data of the acquired target, may be difficult to obtain without the cooperation of the target. Even though Article 13 of the Guiding Opinions has provided that the acquired target shall have the obligation to assist with the acquirer’s filing, there are no specific rules about the legal liabilities for breaching such obligation to assist. As a possible solution, based on our experience, the acquiring party may apply for pre-notification consultation with MOFCOM under such circumstances, and MOFCOM would take a case-by-case approach to reviewing the notification.

**Minority ownership interests**

There are no provisions under the AML or in its related regulations and rules that address the acquisition of minority ownership interests. However, acquisition of minority interests may also give rise to a notifiable transaction, depending on whether such acquisition may confer ‘control’ of the target company on the acquirer.

MOFCOM may also consider minority ownership interests in the substantive review process. For instance, in MOFCOM’s decision regarding the acquisition by Penelope of Savio, MOFCOM mainly raised competition concerns about Uster Technologies Co, Ltd (Uster) and Loff Brothers Co, Ltd (Loff), which were the only two manufacturers of electronic yarn cleaners for automatic winders in the world. Loff was a wholly-owned subsidiary of Savio, the target company. However, Alpha Private Equity Fund V (Alpha V), as the parent company of the acquiring party, Penelope, only held a 27.9 per cent stake in Uster. Even so, MOFCOM held that it cannot ‘rule out the possibility that Alpha V may get involved or influence the business operations of Uster’.

**V OUTLOOK AND CONCLUSIONS**

i Pending legislation

The following measures are still in draft form:

- Tentative Measures for Investigation and Handling of Concentration of Business Operators Not Satisfying Notification Thresholds But Involving Alleged Monopoly Acts; and

ii Unresolved issues

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

In addition, it would be helpful if MOFCOM issued merger clearance decisions with more details (such as proposed market definition and a summary of its competition analysis). MOFCOM currently publishes its decisions for cases that it has approved with conditions or prohibited, and a brief summary of cases under simplified procedures for the purposes of public announcement. However, for unconditionally approved decisions, it only publishes the name of the transactions without mentioning any substantive details. If MOFCOM disclosed more details of its unconditionally approved decisions, it would be useful for building jurisprudence and improving the transparency of the merger clearance process.
I INTRODUCTION

The Law for the Promotion of Competition and Consumer Protection No. 7492 (Competition Law or Law) was enacted in Costa Rica in 1994 and came into effect in January 1995. The Law contains provisions related to deregulation, competition, unfair competition, consumer protection, comparative advertising and strict liability. It also created the institutional arrangements for the competition regime and for consumer protection by creating two separate bodies ascribed to the Ministry of Economy, respectively the Competition Promotion Commission (Commission or COPROCOM) and the National Consumer Commission. While these bodies are part of the Ministry, they are independent on technical matters. This means that the decisions of COPROCOM can neither be appealed nor revoked by the Minister of Economy. The Law is based on Article 46 of the Constitution. Furthermore, Costa Rica’s free trade agreement with Canada contemplates a commitment by both countries to establish mechanisms to deal with anti-competitive conducts and concentrations.

The merger control regime contained in the Law was enacted \textit{ex post}. In 2012, the legislature finally passed an amendment to the Competition Law that includes pre-merger notification provisions.

The Commission has reviewed more than 40 mergers since the amendment of the Law became effective in April 2013. Under the amendment, the regulators of the telecommunications, stock market, financial, insurance and pension funds sectors must issue a request to COPROCOM before approving a merger in their respective market. However, COPROCOM has not been given any additional resources; therefore, COPROCOM’s control of horizontal and vertical conduct might weaken if it wants to
keep up with the pace of merger control. The Law has been complemented by regulations issued by the government and by the Guidelines issued by COPROCOM.

In the telecommunications sector, General Telecommunication Law No. 8642, issued in 2008, contemplates specific competition regulations that include pre-merger notifications. Filings must be made before SUTEL, the telecommunications authority; and SUTEL must then request a technical opinion from COPROCOM prior to issuing its final decision. COPROCOM’s opinion is not binding on SUTEL. The same applies to SUGEFL in the banking sector, SUGEVAL regarding the stock markets, SUPEN in pension funds sector and SUGESE regarding the insurance markets; according to the Competition Law, all these regulatory agencies must request COPROCOM’s technical opinion prior to approving a concentration. COPROCOM must issue its opinion within 15 days of receiving a request. Again, this opinion is not binding; however, if a regulatory agency does not agree with COPROCOM’s opinion and is not going to act upon it, it must explain the reasons why it will not do so.

II YEAR IN REVIEW

The following is a list of the mergers reviewed by COPROCOM in the past year:

<table>
<thead>
<tr>
<th>Resolution</th>
<th>Parties</th>
<th>Market</th>
</tr>
</thead>
<tbody>
<tr>
<td>01-2014</td>
<td>Unopetrol-Servicentro Limón y otras</td>
<td>Gas stations</td>
</tr>
<tr>
<td>04-2014</td>
<td>Arcelor Mittal-Bekaert</td>
<td>Steel construction materials</td>
</tr>
<tr>
<td>05-2014</td>
<td>DMS-Metroarchivos</td>
<td>Documents warehouse</td>
</tr>
<tr>
<td>07-2014</td>
<td>Sigma Alimentos-Savi San José y otro</td>
<td>Sausages</td>
</tr>
<tr>
<td>12-2014</td>
<td>Sysco-Mayca</td>
<td>Food distributors</td>
</tr>
<tr>
<td>13-2014</td>
<td>Roma Prince-Lucema</td>
<td>Pasta</td>
</tr>
<tr>
<td>14-2014</td>
<td>Centro de Lubricación para Supermercados-Superservicio SA</td>
<td>Oil and lubricant services</td>
</tr>
<tr>
<td>18-2014</td>
<td>Hapag Lloyd-CSAV Agency</td>
<td>Maritime transportation</td>
</tr>
<tr>
<td>19-2014</td>
<td>Unopetrol-Propiedades Benidorm y otras</td>
<td>Gas stations</td>
</tr>
<tr>
<td>23-2014</td>
<td>Inmobiliaria Hospitalidad San Rafael SA-Hotel Índigo</td>
<td>Hotels</td>
</tr>
<tr>
<td>24-2014</td>
<td>Chiquita Brands-Fyffes</td>
<td>Bananas</td>
</tr>
<tr>
<td>31-2014</td>
<td>Estandar Fruit Company Costa Rica-Compañía Agrícola Ganadera Carriari SA-Compañía Bananera La Teresa SA</td>
<td>Export banana growers</td>
</tr>
<tr>
<td>30-2014</td>
<td>Pelmot Investments SA y Rivara Holdings SA</td>
<td>Fruit juices and related products</td>
</tr>
<tr>
<td>33-2014</td>
<td>Grupo Q SA y Grupo Q Productos Automotrices SA</td>
<td>Car dealers</td>
</tr>
<tr>
<td>35-2014</td>
<td>Yara, Cafesa y Fertitec</td>
<td>Fertilisers</td>
</tr>
<tr>
<td>36-2014</td>
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<td>Logistic services</td>
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<td>Agroindustrial Piñas Del Bosque SA y Collin Street Bakery Incorporated</td>
<td>Agricultural products</td>
</tr>
<tr>
<td>46-2014</td>
<td>Holcim (Cr) SA y Coopelesca</td>
<td>Electricity</td>
</tr>
<tr>
<td>47-2014</td>
<td>Agroindustrial Piñas del Bosque SA y Ganadera La Flor SA</td>
<td>Agricultural products</td>
</tr>
<tr>
<td>48-2014</td>
<td>Banco Citibank y Gestionadora De Crédito De Sj</td>
<td>Banking</td>
</tr>
</tbody>
</table>
i Yara, Cafesa and Fertitec (fertilisers market)

This case is interesting because the Commission found it could have anti-competitive effects, and because the case took a very litigious turn due to the participation of a third party, which happens to be the largest player in the market. Yara proposed to acquire ABOCOL for the sale of OFD Holding INC and its subsidiaries, FERTITEC and CAFESA. Yara has a 34 per cent share in ABOPAC, and is by far the largest player in the market.

COPROCOM determined (through Resolution 06-2014 of 6 May 2014) that the proposed concentration would generate anti-competitive unilateral and coordinated effects given the high market shares of ABOPAC and ABOCOL, the participation of Yara in ABOPAC and the high entry barriers in the market. Another competitor in the market, El Colono, buys inputs from ABOPAC. The Commission ordered the parties to present a proposal to counteract such negative effects. Yara argued that buying ABOCOL would allow it to compete with ABOPAC in the market. Yara’s 34 per cent participation in ABOPAC did not allow it to make any decisions, and Yara was interested in introducing new products and production techniques that ABOPAC did not want to undertake. This reconsideration filing suspended the 10-day term granted to Yara to present its proposal to counteract the anti-competitive effects of the transaction. Yara proposed keeping the entities independent from ABOPAC after closing. The Commission continued to believe that the transaction would create coordination effects,
and did not believe that the proposal was enough to mitigate the anti-competitive effects; therefore, the reconsideration was rejected. Yara presented its proposal to counteract the anti-competitive effects on 14 August 2014. On 7 October 2014, the Commission issued Resolution 35-2014 with the conditions Yara must comply with to proceed with the transaction, but the conditions were kept confidential. ABOPAC then presented a request to COPROCOM to review the Resolution 35-2014 decision. This was very unusual, first because ABOPAC was not a party to the proceeding, and second because, according to the Commission's theory of the case, the transaction would create coordinated effects. According to this theory, ABOPAC should have been happy with the transaction approval. However, ABOPAC wanted the Commission to reverse its decision that had approved the transaction.

On 20 October 2014, Yara accepted the conditions ordered by COPROCOM but requested clarification. In November, the Commission approved the transaction subject to the conditions specified in Resolution 35-2015. More than a year after the first filing, ABOPAC was still fighting for the annulment of Resolution 35-2015. The Commission eventually issued a public version of Resolution 35-2014 in March 2015, in which the conditions are described as follows:

a. Yara must sell Fertitec;
b. Yara must sell 10,000 tons of urea and 5,000 tons of MAP/DP annually to small producers for five years at no profit;
c. because Yara will continue to have a participation in ABOPAC, and will also be the owner of ABOCOL, a firewall must be built between the employees who represent Yara’s interest in ABOPAC, and those who work in ABOCOL;
d. Yara shall not increase the scope of the distribution agreement that already exists with ABOPAC; and
e. Yara must keep CAFESA and ABOPAC as separate legal entities.

ii INTERGLO and AEP (rice market)

TCR is a producer in the United States and the majority shareholder in ALIGRO (through a subsidiary called INTERGLO). TCR is the leading seller of imported rice to Costa Rica, with a 14 per cent market share in the rice market, most of which had already been sold to AEP. AEP, the seller in this transaction, is a minority shareholder in ALIGRO. AEP had been facing financial stress, and was close to having its assets foreclosed due to a severe cash-flow situation. Thus, the parties expressly claimed the applicability of Article 55(a) of the Law’s regulations, arguing that the transaction was required to prevent productive assets leaving the market. TCR also participates in CACSA, which is another competitor in the local rice market. Thus, the Commission considered this concentration to be both vertical and horizontal. Given the importance of rice for the vast majority of the population, the Commission considered that this case deserved special attention. (It should be noted that, while it is true to say that rice is a key product in Costa Rica, and especially for lower income groups, there is no mandate in the Law that special attention be given to any particular market or any particular type of case.)

The Commission looked at the demand for rice at the industrial level, where there are 12 different players. Local production is not enough to cover this demand, so 35 per cent of the demand has to be imported. While there are more than 1,000 local
growers, the agro (crop) level is dominated by the largest growers, who produce 55 per cent of the total production. With respect to milled rice, these 12 industrial companies are also the ones that import the additional rice to meet local demand. To meet local demand, the government allows a quota that is distributed among the industry players who purchase rice from local producers (although the distribution of the quota of milled rice is distributed among a larger number of players, it still represents a much smaller percentage of the imported rice).

Imports of milled rice outside the quota that are subject to 35 per cent import duties have been increasing during the past three years due to the much lower milled rice prices in countries such as Uruguay and Argentina. This has led the government to increase the import duties, and to almost doubling them. The government has also decided to retain and strengthen its regulation of the rice price. According to government regulations, milled rice must be fortified with certain additional minerals. COPROCOM has determined that these two rules constitute additional barriers to entry for imported rice. Some of the industry players, such as AEP, offer outsourcing services to third parties.

Based on the Herfindahl–Hirschman Index (HHI) estimates, COPROCOM concluded that the purchase of rice is not concentrated. Furthermore, both CACSA’s and AEP’s market shares have been in decline during the past four years, down from 30 to 17 per cent of local production, and there are at least four other players that have larger market shares. In the milled rice market, their shares had been more stable, with CACSA at around 18 per cent and AEP 12 per cent; however, again there are at least three players with higher market shares. The Commission look at the vertical effects, given the relationship between TCR and AEP, and concluded that AEP’s competitors will continue to have access to other rice suppliers in the US. Furthermore, the Commission concluded that, given the market shares that will result from the transaction, ALIGRO will not acquire market power.

However, given the significant entry barriers to the market, and the participation of TCR in two different players in the market (CACSA and ALIGRO), COPROCOM considered that the transaction could create a coordinated effect with regard to quality, volume and other aspects that may affect consumers. COPROCOM also concluded that AEP’s financial stress was not evidence that the company or its assets were going to exit the market. As a result, COPROCOM ordered the parties to present a proposal to counteract the possible coordinated effects of the transaction and granted them 10 days in which to do so.

iii The Merger Guidelines (Guidelines)

The Guidelines, which were issued by COPROCOM on 28 May 2014, 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, we make reference here only to some of the specific topics covered therein that have some connection to the cases already reviewed by COPROCOM.

The Guidelines also include definitions of some concepts that are not covered herein (e.g., a definition of economic control, plus suggestions of a variety of ways in which a change of control may take place), and a definition of the different types of mergers and how they are likely to impact competition.
In horizontal mergers that involve intermediate goods, if COPROCOM finds a negative impact for the clients, it will assume that such impact will also affect consumers of the final goods. However, if the merger is vertical or conglomerate, COPROCOM shall seek to determine the impact on consumers.

Market shares and market concentration will be more significant in the analysis of more stable markets. With regard to market power and the calculation of market shares, COPROCOM will generally use annual sales. However, in certain markets this may not be appropriate, such as very dynamic markets or markets where transactions are rather sporadic (i.e., wind turbines); therefore, different periods of sales might be used. In some cases, units sold or production capacity will also be used instead of sales.

In mergers that involve an entity with a large market share and a recent entrant to the market, COPROCOM will also look at the potential of the entrant to challenge the established competitors. Similarly, in mergers involving a maverick, COPROCOM will look more closely at the transaction.

The general standard based on the HHI will be:

a no anti-competitive effects: $\text{HHI variation} < 100$ and $\text{HHI} < 1,500$;

b potential anti-competitive effects: in markets with moderate concentration ($1,500–2,500$), $\text{HHI variation} > 100$, and in highly concentrated markets ($\text{HHI} > 2,500$), $\text{HHI variation} 100–200$; and

c where market power can be increased: in highly concentrated markets ($\text{HHI} > 2,500$), $\text{HHI variation} > 200$, particularly if market share exceeds 50 per cent.

The Guidelines list in detail the criteria COPROCOM will use to evaluate unilateral and coordinated effects, including the specifics of bid markets. This is conducted separately for each type of merger.

With regard to efficiency gains, consumer welfare shall prevail over internal efficiencies; thus, efficiencies should create benefits for consumers. Evidence must be based on studies conducted through sound technical methodology, and the studies should probe specificity, cost estimates, likelihood, when and how benefits will be transferred to consumers, how they stimulate capacity to compete, which consumers will benefit, and any other evidence requested by COPROCOM. Reductions in variable costs will be more appreciated than reductions in fixed costs, although the latter will not be ignored.

Finally, the Guidelines include some particularities regarding the analysis of mergers in specific markets such as telecommunications, air transport, energy and financial services. For instance, according to the Guidelines, with regard to telecommunications the definition of markets made by SUTEL is for regulatory purposes only. For competition purposes, such definition is not binding, although it might be used as a reference point by COPROCOM in its definition of the relevant market on case-by-case basis, where COPROCOM will favour supply substitution over demand substitution.
III THE MERGER CONTROL REGIME

The Law defines concentrations as any change in control of an entity or of productive assets. The Commission shall approve:

a concentrations that do not have the object or effect of creating or significantly incrementing market power when this may result in a limitation or reduction of competition;

b concentrations that do not facilitate express or tacit coordination among competitors, or that may not result in adverse effects for consumers; and

c concentrations that do not reduce, damage or prevent competition and concurrence on similar or closely related goods or services.

i Thresholds and deadline to notify

All concentrations where the amount of the assets of the entities involved, and those of their respective parent companies, exceed 30,000 minimum wages (about US$15 million), or where the total income generated in Costa Rica during the last fiscal year of all entities involved in the concentration exceeds that amount, must be notified to the Commission. Concentrations must be notified to the Commission before closing, or within five days after closing.

The Government Decree\(^2\) narrows this threshold, indicating that concentrations shall be notified to COPROCOM where at least two of the entities involved have operations in Costa Rica, and also indicating that when the purpose of the concentration is the acquisition of part of the assets or a specific operation of an entity, then only the value of those assets or the income of said part of the operation shall be considered. The Government Decree also clarifies that only productive assets registered in the last annual financial statement shall be considered, but they must include the value of the productive assets of all affiliates that have had business activity in Costa Rica during the two years prior to the concentration. Income shall also include sales by all affiliates in the country (excluding sales among affiliates).

Once approved, COPROCOM cannot review a merger again, unless approval was granted based on false information, or the parties do not comply with the conditions or remedies imposed by the Commission.

The application may be filed by any of the entities involved in the concentration, and must include:

a a detailed description of the transaction;

b a description of the entities involved;

c audited financial statements of the past three years; and

d a description of the relevant markets, competitors and market shares, and the economic justification for the transaction.

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\(^2\) In September 2013, the regulations were published as a Government Decree for the proper implementation of the amendment of the Law.
The application must also include an analysis of the possible anti-competitive effects of the concentration, and a proposal to counterbalance such effects. The Government Decree includes a more detailed list of requirements, including a description of the barriers to entry.

ii Analysis of the Commission

In the analysis of each concentration, the Commission shall determine whether the concentration is needed to achieve economies of scale or develop efficiencies that may offset the anti-competitive effects. If the Commission finds that the concentration may cause anti-competitive effects, it must also determine if such effects may be counterbalanced by structural or behavioural remedies or conditions. The Commission may also approve a concentration, even if it may cause anti-competitive effects, if it finds any other circumstance that may protect the interest of local consumers, including if the merger prevents productive players from leaving the market.

Efficiencies must be directly generated by the concentration, not achievable by less restrictive means, verifiable and enough to counterbalance the potential anti-competitive effect of the concentration.

According to the Government Decree, some concentrations do not create anti-competitive effects and shall therefore be approved by COPROCOM. This will happen in concentrations where:

- $a$ the parties involved do not participate in the same relevant market, horizontally or vertically, when the market share of the parties is less than 25 per cent jointly, or less than 40 per cent if the delta is less than 2 per cent;
- $b$ when the parties do not reach a 30 per cent market share in a vertically related market where one of them has operations;
- $c$ when the concentration is to complete ownership of an entity already controlled by the buyer; and
- $d$ when the entity created does not have or will not have business in the local territory.

This presumption shall not apply if the current market share of the parties is reasonably likely to increase, when there are indications of coordination among competitors or when COPROCOM determines that the presumption shall not apply.

The Government Decree also allows concentrations under the failing firm scenario. In this case, the concentration shall be authorised regardless of its effects, provided the financial situation of the entity being bought is such that it will exit the market in the short term if it cannot be reorganised under any insolvency proceeding, and when, prior to the concentration, efforts have been made to seek other purchasers or alternatives to the concentration.

iii Remedies and conditions

If the Commission finds that the concentration may cause anti-competitive effects, it may approve the concentration subject to one or more of the following conditions:

- $a$ transfer or sale of assets;
- $b$ limiting of the sale of products or services;
an obligation to provide or sell certain products or services;

introduction, amendment or elimination of certain contractual provisions; and

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

Conditions and remedies must have a maximum term of 10 years, which may be extended for five additional years if there are still anti-competitive effects. The conditions imposed by the Commission must be to address the specific effects of the concentration, and not to improve existing market conditions.

iv Time frames

The application may be filed by any party involved in the concentration before closing, or within five days after closing. After filing, the Commission has 10 days to request additional information, which must be filed by the parties within 10 days.

The Commission has 30 days to issue the resolution. However, in cases that are particularly complex, the Commission may extend this term prior to its expiration for an additional 60 days. Only one extension is allowed. In the telecommunications sector, the extension is only 15 working days.

If the Commission fails to issue the resolution within said time frames, the concentration is automatically approved.

According to the proposed regulations, temporary acquisitions do not have to be notified. This includes acquisitions where assets are subsequently sold to a third party within a year, and where the buyer does not participate in any decision-making.

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

It is important to include all information requested by the Law and the regulations, and any additional information that may make it easier for the Commission to determine that there will be no anti-competitive effects so that the case may be completed in 30 days.

The application must include a description of the concentration and the possible anti-competitive effects of the concentration. Parties may also include proposals to counterbalance these anti-competitive effects. This seems to be the only way to expedite the procedure; if the Commission 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 anti-competitive effects, it must approve the concentration subject only to the remedies or conditions proposed by the applicants.

If the Commission determines that the proposal is insufficient to counterbalance the anti-competitive effects, it will notify the parties, and they will then have an additional 10-day term to submit a second proposal. If the Commission is still unconvinced by the proposals of the parties, it will decide whether the concentration is authorised subject to different remedies or conditions, or whether it is not authorised.

Implementing the possibilities of parties to propose remedies and conditions depends on the ability of COPROCOM to quickly understand the market and the rationale of the concentration. In this sense, the parties need to be able to approach the Commission to explain and discuss ideas for the proposal, and to try to anticipate what the authority’s reaction might be. While approaching administrative and judicial
authorities in somewhat informal meetings to discuss matters before them is quite usual in Costa Rica, the Government Decree offers a more formal approach. Both the applicants and COPROCOM’s staff may take the initiative to request a meeting to clarify information filed by the parties, and a summary of the meeting must be signed by all participants at the end of the meeting. This should facilitate more realistic and effective proposals from parties.

vi Third-party access to the file and rights to challenge mergers
The Commission shall order the applicant to publish a brief description of the concentration in a newspaper, including a list of the parties involved. The Government Decree aims to expedite this step by indicating that applicants must make such publication within three working days after filing, and send a copy to COPROCOM within three working days after publication. Third parties shall have 10 days to file information and evidence before the Commission. The Fertilisers case (see Section II.i, supra) is extraordinary in the sense that a third party intervened and appealed COPROCOM’s decision to approve the transaction.

The Commission can also request information from third parties (e.g., competitors, suppliers and clients of the parties involved in the transaction), and these third parties must respond within the term granted by the Commission. The Government Decree establishes that this term shall be five working days.

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

Judicial review may include both the formalities and the substance of the case. So far, the judiciary has favoured all decisions issued by COPROCOM on anti-competitive conducts (except in one case, when the court ordered COPROCOM to justify why different penalties were imposed upon the parties involved in the same case). Courts have focused on procedural matters, but have also made some considerations on the substance of cases, which is an indication that judges have a good understanding of competition matters.

viii Effect of regulatory review
Concentrations on regulated markets (i.e., telecommunications, banking, stock, pension funds and insurance) are examined and decided by the regulatory agencies. In all cases, the regulatory agency must request COPROCOM’s technical opinion and justify its own decision if it differs from COPROCOM.

IV OTHER STRATEGIC CONSIDERATIONS
The merger control system is more a hybrid than a pure pre-merger system. The possibility to notify within five days after closing poses a challenge to everyone involved. This is not an issue in regulated markets, where pre-closing notification is compulsory. If parties notify after closing, it is likely COPROCOM will face the same challenges that it was
used to under the *ex post* merger control prior to the Law’s amendment. Likewise, the parties should be ready to face post-closing scrutiny that may end in an order to partially or totally undo the concentration.

Notifying prior to closing was a concern in local trade associations when the bid was being discussed in Congress. Many felt that notifying prior to closing would jeopardise deals, as third parties may have the chance to intervene. Thus, in those concentrations where local entities are involved, if they are not used to merger control and comparative law, it is likely they will want to notify after closing. Local entities are usually on the selling side of the transaction, and the decision of when to make the filing is more likely to fall on the buyer’s side. Therefore, this should not be such an issue.

In addition to the difficulties discussed above, the possibility of filing after closing makes coordination with authorities from other countries more difficult if other jurisdictions are involved, because in most other countries there is a pre-merger control system, and by the time they make their decisions, the application may not have been filed in Costa Rica.

If that is not an issue and all parties agree to notify before closing, then it is important to determine whether the possible anti-competitive effects are similar in all jurisdictions. If the possible anti-competitive effects are similar in all jurisdictions, the local authority may accept and adopt similar remedies or conditions imposed by more experienced authorities. However, because the time frame to reach a final decision is usually longer in other jurisdictions than that contained in our Law, parties to a multi-jurisdiction concentration may want to schedule the filings so that they receive a resolution from a more experienced agency first, which may then, be used as reference by the less experienced agencies.

**V OUTLOOK AND CONCLUSIONS**

COPROCOM’s response continues to be up to the challenge in many respects. On the merger control front, COPROCOM managed to complete its review of all the cases filed before it within the term established in the Law. With regard to the substantial analysis, there were cases where more in-depth discussion was necessary regarding key issues. This year, COPROCOM approved the first cases subject to conditions. Therefore, it remains to be seen whether these conditions will suffice to limit the anti-competitive effects identified by COPROCOM. It is not clear how COPROCOM will monitor compliance with these conditions or, more importantly, how COPROCOM will measure the impact on the market.

In the longer term, all stakeholders face a major challenge. The Association Agreement signed by the Central American countries and the European Union contains a competition chapter, Chapter VII, according to which all countries in the region must have in place a competition law that includes regulations regarding horizontal and vertical conducts and merger control. If a country does not have a competition law in place (like Guatemala), it should enact one within three years of the ratification of the Agreement by all countries. In addition, within seven years Central America must have a single competition law and competition authority. While this may be far in the future, as time passes we should begin to see greater coordination and teamwork between the competition authorities of the region.
I INTRODUCTION

The Organic Law for the Regulation and Control of Market Power (Law) was enacted in 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 governing regulations and sector-wide recommendations, and implementing economic thresholds for mergers.

Merger notifications are made to the Intendancy for Concentration Control (Merger Control Intendancy), an investigative authority that must issue a recommendation report for resolution by the First Instance Resolution 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 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. This intendancy has been one of the busiest in the past year within the administrative structure of the Superintendency, with a large number of clearances and investigations.

The Superintendency is organised into four investigative intendancies. These intendancies perform their analysis and investigations independently and issue recommendation reports to the decision-making authority, the First Instance Resolution Commission. The Merger Control Intendancy is in charge of analysing notified transactions and issuing final recommendation reports, which contain economic analysis
of the competitive landscape, the transaction’s potential impact on this competitive structure, and its final recommendation as to the clearance, conditional clearance subject to conditions or denial of the transaction. The First Instance Resolution Commission, a three-person resolution panel, must then evaluate this recommendation report and issue its final decision. Although empowered to issue an independent decision, the majority of cases have been issued in the line of the recommendation reports.

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 exceeding either of the economic or market share thresholds may be subject to mandatory merger control notification and prior approval before its execution in Ecuador. Mergers and acquisitions, joint-venture and administration agreements, and assignments of the effects of a trader, *inter alia*, are defined as ‘concentration operations’, although the broad scope of the law may determine that other forms of agreements could be subject to notification in this jurisdiction, and may therefore merit further legal analysis with local counsel when the economic or market share thresholds are met.

In addition to the competition perspective, under which merger control regulation has only been effective since October 2011, mergers and acquisitions where a local business presence exists may also be subject to corporate and tax implications, and governed by the Superintendency of Companies and the Internal Revenues Service. It is worth noting, however, that even if the parties do not have a direct business presence in Ecuador, the merger control regulation may be mandatory, considering the effects-based approach instated by the Law.

II  ECUADORIAN LEGISLATION

The Law was enacted on 13 October 2011. On 23 April 2012, the President signed Executive Decree No. 1152, published in the Official Register of 7 May 2012, comprising Regulations to the Law (Regulations). The Superintendent of Market Power Control was appointed in July 2012, at which time the administrative structure of the Authority began to be organised and the Law was implemented.

1  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 in one or several economic operators through the following acts:

• mergers;
• assignment of assets of a trader;
• direct or indirect acquisition of shares, equity or debt certificates if they grant influence over the other operators’ decisions, thereby giving the acquirer control or substantial influence in the other operator;
• joint-venture and administration agreements; or
• any other act or agreement transferring the assets of an economic operator, or granting control or determinant influence on an economic operator’s adoption of regular or extraordinary administration decisions;

b the above-mentioned exemplary acts, and others falling within this scope, will require the prior authorisation of the Superintendency before their execution; and
c ‘control’ is defined by the Law as control over any contract, act or, bearing in mind the de facto and de jure circumstances, circumstances that confer the possibility of exercising substantial or determinant influence over an enterprise or an economic operator. This control may be joint or exclusive.

ii Thresholds
When an act is considered to be a ‘concentration agreement’ under the terms of the Law, notification and prior approval will be mandatory if either of the following alternative thresholds is exceeded:

Economic threshold
The economic threshold will be reached in cases where the combined annual turnover of the parties in Ecuador in the year preceding the transaction exceeds an amount fixed by the Regulation Board. The Regulation Board set this threshold through Resolution No. 002 of 22 October 2013, effective as of 27 November 2013. The turnover threshold is currently as follows:

<table>
<thead>
<tr>
<th>Type</th>
<th>Amount of unified basic remuneration</th>
<th>Value (in US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Concentrations involving financial institutions and entities that participate in the stock exchange</td>
<td>3.2 million</td>
</tr>
<tr>
<td>b</td>
<td>Concentrations involving insurance and reinsurance companies</td>
<td>62,000</td>
</tr>
<tr>
<td>c</td>
<td>Concentrations involving undertakings not contemplated in (a) and (b)</td>
<td>200,000</td>
</tr>
</tbody>
</table>

The basic unified remuneration in Ecuador for 2015 is US$354.

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.

2 Resolution No. 002 of the Regulation Board was applicable after its publication in Official Registry No. 132 of 27 November 2013.
iii Timing
Concentration operations that exceed either of the above-mentioned thresholds require clearance from the regulator to be executed. Notification must be made within eight calendar days from the date of the ‘conclusion of the agreement’. Generally, conclusion of the agreement will take place on the date when the general terms and conditions of a transaction are decided by the parties through a letter of intent, memorandum of understanding, joint-venture agreement or share purchase agreement. The Regulations to the Law, however, provide further guidance in respect of the ‘conclusion’ concept, and stipulates that it should occur at the following times:

\( a \) for mergers: from the time when at least one of the participants at the shareholders’ meeting has agreed to the merger;

\( b \) for an assignment of assets of a trader: from the time the entities agree to the operation, and determine the form, term and conditions thereof. In the case of companies, as of the moment that the assignment is approved by the shareholders’ meeting;

\( c \) for a direct or indirect acquisition of shares, equity or debt certificates: from the time that the participants consent to the operation giving rise to the concentration, and determine the form, term and conditions for its performance. In the case of companies, as of the moment the assignment is approved by the shareholders’ meeting;

\( d \) for joint-venture and administration agreements: from the time that the administrators have been designated by the shareholders’ meeting;

\( e \) for any other act or agreement that grants control or determinant influence: from the time the parties consent to the operation giving rise to the concentration, and determine the form, term and conditions for its performance.

iv Requirements for notification
Merger notifications must be submitted by the party that acquires control. If several undertakings are acquiring joint control, notice must be given jointly through a common attorney in fact. The Superintendency issued a filing form template on 9 May 2013, which must now be completed and used in all mandatory merger control filings. The requirements and mandatory accessory documents are fixed by the Regulations of the Law, and generally require information regarding, inter alia, the notifying entities, the transaction, the market structure, barriers to entry, efficiencies and the rationale for the transaction. Accompanying documents principally relate to the corporate existence of the parties to the transaction, their financial statements, a power of attorney to represent the entities in the merger notification, and a sworn affidavit attesting to the veracity of the information being provided and the good faith calculation of the figures submitted to the Authority.

v Deadlines and filing fee
As of the date of admittance to file as complete, the Superintendency has 60 working days to approve, deny or impose conditions on the transaction. That period can be extended by the regulator for an additional 60 days, although it is still under discussion whether this additional term is a calendar or working day calculation. 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 four to six months from the date of filing until a clearance decision is issued for a merger.

The Regulations grant the Superintendency the right to determine official fees for the evaluation of a concentration notification. On 9 May 2013, the Superintendency published regulations containing the parameters that will be used to determine the fee that will be charged for the processing of each concentration notification. The regulations establish that the processing fee will be the greatest of the following:

a. 0.25 per cent of the income tax paid in the previous fiscal year in Ecuador;

b. 0.005 per cent of sales obtained in the previous fiscal year from the undertakings’ activities in Ecuador;

c. 0.01 per cent of the assets in Ecuador; or

d. 0.05 per cent of the book equity in Ecuador.

Although the regulations do not specify which of the involved undertakings’ figures these parameters will apply to, it has been the reiterated practice of the Intendancy to apply these figures to the combined entities in the case of mergers, and to the acquired or target entity in the case of acquisitions.

vi Exemptions

Article 19 of the Law establishes that the following operations are exempted from the obligation to notify:

a. acquisitions of shares without voting rights, bonds, securities or any other right convertible to shares without voting rights; and

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.

A serious practical issue arose from the fact that merger control was instated in Ecuador on 13 October 2011, but the Superintendent only took office on November 2012. To fix this, a regulation of the Law created a legal obligation for companies that could not notify during this period to subsequently submit these notifications for control. It remains to be seen how this transitory provision of the regulation is applied to transactions that were closed during this period and that were notified clearly outside deadline, or if such transactions will be investigated by the regulator in the future for lack of notification.

III CONCENTRATION OPERATIONS

At the time of writing, the regulator has approved more than a dozen mandatory notifications, one of which was originally denied on formal grounds but approved on appeal, and has only denied one transaction based on anti-competitive concerns. These transactions have been focused in the following industries: insurance, financial, food and beverage, container liner shipping, steel processing, oxygen production and telecommunications.
IV  FINES

The Law is very severe in its the application of fines for lack of, or late notification of, transactions subject to its control. The amount of fines will depend on the state of execution of the transaction once the regulator commences its investigation into the lack of notification. Late notification (that is, notification outside the eight-day term from execution) is considered a minor offence under the Law, whereas execution prior to notification, or prior to approval, is considered a serious offence under the Law. Execution of acts or agreements prior to notification or prior to approval is considered a serious offence under the Law. Minor offences are subject to a fine amounting to 8 per cent of the annual turnover in Ecuador of the combined entities in the year preceding the imposition of the fine; serious and very serious offences are subject to 10 per cent and 12 per cent fines corresponding to the annual turnover, respectively.

In addition to these exorbitant fines, the Authority can also order the divestment or unwinding of the transaction in cases where the effects of the non-notified transaction are considered anti-competitive in order to restore the competitive process. The statute of limitations of the authority to gain knowledge of non-notified transactions expires four years from the date when it comes to know that a transaction subject to its control was not notified, thus making the risk of lack of notification or gun jumping practically indefinite.

V  THE MERGER CONTROL REGIME

Mergers and acquisitions of commercial companies are governed by the Companies Law and the Commercial Code. The following types of procedures are available under local law: mergers by union or takeover; acquisitions by assignment of business; and acquisitions by assignment of shares or share participations.

i  Merger procedures

According to corporate legislation, a merger can take place in one of two ways: two or more companies join to form a new company that succeeds them regarding their rights and obligations (merger by union); or one or more companies are taken over by another company that continues post-takeover (merger by takeover).

For a merger of any company (or companies) into a new company (merger by union) to take place, it is first necessary to agree the former’s dissolution and then to transfer all the corporate assets in bulk to the new company. If the merger results from a takeover of one or more companies by another existing company, the existing company must likewise acquire the assets of the company or companies taken over by means of capital increase.

In the event of a merger by takeover, the company taking over must approve the basis for the operation and the amended incorporation charter during a special shareholders’ meeting specifically called for that purpose. The companies that will be taken over or that merge to create a third company must likewise approve the merger in the same manner (that is, by calling a shareholders’ meeting).
Either type of merger must be recorded in a public deed to which the balance sheets of the absorbed companies must be attached. The Superintendency of Companies 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 immoveable property transfer in some types of mergers. For instance, merger by union of capital stock companies shall not bear any tax on immoveable 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 immoveable 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) or of the branch of a foreign company.

It should be noted that this system does not result in the union of two or more juridical persons, or in the takeover of one or more of them by a third party, such as is the case for mergers ruled by the Law on Companies; rather, it is a commercial purchase and sale contract provided that it involves all the merchandise or assets of a business person.

The only formality to perfect these contracts is that, under penalty of annulment, they must be executed through a public deed. It is not necessary to register them with the Mercantile Registry.
From a taxation standpoint, the acquirer of the businesses is responsible as successor for the taxes generated from the business or enterprise being transferred during the year the transfer takes place and for the two preceding years. Liability is limited to the value of the assets.

The sale of a business transferring all assets and liabilities is not subject to value added tax. However, it is subject to income tax withholding at a rate of 2 per cent in a local transfer.

### iii Acquisition by assignment of shares or share participations

#### Shares assignment

Another way to acquire an Ecuadorian commercial company is through a transfer of shares (capital stock companies) or share participations (limited liability companies).

Shares – whether common or preferred – are freely transferable, and their transferability cannot be avoided even in the case of a contract between parties limiting their transferability. For instance, in cases of a breach of a contractual limitation of the transferability of shares, the transfer cannot be undone, but there can be a contractual penalty applicable against the default party.

Ownership of shares in a stock corporation is transferred by means of an assignment letter signed by the transferor or by a securities trading company that represents the transferor. The assignment must be written on the corresponding share certificate or on a sheet attached thereto. In the case of share certificates delivered for custody at a centralised securities clearing and liquidation deposit, the assignment may take place pursuant to mechanisms established by such centralised deposits. An assignment of shares or a transfer of ownership takes effect via the company and third parties only as of the date it is registered in the book of shares and shareholders of the company. Registration is made with the signature of the company's legal representative upon delivery of a joint (or individual) communication from the assignor and the assignee.

If the shares are immobilised in a centralised securities clearing and liquidation deposit, they will be registered in the book of shares and shareholders by the centralised deposit upon submission of an assignment form signed by the securities trading company acting as an agent. The centralised deposit must keep files and records of transfers, and must give notice thereof to the company on a quarterly basis.

Stock corporations must be incorporated with at least two shareholders. The company's legal existence begins upon such registration.

If the shares of a stock corporation are not listed in a stock exchange, their transfer requires no formality other than that described above (that is, by means of an assignment document and registration of the assignment in the book of shares and shareholders). On the other hand, if the shares are listed in a stock exchange, several Stock Market Law rules must be observed.

From a taxation standpoint, shares assignment is subject to income tax.

#### Share participations assignment

Given the different juridical nature of limited liability companies – that is, they are partnerships involving persons and not capital – the assignment of share participations is governed by different rules with respect to an assignment of shares. Share participations
that are not moveable properties or assets cannot be freely assigned or transferred. 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 \textit{inter vivos} for the benefit of another partner or partners of the company or of third parties if the unanimous consent of the capital is obtained according to Article 113 of the Law on Companies.

An assignment of share participations must be carried out by means of a public deed. The notary will include in the protocol a certificate from the company’s legal representative evidencing that the requirement mentioned in the preceding paragraph has been met. The assignment will be recorded in the books of the company.

From a taxation standpoint, share assignment is subject to income tax.

Thus, mergers and acquisitions are governed in Ecuador by the Law on Companies and the Commercial Code with respect to their formalisation, and in most cases they require prior authorisation. All of the above-described forms of concentration are subject to notification and authorisation by the Superintendency if they surpass the thresholds set in the Law.

VI OUTLOOK AND CONCLUSIONS

From the competition and corporate perspective, two separate rules are in force in Ecuador, and they are subject to different procedures and clearance processes. From the competition perspective, however, considering the few years of practice and the high degree of turnover of regulator staff, practice can at times be unpredictable and deadlines may be extended further than anticipated. From the perspective of global transactions being cleared in different jurisdictions, it will likely be the case that a merger notification will be filed in Ecuador far in advance of other jurisdictions, merely because of the country’s strict deadlines for notification and prior approval. In our opinion, a reform should take place regarding Ecuador’s strict eight-day deadline, considering that it is in the parties’ interest to submit complete notifications as far in advance as possible, and considering the requirement to have approval in order for the closing of transactions. The unpredictable nature of the regulator, and cases that have seen transactions being denied, or being considered withdrawn due to a lack of submission of exhibits, have greatly concerned practitioners, and it is hoped that the regulator shifts from an overly formalistic approach regarding accompanying documents to a more diligent and thorough review of the fundamental economic reality of the transaction.
I INTRODUCTION

The Finnish Competition and Consumer Authority (FCCA) is in charge of protecting effective and sound competition in Finland. The Competition Act,\(^2\) which includes the most important regulations on competition matters, lays down provisions regarding restrictive practices, such as cartels and abuse of dominant position, as well as merger control. The powers of the competition authorities and the procedural framework for enforcement are also laid down in the Competition Act. The provisions concerning merger control can be found in Chapter 4 of the Act, according to which concentrations exceeding a certain threshold shall be notified to the FCCA. A concentration is not to be implemented prior to the FCCA's clearance decision.

Aside from the Competition Act, other statutes of importance in the field of merger control are the Government Decree on the obligation to notify a concentration\(^3\) and the Government Decree on the calculation of turnover of parties to a concentration.\(^4\) The FCCA's guidelines on merger control, which were issued in 2011, also contain valuable information and practical guidance on the matter. In addition, the Act\(^5\) and Decree\(^6\) on the Finnish Competition and Consumer Authority as well as the Act on the

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1 Sari Hiltunen is a partner and Mikko Huimala is a counsel at Castrén & Snellman Attorneys Ltd.
2 948/2011.
3 1012/2011.
4 1011/2011.
5 661/2012.
6 728/2012.
Market Court\(^7\) and the Act on Proceedings before the Market Court\(^8\) include mainly administrative provisions on the purpose and functions of the authorities. No new statutes, regulations or guidelines relating to merger control have been issued in the past year.

The FCCA is responsible for all merger control investigations and has jurisdiction to clear mergers or impose conditions on the implementation of a merger, provided that the notifying party has accepted these conditions.\(^9\) Merger control matters are dealt with by a separate merger control unit within the FCCA. The unit is headed by the Head of Research, Ms Maarit Taurula, and includes three research officers. When needed, the merger control unit also uses resources from the authority’s other units (e.g., when the authority is dealing with several simultaneous in-depth investigations).

The FCCA does not have jurisdiction to prohibit a merger, but must make a proposal to the Market Court in this regard. The Market Court can only take a prohibition decision on the basis of a proposal of the FCCA, but the Market Court is not bound by the FCCA’s view in the matter. The FCCA’s merger control clearance decisions can also be appealed to the Market Court, giving it an appellate function as well (although, as explained below, the possibilities to appeal in practice are limited). The Supreme Administrative Court is the highest appellate instance in merger control and other competition law matters.

Before the current Competition Act came into force in 2011, the dominance test was applicable when assessing whether a notified concentration should be prohibited or subjected to conditions. According to the dominance test, a concentration could be prohibited or subjected to conditions if it would result in the creation or strengthening of a dominant position.

When the new Competition Act came into force in 2011, the dominance test was replaced by the SIEC (significant impediment of effective competition) test, which has also been used by the Commission since the implementation of the EU Merger Regulation in 2004.\(^10\) Thus, the creation or strengthening of a dominant position is no longer a requirement for intervention by the competition authority. Accordingly, the Market Court may, upon the proposal of the FCCA, prohibit or impose conditions on the implementation of a concentration if the concentration significantly impedes effective competition in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

A particularity in Finnish merger control is a specific substantive test concerning the electricity market. According to the Competition Act, the Market Court may, upon the proposal of the FCCA, prohibit a concentration in the electricity market if it would result in the parties’ gaining more than a 25 per cent combined share of the transmission operations of electricity transmitted at 400V on a national level.

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\(^7\) 99/2013.

\(^8\) 100/2013.

\(^9\) For further information, see Section III, infra.

\(^10\) Council Regulation No. 139/2004 on the control of concentrations between undertakings.
In Finnish merger control, competition concerns are primarily addressed by subjecting the implementation of the concentration to conditions. In cases where conditions are not sufficient to address competition concerns, a concentration may also be prohibited in its entirety. Thus, if competition concerns may be avoided by imposing conditions for clearance, the FCCA is obliged to negotiate with the notifying party with a view to finding suitable remedies, and subsequently impose conditions for clearance. Nonetheless, the FCCA cannot impose conditions on a concentration that are not approved by the notifying party. In cases where the notifying party and the FCCA cannot reach agreement on suitable remedies to address competition concerns, the FCCA must make a proposal to the Market Court for the prohibition of the concentration.

The FCCA generally considers structural remedies (e.g., divestiture commitments regarding business operations, patents, trademarks or other business assets) to be more suitable than behavioural remedies. A structural condition may also oblige a party to dissolve certain cooperation arrangements or to withdraw from a joint venture. The FCCA may also accept combinations of structural and behavioural commitments. Non-structural conditions are primarily accepted by the FCCA in situations where the competition concerns are of a temporary nature and are expected to disappear after a transitional period.

The concept of a concentration under the Competition Act largely corresponds with, and is mostly interpreted in line with, the concept in the EU Merger Regulation. The calculation of turnover of the undertakings concerned is regulated by the Competition Act and more specifically by the Decree by the State Council on the calculation of turnover of parties to concentration.\(^\text{11}\) The calculation of turnover and the definition of a party to a concentration are also mainly in line with the EU Merger Regulation.\(^\text{12}\) According to the Competition Act, a concentration refers to:

\begin{align*}
a & \text{ the acquisition of control of another undertaking;} \\
b & \text{ the acquisition of the entire business operations or a part thereof of an undertaking;} \\
c & \text{ a merger; or} \\
d & \text{ the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic unit (full-function joint venture).}
\end{align*}

A concentration shall be notified to the FCCA if the combined turnover of the parties to the concentration exceeds €350 million and the Finnish turnover of at least two of the parties exceeds €20 million each.\(^\text{13}\) The turnover thresholds are cumulative; thus,

\(^{11}\) 1011/2011.

\(^{12}\) However, some differences exist; for example, the Finnish turnover calculation rules apply the concept of control in defining the relevant group of companies, whereas the concept of a ‘right to manage’ is applied under Article 5(4) of the EU Merger Regulation; and the relevant financial year in Finland is based on the preceding drawn up financial statements (which are not necessarily the same as the audited accounts under the EU Merger Regulation).

\(^{13}\) If the same buyer (or buyers) and seller (or sellers) have executed another concentration within the preceding two years, the target turnover of such a preceding concentration must be included.
only concentrations exceeding both thresholds need to be notified to the FCCA. All concentrations exceeding the thresholds must be notified to the FCCA, and clearance must be obtained prior to the implementation of the transaction. The FCCA does not have jurisdiction to review concentrations that do not exceed the turnover thresholds. Concentrations falling within the scope of the EU Merger Regulation shall be notified to the European Commission.

As regards the timing of the submission of a notification, the FCCA shall be notified following the conclusion of the agreement concerning the transaction; the acquisition of control; or the announcement of a public bid referred to in the Securities Market Act.\(^\text{14}\)

A concentration may also be notified to the FCCA as soon as the parties can demonstrate with sufficient certainty their intention to conclude a concentration.

II YEAR IN REVIEW

During 2014, the FCCA issued a total of 30 merger control decisions, 27 of which were approved without conditions within the Phase I investigation.\(^\text{15}\) One transaction was approved without conditions after a Phase II investigation. The remaining two concentrations were approved with conditions after Phase II investigations: the acquisition of Muna Foods Oy by DAVA Foods Holding A/S, and the acquisition of TryghedsGruppen smba by Altor Fund III via Elixia Holding IV A/S.

During the first five months of 2015, the FCCA has approved 15 mergers after a Phase I investigation and two after Phase II investigations; one of the cases (Elisa Oyj’s acquisition of Anvia Oy) was cleared with conditions, while the other (EQT Limited/Animagi Oy) was an unconditional clearance. No proposals were made to the Market Court to prohibit a notified transaction. The above-mentioned merger control investigations that triggered a Phase II investigation are explored in further detail below.

In January 2014, the FCCA issued its decision regarding Atria’s acquisition of Saarioinen’s procurement, slaughtering and cutting operations for beef, pork and chicken. The FCCA examined the impact of the deal, particularly in the procurement market for animals for slaughter and in the wholesale market for fresh meat. Ultimately, the FCCA considered that the notified transaction did not significantly impede competition. In its decision, the FCCA drew attention to the fact that there were several companies competing in the procurement market, and that Atria’s position in this market would not be excessively strengthened by the deal. The FCCA emphasised that producers would have the possibility of selecting their trading partners from among different meat producers in the future as well. In addition, the FCCA estimated that the change brought about by the transaction was of little significance in the wholesale market for fresh meat.

The transaction between TryghedsGruppen and Altor Fund concerned a merger of the Elixia and SATS gym chains. According to the FCCA’s assessment, the concentration

\(^{14}\) 495/1989.

\(^{15}\) The concepts of Phase I and Phase II investigations are explained in detail in Section III, infra.
threatened to significantly impede effective competition on the full service gym markets in the cities of Espoo and Vantaa, probably resulting in price increases. The FCCA carried out a consumer survey among the clients of Elixia and SATS, which was then used to carry out an economic analysis of the competitive situation in Espoo and Vantaa. The analysis revealed that the merging parties were each other’s closest competitors and that their customers did not consider there to be any other strong competitors in the market. This economic analysis played a key role in assessing the impediment of effective competition, and it was the first time that the FCCA applied upward pressure on price and diversion ratio analyses. In its decision, which was issued in February 2014, the FCCA approved the merger with conditions requiring Elixia and SATS to divest two of SATS’s gyms in Espoo and Vantaa.

The third concentration that was subject to a Phase II investigation in 2014 was the acquisition of Muna Foods Oy by DAVA Foods Holding, which is part of the agricultural sector company Danish Agro Group. In connection to the acquisition, the producers’ cooperative, Munakunta, owned by approximately 150 Finnish egg producers, planned to transfer its entire business to Muna Foods, a company that was yet to be established. The FCCA estimated that the proposed acquisition, if it had been approved without conditions, would have significantly impeded effective competition in the egg business in Finland. Approval of the acquisition was made conditional on the sale of Munakunta’s minority holding in the chicken feed manufacturer Rehux to a party independent of the transaction parties. This ensured that Rehux, practically the sole competitor to Danish Agro, would maintain its position as an independent alternative in the chicken feed market in Finland.

In April 2015, the FCCA conditionally approved a transaction whereby Elisa Oyj acquired control of Anvia Oyj. Both Elisa and Anvia operate in the telephone and data communications services markets in Finland, with their core business consisting of services provided in landline and mobile networks. The FCCA conditioned its approval of the transaction on commitments concerning the provision of landline broadband services to consumers in Vaasa, Mustasaari and Laihia. The FCCA was concerned about landline broadband service prices for consumers rising in these territories; therefore, the merger was conditioned on Elisa undertaking to divest these entities.

Another transaction approved by the FCCA in April 2015 was private equity investor EQT Limited’s acquisition of sole control over the Animagi Oy chain of veterinary service clinics. Prior to this transaction, EQT owned Univet Oy, a veterinary service provider that has 18 clinics in the vicinity of Finland’s largest cities. The Animagi chain consisted of 37 clinics, mainly located in Southern Finland and the Helsinki Metropolitan Area. The FCCA initiated Phase II proceedings in February 2015, but concluded after two months of investigations that the acquisition did not significantly impede effective competition, and that thus no conditions for clearance were required.

In summary, during 2014 and the first half of 2015, the FCCA has had to deal with several Phase II investigations on top of the typical number of Phase I investigations. Despite its workload, the FCCA’s merger unit has maintained its track record of being able to respond to pre-notification queries rapidly, and the lead times for decisions in non-problematic mergers have remained consistent.
III THE MERGER CONTROL REGIME

i Review procedure

As explained above, all concentrations exceeding the turnover thresholds as set out in the Competition Act must be notified to the FCCA, and clearance must be obtained prior to implementing the merger (standstill obligation). The standstill obligation is in force until the FCCA gives its clearance decision.

The standstill obligation comprises all measures related to the implementation of the transaction: only certain measures related to safekeeping and safeguarding of assets and measures absolutely necessary for the continuation of business are allowed. Particular statutes apply regarding the standstill obligation in the context of, for example, the announcement of a public bid.

The notification shall include the information required in the Government Decree on the obligation to notify a concentration. Business secrets and other confidential information in the notification must be identified. Pre-notification discussions are possible with the FCCA regarding, inter alia, the information required in the notification and whether the FCCA has any preliminary concerns regarding the transaction.

The FCCA may provide waivers regarding the information to be submitted in the notification in cases where, for example, the competitive effects of the concentration are clearly minor or if the information required is unnecessary for assessing the effects of the transaction. In its guidelines, the FCCA has provided a separate short-form notification for situations where, for example, companies that generate turnover in Finland establish a joint venture abroad.

Furthermore, the standard notification form requires less market information for transactions where the combined market share of the parties to the concentration is less than 15 per cent as regards markets with a horizontal overlap; and, where the parties are active in any upstream or downstream markets, the market share of each party is less than 20 per cent.

Upon notification, the FCCA must immediately commence its examination of the notified concentration. During the initial phase, which lasts up to one month, the FCCA decides whether further investigations are required. This initial phase is often referred to as Phase I. If the FCCA does not decide to commence further proceedings within one month from receipt of the notification, the concentration is considered approved. The time limit does not start running if the notification is significantly incomplete. Where further proceedings are not required, the FCCA often issues the clearance decision within two to three weeks from notification. The FCCA nearly always conducts a market enquiry concerning the key facts provided in the notification, which takes approximately one week. Should the notifying party wish to accelerate the review process, it is recommendable to approach the FCCA with pre-notification contacts in advance of signing, and to ensure that the notification and its annexes are entirely complete to allow the FCCA to conduct its market investigation without delays. However, in view of the time the FCCA usually reserves for stakeholders to respond to the market investigation, it is exceptional that clearance would be received in less than 10 days from notification.

If the FCCA decides to commence further proceedings (Phase II investigations), these may last for an additional three months. A further two-month extension to the Phase II deadline is possible by application to the Market Court. If the FCCA does not
impose conditions for clearance or does not propose the prohibition of the concentration within these time limits, the concentration is considered approved. In practice, however, the FCCA always issues its decisions within the defined time limits.

The FCCA may also extend the above time limits (i.e., ‘stop-the-clock’) if the parties to the concentration do not submit information requested by the FCCA within the set time limit, or they submit information that is significantly incomplete or misleading. The time limits are extended by the same number of days that the submission of the information is delayed by from the date originally set for its submission. If the FCCA extends the time limit, it must issue a decision in this regard.

If the FCCA concludes that the merger impedes competition significantly and the competition concerns cannot be remedied, it will propose the prohibition of the concentration to the Market Court. The Market Court must issue its decision within three months from the FCCA’s proposal to prohibit a concentration; otherwise, the concentration shall be considered approved. If the FCCA has proposed prohibiting a concentration, the standstill obligation expires unless the Market Court orders the standstill obligation to remain in force within one month from the FCCA’s prohibition proposal.

Notwithstanding a prior decision, the Market Court may, upon the proposal of the FCCA, prohibit or order a concentration to be dissolved, or attach conditions on its implementation if the parties concerned have supplied false or misleading information that has had a substantial effect on the clearance decision. The same applies if the concentration has been implemented without prior notice to the FCCA or in breach of other rules (e.g., if the concentration has been implemented prior to the FCCA’s decision in the matter). A further requirement is that the parties to the concentration are informed of the proposal by the FCCA to re-open the case no later than one year from the final decision becoming effective, or from the implementation of the concentration.

According to the Competition Act, a penalty payment will be imposed on an undertaking that implements a concentration in breach of the above rules, unless the conduct is deemed to be minor or the imposition of a fine is otherwise unjustified with respect to safeguarding competition. To date, no such penalties have been imposed in Finland.

ii Means of investigation

The FCCA has a wide range of investigatory powers at its disposal. For example, it can oblige any undertakings or associations of undertakings to supply any information or documents required for the assessment of a notified concentration. The FCCA may also conduct on-site investigations at undertakings and associations of undertakings in the course of investigating a notified concentration.

For non-complex concentrations, the FCCA generally conducts a market investigation during which it requests comments from competitors, suppliers and customers as regards the notified concentration. In cases where competition concerns arise, the FCCA has in recent years increasingly conducted on-site inspections, and has also conducted them without prior announcement (i.e., dawn raids). The FCCA has further increasingly conducted in-depth economic analyses during Phase II investigations.
iii Judicial review and third-party rights

As explained above, the FCCA's decisions can be appealed to the Market Court, and further to the Supreme Administrative Court. The FCCA's decision about whether it will initiate a Phase II investigation may, however, not be appealed. Decisions adopted by the Market Court at the first instance may also be appealed to the Supreme Administrative Court.

As merger control is an administrative procedure in Finland, the Administrative Procedure Act\(^{16}\) governs the FCCA's investigations and the Administrative Judicial Procedure Act\(^{17}\) governs the court proceedings. This means, inter alia, that the right to challenge mergers is governed by the provisions of these two general acts.

According to the Administrative Judicial Procedure Act, any person to whom a decision is addressed or whose rights, obligations or interests are directly affected by a decision may appeal the decision. This general provision has been the subject of dozens of court rulings concerning a variety of administrative matters. In the field of merger control, the Supreme Administrative Court has ruled that a clearance decision by the FCCA does not normally directly affect the rights, obligations or interests of competitors.\(^{18}\) As such, the competitors to the parties to the merger do not generally have the right to appeal such clearance decisions to the Market Court. In view of the above, it may be only in exceptional circumstances that other third parties would be directly affected by a merger control decision and thus have standing to appeal merger control clearance decisions.

In addition, since the 2011 reform of the Competition Act, the notifying party can no longer appeal a decision whereby the FCCA has conditionally approved a transaction. According to the Competition Act, the FCCA is not competent to impose conditions that the notifying party has not accepted. Therefore, if the notifying party does not accept the conditions as required by the FCCA, the notifying party can only refuse to accept them, forcing the FCCA to propose to the Market Court the prohibition of the concentration. This amendment to the Competition Act has made it impossible for the notifying party to secure a conditional clearance decision from the FCCA and thereafter appeal the conditional clearance to the Market Court for the removal of the conditions.

Access to file is mainly governed by the Act on the Openness of Government Activities (Openness Act).\(^{19}\) The Openness Act is the general act regulating the public availability of documents in the possession of public authorities in Finland. The main principle is that all official documents must be made publicly available, unless otherwise provided for in law. The notion of ‘official documents’ comprises both documents delivered to an authority and those prepared by an authority.

\(^{16}\) 434/2003.
\(^{17}\) 586/1996.
\(^{18}\) Judgment 2002:50 of the Supreme Administrative Court. See also judgment 2005:282 of the Market Court, where the Court considered that a supplier did not have the right to appeal a merger control decision.
\(^{19}\) 621/1999.
According to the Openness Act, documents containing business confidential information are not to be disclosed if access would cause economic losses. However, even confidential information may in certain circumstances be disclosed to the parties of an administrative proceeding, such as merger control proceedings, in cases where it may affect the outcome of the proceedings.

IV OTHER STRATEGIC CONSIDERATIONS

The Finnish merger control regime and the FCCA’s merger control proceedings can be considered to be rather efficient and flexible, and thus a merger control proceeding in Finland is generally straightforward.

The information required in the Finnish notification form is somewhat akin to that of the EU Commission’s Form CO, with some additional and differing requirements. While pre-notification discussions are often conducted with the FCCA in English, the formal notification must be submitted in either of the official languages of Finland (i.e., Finnish or Swedish). In cases involving multi-jurisdictional filings, clearance from Finland is often received earlier than in many other European jurisdictions.

As regards special situations that are governed in the EU under Article 3(5) of the EU Merger Regulation, it is noteworthy that the Competition Act does not have an equivalent to that Article. Thus, a concentration may also be deemed to arise under the Finnish merger control rules where, for example, credit institutions or insurance companies hold shares on a temporary basis, and where control is acquired by an officeholder relating to liquidation, winding up, insolvency, cessation of payments, compositions and analogous proceedings.

As regards hostile takeovers, generally the same rules apply as for other concentrations. However, the FCCA does note in its guidelines that in a hostile takeover, it may not be possible for the notifying party to provide complete information regarding the target. In such circumstances, the FCCA would not invoke its powers to suspend the deadline for clearance (i.e., ‘stop the clock’).

In summary, the Finnish merger control regime is relatively easy to coordinate in a multi-jurisdictional filing context with other EU national filings in terms of the information required, the standstill obligation and the applicable deadlines. The FCCA’s merger control unit also has a reputation of being practical-minded and reliable, and pre-notification contacts at an early stage are often encouraged.

V OUTLOOK AND CONCLUSIONS

No major changes to the Finnish merger control regime or the FCCA’s practices are expected in 2015. However, in 2014, the FCCA held a stakeholder meeting to discuss whether the acquisition of minority shareholdings (i.e., transactions that result in shares or votes held below the threshold of control) should also be subject to merger control under the Finnish merger control rules. The FCCA’s annual report for 2014 also notes that the appropriateness of the current turnover thresholds should be examined. Therefore, it is possible that in the future, the concept of a concentration will be enlarged in Finland and the turnover thresholds amended to capture more transactions than those that are currently subject to merger control.
Chapter 11

FRANCE

Hugues Calvet and Olivier Billard

I  INTRODUCTION

i  Merger control authority

Further to a considerable reform of the French merger control regime (Law on Modernisation of the Economy) and since 2 March 2009, the Autorité de la concurrence (Authority) has exclusive jurisdiction in merger control cases.

The Minister for the Economy, previously in charge of merger control in France, still holds residual powers; he or she may request the opening of an in-depth investigation and may reverse the Authority’s decision on grounds of general interest.

ii  Statutes, regulations and guidelines

Rules applying to the French merger control procedure are set out in the French Commercial Code under Article L430-1 et seq and Article R430-1 et seq.

In addition, new guidelines on merger control were adopted on 10 July 2013 after a public consultation was held to consider a draft interim text. This text is a revision of the previous guidelines on merger control of December 2009, and takes into account the experience acquired since then by the Authority and also refers to the practice elaborated under the jurisdiction of the Minister for the Economy, as well as to the practice of the European Commission (Commission) and case law of the Court of Justice of the European Union and the French Supreme Administrative Court. Answers to questions concerning both procedure and substantive assessment can be found in these guidelines.

1  Hugues Calvet and Olivier Billard are partners at Bredin Prat. The authors would like to thank Camille Smadja for her contribution to the writing of this chapter.

The new guidelines on merger control aim to:

a facilitate the pre-notification process;
b specify the criteria for the simplified procedure;
c specify the conceptual framework for the analysis of relevant markets and the role of this analysis; and
d propose standard models for transfers of assets and trustee mandates.

Even though these guidelines are not binding, the Authority is committed to applying them in each case unless specific circumstances or general interest considerations justify derogation.

iii Transactions that require approval

Pre-merger notification to the Authority is required when the envisaged transaction qualifies as a concentration and, provided the Commission does not have jurisdiction, when turnover thresholds are met.

Definition of concentration

The French definition of ‘concentration’ is similar to that set out in the EU Merger Regulation (EUMR). Accordingly, there is a concentration where:

a two or more formerly independent undertakings merge; or
b one or several persons who already control at least one undertaking, or one or several undertakings, directly or indirectly acquire control of the whole or parts of one or more other undertakings.

In addition, the definition of ‘control’ under French law is the same as that set out in the EUMR. Thus, ‘control’ shall be constituted by 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. French law is in line with EU practice regarding transactions leading to a change in control. In this respect, therefore, reference can be made to the Commission’s consolidated jurisdictional notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

The creation of a joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity (a full-function joint venture) also constitutes a concentration.
Jurisdictional thresholds
French merger control applies where the following cumulative thresholds and 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.

Which undertakings are to be considered as parties to the concentration or as parties concerned depends on the type of transaction. Thus, it will, for instance, be 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.

In addition, special thresholds have been introduced to catch, under certain circumstances, concentrations that do not fall within the regular thresholds. In the retail sector, if two or more of the parties operate a retail outlet, merger control applies where all the undertakings that are party to the concentration have a worldwide combined pre-tax turnover in excess of €75 million, and at least two of the parties concerned each have a pre-tax turnover in France exceeding €15 million in the retail sector. Other special thresholds apply to concentrations involving at least one party having activities in one or more of the French overseas territories. In this case, merger control applies where all the undertakings that are party to the concentration have a worldwide aggregate pre-tax turnover in excess of €75 million, and at least two of the parties concerned each having a pre-tax turnover exceeding €15 million in at least one of the French overseas territories concerned.

‘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, depending on the nature of the transaction (e.g., the purchaser’s turnover including the turnover of its group and the target’s excluding the seller’s turnover in the case of a basic acquisition, aggregate turnover of the parent companies (and their groups) intending to share control in the case of a joint venture) and on the sector concerned (e.g., specific rules applying in the banking and insurance sectors).

When jurisdictional thresholds are met, pre-merger filing is mandatory. This applies to all concentrations, including foreign-to-foreign transactions and 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 must file a joint notification.

Sanctions for not filing or for closing before clearance are as follows: corporate entities – up to 5 per cent of the turnover in France during the previous financial year (plus, where applicable, the turnover in France over the same period by the acquired party); and individuals – up to €1.5 million. For instance, on 26 December 2013, the Authority 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. A third party informed the Authority about the acquisition, and there was evidence that Castel Frères engaged in such ‘gun-jumping’ on purpose in order to close the transaction rapidly. Even though the transaction was finally notified and authorised by the Authority on 2 July 2012, the Authority specified that this did not make the breach less serious. The Authority’s decision is currently under appeal before the French Supreme Court.

Finally, the parties may be required, subject to a periodic penalty, either to file the concentration or to demerge. Transactions that have been completed without clearance are illegal and not enforceable. There are no criminal sanctions for not filing.

In this regard, it is worth mentioning that the power of the Authority to withdraw merger approvals has been validated by a decision of the French Constitutional Court in the context of the appeal by Canal Plus and Vivendi against an order to re-notify the purchase of its former rival TPS. According to the Constitutional Court, rules allowing the withdrawal of merger clearances are legal, and the French enforcement system ensures the impartiality of these decisions. According to this decision, the powers granted to the Authority ‘do not breach companies’ right to undertake business in a disproportionate manner’. The court also concluded that the French rules did not lead to any ‘confusion between the investigative function and that of decision-making within the competition authority’. The Authority’s power to start an investigation on its own decision does not prejudge the outcome, the ruling concludes.

II YEAR IN REVIEW

The increasing importance of economic and econometric analysis in French merger control procedures, which was highlighted in our review last year, has once again been confirmed in 2014. By way of a reminder, in its new merger guidelines of July 2013, the Authority introduced a reference to the upward pricing pressure, illustrative price rise and gross upward pricing pressure index (GUPPI) tests used to measure the impact of a merger on prices without having to define the relevant market. In 2014, the Authority used the test in practice in its decision of 14 April 2014 authorising the acquisition by Orlait of exclusive control over the UHT milk activity of Terra Lacta. The Authority based its analysis of unilateral effects in the decision on the GUPPI test, using profit margins and diversion ratios to conclude that a post-merger price increase by the new entity was unlikely. It cleared the acquisition unconditionally, concluding that it would not have an adverse effect on competition in view of the highly competitive market structure and strong countervailing buyer power. Another notable feature of this case is that the acquisition of control was based on a long-term contractual relationship between the parties, namely an exclusive distribution agreement that made Orlait Terra Lacta’s exclusive distributor of UHT milk. The agreement gave Orlait sole control over Terra Lacta’s UHT milk activity in accordance with point 51 of the Authority’s merger control guidelines, which states that in exceptional cases, control can be acquired on a

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3 Case No. 2012-280 QPC.
contractual basis. The agreement was made in exchange for a minority stake acquired by Terra Lacta in Orlait.

In 2014, 249 concentrations were reviewed and cleared by the Authority, 10 of which were cleared conditionally (that is, with remedies).

Three major decisions have been adopted that concern various industry sectors.

The first notable decision, dated 27 October 2014, is the acquisition of SFR, previously owned by Vivendi, by Numéricable (a subsidiary of the Altice Group), in the telecoms and media sector, following an in-depth (Phase II) investigation. The acquisition created France's second-largest telecoms company, and marked the first time that a competition authority in Europe has opened up access to cable. The acquisition gave the new entity control of around 30 per cent and around 20 per cent of the French mobile market and the fixed telephony market, respectively. A number of potential risks to competition were identified by the Authority:

a in the retail market for high speed broadband (HSB), the new entity would be able to offer quadruple play services, combining both fixed and mobile offers, thereby gaining a very significant client base. The Authority feared that Numéricable, which has an extensive cable network, would be able to pre-empt HSB customers, at the expense of operators that are currently developing optical fibre to provide similar high-speed services. Numéricable could also be prompted to close access to its network to its competitors (for instance, Bouygues Telecom) in order to preserve its own business in the retail market;

b the operation reduced the number of telecom operators from three to two in some markets directed at businesses;

c the operation would have conferred on Numéricable considerable market power in the mobile phone sector in two overseas territories, namely La Réunion (66 per cent market share) and a virtual monopoly in Mayotte (90 per cent); and

d Vivendi, which retains a 20 per cent market share in the Numéricable group, could gain access to strategic information, allowing it to adapt its behaviour on the market for subscription television and telecommunications services.

As a result, several commitments were adopted by the parties, including both structural and behavioural measures, with Numéricable giving its rivals (internet service providers and MVNOs) access to its cable network on a temporary basis to allow for competition in the HSB market, where Numéricable is known as a market leader. Numéricable also committed to divest the copper network of Completel, a subsidiary active in the market for professionals, and to sell its mobile assets under its Outremer Telecom brand in La Réunion and Mayotte. Finally, Numéricable committed not to provide any strategic business information to Vivendi concerning the markets in which the two groups are or would be in competition. The merger reflects the broader trend towards consolidation in the media and telecoms industry in Europe.

4 Case No. 14-DCC-160.
Another interesting merger decision, dated 21 November 2014, is the acquisition of Dia France SAS (Dia) by Carrefour France (Carrefour)\(^5\) in the food-retail sector, which was referred to the Authority by the Commission. The Authority concluded that the acquisition would significantly strengthen Carrefour’s presence in the food-retail market in 56 catchment areas, 12 of which are located in Paris. The parties’ retail outlets accumulated high market shares in those areas, without their current competitors being able to exert sufficient competitive pressure on the new entity, especially in relation to price. As a result, Carrefour committed to divest 50 shops and to terminate six franchise agreements, which removed the additional market share gained through the acquisition of Dia. Furthermore, Carrefour was prohibited from acquiring direct or indirect influence over all or part of the assets transferred for a period of 10 years.

A similar decision was made by the Authority with regard to the acquisition of Nocibé by Douglas (Advent International Corporation)\(^6\) in the luxury perfumes and cosmetics sector on 4 June 2014. The concentration was authorised with conditions that comprised the divestment of 38 sales outlets by the new entity. After a detailed examination and extensive consultation of market players, the Authority concluded that there were no competition issues in the upstream market for the supply of luxury perfumes and cosmetics. Nevertheless, it noted that the transaction would significantly increase Douglas’ presence in the retail market for luxury perfumes and cosmetics in 32 catchment areas, giving the new entity a large market share, without the current competitors being able to exert significant competitive pressure, especially on prices. Douglas has thus undertaken to sell off its 13 directly owned shops, and to terminate 25 current franchise agreements while simultaneously seeking replacement solutions for those sales outlets. These remedies are aimed at maintaining ‘balanced competition’ while restricting Douglas’ position to a level of below 50 per cent market share and removing any additional market share created by the transaction. Advent also committed to not repurchase the shops it committed to sell; acquire direct or indirect influence for a period of 10 years; or enter into franchise agreements with the franchisees affected by the transaction.

In its decision dated 24 February 2015 relating to the acquisition by LDC Volaille (LDC) of Glon Sanders’ (Glon) poultry slaughtering and sales activities,\(^7\) the Authority cleared the transaction unconditionally, despite the fact that, in some of the product markets for the sale of fresh meat and poultry-processed products, the combined market shares of the parties would be very high (up to 70 or 80 per cent). The Authority noted that Glon’s assets were only present in the private label segment and, as regards the sale of food products intended for mass retail distribution, there was very strong countervailing buyer power, especially regarding Glon’s private label activities. The Authority also noted that several competitors would remain in the market after the deal has been completed. The Authority further took into account the growing importance of imports in the

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5 Case No. 14-DCC-173.
6 Case No. 14-DCC-71.
7 Case No. 15-DCC-14.
poultry sector, which exercises strong competitive pressure on producers in France, and on LDC in particular.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames
Filing has a suspensive effect, which means that the parties cannot implement the merger before clearance is granted by the Authority. Timetable management is therefore of the utmost importance.

Pre-notification contacts
Pre-notification contacts with the Authority are optional but strongly advisable. Pre-notification is particularly recommended when there are uncertainties as to whether the transaction must be notified, or in the event of complex concentrations when the parties intend to include economic studies with their notification or when they would like to have an initial idea, on a confidential basis, of the Authority's opinion on their project. To start this phase, the parties generally send a briefing memorandum on the transaction (describing the parties, the envisaged transaction, the markets concerned, the competitors and the parties’ market shares) or a draft notification form. Informal meetings can also be arranged between the Authority and the parties if necessary.

Formal filing
Filing can be made as soon as the parties are able to present a sufficiently well-advanced project. In other words, 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.

Practically, notification must be made in a specific format prescribed by the French Commercial Code. The content of the notification form and the documents to be provided to the Authority are also specified in the Commercial Code and described in the guidelines. Information communicated to the Authority in the notification form and during the review process may be disclosed when the Authority's decision is issued. However, business secrets may be protected upon request.

Review
As to formal notification and provided, the notification form is deemed to be complete, the review of a concentration takes place in two phases.

Phase I
The Authority shall issue a first assessment of the concentration within 25 working days of the day on which complete notification was received. To this end, the Authority may request further information from the parties. 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 Authority, the review period is automatically extended by 15 working days. Besides, parties may ask when necessary for the review period to be suspended (‘stop the clock’) for a period of up to 15 working days. Such possibility may be used to finalise commitments, for example. At the end of this period, if no particular competition concerns arise, the Authority will clear the concentration. Otherwise, the process moves on to Phase II.

Within five working days after the notification of the Authority’s clearance decision to the Minister for the Economy, the latter can ask the Authority to open a Phase II for the review of the concentration.

**Phase II**

If the concentration raises serious doubts as to competition issues, the Authority will initiate an in-depth examination. The opening of Phase II will usually lead to additional information requests. State-of-play meetings and hearings may also be held. The Authority will then issue its decision within 65 working days as from the opening of Phase II. If commitments 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. 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).

Within 25 working days from the notification of the final decision of the Authority, the Minister for the Economy can, on the basis of public interest grounds (industrial development, companies’ competitiveness in an international context, social welfare, etc.), call the case and issue a decision based on the aforementioned grounds.

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

French law does not provide for an accelerated procedure. However, upon request, parties to a concentration may benefit from an anticipated decision, particularly in cases where a simplified notification form may be used (absence of overlap, for instance).

Besides this, there are two cases where the parties can proceed without having to wait for the Authority to issue its decision.

First, it is possible to obtain an individual derogation allowing completion of all or part of the concentration without awaiting the Authority’s decision. Derogations remain exceptional and difficult to obtain to the extent that they must be necessary and duly justified. For instance, a derogation could be granted in the case of an offer to buy an undertaking subject to insolvency proceedings. It should nonetheless be stressed that in the case of acquisitions by investment funds, in the absence of overlap, the derogation is quite easily granted.

Second, there is an automatic derogation in the case of the exchange of securities on a regulated market. The rule is that takeover bids may always be implemented, provided that the acquirer does not exercise the voting rights attached to the securities at issue.
iii Third-party access to the file and rights to challenge mergers

Third parties are not directly involved in the merger control proceedings. Third parties do not have access to the notification file, but notifications are announced on the Authority’s website with a summary of the concentration, enabling third parties to react. Furthermore, the works councils of the companies involved in the concentration must be informed within three days after publication of the notification of the concentration on the Authority’s website.

Moreover, the Authority has the power, during both phases, to interview any third party when reviewing a concentration (clients, competitors, suppliers, etc.).

Clearance and prohibition decisions, and also certain related decisions, particularly those regarding publication or approval of a purchaser of assets in the case of remedies, can be challenged by any third party having an interest in contesting such decision.

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. Even though remedies are usually proposed by the parties, they can also be imposed by the Authority.

Remedies can be submitted at the time of formal notification or at any time during the review. The review period is automatically extended by 15 working days when remedies are submitted in Phase I; when they are submitted less than 20 working days before the end of Phase II, the review period ends 20 working days after the day the said remedies were submitted.

While the Authority first seeks structural remedies (divestitures of business activities or assets, elimination of structural links between competitors), the new guidelines adopt a position that is more favourable to behavioural remedies than previously. However, the implementation of behavioural remedies is rigorously controlled by the Authority (point 618).

In certain (rare) circumstances, behavioural remedies may be envisaged as a temporary solution or otherwise in place of structural measures, particularly when a divestiture would be difficult to implement. For example, in the Banque Populaire/Caisse d’Épargne case, the Authority acknowledged that the sale of part of the assets held by the new group in the French overseas territory of La Réunion would be difficult considering the crisis that the financial sector was experiencing, and specifically the fact that the crisis was hitting French overseas territories particularly hard. Measures to maintain autonomous management and legal independence of three branch networks of the new group in this region were therefore preferred to a divestiture considering that, in the event of non-compliance or inefficiency, these measures would be automatically replaced by a structural remedy (undertaking to sell assets).

On 26 July 2013, the Authority conditionally cleared the acquisition by Bouyer-Leroux, a company manufacturing earthenware construction materials (wall bricks, partition bricks, tiles), of those Imerys Structure assets corresponding to all of its

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8 Case No. 06-DCC-16.
activities in the same sector. Following an initial investigation phase, the authority started an in-depth Phase II investigation. Further to this investigation, the Authority considered that there was no risk of the altering of competition in the sector of partition bricks in the western region of France. However, the Authority noted that the transaction would lead to competition problems on the wall brick market in Aquitaine. While the Authority seemed to be very keen on structural remedies during Phase I, it finally implemented behavioural remedies: to prevent risks to competition, Bouyer-Leroux undertook to transfer a volume of 25,000 tons per year, at cost price, to its two competitors or to one wholesaler working with distribution networks and traders in the region, for a period of five years (such period being renewable once).

In an Authority decision dated 21 August 2014 relating to the acquisition of sole control of Brasserie Lorraine (BL), active in the fabrication and distribution of beer in French overseas territories, by Antilles Glace (AG), also active in the fabrication and supply of beer, two behavioural remedies were undertaken by the parties. The acquisition led to competition concerns in Martinique, a French overseas territory. To counter the risks of vertical effects, AG committed to offer to wholesalers having signed a contract with BL the renewal of these contracts when they reached their termination date, under objective and non-discriminatory conditions. To counter any conglomerate effects, AG was also prohibited from bundling beer sales to any other products manufactured by the AG group. After the operation, beers from brands such as Corsaire and Malta du Corsaire would also have to be distributed by a third party.

The above-mentioned decision dated 27 October 2014 regarding the acquisition of SFR by Numéricable is also very interesting, as the remedies adopted are both of a structural and behavioural nature. The Authority has also welcomed rather innovative commitments in cases involving calls for tenders. For example, in the Veolia/Transdev case, to remedy the competition issues raised by the Authority in the market of urban public transport (outside of the Île-de-France), the parties proposed to finance the creation of a competition stimulation fund in an amount of €6.54 million. This fund shall in particular allow the transport organising authorities throughout France to finance measures compensating all or part of the response expenses for candidates not selected during calls for tenders, thereby encouraging more competitors to take part in them. In the GDF Suez/Ne Varietur case, to address the Authority’s competition concerns in the market for management of district heating networks, GDF Suez undertook to allow local authorities to terminate their ongoing contracts with Ne Varietur’s subsidiaries. This commitment was intended to allow competition for public service contracts long before the ongoing contracts were due to expire. On 1 October 2013, the Authority also cleared the acquisition of sole control of the Transdev Group (formerly Veolia–Transdev) by the Caisse des Dépôts et Consignations.

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10 Case No. 10-DCC-198.
11 Case No. 11-DCC-34.
12 For further information, see Section II of the France chapter in the previous edition of this publication.
Other recent cases with remedies include the SNCF/Novatrans case, where the acquisition by SNCF, the incumbent rail transport operator, of exclusive control of Novatrans, the leading combined railway transport operator and manager of several terminals, was cleared subject to several commitments by SNCF, including that Novatrans organise requests for tenders to ensure that railway companies competing with SNCF have access to the demand of the main combined transport operator. SNCF has also undertaken to establish open capital operating companies that will allow equity interest to be taken by other combined transport operators in companies operating the terminals that they use. To prevent requests from its subsidiaries specialised in combined transport being given priority and better price conditions, SNCF undertook to guarantee transparent and non-discriminatory access to its services through the use of public tariffs and transparent commercial terms.

In the TF1/TMC/NT1 case, to remedy the risks of adverse effects on competition in the markets for acquisition of broadcasting rights for television programmes and television advertising, resulting from TF1's acquisition of the television channels TMC and NT1, TF1 undertook:

a. to amend the right of first refusal clauses in agreements signed with film producers to facilitate the circulation of rights for the benefit of competing channels;
b. not to answer calls for tenders for the acquisition of broadcasting rights for sporting events for more than two of the group's FTA stations;
c. not to broadcast certain programmes (including, in particular, popular American series) on more than two of the group's FTA stations; and
d. not to bundle TF1 and the acquisition channels' offer in relation to advertising.

More recently, the Authority cleared the acquisition of Quartier Français Spiritueux by Compagnie Financière Européenne de Prise de Participation subject to a set of structural and behavioural commitments in the liquor sector. The notifying parties committed to divest all assets (distillery, rum brands and a distribution company) in Martinique, and to sell a brand and supply rum quotas on an annual basis in Réunion. More traditional commitments were taken in the HTM/Media Concorde SNC case where, to remedy the Authority's concerns that the entity resulting from the transaction would have too strong a market presence in the retail sale of household appliances and consumer electronics, retail outlets were divested in several catchment areas.

Whatever the type of remedy decided, the appointment of an independent officer responsible for monitoring implementation of the measures is almost systematically required by the Authority. This independent officer'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 Authority are specified in the commitments.

13 Case No. 09-DCC-54.
14 Case No. 10-DC-11.
15 Case No. 11-DCC-187.
16 Case No. 11-DCC-87.
It is also important to note that, in the new guidelines on merger control, the Authority has detailed and provided illustrative examples of its decision-making practice, which is characterised by a preference for structural remedies, including transfers of minority share holdings where the particularities of the merger operation will allow it. However, in the case of complex operations, especially when they consist of the acquisition of suppliers or distributors (vertical integration) or when they lead to conglomerate effects, the Authority indicates that it will pragmatically accept behavioural remedies (for which it provides several examples). Compliance with commitments by the companies is central to the process of French merger control. The Authority underlines that any such commitments must be complied with, except in the event that the market conditions evolve and thus could lead to a new examination.

Taking its inspiration from models developed by the Commission and other competition authorities, in the new guidelines the Authority also suggests two model forms for the transfer of assets and trustee mandates aimed at relevant parties contemplating structural remedies. These models can be adapted on a case-by-case basis. The model form for divestiture commitments lists the legal requirements and defines the terms of the commitment. It also contains a pre-formulation of the transfer procedure, as well as some basic guarantees that the Authority deems necessary to retain the viability of the assets transferred. The role of the trustee tasked with monitoring the commitments or the transfer procedure has moreover been specified: its status, the terms of its independence from the companies and, more generally, the conditions to obtain the Authority’s approval, as well as the tasks to be implemented by the trustee in practice, are set out in a model contract.

By using these examples, the Authority intends to facilitate, secure and homogenise the practice of notifying parties during the crucial phase of the commitments. Experience has shown that it is necessary to anticipate any potential transfers of assets very early in the process when a merger operation raises competition problems, particularly for the acquisition of a competitor firm or a merger between competitors.

It is also important to note that the Authority carefully follows the implementation of behavioural remedies and has the power to withdraw a previously given authorisation when it is established that the parties did not comply with the submitted remedies. The parties will then have to either restore the situation to what it was before the transaction (i.e., ‘unwind’ the operation) or re-notify the transaction to the Authority within a month.

If such refusal to comply with the remedies is confirmed, the Authority is also able to impose financial penalties on the notifying parties of up to 5 per cent of their net turnover realised in France.

**Appeals and judicial review**

Appeals against the Authority’s decisions can be brought before the French Supreme Administrative Court. The time limit to lodge such appeal is, for the parties, two months from the date of the notification of the Authority’s decision and, for third parties, two months from the publication of this decision on the Authority’s website.

Clearance and prohibition decisions, but also certain related decisions, particularly regarding publication or approval of a buyer of assets in the case of remedies, can be
Actions directed against the Authority’s decision are essentially actions for annulment. For example, the French Supreme Administrative Court may examine matters relating to the compliance of proceedings, whether a transaction had to be reported, the definition of relevant markets and competitive assessment. When bringing an action for annulment, the applicant can also bring a claim in summary proceedings requesting suspension of the challenged decision. In the event of total or partial annulment of a decision taken by the Authority or by the Minister for the Economy, and, as the case may be, re-examination of the file, an updated notification will have to be filed within a period of two months from the date of notification of the French Supreme Administrative Court’s decision.

In 2014, the French Supreme Administrative Court only adopted one judgment in the field of merger control, rejecting a claim against the Authority’s decision of 26 July 2013 that related to the acquisition by Bouyer-Leroux of exclusive control over some assets of Imerys TC, namely construction materials, in particular wall bricks, partition bricks and tiles. The Authority had cleared the acquisition with conditions following an in-depth investigation (Phase II) during which it decided that the transaction would not lead to competition concerns in the market for partition bricks in the west of France, as partition bricks could be substituted by other construction materials, and that there was no local preference for plaster bricks. However, the Authority decided that the operation could nevertheless lead to competition issues in the wall brick market in the Aquitaine region. According to the Authority, due to regional preferences of consumers in this geographical area, wall bricks represented a distinct market from other construction materials. As such, the transaction would have given the new entity very high market shares, allowing it to raise its prices. To address these concerns, Bouyer-Leroux undertook to transfer a volume of 25,000 tons per year, at cost price, to its two competitors or to one wholesaler working with distribution networks and traders in the region, for five years (which period would be renewable once). This would enable competitors to build up a client base and establish themselves on a long-term basis in this market. A competitor of the parties, Wienerberger, appealed the Authority’s decision, alleging several procedural deficiencies as well as mistakes in the Authority’s substantive assessment.

Wienerberger first alleged that the procedure was flawed because there was no additional report on the new set of commitments, the decision-making body did not rule on the commitments collegially and Wienerberger’s rights to a defence had been breached as it was not given the opportunity to make oral observations before the Authority. These arguments were all rejected by the Court as there was no legal requirement for an additional report, the Authority had in fact made a collegial decision on the new commitments, and Wienerberger was not a party to the transaction and its rights were not adversely affected.

On substantive grounds, Wienerberger argued that the market is oligopolistic and that the remedies undertaken within the context of the transaction would lead to coordinated effects that would facilitate exchanges of information between competitors and thereby give rise to anti-competitive effects. This argument was rejected by the Supreme Court, which judged that the information that would be obtained was not strategic and not determinative for commercial policy. Wienerberger also claimed that
the transaction would enable the new entity to abuse its dominant position, and this was also rejected by the Court, which stated that the remedy given was sufficient to reduce the removal of capacity in the market and to maintaining sufficient competitive pressure.

v Regulatory review

There is a number of 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 Authority will request non-binding opinions from the relevant regulatory authorities. This applies in particular in the audiovisual sector (the Audiovisual Council), in the banking sector (the Credit Institutions and Investment Firms Committee, the Banking Commission and the Financial Markets Authority), the insurance sector (the Insurance Companies Committee), the energy sector (the Energy Regulation Commission) and the telecommunications sector (the Regulatory Authority for Electronic Communications and Post).

IV OTHER STRATEGIC CONSIDERATIONS

i Coordinating with other jurisdictions

When dealing with concentrations, the Authority and competition authorities of other states (including EU Member States) may have concurrent jurisdiction. The Authority cooperates with competition authorities of other Member States through the European Competition Network. In parallel, the European Competition Authorities (ECA), which groups together the competition authorities in the European Economic Area, has been considering ways in which the processing of mergers subject to investigation in more than one country can be made easier both for the parties to the merger and the authorities, while ensuring that cooperation between members takes place as far as national legislation allows this. According to the arrangements agreed upon by the ECA, when an ECA authority is informed by the notifying parties that they have also notified or will be notifying the concentration to other 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

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17 EU Member States and the Commission, Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority.
legislation makes this possible), and keep each other informed of the development of the case as appropriate. It should also be noted that, on 9 November 2011, the ECA adopted a set of best practices to handle cross-border mergers that do not benefit from EU 'one-stop shop' review (i.e., mergers reviewed by two or several ECAs simultaneously that are not subject to notification before the Commission). This document envisages cooperation in multi-jurisdictional cases where the exchange of information between ECAs could be valuable. The success of such cooperation depends to a great extent on the goodwill of the notifying parties, since ECAs will in most cases depend on them for permission to exchange confidential information.

However, the Authority and the Commission do not have concurrent jurisdiction. Concentrations with a Community dimension fall within the exclusive jurisdiction of the Commission, and reciprocally the Commission has no jurisdiction to deal with a concentration falling within the competence of the Member States.

In spite of this clear division of competence, some cases can, upon request and provided certain criteria are met, be re-attributed by the Commission to the Authority and vice versa (Articles 4, 5, 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 Authority to review a concentration with an EU dimension.

Recently, the Commission referred the part of the Veolia/Transdev concentration that related to the activities of Veolia Transport and Transdev in France to the Authority, at its request.\footnote{Commission decision dated 12 August 2010 in Case No. M.5741.} Following a preliminary examination, the Commission found that the transaction would lead to substantial overlap of the companies’ activities, particularly on the public passenger transport markets in France. These aspects were therefore examined by the Authority.\footnote{Case No. 10-DCC-198.} At the same time, the Commission approved the Veolia/Transdev transaction for territories outside France.

In the SNCF/CDPQ/KEOLIS/EFFIA case,\footnote{Case No. 10-DCC-02.} also upon the request of the Authority, which stated that the concentration would significantly affect competition in the markets for French public passenger transport through potential conglomerate effects and that these markets are national or regional in scope, the Commission decided to refer the concentration to the Authority for examination. The Authority cleared the concentration subject to a series of commitments proposed by the parties to address competition issues, and in particular commitments aimed at preventing SNCF, the incumbent rail transport operator, from favouring Keolis, a leading urban transport operator, which as a result of the transaction would be jointly controlled by SNCF.

Two recent cases, Akzo/Metlac and Eurotunnel/SeaFrance, have shown that EU cross-border merger control could lead to conflicts of decisions that are extremely detrimental to business. The French Minister for the Economy and the President of the
ii Dealings with special situations

Ancillary restraints

Agreements entered into by the parties to a concentration may restrict the parties’ freedom of action in the market and thus contain restrictions on competition. Commonly encountered restrictions in this context include in particular non-compete clauses imposed on the vendor, restrictions in licence agreements and purchase and supply obligations.

Contrary to EU law, which has long provided that such restraints are covered by the decision clearing the concentration if they are directly related to and necessary to the implementation of the concentration (ancillary restraints), the French merger control regulation did not have specific provisions dealing with ancillary restraints. Nevertheless, the French decisional practice had so far been in line with that of the European Union, the Minister for the Economy considering restrictions that were necessary and directly related to the concentration as covered by the clearance decision.

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 Authority of the existence of such restraints, it is in their interest to do so to the extent that their compatibility with competition law can raise doubts.

It is further specified that, when examining such restraints, the criteria of direct relation and necessity will be assessed by the Authority, which is not bound by the parties regarding said restraints as such.

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

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21 For further information, see Section II of the France chapter in previous edition of this publication.
policy (e.g., through contractual mechanisms that transfer all or part of the members' commercial risk to the network leader) and in having the possibility to change network, and will determine whether they are sufficient to give the 'network leader' a decisive influence on its members' business, namely, control, as defined by merger regulations.

In the same way, if the distribution network leader acquires a stake in the share capital of a member that enables it to exercise control alone or jointly over the member, the transaction will easily be qualified as a concentration.

The situation is less clear-cut if only a minority stake is acquired. Such an acquisition can have as its main objective the protection of minority shareholders’ financial interests as investors and is not sufficient a priori, as such, to grant a decisive influence on the franchise holder (the dealer or the cooperative member). In this case, the Authority will assess to what extent other elements could give the minority shareholder a decisive influence on the member. In a recent case\textsuperscript{22} where the articles of association, which could only be amended with the consent of the minority shareholder, provided that the member should carry on its business under a specific name, the Authority considered that this minority shareholding, together with the distribution agreement, granted the network leader a decisive influence. The same applies when the articles of association provide for a very long period of time before the members can leave the network or de facto prevents members from leaving the network for a very long time. Such provisions in the articles can be in consideration for stakes equal to a blocking minority or even for holding one preference share. In another recent case\textsuperscript{23} where the network leader owned only one preference share in a company operating a point of sale but where the articles of association granted the network leader, for a period of more than 10 years, the possibility of preventing any change of trade name, opposing any transfer of shares and obliging majority shareholders to sell the business if they operated a similar business with a competing trade name, the Authority considered that the network leader controlled the network member. In addition, the network leader had a right of first refusal in the event of sale of the business.

Depending on other prerogatives that may have been granted to the minority shareholder pursuant to the articles of association as regards the management of the business and depending on the provisions of the trade name agreement, the control exercised by the network leader on the members can be joint, with both parties necessarily having to agree on the sales policy for the points of sale, or exclusive, with the network leader alone being able to determine this policy. When the network leader already exercises joint control on the members, the transaction by which the network leader acquires exclusive control of the member also constitutes a concentration.

\textbf{Financial distress and insolvency}

The fact that a concentration takes place within the context of an insolvency proceeding does not prevent the Authority from reviewing it.

\textsuperscript{22} Case No. 09-DCC-06.

\textsuperscript{23} Case No. 09-DCC-064.
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 Authority. However, derogation in no way prejudges the outcome of the merger control. The Authority retains full jurisdiction to consider the merits of the case and can, after review, impose divestment of the target’s or the purchaser’s assets, and even prohibit the concentration if it adversely affects competition.

In the case of a concentration involving the acquisition of an undertaking that would soon disappear without the transaction, the Authority can consider clearing the case, even if it adversely affects competition. The Authority’s positions are inspired in this respect by the case law of the European Court of Justice, according to which in the event of a competitor purchasing a failing company, the transaction can nevertheless be authorised when it appears that the effects of the transaction would not be more unfavourable than those that would result from the disappearance of the failing company (the ‘failing firm defence’). The effects of a transaction can be considered to be no more damaging to competition than the disappearance of the failing company when, if not taken over by another undertaking, the financial difficulties would force the failing company out of the market; there is no less anti-competitive alternative purchaser than the notifying party; and the disappearance of the failing company would be no less damaging to consumers than the planned purchase.

**Concentrations involving investment funds**

Merger control applies to concentrations involving investment funds. However, the Authority acknowledges that specific issues may arise in the case of acquisitions of control by investment funds. An annex to the guidelines is dedicated to the general features of merger control applied to such structures, including questions such as the notion of control, turnover calculation, etc.

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

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

Substantive assessment of a concentration involving an investment company raises specific issues as to the extent to which the investment company can be considered autonomous from the investors. In the case of a sufficiently autonomous investment company, the competitive assessment will take into account all undertakings over which it exercises decisive influence through its funds. When it appears that the investment company does not control any undertaking active in the same market in which the target is active or in an 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 cover all undertakings controlled by the said investors.

V OUTLOOK AND CONCLUSIONS

The transfer of merger control from the Minister for the Economy to the Authority alone is no doubt the cornerstone of the recent reform of the French competition enforcement framework. Beyond dropping the double jurisdiction system (the Minister for the Economy plus the Competition Council), other significant changes, such as new turnover thresholds and new procedural time limits, have been implemented. As illustrated above, although the new merger control regime is in line with past practice, the Authority has clearly shown during its first years of enforcement that it will not hesitate to explore its own methods of reviewing mergers. The new guidelines on merger control now provide more clarity regarding the specificities used by the Authority in reviewing mergers, and will hopefully improve the French merger control process in the future.
I INTRODUCTION

Every dealmaker with experience in the EU is aware that German merger control differs from that of the EU and most other national merger control regimes in Europe, and that these differences need to be taken seriously since the jurisdictional thresholds in Germany are low and the German competition authority, the Bundeskartellamt, (rightly) has the reputation of being a very active watchdog.

However, in the recent past, the business community experienced a welcome move of the German merger control system towards mainstream Europe with, in particular, the entry into effect of the 8th Amendment to the German Competition Act (GWB)\(^2\) in the summer of 2013 and a more economic approach (formally) adopted in the Bundeskartellamt’s decision practice since 2012.\(^3\)

In fact, one of the main objectives of the 8th Amendment was to bring German merger control rules more in line with the rules provided for by the EU Merger Regulation. The changes included the introduction of the EU’s SIEC test with the

\(^1\) Götz Drauz is a senior competition counsel and Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati’s Brussels office. The authors would like to thank Bastian Voell for his valuable assistance in the preparation of this chapter.

\(^2\) The applicable merger control rules can be found under Chapter VII (Sections 35–43) of the GWB. The text, as well as comprehensive guidance materials and forms issued by the Bundeskartellamt, are available in English, French and German on the authority’s website (see www.bundeskartellamt.de).

previous dominance test becoming an example of a ‘significant impediment to effective competition’ (SIEC).

In 2014, economic analysis has indeed played a more central role in the Bundeskartellamt’s enforcement practice comparable to the reviews carried out by the European Commission and the US agencies. In any event, even since the 8th Amendment and its significant changes entered into effect, German merger control continues to differ in some important aspects, including:

- **a** substantive appraisal: continued application of the presumption of dominance (based on market shares) and of the balancing clause;
- **b** jurisdictional test: continued relevance of a different concentration test (whereby certain minority shareholdings below the control threshold are systematically caught);⁴
- **c** procedure: continued procedural flexibility as far as the formal requirements for a filing and the deadlines for the review are concerned;
- **d** remedies: continued use of remedies only in Phase II with a preference for upfront buyer solutions; and
- **e** government veto: continued relevance of executive power to overrule a merger prohibition for public interest reasons.

In the following sections, we discuss the main rules and the most important aspects of the Bundeskartellamt’s recent enforcement action with a particular emphasis on those rules and decisions that are relevant for the business community since the 8th Amendment to the GWB entered into effect in summer 2013.

## II THE MERGER CONTROL REGIME

### i Jurisdiction

The German merger control regime provides for pre-merger filings. Accordingly, a proposed concentration must not be put into effect prior to obtaining clearance (or derogation from the suspension obligation) from the Bundeskartellamt. There is no specific deadline for the notification. A (simplified) jurisdictional test consists of the following:

- **a** transaction amounts to a concentration,⁵ i.e., acquisition, of:
  - control;
  - all or a substantial part of another undertaking’s assets;

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⁴ The European Commission has concluded its consultation on a possible reform of the European Merger Regulation to allow it to also review the acquisition of non-controlling minority shareholdings. Its White Paper on the merger control reform is available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&from=EN.

⁵ 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 turnover thresholds will apply to the transactions as a whole, to ensure that parties cannot avoid a notification obligation by slicing a deal into staged transactions each falling below the relevant turnover threshold.
• shares constituting 25 per cent or 50 per cent of capital or voting rights; or
• competitively significant influence;

b turnover thresholds provided for by German merger control rules are exceeded: 6
• aggregate worldwide turnover of all undertakings concerned of more than €500 million;
• German turnover of at least one undertaking of more than €25 million; and
• German turnover of a second undertaking of more than €5 million;

c no de minimis (target company) exception; 7 and
d domestic effect. 8

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

ii Procedure

When the jurisdictional test is met, notification to the Bundeskartellamt is mandatory and must be made prior to implementation. The filing can be made as soon as the parties to the concentration can show a good faith intention to enter into an agreement. There is no filing deadline. The fact that a filing has been received will be published on the authority’s website, and the transaction thus can no longer be kept confidential.

The parties are prohibited from implementing a concentration notified to the authority before receiving clearance. 9 This prohibition not only applies to the legal implementation of the transaction but also to restructuring measures that go beyond

6 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 fields of publication, production and distribution of newspapers and magazines are subject to new notification thresholds as the applicable turnover multiplier has been lowered from 20 to 8.

7 The 8th Amendment to the GWB removed the de minimis market exception from the filing requirement, reducing the de minimis market test to its role in the substantive review. For example, in Tokyo Electron/Applied Materials, the Bundeskartellamt found 22 out of the 44 relevant markets to qualify as ‘de minimis markets’ (total revenues of less than €15 million in the last calendar year and in existence for more than five years), which a prohibition decision could not be based on (pursuant to Section 36(1) No. 2 GWB).

8 In September 2014, the Bundeskartellamt published a revised version of its guidance document regarding the assessment of ‘domestic effects’ under German merger control. The guidance paper is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20-%20domestic%20effects%202014.pdf?__blob=publicationFile&v=2.

9 In line with the EU’s merger control rules, the 8th 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
usual business practice in the sector concerned. The Bundeskartellamt may impose interim measures to prevent the parties from taking such measures.\textsuperscript{10} Violation of this suspension obligation as well as the failure to notify at all can lead to the imposition of a fine (of up to €1 million for natural persons and up to 10 per cent of the aggregate group turnover of the undertakings concerned) and the invalidity under civil law of the contracts bringing about the concentration.

The 8th Amendment to the GWB introduced certain changes to the statutory time limits, including the EU’s ‘stop-the-clock’ possibility and an automatic extension of the deadlines upon submission of a remedy proposal. Once notified, the vast majority of cases are cleared after a Phase I inquiry (lasting one month). Under the new rules, the maximum time frame for an in-depth review, encompassing Phase I and Phase II, will be five months from the time of the complete notification.\textsuperscript{11}

In problematic cases, the Bundeskartellamt must inform the notifying parties within one month of receipt of the notification that it has initiated an in-depth investigation of the proposed merger. In the absence of any such communication by the end of Phase I, the proposed merger is deemed cleared by time lapse. A reasoned decision will only be issued following an in-depth investigation by the agency in Phase II.

Third parties such as competitors, suppliers and customers of the merging parties will generally have the opportunity to comment on a proposed merger in the context of information requests issued by the Bundeskartellamt in the course of its investigation, or to submit unsolicited comments. Third parties may thus raise concerns without having to request formal admission to participate in the proceeding.

Third parties whose economic interests will be substantially affected by a decision of the Bundeskartellamt may, however, formally intervene in the proceedings upon application and admission by the authority. Once admitted, these intervenors 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.

\section*{iii Substantive assessment}

The substantive test carried out by the Bundeskartellamt under the new merger control rules is whether the proposed transaction would lead to a ‘significant impediment to effective competition’ (SIEC), in particular by means of the ‘creation or strengthening of a dominant position’. As discussed above, the previous dominance test has thus merely

\begin{itemize}
\item 10 Such interim measures have been imposed recently in the Edeka/Tengelmann proceedings.
\item 11 In straightforward cases, the Bundeskartellamt is generally prepared to clear the transaction ‘without delay after receipt of the complete notification’ well before Phase I has expired. See Section 2.2 of the Bundeskartellamt’s information leaflet on German merger control, available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20German%20Merger%20Control.pdf?__blob=publicationFile&v=3. In the absence of any mandatory form to be used, the notification of such cases can be brief.
\end{itemize}
been ‘complemented’ by the EU’s SIEC test following the entry into effect of the 8th Amendment to the GWB.

According to its ‘Guidance on Substantive Merger Control’ of March 2012, the Bundeskartellamt 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 then distinguishes again between single and collective dominance.

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

However, in the Bundeskartellamt’s decision practice, these presumptions play only a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. In fact, the presumptions merely 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 anti-competitive agreements (Section 1 of the GWB).

A merger that leads to a ‘significant impediment to effective competition’ will not be prohibited if the requirements of the balancing clause are met (i.e., if the companies show pro-competitive effects on a different market that outweigh the negative effects on the affected market). To be taken into account, the pro-competitive effects presented by the parties must be of a structural nature.\(^\text{12}\)

When the Bundeskartellamt reaches the preliminary conclusion that a concentration raises competition concerns, the parties have the possibility of offering commitments in Phase II with a view to securing conditional approval. Conditions precedent (in which case the merger may not be implemented until the condition is satisfied\(^\text{13}\)), such as upfront buyer solutions, are generally preferred by the Bundeskartellamt.

The 8th Amendment introduced the possibility of behavioural remedies that are equivalent to divestitures in their effects (provided that ‘effective control’ is possible). However, the type of remedy that is most likely to be accepted by the Bundeskartellamt is a divestiture that removes the competition concerns. In cases where such structural remedy is not possible, the parties continue to face a difficult time to convince the authority to accept any other remedy solution.


\(^{13}\) In Asklepios/Rhön-Klinikum, for the first time in the history of German merger control, the parties did not fulfil the Bundeskartellamt’s divestiture conditions (precedent) attached to the clearance decision of early 2013, with the consequence that, in July 2013, the clearance decision fell away and the deal was (automatically) prohibited. The Bundeskartellamt issued a press declaration to this effect.
In fact, the Düsseldorf Court of Appeals’ Liberty Global/KBW judgment supports the Bundeskartellamt’s tough standard for remedy proposals. The Court criticised the authority’s conditions in Liberty Global/KBW for merely creating the theoretical possibility of restoring competition instead of actually leading to it. Not surprisingly, it continues to be difficult to convince the authority not to insist on structural remedies in the form of conditions precedent. 14

III YEAR IN REVIEW

i Jurisdiction

Timing
The notification requirements must still be met on the day of the Bundeskartellamt’s final decision. In TBC/Frauenthal, for example, the buyer (TBC) sold shares in another undertaking during the agency’s in-depth review of its acquisition of Frauenthal. Following the closing of the sale, the turnover thresholds were no longer exceeded and the parties withdrew the notification of the Frauenthal acquisition. No decision was issued as a consequence of the withdrawal.

Domestic effect
Foreign-to-foreign transactions meeting the jurisdictional thresholds are subject to German merger control legislation – unless the concentration has no effect on the German domestic market. The Bundeskartellamt’s 2014 guidance document on domestic effects confirms that, even where the (low) turnover thresholds are exceeded, in certain joint venture scenarios no notification is necessary if the joint venture is not expected to have appreciable effects in Germany: 15

- concentrations involving only two parties (regardless of their location) always have to be notified if the applicable thresholds are exceeded;

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14 One Equity Partners/Linpac RTP is one of the relatively rare cases where the Bundeskartellamt did not insist on a condition precedent but used a condition subsequent for the divestment – allowing the merger to be put into effect immediately following the clearance decision (which would only become invalid upon the failure of the parties to satisfy the condition). Unlike in Germany, traditionally the European Commission has rarely insisted on upfront buyer solutions. However, the signal from, in particular, UPS/TNT, is clear: parties to difficult horizontal mergers are faced with tough standards for efficiency claims and remedies when trying to address the Commission’s concerns. In the absence of a viable efficiency defence, the Commission’s increasingly rigid approach to remedies is unwelcome news. Therefore, the timely negotiation of upfront buyer solutions with the Commission seems to be of critical importance.

15 In contrast to the existing practice of the European Commission, under German merger control rules, appreciable domestic effects are a prerequisite for triggering the obligation to notify a concentration in Germany (see Section 130(2) GWB). The guidance paper is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%202014.pdf?__blob=publicationFile&v=2.
concentrations involving more than two parties (joint ventures) do not have to be notified if:

• the joint venture is only active outside of Germany (and also cannot be considered as a potential competitor in Germany); and
• the joint venture has no ‘spill-over effects’ in Germany (i.e., parent companies do not compete on the joint venture’s product market (nor upstream or downstream)); and

c all other joint ventures require a case-by-case assessment based on the criteria set out in the agency’s guidance document.

In the case of doubt, it is highly advisable to discuss any claimed absence of such ‘domestic effects’ with the agency during informal guidance discussions. This is particularly true since the introduction of a second domestic turnover threshold in 2009. Alternatively, where the effects are difficult to determine but the deal does not raise any competition concerns, parties typically proceed with the filing securing legal certainty by means of a (timely) clearance.16

Referrals

Parties to a merger in the EU must pay particular attention to strategic questions concerning possible referrals and the significant consequences of a referral request on the timeline of the deal and its substantive review. In the past, the Bundeskartellamt frequently requested referrals of mergers under review by the Commission in sectors with national sensitivities (e.g., in the telecoms, media and energy sectors).

For example, in Telefónica/E-Plus, the Commission rejected referring the review of the planned acquisition of E-Plus by Telefónica Deutschland to the Bundeskartellamt. Despite significant and repeated efforts by the German authority, the Commission concluded that it was better placed to deal with the case because of its experience in assessing mergers in the mobile telecommunications sector and the need for a consistent application of the merger control rules in the EU.17

16 In EMC/Cisco, in 2011 the parties narrowly escaped a fine for gun jumping when they did not notify their joint venture distributing integrated data centres, which was originally only active in the US. The Bundeskartellamt, in its case summary, found that the parties had violated the filing obligation but refrained from imposing a fine in light of the insignificant effects of the joint venture on the markets in Germany.

17 On the other hand, in Liberty/KBW in 2011, the Commission agreed to refer the review of the acquisition of German regional cable operator KBW by Liberty Global Inc to the Bundeskartellamt. The referral request by the German authority added significant time to the clearance timetable, resulting in a total duration of approximately eight months from the time of notification to the Commission until (conditional) clearance by the Bundeskartellamt. In the meantime, on 14 August 2013, the Bundeskartellamt’s conditional clearance decision was overturned by the Düsseldorf Court of Appeals before the parties agreed to settle in 2015.
ii Procedure

Fines
In merger cases, no fines were imposed during the past 12 months. In January 2013, the Bundeskartellamt imposed its last fine in the amount of €90,000 for the filing of an incomplete notification concerning the planned acquisition of Tummel by Tönnies (which was prohibited in November 2011). The fine was issued for not disclosing a majority shareholding in a competitor that the authority, according to its press release, found ‘highly relevant’ for the assessment of the merger.

Procedure for assessment of cooperative aspects
Unlike under the EU Merger Regulation (in the case of full-function joint ventures), the Bundeskartellamt analyses the risk that a joint venture may lead to anti-competitive coordination between the parent companies (beyond the scope of the concentration) not necessarily as part of the merger control review but in a separate proceeding under Section 1 GWB – which may lead to significant delays and legal uncertainty (see, e.g., Agronovita JV and Macquarie/OGE).

Under Section 1 GWB, anti-competitive effects are generally presumed by the German competition authority if at least two of the parents and the joint venture are active on the same product and geographic markets. In these instances, the Bundeskartellamt is particularly concerned about the information exchange resulting from the cooperation between the parent companies (see, e.g., the authority’s decision in Brenntag/CG Chemikalien/CVH Chemie-Vertrieb).

Interim measures to clarify scope of suspension obligation
In EDEKA/Tengelmann, in an unusual step, the Bundeskartellamt issued an interim measures decision to clarify that certain steps agreed upon by the parties were considered as unlawful implementation (and not merely as lawful preparation) of the merger in violation of the suspension obligation. According to the Bundeskartellamt, the interim measures were ordered as a precautionary step to ensure that the pre-merger status was maintained during the agency’s review.

iii Substantive assessment

Roadmap for substantive merger reviews
In 2012, the issuance of the ‘Guidance on Substantive Merger Control’ document by the Bundeskartellamt was a remarkable development as – even prior to the introduction of the SIEC test by means of the 8th Amendment to the GWB in the summer of 2013 – it effectively already moved German merger review more in line with the European Commission’s review under the EU Merger Regulation.

According to the Bundeskartellamt, the guidance document is aimed at merely summarising the approach used by the agency ‘over the past years’ in reviewing a merger. In reality, however, it lays out an analytical framework that, so far, was not reflected in
the German competition authority’s decisions but rather follows the ‘roadmap’ used by
the European Commission in its guidelines and decisions.\footnote{For a detailed discussion of the Commission’s substantive review under the EU Merger
Regulation distinguishing between horizontal, vertical and conglomerate effects, see Rosenthal/
Thomas, European Merger Control, CH Beck/Hart Publishing (2010), pp. 83 et seq.}

In 2014, the Bundeskartellamt delivered a significant number of decisions where
the more economic approach was clearly implemented and reflected not only in the
language but in the agency’s actual substantive assessment of the effects brought about
by the mergers under review. For example, since the entry into force of the SIEC test, the
Bundeskartellamt regularly relies on the analysis of closeness of competition.

**Significance of market shares**

The Bundeskartellamt’s guidance document emphasises that ‘the value of market shares
as an indication of the merging parties’ market position and market power depends
largely on the conditions prevailing on the individual market in question’. However, the
importance of market shares in the agency’s practice varies significantly from one case to
another and should generally not be underestimated.

Even with the introduction of the SIEC test, commentators (including the
Bundeskartellamt’s Chief Economist) emphasise that market definition (and market
shares) will remain a focal point of the agency’s analysis of the effects brought about by a
concentration: for both legal and practical reasons, the definition of the relevant product
and geographic markets will continue to be a necessary step in the merger analysis that is
considered ‘not only meaningful but even warranted’.

This was confirmed in EDEKA’s prohibited acquisition of Kaiser’s supermarkets
(owned by Tengelmann). Despite extensive remedy negotiations, the parties could
not remove the Bundeskartellamt’s concerns – which mainly resulted from a narrow
(geographic) market definition and a finding that, in a large number of local and regional
markets, the target was EDEKA’s strongest competitor, meaning that its disappearance
would significantly reduce consumer choice.

On the other hand, cases where high market shares were successfully rebutted by
the parties include Goodmills/GB Hartweizen (existence of, in particular, overcapacities,
alternative sources of supply and customers pursuing multi-sourcing strategies) and
Continental/Veyance (existence of, in particular, different customer groups (i.e., the
parties were no close competitors), increasing potential competition, low entry barriers
and customers pursuing multi-sourcing strategies).

Not only in Continental/Veyance, but also, for example, in Tokyo/Elektron and
EDEKA/Tengelmann, the agency’s new effects-based approach involved an assessment of the
closeness of competition between the merging parties and their rivals: where the merging
parties are not close competitors, even in the event of high market shares, the effects of the
concentration (i.e., the risk of a unilateral price increase post-merger) are limited.

With regard to its review of non-horizontal mergers, for example, in Tokyo Electron/
Applied Materials, the Bundeskartellamt closely reviewed conglomerate (portfolio)
effects. Although both parties had significant power in several markets and provided
complementary products to identical customers, the authority decided that the merged entity had neither the ability nor the incentive to engage in bundling practices. Vertical effects were examined in, *inter alia*, *Continental/Veyance*.

With print media operating in an increasingly difficult (online) environment, in 2014, the failing division or failing firm defence was invoked several times by media companies. However, due to the strict legal standard, such defence was not always successful. Thus, while the defence was successful in *Münstersche Zeitung/Ashendorff* (failing division) and in *Münchener Abendzeitung/Straubinger Tagblatt* (failing firm), the failing firm defence failed in *Dortmunder Lokalausgaben*.

**Network effects**

In *Immowelt/Immonet*, the Bundeskartellamt cleared the merger between the second and third-largest real estate online portals in Germany. In its press release, the agency noted that, due to the network effects brought about by two-sided platforms, smaller competitors could not exert sufficient competitive pressure on the market leader Immoweb. The transaction would thus increase competition by creating a viable alternative to Immoweb.

**Remedies**

In 2014, the most prominent merger review involving remedy discussions with the Bundeskartellamt was *EDEKA/Tengelmann*. In its press release announcing the prohibition decision, the Bundeskartellamt described the parties’ remedy offers as ‘not sufficient’ to eliminate its concerns, highlighting that the around 100 outlets offered by the parties were ill-chosen as they were not the outlets creating the concerns (since some of them had already closed or were on the verge of being closed).

**IV OTHER STRATEGIC CONSIDERATIONS**

i  **Acquisition of minority shareholdings**

One distinguishing feature of German merger control is that the notification requirement is also triggered in cases of the acquisition of minority shareholdings, namely the acquisition of at least 25 per cent of the target company’s capital or voting rights or ‘any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking’.

As a result of this catch-all clause, unlike in the vast majority of merger control regimes across the globe, transactions can be notifiable with the Bundeskartellamt well below the ‘control’ threshold. Since the significant competitive influence test is broadly construed by the German competition authority, merging parties are faced with a significant degree of uncertainty regarding the notifiability of their minority shareholdings.

A ‘significant influence’ is found in cases where the minority shareholder’s interests will (post-transaction) need to be taken into account by the target company’s

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19 In the past year, the Bundeskartellamt reviewed minority shareholdings in, for example, *RWE/Dortmunder Energie- und Wasserversorgung GmbH*. 

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other shareholders and management. According to the authority’s decision practice, as a rule of thumb, the acquisition of a financial interest of less than 20 per cent (without any additional rights attached) generally does not grant such influence.

There is no safe harbour, however, as exemplified by the Bundeskartellamt’s Asklepios/Rhön-Klinikum and A-TEC/Norddeutsche Affinerie decisions, where the authority found a competitively significant influence through a minority shareholding of only 10.1 per cent and 13.75 per cent respectively. Generally, it is in cases where 20 per cent or more (up to 25 per cent) are acquired that a ‘significant influence’ is not unlikely.

Finally, the significant influence needs to be of ‘competitive’ relevance. As a general rule, this criterion will only be met in the case of horizontal and vertical but not in the case of conglomerate mergers. Accordingly, for example, the test will not be met where the minority interest is acquired by a financial investor that does not yet control another company active in the same or vertically related market or markets as the target company.

V OUTLOOK AND CONCLUSIONS

With the introduction of the SIEC test in the summer of 2013, the Bundeskartellamt has continued to move its substantive review under German merger control rules more in line with the European Commission’s review under the EU Merger Regulation. The German authority’s ‘Guidance on Substantive Merger Control’ largely follows the analytical framework used by the European Commission in its guidelines and decisions.

In the meantime, since the entry into effect of a new analytical framework for the substantive review, the Bundeskartellamt has moved to an effects-based review similar to the one carried out by the Commission under the EU Merger Regulation. However, for legal and practical reasons, the Bundeskartellamt is likely to keep giving particular weight to familiar concepts such as market definition and market shares.

20 In Asklepios/Rhön-Klinikum, due to particularities in Rhön-Klinikum’s articles of association, the owner of 10 per cent of the shares acquired a similar right to block decisions as an owner of 25 per cent of the shares would hold under the German Stock Corporation Act. In A-TEC/Norddeutsche Affinerie, the target companies’ shares were widely dispersed, the attendance rate at shareholders’ meetings was historically very low and the acquisition of the 13.75 per cent share would have resulted in A-TEC holding by far the most significant interest in its competitor, Norddeutsche Affinerie. On appeal, the decision was upheld.
I INTRODUCTION

The Securities and Exchange Commission regulates takeovers and mergers involving public companies. The Securities Industry Act, 1993 (PNDCL 333) (Securities Industry Act) grants the Securities and Exchange Commission (SEC) the power to exercise a general regulatory supervision of takeovers and mergers. Under Section 9(h) of the Securities Industry Act, the function of ‘reviewing, approving and regulating takeovers, mergers, acquisitions and all forms of business combinations in accordance with any law or code of practice requiring it to do so’ vests with the SEC. There is currently no separate competition authority in Ghana.

The SEC’s Code on Takeovers and Mergers (Takeovers Code) applies to all takeovers and mergers where the target company is a public company and all takeovers and mergers between or among public companies, whether listed or unlisted. Merger is defined in Rule 3.16 to mean an arrangement where the assets of two or more companies become vested in or under the control of an existing company, while acquisition and takeover are defined in Rule 3.2(i) of the Takeovers Code as:

\[ a \] the direct acquisition of shares carrying voting rights in a target company, with no new company being formed; or

\[ b \] the indirect acquisition of the shares or control of shares carrying voting rights of a target company by virtue of the acquisition of holding companies, whether listed or unlisted, whether in Ghana or abroad, with no new company being formed.
Any firm intention or offer to acquire 30 per cent or more of the shares of a public company must comply with the Takeovers Code; in particular, any person, whether acting alone or in concert with other persons, is obliged to make a takeover offer of the public company and shall be required to comply with the merger control regime if he or she:

- acquires or intends to acquire more than 30 per cent but less than 50 per cent of the voting shares of a public company in any 12-month period;
- acquires or intends to acquire 50 per cent or more of the voting shares of the public company; or
- acquires a company that holds effective control in a public company or that, together with the shares already held, will result in the person acquiring effective control of a public company.

Pre-merger notification and approvals are also required for specific sectors, including the banking, mining, petroleum, insurance and telecommunications sectors. In the absence of industry-specific approval requirements, there are generally no pre-merger thresholds or notifications required in respect of mergers involving private companies.

The Securities Industry Act is currently under review. However, no statutes, regulations or guidelines relating to merger control have been issued in the past year.

II THE MERGER CONTROL REGIME

The merger control regime begins with a declaration of a firm intention by the offeror or purchaser to acquire the shares of the target company, and runs for a minimum of 131 days. The purchaser must have the resources to implement the offer in full. The key procedural steps involved in the process are set out below:

- within 24 hours of its board of directors’ decision to acquire, the purchaser must make an announcement of the intended acquisition (announcement) on the floor of the Ghana Stock Exchange (GSE) (if the target company is listed), in the Ghanaian electronic media and in at least two Ghanaian daily newspapers of national circulation. In addition to the announcement, a written notice of intent must be submitted to the board of the target company, the GSE (if the target company is listed) and the SEC:
  - the announcement must be made in at least two English language daily newspapers of national circulation;
  - the announcement must state that the purchaser intends to acquire or has effective control in the target company and has served a notice of intent to make a takeover offer to the target company, or has made an application to the SEC for exemption from the mandatory takeover requirements; and
  - the announcement must contain the specified information as applicable;
- within 10 days of the announcement, the purchaser must submit its statement of the takeover to the SEC and the target company (statement). The statement must be dated and duly signed by two directors of the purchaser (where the purchaser is

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c the board of the target company must, within 24 hours of receipt of the statement, inform the relevant securities exchange or exchanges (if applicable) and the SEC, and make an announcement via a press notice, of the proposed takeover;

d the board of the target company must appoint an independent adviser (who must be an investment adviser or a broker-dealer licensed by the SEC, or any other professional acceptable to the SEC) within five days of receipt of the statement;

e the purchaser must, within 10 days from the date of submitting the statement above, submit the takeover offer document signed by two directors of the purchaser (where the purchaser is a corporate body) or by the purchaser (where the purchaser is an individual) to the SEC for approval. The offer document must include, *inter alia*, the following information:

- whether the purchaser has any intentions regarding the continuation of the business, and if so, its intentions;
- the purchaser’s stated intentions regarding major changes to be introduced in the business or strengthening the target company’s financial position, whether such plans include a merger, liquidating the target company, selling its assets or re-deploying its fixed assets, or making any other major change in the structure of the target company, and if so, its intentions;
- whether there are any long-term commercial justifications for the proposed takeover offer, and if so, those justifications;
- whether the purchaser has any intentions with regard to the continued employment of the employees of the target company, and if so, its intentions;
- the maximum number of shares the purchaser proposes to acquire, the price and other terms of the offer in respect of the shares; and
- details of the offer and timetable of the offer;

f the offer document must be approved by the SEC within 30 days if the SEC is satisfied with the contents of the offer document, or within such other time frame as may be determined by the SEC where the SEC has determined that it is not possible to grant approval within the stipulated 30 days;

g the purchaser must submit the offer document to the target company within five days of SEC approval;

h the board of the target company will then circulate the offer document to its shareholders within 15 days of receipt of the offer document from the purchaser;

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4 Ibid, Rule 5.4 and Schedule II.
5 Ibid, Rule 6.1.
6 Ibid, Rules 10, 12.2 and Schedule V.
7 Ibid, Rules 7.1 and 7.2 and Schedule III.
8 Ibid, Rule 7.1 and Schedule III.
9 Ibid, Rule 7.3.
10 Ibid, Rule 7.5.
11 Ibid, Rule 7.6.
the independent adviser’s statement must be circulated to all shareholders of the target company within 15 days from the date the purchaser submits the offer document to the board of the target company. In practice, the independent adviser’s statement can be incorporated into the offer document.

The independent adviser’s statement must contain all the information and statements specified in Schedule V of the Takeovers Code, including:

- the purchaser’s intentions regarding the continuation of the business of the target company, any major changes to be introduced in the business and the continued employment of employees of the target company;
- the merits of the takeover offer, including the reasonableness and accuracy of profit forecasts and the underlying assumptions of the target company, if any, contained in the offer document;
- the purchaser’s long-term commercial justification for the proposed takeover offer;
- comments on the outlook for the next 12 months of the industry in which the target company has its core business, the target company’s prospects for the next 12 months in terms of financial performance, as well as its positioning in the industry and the risk factors associated with its business, and the probability of such risks materialising within the next 12 months;
- whether the target company holds any direct or indirect voting shares or convertible securities in the purchaser (if the purchaser is a corporate body), whether the directors of the target company hold any direct or indirect voting shares or convertible securities in the purchaser (if the purchaser is a corporate body) or the target company, and whether the directors of the target company intend, in respect of their own beneficial holdings, to accept or reject the takeover offer; and
- particulars of all service contracts of any director or proposed director of the target company;

the offer to the shareholders of the target company will remain open for 30 days from the date of submission of the offer document to the target company; the minimum offer price for the shares will be the highest of the following:

- the highest price paid by the purchaser for acquisitions during the 26 weeks prior to the date of the announcement;
- the price paid by the purchaser under a preferential allotment, if applicable, made to the purchaser or persons acting in concert with the purchaser at any time during the 12-month period immediately prior to the date of the closure of the offer; or
- the average of the highest weekly prices realised by the shares of the target company in the six-month period immediately prior to the date of the public announcement of the offer.

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If the purchaser or any person acting in concert with the purchaser purchases the shares after the announcement and prior to the closure of the offer at a price exceeding the offer price, the purchaser will be obliged to increase the offer price to an amount that is not less than the highest price paid for the outstanding shares.13

If the purchaser acquires 90 per cent or more of the shares, it must offer the remaining shareholders a consideration that is equal to the prevailing market price of the shares or the price offered to the holders, whichever is higher;14

l the remaining shareholders can accept or reject the offer;15

m the offer will be deemed to close at the end of the last day of the offer period (expiration date);16

n settlement must occur within three business days of the expiration date;17 and

o the offer must be announced within 10 days of the expiration date. A press notice of the offer results must also be published in at least two English language dailies of national circulation on the total number of voting shares to which the offer relates:18

• for which acceptances of the offer have been received after having been served with the offer document in accordance with the Rules;

• that are held by the purchaser and all persons acting in concert with the purchaser at the time of serving the offer document of the target company’s shareholders in accordance with the Rules;

• that are acquired or agreed to be acquired during the offer period; and

• the shareholding structure of the target company after the offer.

The parties must follow the above procedure and time frames. The SEC has the power to enforce the Takeovers Code, and may upon determination of a violation of the Takeovers Code nullify a merger transaction.

Pre-merger notification and approvals are also required for specific sectors, including the banking, mining, petroleum insurance and telecommunications sectors. Mergers involving entities in these sectors will additionally be subject to regulatory review by the following regulatory bodies:

a the banking sector19 — the Bank of Ghana (Bank);

b the mining sector20 — the Ministry of Mines;

16 Ibid, Rule 20.1.
17 Ibid, Rule 32.2.
18 Ibid, Rule 22.2.
19 As mentioned in Section II, supra, under the Banking Act, any direct or indirect acquisition that represents 10 per cent or more of the shares of a bank or that makes it possible to exercise significant influence over the management of a bank requires three months’ prior written notice and the written approval of the Bank.
20 Under the Minerals and Mining Act, 2006 (Act 703), prior written approval of the Minister of Mines is required before the rights in a mineral right can be transferred. Additionally, a
In the absence of industry-specific approval requirements, there are generally no pre-merger thresholds or notifications required in respect of mergers involving private companies.

III OTHER STRATEGIC CONSIDERATIONS

Significantly, industry-specific regulators involved in the merger control regime must give prior approval or object to a transaction only after considering factors including procedural integrity, competence, public interest and national interest. What amounts to a detrimental effect, public interest, national interest, etc., is left to the discretion of the industry regulator; however, this discretionary power requires that decisions should be fair and candid, and not arbitrary, capricious or biased due to resentment, prejudice or personal dislike, and shall be in accordance with the due process of the law.

Further, administrative bodies (including industry regulators) and administrative officials must act fairly and reasonably and comply with the requirements imposed on them by law, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal. 24

person may not acquire 20 per cent of a mining company unless the prior written approval of the Minister of Mines has been obtained.

21 The Petroleum (Exploration and Production) Act governs the petroleum upstream industry (exploration, development and production) in Ghana and empowers the Minister of Energy to enter into petroleum agreements with investors. Investor participation in the petroleum upstream industry is permitted. The Minister of Energy must give prior approval to any direct or indirect assignment of a petroleum agreement and the transfer of shares in a petroleum business where the transfer is likely to result in a change in control of the business or a takeover of 5 per cent or more of the interests of a shareholder.

The National Petroleum Authority (NPA) Act also empowers the NPA to license and regulate all businesses or commercial activities in the petroleum downstream industry. The NPA must also give prior approval to the transfer of any downstream licence.

22 Under the Insurance Act, 2006 (Act 724), the prior written approval of the National Insurance Commission is required for any acquisition, transfer, merger or takeover of 10 per cent or more in an insurance business.

23 Under Regulation 121 of the National Communications Authority Regulations 2003 (Li1719), the NCA must approve transfers of shares in a licensee company if that transfer would result in a change of control of that company and cause that company to breach licence terms relating to its ownership structure. If no change in control or breach arises from the transfer, then mere notification of the transfer to the NCA will suffice.

As a guide, a transaction would be deemed to be in the public interest if any right or benefit enures or is intended to enure to the ‘benefit generally of the whole of the people of Ghana’ or in the national interest where ‘the nation attaches high value, returns, benefit and consideration to the matter in question’. Where the regulators find it necessary to review a transaction on public policy grounds, the review is carried out solely by the industry regulator in question. Any person interested in the outcome of the transaction or that has information that may be in the public interest may make representations to the relevant authority.

As is the case in all merger proceedings, timing is of the essence.

Under Section 218 of the Companies Act, a dissenting shareholder may apply to the High Court for an order on the grounds that the affairs of the company are being conducted and the powers of the directors are being exercised in a manner oppressive to it or other shareholders or in disregard of their interest as shareholders. Section 218 also allows a member to apply to the court for an order that an act of the company unfairly discriminates against or is otherwise unfairly prejudicial to one or more of the members.

Under Section 218(2) of the Companies Act, if the court is satisfied that the grounds for an application under Section 218(1) have been established, the court may, with the view of ending or remedying the matters related to the complaint:

- direct or prohibit any act, or cancel or vary any transaction or resolution;
- regulate the conduct of the company’s affairs in future; or
- provide for the purchase of the shares of any members of the company by other members of the company or by the company itself.

In *Pinamang v. Abrokwa*, it was held that to bring a successful application under Section 218 of the Companies Act:

- the petition must be made with the genuine objective of obtaining the relief claimed, and not for exerting pressure to achieve a collateral purpose;
- the matters complained of must affect the person or persons alleged to have been oppressed as a member or members of the company and not in any other capacity; and
- the applicant must adduce evidence seeking to show a chain of events and occurrences of harsh and burdensome conduct continued up to the date of presentation of the petition.

However, even though, such as in the *Pinamang v. Abrokwa* case, judicial authorities establish the conditions under which a Section 218 application can be lawfully made under the Companies Act, certain shareholders have notoriously filed applications to stall merger proceedings involving companies in which they hold shares, thus substantially stalling the merger process. Unfortunately, most of these cases are eventually settled out of court, thus denying the courts the opportunity to develop precedents to curb unwarranted and unmeritorious applications solely designed to stall merger proceedings.

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Integration is also a key issue that, if not handled properly, could potentially derail the merger process or significantly adversely affect the merged entity. In Ghana, while the target is generally not mandated to inform or consult its employees at the time that it receives the firm intention letter, where the merger is likely to result in terminations of employment of workers, the Labour Act, 2003 (Act 651) (Labour Act) obliges the target to provide, three months prior to the merger, a written notification to the employees, the relevant trade union and the Chief Labour Officer regarding the number and categories of workers likely to be affected, the period within which the terminations are to be carried out and the reasons for the termination. The target must also consult the trade union concerned on measures to be taken to avert or minimise the terminations, as well as measures to mitigate the adverse effects of the terminations on the workers concerned (e.g., finding alternative employment). Where, as a result of any merger or takeover, there is a severance of the legal relationship of a worker and employer, and as a result of and in addition to the severance, that worker becomes unemployed or suffers a diminution in the terms and conditions of employment in the new entity it is absorbed into, that worker is entitled to redundancy pay. The quantum of redundancy pay is based on negotiations between the employer and the affected employees or their union. In determining whether an employee has suffered a diminution in the terms and conditions of employment, account must also be taken of the past services and accumulated benefits of the affected employees.

Under Section 65 of the Labour Act, a company may declare redundancies where it is closed down or undergoes an arrangement or amalgamation and the closure, arrangement or amalgamation causes a severance of the legal relationship of employee and employer as it existed immediately before the closure, arrangement or amalgamation, and as a result of and in addition to the severance, each affected employee becomes unemployed or suffers any diminution in the terms and conditions of employment. A company is entitled to declare redundancies when the business ceases to exist or the business no longer requires the same number of employees to carry out work of a particular kind, and there is a diminution or cessation in relation to any work that the employees could have been asked to carry out.

Another key issue in the merger control process is the ability of the board of the target to frustrate bids and offers from an offeror. Under Ghanaian law, the ability of the target’s board to resist a change of control is very restricted. The essential role that the board may play in the process of a merger transaction is that it may make recommendations to the target shareholders on whether to accept or reject the offer. This recommendation is not a legal requirement, and, although it may be influential, it is not binding on the shareholders. In addition, the target’s board has the right to petition the SEC or commence legal action where there is any infraction of the relevant laws by the

26 Labour Act 2003 (Act 651), Section 65(1)(a).
27 Ibid, Section 65(1)(b).
28 Ibid, Section 65(2)(a) and (b).
29 Ibid, Section 65(3).
offeror.\textsuperscript{31} Besides these measures, the target’s board are not permitted to do anything that will frustrate an offer.

Where the offeror’s stated intentions include liquidating the offeree, the impact on the transaction would depend largely on whether the offeree can be liquidated by private liquidation or through an official liquidation.

In Ghana, a company may be liquidated by private liquidation where its assets exceed its liabilities or it is able to pay its debts as they fall due within a 12-month period. If the company is unable to pay its debts as they fall due, liquidation can only be carried out pursuant to the laborious procedures set out under the Bodies Corporate Official Liquidation Act (Act 180).

Whether liquidation is carried out privately under the Companies Act or officially under the Bodies Corporate Official Liquidation Act, company debts and liabilities incurred before the commencement of liquidation are not extinguished, but rather remain to be paid by the company during the liquidation process. With the exception of companies listed on the GSE, gains realised by a transferor of shares are liable to 15 per cent capital gains tax.\textsuperscript{32}

Finally, it is possible for transactions to be hostile as there are no legal impediments to making hostile bids in Ghana. However, hostile bids are not common, as most offerors prefer to seek the support of the offeree board before embarking on control transactions. Where two or more entities make competing offers for the target, such offers must be dealt with in much the same way as the original offer is dealt with. The competing offeror must serve a competing offer document at least 10 days prior to the closure of the original offer period, and this period also applies to revisions that may be made to the competing offer.\textsuperscript{33} Any information given to any offeror, including the particulars of shareholders, must be furnished equally and promptly on request to any other competing offeror who has made a competing offer in terms of the Takeover Code.\textsuperscript{34}

The above strategic considerations underpin the merger control regime and must be carefully considered, as must the time frames involved for completion of each stage.

\section*{IV OUTLOOK AND CONCLUSIONS}

Ghana has an enabling, transparent legal environment that aids investment in the country. Current key reforms include a review of the Banking Act, and the Securities and Industry Act. The Companies Act is also being reviewed to synchronise its provisions on takeovers and mergers with the Takeover Code. It is expected that the reviews will consider and regulate competition in the merger control regime. With these ongoing reviews, it is anticipated that the regulatory regime regarding merger control and merger reviews will develop in future years.

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\textsuperscript{32} The Internal Revenue Act 2000 (Act 592), Sections 96 and 97.
\textsuperscript{34} Ibid, Rule 15.3.
\end{flushleft}
I INTRODUCTION

Hong Kong does not have a general merger control regime. However, mergers and acquisitions that affect a telecommunications market are currently subject to merger control under the Telecommunications Ordinance.²

The Competition Ordinance³ (Hong Kong’s first substantive competition law regime) became law on 22 June 2012, but the substantive provisions of the Competition Ordinance are not expected to become operational until late 2015.

The Competition Ordinance does not contain a general merger control regime, but it does contain a merger control regime for the telecommunications industry. When this regime in the Competition Ordinance becomes operational, it will replace the merger control regime currently contained in Section 7P of the Telecommunications Ordinance, which will be repealed.

The Competition Commission and the Telecommunications Authority will have concurrent authority for the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.

i Current telecommunications merger control regime

The current telecommunications merger control regime is contained in Section 7P of the Telecommunications Ordinance and is administered by the Communications Authority. The Communications Authority is an independent statutory body that was established under the Communications Authority Ordinance⁴ on 1 April 2012 when the

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1 Sharon Henrick and Joshua Cole are partners at King & Wood Mallesons.
2 Chapter 106 of the Laws of Hong Kong.
3 Chapter 619 of the Laws of Hong Kong.
4 Chapter 616 of the Laws of Hong Kong.
functions of the Broadcasting Authority and the Telecommunications Authority were transferred to it. The Communications Authority oversees both the telecommunications and broadcasting sectors.

The regime in Section 7P of the Telecommunications Ordinance only applies where there is a change in relation to a carrier licensee. A carrier licensee is the holder of a carrier licence, which is a licence issued for the establishment or maintenance of a telecommunications network for carrying communications to or from the public.\(^5\) Carrier licensees are essentially network operators that establish and maintain transmission facilities (by wired or wireless means) that carry communication between locations that are separated by public streets or unleased land. They include the local and external fixed network operators and mobile network operators.\(^6\)

For the purposes of Section 7P, a change in relation to a carrier licensee will occur where a person, either alone or with any associated person:

1. becomes the beneficial owner or voting controller of more than 15 per cent but not more than 30 per cent of the voting shares in a carrier licensee and that person, either alone or with any associated person:
   - already is, or will concurrently become, the beneficial owner or voting controller of more than 5 per cent of the voting shares in another carrier licensee; or
   - has, or will concurrently acquire, the power to ensure the affairs of another carrier licensee are conducted in accordance with their wishes;

2. becomes the beneficial owner or voting controller of more than 30 per cent of the voting shares in a carrier licensee;

3. becomes the beneficial owner or voting controller of more than 50 per cent of the voting shares in a carrier licensee;

4. acquires the power to ensure the affairs of the licensee are conducted in accordance with their wishes.\(^7\)

Where there is a change in relation to a carrier licensee, the Communications Authority has the power to investigate to determine whether the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market.\(^8\) A telecommunications market is a market for the provision or acquisition of telecommunications networks, telecommunications systems, telecommunications installations, or customer equipment or services.\(^9\)

If the investigation reveals that the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market, the Communications Authority may, by written notice, direct the licensee to take such action it considers

\(^{5}\) Section 2 of the Telecommunications Ordinance.

\(^{6}\) Paragraph 1.13 of the Guidelines issued by the Telecommunications Authority, Mergers and Acquisitions in Hong Kong Telecommunications Markets.

\(^{7}\) Sections 7P(16) and (17) of the Telecommunications Ordinance.

\(^{8}\) Section 7P(1)(a) of the Telecommunications Ordinance.

\(^{9}\) Section 2 of the Telecommunications Ordinance.
necessary to eliminate or avoid any such effect. However, the Authority is prevented from issuing such direction where it is satisfied that the change has, or is likely to have, a net public benefit.\textsuperscript{10}

A carrier licensee served with such notice must comply with the direction in the notice.\textsuperscript{11}

Where there is a proposed change in relation to a carrier licensee, the licensee or an interested person may, although they are not required to, apply to the Communications Authority under Section 7P(6) of the Telecommunications Ordinance for consent in relation to the proposed change.

The Communications Authority will grant consent where it does not consider the proposed change would have, or will be likely to have, the effect of substantially lessening competition in a telecommunications market.

If the Communications Authority considers that the proposed change would have, or will be likely to have, the effect of substantially lessening competition in a telecommunications market, it may:
\begin{itemize}
\item[a] refuse to give consent;
\item[b] give consent subject to the direction that the carrier licensee takes the action that the Communications Authority considers necessary to eliminate or avoid that effect; or
\item[c] give consent without issuing a direction if the Communications Authority is satisfied that the proposed change would have, or will be likely to have, a net public benefit.\textsuperscript{12}
\end{itemize}

If a proposed change takes effect pursuant to the consent given by the Communications Authority and in compliance with any direction issued by the Communications Authority, then the Authority cannot issue a direction under Section 7P(1)(b) in respect of the change.

Since the enactment of Section 7P, the Communications Authority has published nine decisions regarding a change in relation to a carrier licensee, the most recent being in May 2014. In all of these published decisions, the Authority found that the changes did not constitute a contravention of Section 7P.

ii \hspace{1em} \textbf{Incoming telecommunications merger control regime}

When Schedule 7 of the Competition Ordinance becomes operational, the telecommunications merger control regime in Schedule 7 of the Competition Ordinance will replace the current regime contained in Section 7P of the Telecommunications Ordinance. The new telecommunications merger control regime in the Competition Ordinance is described in Section II, \textit{infra}.

\begin{itemize}
\item[10] Section 7P(1)(b) of the Telecommunications Ordinance.
\item[11] Section 7P(5) of the Telecommunications Ordinance.
\item[12] Section 7P(7) of the Telecommunications Ordinance.
\end{itemize}
II YEAR IN REVIEW

In 2014, the Communications Authority considered one significant merger relating to carrier licensees under the telecommunications merger control regime. There have not been any mergers that were subject to merger control in Hong Kong since then.

i Acquisition of CSL New World Mobility Limited (CSL) by HKT Limited (HKT)

On 2 May 2014, the Communications Authority approved the acquisition of CSL by HKT, subject to certain conditions.

At the time, HKT and CSL were both major mobile telephony network operators in Hong Kong, and the merger would reduce the number of mobile network operators from five to four. According to communications by the parties, the merged entity would have a market share of 37 per cent of mobile phone subscribers (and 46 per cent of 3G and 4G subscribers). The proposed transaction was announced on 19 December 2013, and public consultations were conducted between 23 December 2013 and 4 February 2014. The Communications Authority appointed a private economic consultant to assist with its assessment of the economic impact of the transaction.

The Communications Authority found that the transaction would have, or would be likely to have, the effect of substantially lessening competition in both the downstream retail mobile telecommunications service market and the upstream market for wholesale mobile network access, and also that the transaction would not be of benefit to the public. However, the Communications Authority gave consent for the transaction subject to conditions designed to eliminate or avoid any potential substantial lessening of competition. The conditions included:

a spectrum undertakings: HKT and CSL were required to divest certain spectra, agree not to seek to renew certain spectrum licences when they expire in 2016 and agree not to participate in any 3G spectrum auctions for five years; and

b operational undertakings: HKT are now required to give notice of certain future operational changes, and to continue to provide network access and capacity sharing in accordance with arrangements that were in place prior to the transaction.

ii Introduction of the Competition Ordinance

The Competition Ordinance was introduced in 2012, and is Hong Kong’s first substantive competition law regime. The Competition Ordinance was passed by the Legislative Council on 14 June 2012. The Competition Ordinance became law on 22 June 2012. The substantive provisions of the Competition Ordinance are expected to become operational in late 2015.

The Competition Ordinance provides for the establishment of a Competition Commission and Competition Tribunal. An independent statutory body, the Competition Commission will be responsible for administering the Competition Ordinance, including preparing regulatory guidelines, investigating potential breaches of the Competition Ordinance and bringing proceedings in the Competition Tribunal for breaches of the Competition Ordinance. The Competition Tribunal will have wide powers to impose penalties and make orders for contraventions of the Competition
Ordinance. The Competition Tribunal will also be empowered to review certain decisions made by the Competition Commission under the Competition Ordinance.

The provisions of the Competition Ordinance relating to the establishment and operation of the Competition Commission came into effect on 18 January 2013. On 26 April 2013, the government announced the appointment of the Competition Commission chairperson, Ms Anna Wu Hung-yuk, and 13 other members of the Competition Commission. Dr Stanley Wong has been CEO of the Competition Commission since 3 September 2014. Three executives have been appointed from the Australian Competition and Consumer Commission to the positions of Senior Executive Director, Chief Economist and Executive Director (Operations).

The provisions of the Competition Ordinance relating to the Competition Tribunal came into effect on 1 August 2013.

Currently, the substantive provisions of the merger control regime in Schedule 7 of the Competition Ordinance are not yet operational. The only part of Schedule 7 that is operational is the part providing that the Competition Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to Schedule 7. This part commenced operation on 18 January 2013.

The Competition Ordinance will prohibit cartel conduct, abuses of market power and other types of anti-competitive conduct, subject to a number of exemptions.

The Competition Ordinance does not contain any general merger control regime. The merger control regime in Schedule 7 of the Competition Ordinance is limited to the telecommunications industry.

Once the substantive provisions of Schedule 7 of the Competition Ordinance become operational, the merger control regime in Schedule 7 will replace the regime currently contained in Section 7P of the Telecommunications Ordinance, which will be repealed.

Below is a brief overview of the merger control regime contained in Schedule 7 of the Competition Ordinance.

**Regulatory framework under the Competition Ordinance**

Section 3 of Schedule 7 prohibits direct or indirect mergers that have, or are likely to have, the effect of substantially lessening competition in Hong Kong (Merger Rule). Importantly, the prohibition will only apply where the target or acquirer holds, or controls an entity that holds, a carrier licence.

Sections 3 and 4 of Schedule 7 limit the application of the Merger Rule to the following types of transactions:

a where two or more undertakings previously independent of each other cease to be independent of each other; and one or more of the merger parties holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence;

b where one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings (which would include the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity); and the acquirer or the target holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and
where an acquisition by one undertaking (acquiring undertaking) of the whole or part of the assets of another undertaking (acquired undertaking) results in the acquiring undertaking being in a position to replace, or substantially replace, the acquired undertaking in business or in part of the business in which the acquired undertaking was engaged immediately prior to the acquisition; and the acquiring undertaking or the acquired undertaking holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and the business conducted by the acquired undertaking immediately before the acquisition was conducted under a carrier licence.

However, the scope of the Merger Rule could be extended in the future to other sectors (by amending Schedule 7) after businesses and consumers become more familiar with the new competition law regime.

The Merger Rule applies to a merger even if the arrangements for the merger are made outside Hong Kong, the merger takes place outside Hong Kong or any party involved in the merger is outside Hong Kong.\(^\text{13}\)

There is no requirement for merger parties to notify the Commission of mergers, and there are no minimum turnover or value thresholds in the Competition Ordinance. However, the Competition Commission has indicated in the revised draft guidelines that in general, a horizontal merger with a post-merger combined market share of 40 per cent or more is likely to raise competition concerns.\(^\text{14}\) The Merger Rule will apply to all transactions, so long as those transactions fall within the above types of transactions relating to carrier licences and have, or are likely to have, the effect of substantially lessening competition in Hong Kong.

In determining whether a merger has or is likely to have the effect of substantially lessening competition in Hong Kong, the following matters may be considered:

\(a\) the extent of competition from competitors outside Hong Kong;

\(b\) whether the acquired undertaking or part of the acquired undertaking has failed or is likely to fail in the near future;

\(c\) the extent to which substitutes are available or are likely to be available in the market;

\(d\) the existence and height of any barriers to entry into the market;

\(e\) whether the merger would result in the removal of an effective and vigorous competitor;

\(f\) the degree of countervailing power in the market; and

\(g\) the nature and extent of change and innovation in the market.\(^\text{15}\)

The Competition Commission has warned against relying on the approach of other jurisdictions to merger assessments, noting that ‘Hong Kong has its own new Merger

\(^{13}\) Section 2 of Schedule 7 to the Competition Ordinance.


\(^{15}\) Section 6 of Schedule 7 to the Competition Ordinance.
Rule, and the corporate practices and market environment in Hong Kong may not be the same.  

**Exclusions and exceptions**

There are a number of exclusions and exceptions to the Merger Rule:

- **Section 8 of Schedule 7** excludes mergers that give rise to economic efficiencies that outweigh the adverse effects caused by any lessening of competition in Hong Kong;
- **Section 9 of Schedule 7** allows the Chief Executive in Council (the head of the government) to exempt mergers for exceptional and compelling public policy grounds;
- **Section 3 of the Competition Ordinance** excludes statutory bodies from the application of the Merger Rule; and
- **Section 4 of the Competition Ordinance** allows the Chief Executive in Council to enact regulations to exclude specific persons or activities from the application of the Merger Rule.

An undertaking can apply to the Competition Commission under Section 11 of Schedule 7 for a decision as to whether a merger is excluded from the application of the Merger Rule as a result of Sections 8, 3 or 4 of Schedule 7. The Competition Commission is only required to consider an application if the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions, or if the application raises a question of an exclusion for which there is no clarification in existing case law or decisions and it is possible to make a decision on the basis of the information provided. A decision by the Competition Commission may include conditions or limitations, including, in the case of a proposed merger, a specified date by which the proposed merger must be completed.

**Regulatory authority**

The Merger Rule will be administered by the Competition Commission, which may investigate mergers and bring proceedings in the Competition Tribunal for breach of the Merger Rule. The Competition Tribunal has the power to impose penalties and make orders for contraventions of the Merger Rule.

Section 159 of the Competition Ordinance (which is not yet operational) provides that the Communications Authority may perform the functions of the Competition Commission under the Competition Ordinance so far as they relate to the conduct of undertakings that are licensees under the Telecommunications Ordinance or the Broadcasting Ordinance. This means that the Communications Authority may perform the functions of the Competition Commission in relation to the telecommunications merger control regime.

16 Guide to the Revised Draft Guidelines Issued under the Competition Ordinance, Competition Commission, paragraph 103.
17 Section 13(2) of Schedule 7 of the Competition Ordinance.
Key differences between the current and incoming regime
The telecommunications merger control regime under the Competition Ordinance is broader than that under the Telecommunications Ordinance, in that it applies where either of the parties to the merger or acquisition holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence. By contrast, the current telecommunications merger control regime under the Telecommunications Ordinance effectively only applies where the target is a carrier licensee.

The telecommunications merger control regime under the Competition Ordinance also does not have the technical percentage triggers that the current regime in the Telecommunications Ordinance has. This means that acquisitions that fall within the merger control regime in the Telecommunications Ordinance because they are above the percentage triggers may not necessarily fall within the merger control regime under the Competition Ordinance. Similarly, mergers that fall below the percentage thresholds under the current regime may potentially breach the Merger Rule under the new regime if they have or are likely to have the effect of substantially lessening competition.

The substantive test under the current and incoming merger control regimes is also slightly different. The substantive test under the Competition Ordinance is broader, in that it applies to mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. By contrast, the substantive test under the Telecommunications Ordinance is limited to changes that would have or are likely to have the effect of substantially lessening competition in a telecommunications market.

Further, under the current regime in the Telecommunications Ordinance, the Communications Authority cannot issue a direction where the change has or is likely to have a benefit to the public and that benefit outweighs any detriment to the public from any lessening of competition. The equivalent exclusion under the incoming regime in the Competition Ordinance is limited to where the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong. While economic efficiencies are a form of public benefit, the concept of public benefit is wider than economic efficiencies and could extend to other types of benefits.

III THE MERGER CONTROL REGIME
The following will provide a brief overview of the merger control regime as contained in Section 7P of the Telecommunications Ordinance. Where possible, the current regime will be contrasted with the incoming regime contained in Schedule 7 of the Competition Ordinance.

The Communications Authority has issued guidelines regarding how it will apply and enforce Section 7P of the Telecommunications Ordinance (guidelines). The Competition Commission released two successive drafts of the guidelines on how it

18 Guidelines issued by the Telecommunications Authority, Mergers and Acquisitions in Hong Kong Telecommunications Markets.
will apply and enforce Schedule 7 of the Competition Ordinance,¹⁹ and are expected to release final guidelines in the second half of 2015. Based on the draft guidelines released by the Competition Commission, it appears there will be similarities between how the Communications Authority and the Competition Commission administer the merger control regime. While the guidelines set out how the Competition Commission intends to interpret and apply the Merger Rule, they do not have binding legal effect, and may need to be amended in light of case law.

i Procedures and timetable

The merger control regimes under Section 7P of the Telecommunications Ordinance and Schedule 7 of the Competition Ordinance are voluntary. There is no obligation to notify the Communications Authority or the Competition Commission of a proposed merger or acquisition.

However, the Communications Authority expects parties will wish to approach it at an early stage to establish whether it has any concerns about a proposed transaction. The Competition Commission will likely expect parties to do the same once the merger control regime in the Competition Ordinance is operational.

There are three ways in which parties may approach the Communications Authority:

Informal advice

Parties can seek informal guidance from the Communications Authority prior to the transaction being announced. Any view expressed by the Communications Authority pursuant to this process will be confidential and not binding on the Communications Authority. There is no timetable for giving informal advice. However, the Communications Authority’s position is that it will usually try to meet the parties’ commercial timetables.

Informal advice processes with the Competition Commission are available for proposed mergers, whether they are in the public domain or not.²⁰ The Competition Commission has not given a timetable for giving informal advice, indicating only that it will attempt to resolve the matters in an ‘efficient and timely manner’.²¹

Applications for consent

Parties may apply for consent under Section 7P(6) where the proposed merger has been publicly announced. If merger has not been publicly announced, the Communications Authority will seek consent from the merger parties to conduct market inquiries. This is because the Communications Authority is obliged to undertake public consultation

²⁰ Guide to the Revised Draft Guidelines Issued under the Competition Ordinance, Competition Commission, paragraph 112.
²¹ Guide to the Revised Draft Guidelines Issued under the Competition Ordinance, Competition Commission, paragraph 110.
in relation to a decision under Section 7P of the Telecommunications Ordinance.\textsuperscript{22} For an application for exclusion from the Merger Rule under the Competition Ordinance,\textsuperscript{23} where the application involves a proposed merger not yet in the public domain, the applicant must give consent to the Competition Commission to bring the application to the attention of those it considers likely to be affected by the decision so that representations can be sought. If consent is not given, the application will not be processed.\textsuperscript{24}

In the case of non-contentious matters, the Communications Authority will make its decision within one month of the application. In the case of contentious matters, the Communications Authority will conduct a more detailed investigation and give its decision within three months of the application.

\textit{Investigations}

Any investigation undertaken by the Communications Authority under Section 7P(1) must be commenced within two weeks from the date on which the Communications Authority knew, or ought reasonably to have known (whichever is earlier), that the change occurred.\textsuperscript{25} This is in contrast to the time frame under the Competition Ordinance, which gives the Competition Commission 30 days after the day on which it first becomes aware, or ought to have become aware, that the merger has taken place to commence its investigation.\textsuperscript{26}

Within two weeks after the completion of a transaction has been publicly announced or made known to the Communications Authority, the parties will be notified whether the Authority wishes to carry out a detailed investigation. If the Communications Authority decides to commence a detailed investigation, it will publish a notice to this effect on its website, invite interested parties to comment and seek further information from the merger parties, as it is required to do under the Telecommunications Ordinance.

Following its market inquiries, the Communications Authority will circulate a draft decision setting out its preliminary conclusions to the merger parties and give them an opportunity to comment on the draft decision. The Communications Authority will then reconsider its draft decision in light of the merger parties’ comments before issuing a final decision, which will be published on its website.

The Communications Authority anticipates that detailed investigations will be completed within three months, unless the parties fail to meet the deadlines specified in its information requests, in which case the timetable may be drawn out.

\begin{footnotes}
\item[22] Sections 7P(3) and (8) of the Telecommunications Ordinance.
\item[23] Section 12(1) of Schedule 7 of the Competition Ordinance.
\item[25] Section 7P(2) of the Telecommunications Ordinance.
\item[26] Section 7 of Schedule 7 of the Competition Ordinance.
\end{footnotes}
ii Filing fee

The Communications Authority will recover the costs or expenses it incurs in processing an application for consent under Section 7P(6) as a fee from the applicant. This involves a calculation of the actual costs and expenses incurred by the Communications Authority. A cap of HK$200,000 currently applies to the amount the Communications Authority may recover from the applicant. A fee may also be payable to the Competition Commission for making an application for a merger to be excluded from the application of the Merger Rule. The Competition Commission has proposed fees of HK$500,000, and has completed consultations on the proposals. The Competition Commission has also recommended that it be granted discretion to reduce, waive or refund the fees in certain circumstances. The amount of fees chargeable will be prescribed by a regulation made by the Chief Executive in Council.

There is no filing fee or cost recovery in respect of a request for informal advice or an investigation under Section 7P(1) of the Telecommunications Ordinance by the Communications Authority.

iii Publicity and confidentiality

As set out above, the Communications Authority will publish its final decision in relation to applications for consent under Section 7P(6) and investigations under Section 7P(1) that proceed to detailed investigations.

However, the Communications Authority will not publish its preliminary views given in response to a request for informal advice or if it decides not to conduct a detailed investigation of a merger under Section 7P(1) of the Telecommunications Ordinance.

The Communications Authority will generally not publish submissions received in a merger investigation on its website. However, in some circumstances, it may publish a submission to facilitate public consultation (e.g., to evaluate a claim that a change in relation to a carrier licensee gives rise to a net public benefit). In these circumstances, the Communications Authority will liaise with the author of the submission, and may ask the author to provide a non-confidential version of the submission for publication.

The Communications Authority also liaises with the merger parties before it publishes its final decision and gives them an opportunity to request the deletion of commercially sensitive material prior to publication.

The Competition Commission must establish a register of merger decisions.\(^ {27} \)

However, the Competition Commission may omit confidential information from an entry if it discloses such omission.\(^ {28} \)

iv Penalties

Under the existing regime, as set out above, if the Communications Authority’s investigation under Section 7(1) of the Telecommunications Ordinance reveals that the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market, the Authority may, by written notice, direct the

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\(^{27}\) Section 16(1) of Schedule 7 of the Competition Ordinance.

\(^{28}\) Section 16(2) of Schedule 7 of the Competition Ordinance.
licensee to take such action as it considers necessary to eliminate or avoid any such effect. This may involve divestiture orders. If the licensee fails to comply with a direction in the notice, it will breach Section 7P(5) of the Telecommunications Ordinance, and the Communications Authority may require the licensee to pay financial penalties of up to HK$200,000 for the first occasion, HK$500,000 for the second occasion and HK$1 million for any subsequent occasion. 29

However, the Communications Authority is prevented from issuing a notice where it is satisfied that the change has, or is likely to have, a net public benefit.

Under the incoming regime, if the Competition Commission or the Communications Authority finds that there has been a contravention of the Merger Rule, they may apply to the Competition Tribunal for penalties and orders.

Where the merger has not been completed, the Competition Commission or the Communications Authority may apply to the Competition Tribunal for an injunction under Section 97 of the Competition Ordinance.

Where a merger has been completed, under Section 99 of the Competition Ordinance, the Competition Commission or the Communications Authority may apply to the Competition Tribunal for orders under Section 100 of the Competition Ordinance. An application under Section 99 must be made within six months after the day on which the merger was completed, or the day the Competition Commission or the Communications Authority became aware of the merger (whichever is later). If the Competition Tribunal is satisfied that there has been a contravention of the Merger Rule, Section 100 of the Competition Ordinance gives it the power to make any orders it considers appropriate, including divestiture orders, for the purpose of bringing the contravention to an end.

The Competition Commission or the Communications Authority can also apply to the Competition Tribunal for pecuniary penalties for contravention of the Merger Rule. Applications for pecuniary penalties must be made within six months after the day on which the merger was completed, or the day the Competition Commission or the Communications Authority became aware of the merger (whichever is later). 30 The Competition Tribunal can impose pecuniary penalties of up to 10 per cent of the turnover of the undertaking for each year in which the contravention occurred. 31

v Rights of appeal and procedure

Under the existing regime, decisions of the Communications Authority in respect of Section 7P may be appealed to the Telecommunications (Competition Provisions) Appeal Board (Appeal Board). Decisions of the Appeal Board are final. The Appeal Board may refer any question of law arising in an appeal to the Court of Appeal for determination. 32

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29 Section 36C of the Telecommunications Ordinance.
30 Section 92 of the Competition Ordinance.
31 Section 93 of the Competition Ordinance.
32 Part 5C of the Telecommunications Ordinance.
Under the incoming regime, a decision of the Competition Tribunal made under the Competition Ordinance can generally be appealed to the Court of Appeal. 33

Decisions of the Competition Commission or the Communications Authority in respect of whether mergers should be excluded from the application of the Merger Rule may be appealed to the Competition Tribunal. The Competition Tribunal may confirm or set aside the determination of the Competition Commission or the Communications Authority. If the Competition Tribunal sets aside the determination, it may refer the matter to the Competition Commission or the Communications Authority for reconsideration and direct it to make a new decision in accordance with its decision. Appeals to the Competition Tribunal must be made within 30 days after the day on which determination was made. 34

vi Remedies
As set out above, if the Communications Authority finds that a merger has or would have the effect of substantially lessening competition, it has the power to issue a notice to the merger parties directing them to take such action as it considers appropriate to remedy that effect.

Where the merger has been competed, this may involve directions to divest assets. Where the merger has not been completed, the Communications Authority may require parties to modify the merger. This may take the form of a structural or a behavioural remedy. However, in general, the Communications Authority prefers structural remedies.

In contrast, under the regime in the Competition Ordinance, the impetus is on the merger parties to offer commitments to the Competition Commission or the Communications Authority to remedy any competition concerns the Competition Commission or the Communications Authority may have with a particular transaction. 35

Commitments can be offered at any time, including after the Competition Commission or the Communications Authority has brought proceedings in the Competition Tribunal.

The Competition Commission or the Communications Authority may accept a commitment from a merger party where it considers it appropriate to address its concerns about a possible contravention of a merger rule.

IV OTHER STRATEGIC CONSIDERATIONS
To facilitate a timely review of a proposed merger by the Communications Authority, merger parties are encouraged to provide as much relevant information as possible regarding the transaction.

The Communications Authority has developed a 'checklist' of information that should be provided, which is contained in the annex to the guidelines issued by the Communications Authority regarding how it will apply and enforce Section 7P of the
Telecommunications Ordinance. The annex sets out a comprehensive list of information that should be provided to the Communications Authority, including:

a description of the parties;

b outline of the transaction and its commercial rationale;
c description of the affected markets; and
d documents and information that enable the Communications Authority to assess the competitive effects of the merger.

If merger parties consider that a proposed merger may raise competition concerns, they may proactively approach the Communications Authority with a proposed remedy (instead of waiting for a direction from the Communications Authority).

The merger control regimes under Section 7P of the Telecommunications Ordinance and Schedule 7 of the Competition Ordinance both provide for the exclusion of a transaction from the application of the merger control regimes in certain circumstances. For example, under Section 7P of the Telecommunications Ordinance, the Communications Authority cannot issue a direction where the change has or is likely to have a net public benefit. Under Schedule 7 of the Competition Ordinance, mergers that give rise to economic efficiencies that outweigh the adverse effects caused by any lessening of competition in Hong Kong are excluded from the Merger Rule. Merger parties should consider whether to make arguments to this effect when approaching both regulatory authorities.

V OUTLOOK AND CONCLUSIONS

It is an exciting period in Hong Kong with the enactment of the country’s first substantive competition law regime, the Competition Ordinance. The Competition Ordinance contains a merger control regime that will replace the regime currently contained in Section 7P of the Telecommunications Ordinance.

The Competition Commission has prepared draft guidelines on how it intends to apply and enforce the Merger Rule and Schedule 7 of the Competition Ordinance, which involved a public consultation process that the Competition Commission has now concluded. The final guidelines are expected to be released early in the second half of 2015 after submissions on the revised draft guidelines are considered.

Once this preliminary work is completed, the substantive provisions of the Competition Ordinance, including the Merger Rule, will come into effect.

36 Section 8 of Schedule 7 of the Competition Ordinance.
Chapter 15

INDIA

Samir R Gandhi, Kamya Rajagopal and Rahul Satyan

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 (CA02). The regime is governed by the CA02, notifications issued by the Ministry of Corporate Affairs, Government of India and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended up to 28 March 2014 (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 regulator, the Competition Commission of India (CCI), if it breaches or satisfies the prescribed asset and turnover thresholds and is unable to take advantage of any of the available exemptions. The requirement to notify the CCI is mandatory, and carries with it a standstill obligation – parties cannot consummate the transaction unless the CCI has given its approval or until the 210-day review period has passed, whichever is earlier. To date, the CCI has cleared more than 160 combinations, the vast majority within 30 days.

i Applicable thresholds

The asset and turnover thresholds applicable to combinations include two tests. 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. A notification may be triggered if the parties to the combination have combined assets in India of 15 billion rupees, combined turnover in India of 45 billion rupees, combined global assets of US$750 million including combined assets in India of 7.5 billion rupees, or combined

1 Samir R Gandhi is a partner and Kamya Rajagopal and Rahul Satyan are associates at AZB & Partners.
global turnover of US$2.25 billion including combined turnover in India of 22.5 billion rupees.

A notification may also be triggered if the ‘group’ to which the parties would belong after the combination has assets in India of 60 billion rupees, turnover in India of 180 billion rupees, global assets of US$3 billion including assets in India of 7.5 billion rupees, or global turnover of US$9 billion including turnover in India of 22.5 billion rupees.

ii Exemptions

Every combination that meets any of the above-mentioned asset or turnover thresholds, or both, must mandatorily file a pre-merger notification seeking the approval of the CCI, unless the parties are able to take advantage of any of the exemptions provided in the CA02, the Combination Regulations or the Notification2 issued by the Government of India. These exemptions are as follows:

Statutory exemption

The requirement of mandatory notification does not apply to any financing facility, acquisition or subscription of shares undertaken by foreign institutional investors, venture capital funds, public financial institutions and banks pursuant to a covenant of an investment agreement or a loan agreement.

Categories of transactions ‘normally’ exempt from mandatory notification

Schedule 1 of the Combination Regulations identifies certain categories of transactions that are ordinarily not likely to cause an appreciable adverse effect on competition in India. Such transactions need not normally be notified to the CCI. They are as follows:

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

b acquisition of additional shares or voting rights of an enterprise by the acquirer or its group not resulting in gross acquisition of more than 5 per cent of the shares of voting rights of the target enterprise in a financial year, where the acquirer or its group, prior to the acquisition, already holds 25 per cent, but not 50 per cent, or more shares or voting rights are being acquired, and there is no acquisition of joint or sole control over the target enterprise by the acquirer or its group;

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

2 Government of India Notification dated 4 March 2011, SO 482(E), read with the Corrigendum dated 27 May 2011, SO 1218(E).
acquisition of assets not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of an enterprise, and not resulting in acquisition of substantial business operations in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity;

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

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

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

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

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

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

Target-based exemption (de minimis exemption)

Transactions where the target enterprise either holds assets of less than 2.5 billion rupees in India, or generates turnover of less than 7.5 billion rupees in India, are currently exempt from the mandatory pre-notification requirement. However, the de minimis exemption is only available to the business community for a period of five years, and expires on 3 March 2016.

A critical aspect of determining whether a combination is eligible for certain exemptions is the element of ‘control’. The acquisition of control or a shift from joint to sole control is an important determinant for whether exemptions relating to intra-group reorganisations and minority investments would be applicable.

‘Control’ as per the CCI

The issue of ‘control’ is critical to determine whether certain important exemptions are available for a particular combination. Under the CA02, ‘control’ includes ‘controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over

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3 Ibid.
another enterprise or group, (ii) one or more groups, either jointly or singly, over another group or enterprise’.

The CCI has previously examined the issue of what constitutes ‘control’. In *SPE Mauritius/MSM Holdings*, the CCI held that veto rights enjoyed by a minority shareholder over certain strategic commercial decisions might result in a situation of joint control over an enterprise, including engaging in a new business or opening new locations or offices in other cities; appointment and termination of key managerial personnel (including material terms of their employment); and changing material terms of employee benefit plans. In *Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited*, the CCI observed that veto rights could create a situation of control over the assets and operations of an enterprise when they pertain to approval of the business plan, approval of the annual operating plan (including budget), discontinuing any existing line or commencing a new line of business, and the appointment of key managerial personnel and their compensation.

Interestingly, in the recent *Jet/Etihad* case, the CCI came to the conclusion that the acquisition of 24 per cent of the equity share capital of Jet Airways (Jet) by Etihad Airways (Etihad) allowed Etihad to exercise joint control over the assets and operations of Jet. The CCI felt the nature of the agreements, including an investment agreement and a commercial cooperation agreement, entered into between Jet and Etihad, along with a governance structure that allowed Etihad to appoint two out of six directors (including the vice-chair) on the board of directors of Jet, allowed Etihad to exercise ‘joint control’ over Jet. Notably, the Indian capital markets regulator, the Securities and Exchange Board of India (SEBI) differed on this issue, going on to say that under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code), the definition of ‘control’ is narrower than that under the CA02. Accordingly, SEBI concluded that the acquisition does not grant ‘joint control’ of Jet to Etihad.

The CCI’s interpretation of ‘control’ resonates with the practice of its overseas counterparts like the European Commission and the US Federal Trade Commission (FTC) (particularly the former). Similar to the EC, the CCI has categorically taken the position that the ‘ability to exercise decisive control over the management and affairs’ of the target company amounts to control for the purposes of the CA02.

Investors therefore need to keep in mind that even minority investments could be seen as an acquisition of control and trigger a notification requirement if the asset and turnover thresholds in the CA02 are met. This could extend to entirely innocuous financial investments. In *Paris Cements Investment Holdings/Lafarge Cements*, the acquisition of a minority interest of 14.03 per cent in Lafarge was notified to the CCI because of the veto rights granted to the acquirer.

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4 C-2012/06/63, dated 9 August 2012.
5 C-2012/09/78, dated 4 October 2012.
6 C-2013/05/122, dated 12 November 2013.
8 C-2013/06/125, dated 26 June 2013.
One of the major avenues by which investors do business in India is by way of joint ventures (JVs) with Indian counterparts. These JVs 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).

iv Treatment of JVs
The CA02 does not specifically deal with JVs or provide any guidance on how JVs would be assessed from a merger control perspective. Collaboration in the case of a greenfield JV or the entry of a new partner in the case of a brownfield JV would likely involve acquisition of shares, voting rights or assets. Such acquisition of shares, voting rights or assets may require prior notification to the CCI if it satisfies the asset or turnover thresholds prescribed in the CA02 and is otherwise not eligible for any of the available exemptions.

A greenfield JV would involve the setting up of a new enterprise, and in the process it is possible that a party to the JV may transfer some assets to the newly created entity. In such case, despite the fact that the newly created JV may not have any assets or turnover, the acquisition of shares, voting rights or assets in the newly created JV may require notification to the CCI. This is because the anti-circumvention rule contained in Regulation 5(9) of the Combination Regulations requires that if any assets are transferred to any enterprise for the purpose of the transferee enterprise entering into an acquisition, merger or amalgamation with another person or enterprise, the value of the assets and turnover of the transferor enterprise shall also be attributed to the transferee enterprise.

On the other hand, if there is no transfer of assets from any of the parties to a greenfield JV, given that it will have no assets or turnover at the time of incorporation, the process of setting up the greenfield JV, including the acquisition of shares or voting rights in the newly incorporated JV, is unlikely to require notification to the CCI. This is primarily on account of the JV qualifying for the target-based de minimis exemption.

Interestingly, recent amendments to the Combination Regulations have introduced a ‘substance test’ whereby the CCI can look beyond a transaction structure and assess whether the substance of the transaction would trigger a notification requirement to the CCI. This has certain implications for potential JV partners. If assets are transferred to a greenfield JV by any of the JV partners even after a significant period of time has passed after the set up of the JV, but such transfer is envisaged at the time the JV was set up, the CCI may apply the ‘substance test’ and conclude that the transaction requires notification since the ‘substance’ included the later asset transfer (which would trigger the provisions of Regulation 5(9) of the Combination Regulations).

II YEAR IN REVIEW
The past year has seen the CCI go from strength to strength. In 2014 alone, the CCI cleared more than 68 combinations in various industries such as aviation, manufacturing, information technology, financial services, banking and broadcasting. These include several high-profile transactions, such as the merger of Sun Pharmaceuticals Industries
Limited and Ranbaxy Laboratories Limited⁹ and the merger of Lafarge and Holcim.¹⁰ Sun/Ranbaxy and Lafarge/Holcim were extended Phase II reviews, and resulted in clearances conditional upon divestments of certain pharmaceutical products and cement plants, respectively.

There have also been two significant sets of amendments to the Combination Regulations. On 28 March 2014, the CCI notified certain amendments to the Combination Regulations (Combination Amendment Regulations 2014). Key changes to the existing set of disciplines include the introduction of the above-mentioned ‘substance test’ for filing assessment, whereby the CCI acquired the power of looking beyond the transaction structure to examine the ‘substance’ of the transaction while making a determination on whether it requires notification.

Further, the Combination Amendment Regulations 2014 have done away with the exemption for offshore transactions contained in item 10 of Schedule 1 of the Combination Regulations, as a result of which purely offshore transactions have to be notified to the CCI if they meet the asset or turnover thresholds under the CA02. In addition, Regulation 29 of the Combination Regulations, which laid down that subject to the provisions contained in Section 53B of the CA02, the central government, state government, local authority, enterprise or any person who is party to proceedings on matters relating to a combination and is aggrieved by any direction, decision or order referred to in clause (a) of Section 53A of the CA02 may prefer an appeal to the Competition Appellate Tribunal (COMPAT), stands deleted. However, the true purport of this amendment seems unclear, since the CA02 categorically allows ‘any person, aggrieved by any direction, decision or order referred to in clause (a) of Section 53A’ to prefer an appeal to the COMPAT. In addition, the Combination Amendment Regulations 2014 have increased the filing fees for filing a pre-merger notification to the CCI. The fee to file a Form I (short-form) has been increased from 1 million rupees to 1.5 million rupees. Similarly, the filing fee for a Form II (long-form) has been increased from 4 million rupees to 5 million rupees. In addition, the Combination Amendment Regulations have widened the scope of the exemption towards intra-group mergers and amalgamations. The benefit of this exemption has been extended to include mergers between enterprises that are not ‘wholly owned’ but are only 50 per cent-owned by enterprises belonging to the same group, provided the transaction does not lead to a transfer from joint to sole control.

The rapidly shifting landscape of the Indian merger control regime is likely to change further. The CCI has recently published details of proposed amendments to the Combination Regulations that, on implementation, would mark the fourth round of revisions to the merger control regime in four years. The proposed amendments span:

a the inclusion of a public announcement made under the (Indian) Takeover Code as a ‘trigger’ for a pre-merger notification;

b the expansion of the scope of the CCI’s powers to invalidate a notification;

c a change to the authorised signatory requirement;

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⁹ C-2014/05/170, dated 5 December 2014.
¹⁰ C-2014/07/190, dated 1 April 2015.
procedural amendments to provisions relating to termination of proceedings and pre-merger notifications;

e increased timelines for the CCI to seek information from third parties, other agencies and statutory authorities; and

f an increase in the types of transactions that need not ordinarily be filed with the CCI.

III THE MERGER CONTROL REGIME

i Merger filing time frames

A notification must be filed with the CCI within 30 calendar days of entering into the binding ‘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 trigger event may also be the communication of the intention to acquire, by the acquiring enterprise, to the government or any statutory authority such as the Foreign Investment and Promotion Board or the Reserve Bank of India. The ‘binding’ nature of the trigger document has been the subject of much debate, and past decisions of the CCI indicate that instruments such as memoranda of understanding or letters of intent may not suffice. Once notified, the CCI is bound to issue its prima facie opinion within 30 days of filing, not accounting for ‘clock stops’ (i.e., when the CCI asks for additional information or directs parties to correct defects in their submissions). The CCI is also bound to issue its final order within 210 days; however, 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 days (excluding ‘clock stops’), thus giving positive signals to the business community.

The parties to a combination face significant penalties if they do not file a notification with the CCI within the prescribed time limit of 30 days.

ii Penalties for delayed filings or failure to file

Failure to file within 30 calendar days of the trigger event allows the CCI to impose a penalty of up to 1 per cent of the assets or turnover of the combination, whichever is higher. Recently, the CCI imposed a penalty of 5 million rupees on Zulia Investments Pte Ltd and Kinder Investments Pte Ltd, both acquisition vehicles of Temasek. The maximum penalty imposed to date is 30 million rupees in Tesco Overseas/Trent Hypermarkets – much less than the statutory upper limit. Further, while this has not happened thus far, the CCI has the power to unwind any combination that it believes may or is likely to cause an appreciable adverse effect on competition in India.

11 C-2013/06/124, dated 1 August 2013.
12 C-2014/03/162, dated 27 May 2014.
iii Merger remedies

An interesting development in the Indian merger control regime has been the perceptible shift in the CCI’s ‘soft attitude’ in clearing mergers. Although initially the CCI did not use its powers to modify certain aspects of transactions or impose commitments to ensure compliance with the provisions of the CA02, recently, the CCI has approved four different combinations only after the parties offered binding commitments.

While there are no formal guidelines on merger remedies, the CCI has in several cases asked parties to amend the terms of their agreements, particularly in the context of non-compete agreements. In Elder Pharmaceutical/Torrent Pharmaceuticals, the CCI approved the transaction after the parties agreed to modify the scope of a non-compete clause in the agreement and reduce its scope from five to four years. Similarly, in Agila Specialities/Mylan Inc, the CCI approved the transaction only after the parties undertook to reduce the term of the non-compete clause.

In Orchid Chemicals/Hospira Inc, the CCI approved the proposed acquisition of the active pharmaceutical ingredients business of Orchid Chemicals on the condition that certain modifications were made to the terms of the business transfer agreement entered into between the parties, including the duration of the non-compete obligation imposed on Orchid. In a similar vein, the acquisition of 65.12 per cent of the equity share capital of Gujarat Gas Company Limited by GSPC Distribution Network Limited was approved by the CCI subject to a broad undertaking by GSPC Distribution Network Limited that it would ensure that Gujarat Gas Company Limited’s contracts with its customers complied with the provisions of the CA02.

Most recently, in Sun/Ranbaxy and Lafarge/Holcim, 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 appreciable adverse effects on competition in the relevant markets identified.

iv Confidentiality of submitted information

In the process of notifying a combination to the CCI, or in subsequent submissions, parties invariably submit confidential and commercially sensitive data. Section 57 of the CA02, read with Regulation 35 of the Combination Regulations, lays down a framework within which parties may request that such commercially sensitive information be kept strictly confidential and not be shared with third parties. The CCI is quite particular about the nature and scope of the confidential treatment it allows, and usually grants such treatment only for a period of around three years.

However, concerns have grown in the industry as to whether the CCI’s confidentiality regime is enough to protect their business-sensitive information from disclosure to competitors under the provisions of the (Indian) Right to Information Act, 2005 (RTI Act). The RTI Act is a ‘freedom of information’ piece of legislation and

14 C-2013/04/116, dated 20 June 2013.
allows citizens to secure access to information under the control of public authorities to promote transparency and accountability in the latter’s workings. The RTI Act supersedes the provisions of the CA02, and the CCI is legally bound to provide any information that is sought under the RTI Act. While there has not been a case where a third party has applied for confidential information submitted as part of a pre-merger notification to date, it remains to be seen how the CCI will balance its statutory obligations with legislative requirements such as compliance with the RTI Act. Having said that, the RTI Act is not a blanket piece of legislation; it contains several safeguards to prevent its misuse. Whether these safeguards, coupled with the CCI’s confidentiality regime, will prove adequate to assuage industry fears remains to be seen.

v  Anti-circumvention and the introduction of the ‘substance test’
As previously mentioned, the Combination Amendment Regulations 2014 introduced a ‘substance test’ whereby the CCI shall assess the notification requirement with respect to the substance of the transaction, and any transactional structure that avoids notification in respect of the whole or a part of the combination shall be disregarded. In Jet/Etihad,\textsuperscript{17} the CCI held that the ancillary sale of Jet’s landing slots at London’s Heathrow Airport to Etihad was part of the substance of the larger transaction and ought to have been notified to the CCI.

However, such unfettered powers to look beyond the structure of a transaction and assess its ‘substance’ may create a level of uncertainty, since the CCI, in hindsight, would be able to second guess every transaction to assess its true ‘substance’. To take a pertinent example, Schedule I of the Combination Regulations exempts, in certain cases, the acquisition of up to 25 per cent of the shares in an enterprise. In this regard, an acquirer who makes minor open market purchases of the shares of a target before entering into a definitive trigger document would ordinarily be exempt if such open market purchases do not cumulatively amount to 25 per cent of the equity share capital of the target. This is also in line with the decisional practice of the CCI.\textsuperscript{18}

However, with the coming into effect of the ‘substance test’, the CCI may conclude that any preceding open market purchases, even if individually exempt, constitute part of the larger intent and ‘substance’ of the transaction. In such event, the trigger event as well as the time limit for filing a notification may shift substantially. These powers of the CCI to retrospectively determine the ‘substance’ of the transaction may create uncertainty in the minds of industry players.

vi  Judicial review of mergers and the appellate process
Decisions of the CCI may be challenged before the COMPAT, and a further appeal from any order of the COMPAT lies to the Supreme Court of India. One such challenge

\textsuperscript{17} C-2013/06/125, dated 26 June 2013.
\textsuperscript{18} In \textit{Hexaware/Baring} [C-2013/09/130], the acquirer instituted certain open market purchases before entering into definitive trigger documents for the purchase of shares of Hexaware Technologies Limited. The CCI took the date of entering into such documents as the trigger for filing.
occurred recently in the case of the CCI’s order in Jet/Etihad, 19 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’ and hence had no locus standi to challenge the order of the CCI. 20

vii Changes introduced by the Companies Act, 2013

Indian company law has undergone significant change over the past year. The Companies Act, 2013, which replaced the erstwhile Companies Act, 1956, introduced significant changes to the Indian corporate law landscape, including the Indian merger control regime. For example, under the provisions of the CA02, any share subscription, financing facility or acquisition by a public financial institution is exempt from filing a pre-merger notification to the CCI. Such institutions need only file an ex post truncated notification of the share subscription, financing facility or acquisition within seven days of the event. The Companies Act, 2013 has provided a comprehensive definition of ‘public financial institutions’, and has thus removed all possible ambiguity in this regard. Further, the treatment of ‘demergers’ under the CA02 has been the subject of controversy in the past, with the CCI’s decisional practice being ambiguous as to whether these would be treated as mergers or as acquisitions. The Companies Act, 2013 appears to categorically treat such transactions as mergers, thus shedding some light on the issue.

viii Concurrent jurisdictions of other authorities

The provisions of the CA02 have overriding effect on any other law in force in India, and no civil court in India has jurisdiction to entertain any proceeding with respect to a matter over which the CCI or the COMPAT is empowered to adjudicate. Hence, no other authority, apart from the COMPAT and the Supreme Court, may overturn a decision of the CCI. However, certain sectoral regulators in India have been given concurrent powers to curtail anti-competitive behaviour in their respective domains. For example, the Telecom Regulatory Authority of India has the power to check anti-competitive behaviour by entities such as broadcasters and cable network operators. In addition, high courts also have powers under their writ jurisdiction to look into certain elements of proceedings before the CCI. To ensure smooth functioning between the CCI and other authorities, the CA02 empowers the CCI to hear and decide references from other authorities on issues relating to unfair trade practices.

IV OTHER STRATEGIC CONSIDERATIONS

Since the coming into force of the Indian merger control regime, the CCI has entered into cooperation agreements and memoranda of understanding with several of its overseas counterparts, including the FTC, the EC, the Australian Competition and

19 C-2013/05/122, dated 12 November 2013.
20 Appeal No. 44 of 2013, dated 27 March 2014.
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.

V OUTLOOK AND CONCLUSIONS

The Competition (Amendment) Bill, 2002 (Amendment Bill) has lapsed and may be reintroduced before the Parliament. Specifically with respect to merger control, the Amendment Bill seeks to introduce a new provision that will empower the government to specify sector-specific monetary thresholds (i.e., separate asset or turnover thresholds for any class or classes of enterprises). The introduction of this provision appears to have been largely triggered by concern in the pharmaceutical industry pursuant to the easing of norms for foreign direct investment in this sector.

Further, according to news reports, the CCI is in consultation with SEBI to harmonise the differences between the timelines under the CA02 and the Takeover Code in the event that any transaction triggers an open offer for the shares of a party to the transaction. Under the CA02, the CCI must arrive at a *prima facie* opinion within 30 days, and its final decision as to whether a given acquisition, merger or amalgamation would cause any appreciable adverse effect on competition in India within 210 days. On the other hand, under the Takeover Code, an acquirer must make a public announcement (open offer) within four days of gaining approval for the transaction from SEBI. In the event that consideration is not paid to shareholders who have accepted the open offer within 10 days from the date of expiry of the tendering period, if the delay is due to non-receipt of statutory approvals (e.g., approval from the CCI) and there is no default or neglect on the part of the acquirer, SEBI may extend this time frame subject to the acquirers paying interest to the shareholders for the period of delay. Therefore, it is possible that in the case of acquisitions that trigger a filing with the CCI as well as an open offer under the Takeover Code, any delay in CCI approval could mean substantial financial liability to the acquirer. The CCI is said to be in talks with SEBI to resolve this lacuna. Further, it appears that the CCI is overhauling its pre-merger consultation regime to include consultations on substantive issues as well. At present, the consultation regime allows parties to discuss only procedural issues with CCI officials.

The CCI has proved itself to be a proactive regulator with a willingness to adapt its processes to best practices taken from more advanced merger control jurisdictions. Although the Indian merger control regime remains relatively new, the CCI’s evolution over the past year shows a propensity for continuous development and innovation.
Chapter 16

INDONESIA

Theodoor Bakker, Luky I Walalangi and Miriam Andreta

I INTRODUCTION

Mergers in Indonesia are generally governed by Law No. 40 of 2007 regarding Limited Liability Companies dated 16 August 2007 (Company Law). Article 126 of the Company Law states that when conducting a merger, the companies concerned must consider, inter alia, the public interest and the state of competition that results from the merger. Increasingly, the government has become aware that mergers can cause monopolistic or monopsonic practices harmful to the public, and it now supervises merger activities in Indonesia more actively than ever before to prevent unfair business competition practices. Law No. 5 of 1999 regarding the Prohibition of Monopolistic and Unfair Competition Practices, dated 5 March 1999 (Antimonopoly Law), prohibits certain

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2 Article 126 of the Company Law:
Legal acts of merger, consolidation, acquisition, or division must have due regard to the interest of:
a the Company, the minority shareholders, employees of the Company;
b the creditors and other business partners of the Company; and
c the public and fair competition in doing business.

Elucidation of Article 126 of the Company Law:
These provisions emphasise that Mergers, Consolidations, Acquisitions or Division may not be conducted if they will damage the interest of certain parties. Further, in Mergers, Consolidations, Acquisitions, or Division, the possible occurrence of monopoly or monopsony in any form that will incur damages to the public, must be prevented.

3 In the remainder of this chapter, references to articles are, unless otherwise stated, to articles of the Antimonopoly Law.
activities, certain agreements and dominant positions that are contrary to fair business practices. Mergers, consolidations and acquisitions are regulated by Articles 28 and 29. Further discussions on merger and unfair business practices below will be pursuant to the Antimonopoly Law.

The Antimonopoly Law designates two approaches to unfair business practices: practices that fall under the ‘rule of reason’ and practices that are ‘per se illegal’. The ‘rule of reason’ is an approach whereby the potential pro-competitive features of restrictive business practices are evaluated in comparison with the potential anti-competitive effects to determine whether the practice should be prohibited. On the other hand, the ‘per se illegal’ approach is to declare certain business practices as automatically illegal and prohibited if such business practices meet the terms of the prohibition, without the need to substantiate whether the business practice in question has a negative implication on the competitive process.

Under Article 27 of the Antimonopoly Law, share ownership that results in a dominant position will be considered ‘per se illegal’. A dominant position is a condition in which a business entity does not have any significant competitors in the market concerned in connection with the market share that it controls, or a condition in which a business entity occupies the highest position among the competitors in the market concerned in connection with its financial capability, the capacity to access supplies or sales, and the capacity to adjust the supplies of or demand for a certain good or service.

A business entity shall be deemed to have a dominant position if:

a one business entity or a group of business entities controls 50 per cent or more of the market share of one particular good or service; or

b two or three business entities or groups of business entities control 75 per cent or more of the market share of one particular good or service.

Article 29 of the Antimonopoly Law further provides that if the merger, consolidation or acquisition results in the assets or sales value of the resulting entity exceeding certain thresholds, then such acts must be notified to the Business Competition Supervisory Commission (KPPU), which is the governmental competition supervision agency in Indonesia. The underlying tenet of its supervision is to ensure that mergers do not cause monopolistic or unfair competition practices.\(^4\)

The implementing regulation for Article 28 was not issued by the government for more than 10 years, and this caused much uncertainty for both practitioners and academics. The KPPU took several interim measures to address these areas of uncertainty.

\(^4\) Earlier in 2014, the KPPU and the Indonesian House of Representatives Commission introduced a draft amendment to the Antimonopoly Law to be submitted to the House of Representatives and the President of the Republic of Indonesia. Among the proposed changes, the most significant are the change to the merger notification requirement from ‘post-notification’ to ‘pre-notification’, and the proposed amendment on the definition of ‘business actor’, which will include those conducting business outside Indonesia but affecting the Indonesian market. The draft amendment is still under discussion within the House of Representatives.
including issuing Regulation No. 1 of 2009 regarding Pre-Notification of Mergers, Consolidations and Acquisitions (as amended – Pre-Notification Regulation). The Pre-Notification Regulation is intended to fill the vacuum created by the absence of the government regulation. The Pre-Notification Regulation, however, has been criticised by practitioners, who viewed it as lacking a strong legal basis.

On 20 July 2010, the government finally issued the government regulation that was needed to implement the merger control provisions of Articles 28 and 29 of the Antimonopoly Law. The long-awaited regulation, known as Government Regulation No. 57 of 2010 (GR No. 57), addresses a number of uncertainties in the provisions of Articles 28 and 29, as well as issues raised by the Pre-Notification Regulation.

II YEAR IN REVIEW

i Regulations

2009 and 2010 saw the introduction of other key regulations to further implement the Antimonopoly Law and enhance the KPPU in conducting its supervisory role. The regulations are as follows.

**Code of Ethics for KPPU members**
The Code of Ethics is provided in KPPU Decision No. 22 of 2009, and is intended to address the issue of the credibility and integrity of KPPU members. The Code is enforced by an internal honorary council, which consists of internal appointees and holds closed hearings. Although the decisions of the council are read out at an open session, the closed internal process has triggered the criticism that the Code does not promote transparent and accountable processes.

**Pre-Notification Regulation**
Generally, the Pre-Notification Regulation provides parties the opportunity to test the waters prior to embarking on a transaction. Any final opinion of the KPPU given under the Pre-Notification Regulation is binding on the KPPU. In contrast, and as described below, any notification under GR No. 57 is post-transaction (that is, once the merger, consolidation or acquisition is effective). Although GR No. 57 allows a party to consult in writing or verbally with the KPPU prior to the commencement of a merger, a consolidation or an acquisition (consultation process), it clearly states that the consultation process is not binding upon the KPPU and does not exempt parties from filing a post-closing notification. However, according to its implementing guidelines, the KPPU will not reassess a transaction for which the parties have received pre-closing guidance unless there have been material changes in the transaction structure or the market conditions after closing. This may be seen as a backwards step by the government in providing legal certainty for investment in Indonesia. As per the discussion on the **Temasek** case below (which was resolved prior to the issuance of the Pre-Notification Regulation

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5 Earlier in 2009, a KPPU member was named as a suspect in a corruption scandal, which resulted in a considerable loss of public confidence in the KPPU.
Regulation), the considerable issues surrounding that matter could largely have been avoided had a pre-notification process been in place.

With the issuance of GR No. 57, the opportunities afforded by the Pre-Notification Regulation have become less relevant, and hence are not elaborated on.

**Guidelines on intellectual property rights and franchises**

Through the enactment of KPPU Regulation No. 2 of 2009, the KPPU has laid down the rules on how intellectual property rights licences and franchises can enjoy exceptions under the Antimonopoly Law. The KPPU wishes to make clear that, although exempt, intellectual property licences and franchises should not violate certain practices; the exception under the Antimonopoly Law is not absolute. For example, the KPPU sets out six basic characteristics of the licence or franchise that will be reviewed to ensure that no monopolistic and unfair business competition ensues:

- a) pooling and cross-licensing;
- b) tying arrangements;
- c) restrictions on raw materials;
- d) restrictions on production and sales;
- e) restrictions on the sale and resale price; and
- f) the grant back.

**Guidelines on Articles 51 and 1(10)**

KPPU Decision No. 3/2010 on Article 51 clarifies the criteria on how a state-owned company might be exempt. There are circumstances where a state will permit monopolies to exist to protect its public activities. The rationale for this ‘legal monopoly’ is because the goods or services controlled by the state-owned companies are strategic for the development and economic success of the nation or the greater community in general. KPPU Regulation No. 3/2009 on Article 1(10) introduces the definition of a relevant market, its scope and area of business, and its impact when analysing monopolistic and unfair business practices.

During 2011 and 2012, the KPPU issued various guidelines clarifying a number of articles under the Antimonopoly Law, *inter alia*:

- a) Guideline No. 1 of 2011 on the duties, function and authorities of the KPPU;
- b) Guideline No. 3 of 2011 on Article 19 relating to discrimination practice;
- c) Guideline No. 4 of 2011 on Article 5 relating to price fixing;
- d) Guideline No. 5 of 2011 on Article 15 relating to exclusive agreements;
- e) Guideline No. 6 of 2011 on Article 20 relating to selling at loss;

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6 Article 51 reads: ‘Monopoly and/or concentration of activities relating to the production and/or the marketing of goods and/or services which control the requirement of the public as well as branches of production important for the state shall be regulated by act and run by the State-Owned Corporations and/or agencies or institutes established or appointed by the Government.’

7 Article 1(10) reads: ‘The market concern shall be the market relating to a certain market scope or area by the business operator on the goods and/or services which are similar or of the same type or the substitution of said goods and/or services.’
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Guideline No. 7 of 2011 on Article 27 relating to shares ownership;
Guideline No. 8 of 2011 on Article 8 relating to resale price;
Guideline No. 9 of 2011 on Article 50(H); and
Guideline No. 11 of 2011 on Article 27 relating to monopoly practices.

In 2012, the KPPU issued Guideline No. 4 of 2012 on the imposition of a penalty for delay in submitting a notification on a merger, consolidation or acquisition.

Cases
The KPPU has issued some interesting decisions on mergers, acquisitions and consolidations of companies in Indonesia. Among the more notable were the Temasek and Carrefour cases.

Temasek
Temasek Holdings, which holds significant stakes in Indonesia’s biggest mobile-telecommunications operators PT Telekomunikasi Selular (Telkomsel) and PT Indosat Tbk (Indosat) through its subsidiaries Singapore Telecommunications (SingTel) and Singapore Technologies Telemedia (STT), was found to be in violation of the prohibition of a dominant position by the KPPU because of its cross-ownership in Telkomsel and Indosat.

The Temasek case originated from the government’s approval of the sale of the state-owned PT Telkom shares in Indosat to STT. Prior to such divestment, Temasek Holding, through its other subsidiary, SingTel, was already a shareholder of Telkomsel. Therefore, Temasek Holdings’ ownership of Telkomsel and Indosat, through its respective subsidiaries, created cross-ownership of Temasek Holdings in two major telecommunications companies in Indonesia and arguably gave Temasek Holdings a dominant position in the cellular market in Indonesia.

Upon concluding its investigation, the KPPU ruled that Temasek Holdings, through such cross-ownership, had indeed violated the provisions of Article 27(a), and ordered Temasek Holdings to sell its entire stake in either Telkomsel or Indosat.

Temasek Holdings disagreed with the decision and submitted an appeal to the District Court of Central Jakarta and later to the Supreme Court. Both appeals were rejected. The courts held that Temasek Holdings was proven to control more than 50 per cent of the Indonesian telecommunications market and therefore violated the provisions of Article 27(a). In the end, Temasek Holdings sold its shares in Indosat. Temasek Holdings had to roll back a major acquisition, which, as mentioned above, arguably could have been prevented had a pre-notification process been in place.

Carrefour
PT Carrefour Indonesia (Carrefour) acquired PT Alfa Retailindo Tbk (Alfa), a major player in the retail market. By acquiring Alfa, Carrefour effectively held a dominant position in the downstream retail market. After the acquisition process was completed, KPPU received a report stating that Carrefour Indonesia had abused its dominant position in the downstream retail market and consequently caused monopolistic practices. From its investigation, the KPPU found that Carrefour/Alfa had abused its dominant position in the retail market.
position and had dictated the trading terms of its suppliers. The trading terms, which were favourable to Carrefour/Alfa, have prevented customers from obtaining goods and services at competitive prices from other market retailers.

Based on its investigation, the KPPU ruled that Carrefour had abused its dominant position, and ordered Carrefour to sell its entire stake in Alfa to an unaffiliated party within one year.

Carrefour submitted an appeal to the South Jakarta District Court, which Carrefour won. According to the judgment, the KPPU’s accusations were unsubstantiated, and therefore they released Carrefour from all obligations stemming from the KPPU decision. According to the South Jakarta District Court, Carrefour did not have a dominant position in the retail market and hence had not engaged in any monopolistic practices in the ‘modern market’ sector (which includes hypermarkets, supermarkets and minimarkets). The KPPU then appealed the discrepancy over the consideration of a ‘modern market’ to the Supreme Court. On November 2010, the Supreme Court rejected the KPPU’s appeal.

It should be noted that both the Temasek and Carrefour transactions had been legally completed and approved by or reported to the Minister of Law and Human Rights. It was only later, after the completion of the acquisition process, that there were allegations that the completed acquisitions resulted in unfair business practices, triggering an investigation by the KPPU.

III THE MERGER CONTROL REGIME

GR No. 57 states that a company is not allowed to enter into any merger, consolidation or acquisition (for either shares) that may result in the occurrence of monopolistic or unfair competition practices. For share acquisitions, GR No. 57 limits the restriction only to acquisitions that cause a change of control in the acquired company.

A company may be alleged to have conducted monopolistic or unfair competition practices if the entity that results from the merger engages in prohibited agreements (e.g., oligopoly, price fixing, market division, boycotts, cartels, trusts, oligopsony, vertical integration, closed agreements, agreements with foreign parties), prohibited activities (e.g., monopoly, monopsony, market control, conspiracies), or abuse of a dominant position (cross-ownership, double position or interlocking directorate).

GR No. 57 also sets the following thresholds for a mandatory notification to the KPPU:

a) where a merger, consolidation or share acquisition transaction will result in a company with an asset value that exceeds 2.5 trillion rupiah;

b) where a merger, consolidation or share acquisition transaction of banks will result in a bank with an asset value that exceeds 20 trillion rupiah; or

c) where a merger, consolidation or share acquisition transaction will result in a company with a sales value that exceeds 5 trillion rupiah.

If a proposed transaction meets any of the above thresholds, a notification must be submitted within 30 business days of the merger, acquisition or consolidation becoming
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The penalty for any delay in this submission is 1 billion rupiah per day, up to a maximum of 25 billion rupiah.

For the calculation of the assets and sales value, GR No. 57 adopts the vertical line method (i.e., from the controlling shareholders to the controlled companies). It specifically stipulates that the threshold is calculated as follows:

- for mergers or consolidations: the combined assets value or sales value of the (merged or consolidated) company and the company that directly or indirectly controls or is controlled by the (merged or consolidated) company; and
- for acquisitions: the combined assets value or sales value of the acquirer company and the target company as well as the company that directly or indirectly controls or is controlled by the acquirer and the target companies.

The mandatory notification must be submitted to the KPPU using the form as prescribed by the KPPU containing information on the identity of the company, a summary of the merger, consolidation or acquisition plan, and the value of the asset or the transaction, and must be accompanied by, *inter alia*, documents relating to business plans reflecting the parties’ business policies for the next three years and industrial conditions of the parties as a group, including competition mapping in such industry.

GR No. 57 exempts transactions among affiliated parties from mandatory notification. A company is an affiliate of another if:

- it either directly or indirectly controls or is controlled by that company;
- it and the other company, directly or indirectly, are controlled by the same parent company; or
- either company is the ultimate shareholder of the other.

In addition, to further implement GR No. 57, on 5 April 2013, the KPPU issued Guideline No. 2 of 2013, which provides that, *inter alia*:

- the mandatory notification also applies to a merger, consolidation or acquisition conducted offshore or outside Indonesia that:
  - meets the threshold;
  - is conducted between non-affiliated parties; and
  - has a direct impact on the Indonesian market, either as a result of all parties to the transaction, directly or indirectly, conducting business in Indonesia, or of one of the parties having a subsidiary in Indonesia and the other conducting sales to Indonesia, or one of the parties is conducting business in Indonesia and the other party has a sister company conducting business in Indonesia;

- the threshold only applies to assets located and sales occurring in Indonesia. For the purpose of calculating the threshold, the assets value or sales value of the ultimate shareholder must include the assets value or sales value of all its direct and indirect subsidiaries;

- an increase of capital by a company resulting in that company becoming a controlling shareholder of a company must also be notified to the KPPU; and
an increase in the number of controlling shareholders in a joint venture company resulting from a merger, consolidation or acquisition is not exempted from the requirement to notify the merger, consolidation or acquisition to the KPPU. Establishment of a joint venture company without going through a merger, consolidation or acquisition process, however, is not subject to the notification requirement under GR No. 57.

The determination of whether a merger, consolidation or acquisition will result in monopolistic or unfair competition practices will be made by the KPPU based on an analysis of one or more of the following:

a) the market concentration;
b) any barriers to entering the market;
c) the potential for anti-competitive behaviour;
d) the resulting efficiency; and
e) the intended aversion of the bankruptcy of one of the merging entities.

As regards market concentration, the elucidation of GR No. 57 states that a merger, consolidation or acquisition that creates a high level of market concentration has the potential to create monopolistic or unfair competition practices. Among the methods that will be used to measure market concentration are the Hirschman–Herfindahl Index method and the Concentration Ratio method.

The analysis of barriers to entering into the market can be performed by considering various elements of entry to the market, such as regulations, high capitalisation, technology, intellectual property and high sunk costs. The logic behind this analysis is that if there is no entry barrier, the chances of monopolistic or unfair competition practices occurring will be low, as the merged, consolidated or acquired company will have difficulty carrying out the anti-competitive behaviour.

The third analysis is an analysis of the potential for anti-competitive behaviour. This particular analysis will focus on the question of whether a dominant position is created as a result of the merger, consolidation or acquisition transaction, and whether such dominant position might cause the business entity to abuse its dominant position to raise profits and charge customers higher prices. Anti-competitive behaviour can also occur from vertical merger activity where the merger was conducted within the same chain of production, and consequently created control over the production of a number of products, for example, a merger conducted between a raw material supplier and a processor of such raw material, or between a wholesaler and its retailers.

The fourth analysis, which is an analysis of efficiency, is primarily to determine whether the proposed merger, consolidation or acquisition will create greater efficiency, and whether such efficiency will have any positive impact on customers in the market.

The last analysis is an analysis on bankruptcy. If the proposed merger, consolidation or acquisition is being conducted to avoid the bankruptcy of the related companies, then it must be determined whether the impact of the transaction will be greater than the losses that might be incurred by the customers had the transaction not proceeded.

These five factors are not cumulative and need not be assessed by the KPPU in any particular order. In addition, the KPPU also has wide discretionary power to determine additional factors in the future that may be relevant in assessing a transaction.
The KPPU must complete its assessment on the merger, consolidation or acquisition transactions based on the above criteria within 90 business days of receipt of the complete notification form and supporting documents. The KPPU has the right to request additional documents as it deems necessary other than those initially required for the assessment.

The output of the KPPU’s assessment will be an opinion⁸ on whether there is an assumption of monopolistic or unfair competition practices resulting from the merger, consolidation or acquisition, or an opinion that there is no assumption of monopolistic or unfair competition practices resulting from the merger, consolidation or acquisition provided that certain conditions imposed by the KPPU are complied with by the parties (conditional opinion).

In the event that the KPPU issues a conditional opinion, the KPPU will monitor the relevant parties’ compliance with the conditions provided under the conditional opinion. The KPPU may initiate a case against the relevant parties in accordance with the prevailing regulations if the relevant parties do not comply with the KPPU’s conditions under the conditional opinion.

If a transaction is held to result in a monopolistic or unfair competition practice, the KPPU is authorised to impose sanctions ranging from administrative sanctions to the cancellation of the transaction.

Any objection to the KPPU’s decision must be conducted in line with the requirement of the Antimonopoly Law and Supreme Court Regulation No. 03 of 2005 regarding Appeal Procedures against the KPPU’s Decisions dated 18 July 2005. Accordingly, any objection to a KPPU decision must be submitted by the company to the competent district court within 14 business days from the acceptance of the relevant KPPU decision. The district court must render its decision on the appeal within 30 business days from the day on which the investigation started. However, if the court decides that an additional investigation is required then, with a provisional decision, it may order the KPPU to conduct such additional investigation with reference to the background of such order as well as the time period for conducting the additional investigation. During the implementation of the provisional decision, the decision period is halted and will commence running again after the court resumes its investigation into the appeal. The court must resume the investigation no later than seven business days after the acceptance of the brief including the additional investigation from the KPPU.

IV OTHER STRATEGIC CONSIDERATIONS

As previously discussed, the report requirements under GR No. 57 only capture transactions that meet certain thresholds; however, the Antimonopoly Law authorises the KPPU to conduct investigations of mergers, consolidations or acquisitions below the stated threshold if there is any indication of unfair business practices by the company concerned.

⁸ GR No. 57 refers to an opinion having the nature of a ‘suggestion, guideline or opinion’.
In early 2010, the KPPU revised its case handling procedures. The KPPU will basically initiate investigations into allegations of monopolistic or unfair business practices pursuant to incoming reports or on its own initiative. When taking its own initiative, the KPPU will rely on data from:

- its own assessment;
- media reports;
- results of its supervision;
- reports (whether or not complete);
- information obtained from hearings in Parliament;
- findings in investigations; and
- other reliable sources.

The KPPU’s assessment of a particular sector must fulfill the following basic criteria:

- whether the sector or industry ensures the livelihood of many people;
- whether the sector or industry is a strategic industry that is crucial for the country;
- whether the sector or industry has a high market concentration level; and
- whether the sector or industry is a priority industry at the national and regional levels.

KPPU Regulation No. 1/2010 provides indications of the types of data that the KPPU will rely on, as well as the types of criteria that will be considered when conducting its investigation. On the one hand, it is helpful to know the criteria that will be used by the KPPU; however, much will depend on the data or, more precisely, on the quality of the data provided to the KPPU. How the KPPU collects its data and processes it in its database, therefore, will be as important as the criteria that it sets for the investigation.

In early December 2009, the KPPU issued another regulation, KPPU Regulation No. 7/2009 regarding Interlocking Directorates. This Regulation further clarifies Article 26 of the Antimonopoly Law. Article 26 states that a director or a commissioner of a company cannot at the same time be a director or commissioner of another company that operates in the same line of business or in a related market, or when acting jointly with that other company may create a substantial market share for goods or services (a dominant position).

Regulation No. 7/2009 broadens the meaning of directors and commissioners. The term ‘directors’ is not limited to persons appointed as such in a limited liability company, but also includes the top-level management of a firm, an association, any legal entity, a state or regionally owned company or a foundation. In addition, factual positions that suggest top management responsibility or decision-making authority, such as executive vice president, vice president and senior vice president, are included. The same is applicable for commissioners; it is extended to positions with a similar supervisory function, such as members of a supervisory board of a foundation.

The key components to be examined under Regulation No. 7/2009 include the question of whether both companies operate in the same or a related market; whether

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9 KPPU Regulation No. 1/2010.
both companies have a close connection for the production or marketing of a particular product or service; and whether the companies jointly control a significant size of the market (dominant position) in the relevant market during a particular period. Possible scenarios for the operation of the companies are:

a horizontal coordination: a situation where two companies are competing in a single market; or

b vertical integration: a situation where two companies are supporting each other in a vertically integrated line.

Finally, notwithstanding fulfilment of the criteria, a situation where there is an interlocking directorate within two companies does not automatically render it illegal. Interlocking directorates follow the ‘rule of reason’ test; interlocking directorates are only prohibited if they cause monopolistic or unfair business practices. Although not specifically related, and not a primary consideration when assessing a proposed merger or acquisition, interlocking directorates can nevertheless present another entry point for the KPPU to examine whether the proposed transaction will cause monopolistic or unfair business practices.

V OUTLOOK AND CONCLUSIONS

While GR No. 57 and the other KPPU regulations discussed above have answered certain questions and filled a number of gaps, several matters remain unclear, requiring further analysis and – if necessary – consultation with the KPPU. The following questions, for instance, remain:

a How far would the KPPU extend its authority to cancel a foreign transaction?

b Would a change of control for a short duration (such as two or three days) be subject to the provisions of GR No. 57?10
c Does the KPPU view the representative office of offshore banks as conducting business in Indonesia, and if so, would a merger, consolidation or acquisition conducted by its offshore principal office be subject to GR No. 57?

The contrasts between the Pre-Notification Regulation and GR No. 57 (notably, that a decision by the KPPU prior to commencement of a transaction is now not binding upon the KPPU) may be seen as a step backwards for investment in Indonesia, particularly if one focuses on legal certainty.

Furthermore, an important subset of its ability to render decisions is the question of how the KPPU will effectively enforce its decisions. Under the current Indonesian legal system, enforcement (especially if the defendant refuses to comply with the sanctions) might require the assistance of enforcement agencies (e.g., courts, prosecutors and the police). Also relevant to this discussion is whether the courts, when handling appeals of

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10 An example of this is a temporary acquisition where a new acquirer holds the shares only temporarily and subsequently transfers the shares to an entity within the same group of the original controller.
the KPPU’s decisions, will uphold or overturn decisions and, in particular, whether they apply consistent standards when doing so.

As noted above, interlocking directorates as implemented by KPPU regulations might have implications in the analysis of proposed mergers and acquisitions, and therefore should be considered when structuring the proposed merger or acquisition; this is despite the ongoing discussions between practitioners and academics on legal theoretical questions regarding whether an implementing regulation can expand a definition provided in the law.

Although the Antimonopoly Law has been in place for more than 10 years, it is still, in many aspects, a work in progress. By necessity, it deals with general concepts, and implementing regulations – preceded by proper consultation allowing professional and market input – as well as detailed guidelines from the KPPU are required to effectively implement the general concepts formulated in the law.
Chapter 17

ISRAEL

Ran Ben-Ari

I INTRODUCTION

i Merger transactions

The Israeli merger control regime is governed by the Israeli Restrictive Trade Practices Law as well as the regulations and guidelines thereunder (Antitrust Law).

Under the Antitrust Law, a merger transaction is defined as including any transaction in which a stake in a corporation greater than 25 per cent is purchased, by way of acquiring the share capital, the right to appoint members of the board or the right to profits in the corporation. In addition, a transaction in which a substantial part of a corporation’s business is purchased is also deemed a merger transaction. For such purposes, even if the selling corporation has additional assets, which may even be more significant in their value, the transaction could still constitute a merger transaction if an entire line of business is sold.

Furthermore, certain transactions that de facto combine the control of two corporations, such as long-term lease agreements, may also in certain circumstances be deemed merger transactions.

ii Notification and approval requirement

A merger transaction that triggers one of two types of thresholds – a turnover threshold or a market share threshold – requires notification to the Antitrust Authority and is subject to a review and an approval requirement by the Israeli Antitrust Commissioner.

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(Commissioner) prior to its consummation; i.e., where a notification requirement applies, a transaction may not be consummated prior to receiving the approval.

Consummating a transaction prior to receiving a required approval is deemed a violation of the Antitrust Law and may subject the parties (as well as officers of such parties) to criminal and administrative sanctions. In addition, the Israeli Antitrust Tribunal (Antitrust Tribunal) may issue an order to unwind a transaction that did not obtain a required approval if it finds that there is a reasonable fear that, as a result of the merger transaction, competition in a certain market, or the public, shall be harmed.

iii Transactions of non-Israeli companies

In order to be defined as such, a merger transaction generally requires a transaction between Israeli corporations. However, under guidelines (Merger Guidelines) issued by the Israeli Antitrust Authority (Antitrust Authority), a company need not be incorporated in Israel to be deemed as an Israeli corporation for such purposes. Foreign corporations that were not incorporated in Israel but that have significant activities in Israel will, in certain circumstances, be deemed Israeli corporations for the purposes of the Antitrust Law. In theory, a merger transaction between two foreign corporations that are deemed Israeli corporations would – subject to the applicable thresholds – trigger a notification requirement and require an approval.

Specifically, under the Merger Guidelines a foreign corporation will still be deemed as an Israeli corporation if:

a. it has a place of business in Israel, namely it has an actual office in Israel, it is an Israeli ‘tax resident’, or it can significantly affect the activities of a local representative, agent or distributor (e.g., by determining prices, levels of inventory or other aspects of managing its business); or

b. it has a ‘merger nexus’ with an Israeli corporation, which would exist if it holds more than 25 per cent of the equity or voting rights in an Israeli corporation (whether directly or indirectly, by way of holding shares or even due to contractual rights that effectively provide the foreign corporation with more than 25 per cent of the rights in an Israeli company, or due to the existence of ‘negative control’ (e.g., as a result of certain contractual veto rights in connection with the activities of the Israeli corporation).

iv Possible outcomes of an antitrust review

Following an antitrust review, the Commissioner will render one of three decisions: (1) a merger transaction that is found not to cause a reasonable fear of a significant infringement of competition or an adverse affect on the public in connection with price levels, the quality or the quantity of a certain product or service, will be approved; a merger transaction that does raise one of these concerns will either be (2) rejected (and the Commissioner will issue a notice that it objects to the transaction), or (3) approved

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subject to conditions that will remove or significantly mitigate such concerns. All of these decisions are subject to an appeal before the Antitrust Tribunal.

II YEAR IN REVIEW

i General

According to official data published by the Antitrust Authority, in 2014 the Antitrust Authority decided 149 merger transactions. Of these, 144 were unconditionally approved, four were approved subject to the parties’ compliance with certain terms and conditions, and one was rejected altogether (as further discussed below).

Note that, as further discussed below, when the Antitrust Authority intends to reject a merger transaction it will often inform the parties of such intention, and parties not planning to challenge the decision in front of the Antitrust Tribunal will often withdraw their merger notice (thus, such transactions will not appear in the official data published by the Antitrust Authority regarding the number of merger transactions). The same sometimes applies also to approvals that are subject to conditions.

As noted above, in 2014 only one rejection of a merger transaction was published with the reasoning for the rejection and, of the four approvals that were subject to conditions, only some limited reasoning was provided. As unconditional approvals of merger transactions are published without the reasoning for the approval and without specifying the market and competitive analysis performed by the Antitrust Authority it is sometimes difficult to describe general trends in the merger transaction approval policies of the Antitrust Authority.4

ii Rejection of a merger transaction In Re: Alrov & Kartha5

Alrov owns two parking lots in the Mamilla area in Jerusalem (one containing approximately 587 spaces, the other approximately 151 spaces) that do not operate on Saturdays and on Jewish holidays.

Kartha owns a parking lot in the same area of Mamilla (containing approximately 800 spaces), which also operates on Saturdays and on Jewish holidays.

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4 Certain general policies can be deduced from the Merger Guidelines (see footnote 3) and from the Antitrust Commissioner's Statement 1/11 On Guidelines for Analysing the Competitive Effects of Horizontal Mergers (available in Hebrew at www.antitrust.gov.il/images/docs/01-11.pdf) and the Antitrust Commissioner's Statement 2/11 On Guidelines for Remedies for Mergers that Create a Reasonable Fear for a Significant Harm to Competition (available in Hebrew at www.antitrust.gov.il/files/10918/2-11.pdf).

The merger transaction was an attempt by Alrov to purchase the parking lot from Kartha. The Commissioner rejected the merger transaction, and such rejection was upheld by the Antitrust Tribunal.6

The Commissioner defined the relevant market as including parking lots with more than 40 places, thus further determining that parking on the side of the road (where legally permitted) is not considered a substitute to parking in a parking lot. The Commissioner also reviewed the question of whether the public would be willing to use public transportation to reach the Mamilla area if the price of parking in parking lots increased. The conclusion was that public transportation is not generally deemed a substitute for using private cars and parking lots, primarily due to reasons of convenience.

The Commissioner defined the relevant geographical market to include parking lots within a reasonable walking distance from the end destination of the consumer. Parking lots outside of that geographical market would not be able to act as significant competitive restraints. The relevant end destinations were defined as the Mamilla Shopping Mall and the Jaffa Gate of the Old City of Jerusalem. Based on such criteria, the Commissioner determined that parking lots within 550 metres from the relevant destinations of the consumers would be deemed as substitutes.

The Commissioner found that the prospects of additional competitors entering the relevant market were low since the establishment of a public parking lot is a long and costly process, all the more so in the relevant area where lack of suitable real estate made it doubtful that another parking lot could be established in the foreseeable future.

The Commissioner determined that if the merger transaction between Alrov and Kartha was approved, the merged entity would control all the parking lots in the relevant geographical area, which would mean that no competition whatsoever would exist in this market. As such, the merger transaction would create a substantial fear that the purchaser would obtain significant market power – in fact, an absolute monopoly – that would enable an increase of the parking prices as well as price discrimination. The fact that Alrov also owns the Mamilla Shopping Mall (and thus may have an incentive to maintain low parking costs to encourage people to visit the Mall, as was claimed by Alrov) was not found as a significant relevant factor that offset the competitive concerns created by the proposed merger transaction.

The Commissioner assessed whether any remedies existed in the form of conditions that would enable the merger transaction to be approved subject to such conditions. It found, however, that as the merger would create a permanent change in the relevant market, no such remedies existed. The potential regulation of the parking prices in the relevant lots, for example, was found to be burdensome and impractical. Moreover, the Commissioner stated that price supervision could not serve as a substitute for competition and could not be deemed to imitate, and certainly not prevail over, the conditions created in a competitive market.

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III THE MERGER CONTROL REGIME

i Merger transaction notification process and timing

Under the Antitrust Law, a merger transaction requires an approval if one of three alternative thresholds is triggered and it cannot be consummated prior to receiving the approval. The applicable share purchase agreement or asset purchase agreement can be executed (in fact, it generally must be executed prior to applying for an approval), but receiving an approval must be a condition precedent to closing and consummating the merger transaction. Consummation of the transaction prior to receiving the approval is illegal and exposes the parties to, inter alia, the risk of criminal proceedings. Consummation of a transaction may take several forms for such purposes, and even certain interim actions, such as transferring shares of the purchased company to trustees who control the purchaser, have been deemed as consummation of the merger transaction that should not have been done prior to receiving the approval.7

ii Filing thresholds

The three alternative filing thresholds are:

a at least two of the merging corporations have an annual turnover in Israel of at least 10 million new Israeli shekels each, and an aggregate annual turnover in Israel of at least 150 million new Israeli shekels;

b as a result of the merger transaction, the merged company will have a market share in Israel that is greater than 50 per cent of the production, sale, marketing or purchase of a certain product or service; or

c any of the merging corporations has a market share in any market in Israel (i.e., not necessarily the market that is the subject matter of the merger transaction) that is greater than 50 per cent of the supply or purchase of a certain product or service.

For each of the filing thresholds, not only the actual corporation that is a formal party to the transaction is relevant, but also any corporation under joint control with such corporation. In other words, for each party to a merger transaction, its entire group of parent companies, affiliates or subsidiaries will be taken into account, and not only the specific ‘merging’ entity. However, in all cases, only sales (or purchases) within the Israeli geographical market are relevant. In addition, with respect to the seller only, if as a result of the merger transaction all ties between the selling corporation and the sold corporation will be completely severed, then the seller’s turnover from additional activities or affiliates (which are not a direct part of the merger transaction) need not be taken into account.

To determine whether the turnover threshold is triggered, one has to review the consolidated financial statements of the merging corporations (and where such corporations have ‘ultimate parent entities’, those of their respective parent entities) in the latest fiscal year prior to the year in which the merger transaction was executed. Where

7 In Re: De Facto Merger of Golkal 1992 Ltd and Tsover Trade Company Ltd (Antitrust Resolutions 3001329; 1998).
a merging company conducts business both in Israel and outside Israel, the revenue that will be taken into account for these purposes is only revenue from sales in Israel.

To assess the market share thresholds the first step is defining the relevant market. A market is broadly defined as the smallest group of products in a certain geographical area in respect of which the reactions of customers in and of themselves will not prevent the exertion of market powers by suppliers. In greater detail, it can be said that the market includes the smallest group of products in respect of which a single (and sole) supplier will increase its profits if the terms of sale for at least one of the products (in such group of products) is changed in a way that is adverse to the customers.

To determine the relevant products that comprise the market, one has to assess which products restrain the supplier from exerting such powers. In other words, the relevant products will be those that, from the customers’ perspective, are directly competing with the product being reviewed and can thus be substitutes for such product. This group of substitute (alternative) products will define the market for the relevant product being reviewed.

To obtain the necessary information for such analysis, certain indirect indicators are often referenced, such as the degree of similarity of the characteristics of the different products and the differences in terms of supply (such as price, quality, variety or accessibility).

iii Approval process and timing

Following execution of a transaction agreement that triggers one of the filing thresholds, each of the merging corporations is required to file a merger notice. There are no fees payable to the Antitrust Authority for filing merger notices or for the review.

The Commissioner must render a decision within 30 calendar days. In practice, if such 30-day period is not sufficient for its review, the Antitrust Authority will typically ask the parties for an extension of such period. If the parties do not agree to an extension, the Commissioner can apply to the Antitrust Tribunal for an extension, which will be granted if special circumstances justify it.

The decision of the Commissioner to reject a merger transaction or to approve it subject to conditions can be appealed by the parties to the Antitrust Tribunal within 30 days. A decision to approve a merger transaction, whether or not subject to conditions, can also be appealed by a third party who may be adversely affected by the merger transaction, as well as consumer organisations or professional unions.

The Antitrust Tribunal can approve the Commissioner’s decision, reverse it or amend it.

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8 See the Antitrust Commissioner’s Statement 1/11 (see footnote 4).
9 Provided that the harm suffered by such third party is of the type that antitrust laws seek to prevent, i.e., harm in the form of a significant adverse affect on competition or the price, quantity or quality levels of a certain product or service. AC 5/98 Edgar Investments and Development v. The Antitrust Commissioner (District Cases 32(C); 310 (1998)).
iv Merger notices

There are two types of merger notices: an abbreviated merger notice and a full merger notice. The antitrust review process will not be affected merely by the question of which of the two types is required. However, if the parties file an abbreviated merger notice and the Antitrust Authority determines that a full merger notice was required, it will require that the parties re-file the proper notice, and this will mean that the 30-day period will commence only following the refiling of the full merger notices.

Each of the merger notices must be executed by an officer on behalf of the respective corporation. Under the Merger Guidelines, a foreign corporation is permitted to submit a merger notice in English and accompany it with a Hebrew translation (normally provided by local Israeli counsel).

The merger notices must be accompanied by financial statements for the two latest fiscal years; copies of merger notices filed by the parties in previous transactions in Israel in the last three years, if any; and copies of prospectuses filed in the past five years, if any. In addition, parties may also attach any other information that may be relevant and helpful for the Antitrust Authority's review (e.g., market studies in the relevant markets, internal studies performed in connection with any of the relevant fields, general market information that can be useful in the context of reviewing the competitive effects of the transaction, minutes of board discussions that can provide relevant information).

An abbreviated merger notice may be filed if all the following conditions are met, and a full merger notice is to be filed if any of the four conditions does not apply:

\[ a \]
only the turnover threshold had triggered the filing requirement;

\[ b \]
the aggregate market share of the parties (including affiliates) in the market that is the subject of the transaction (in Israel) is not greater than 30 per cent;

\[ c \]
none of the parties (including affiliates) has a market share (in Israel) that is greater than 50 per cent in any market that is tangential to the market that is the subject of the transaction; and

\[ d \]
none of the parties (including affiliates) is party to an agreement with a third party that is a competitor in the market that is the subject of the transaction.

v Review process

During the review process, the Antitrust Authority will typically approach other participants in the relevant market (major customers and suppliers as well as competitors) to hear their views on the possible effects of the transaction on competition in the relevant markets. The Antitrust Authority will also be able to ask the parties themselves as well as third parties for additional information and for responses to follow-up questions, and it will be able to hold conversations with the parties themselves and with relevant third parties.

Under Section 46(b) of the Antitrust Law, the Commissioner is authorised to ask any person for information that is deemed necessary to enable execution of the law. Pursuant to such authority, the Antitrust Authority can (and does) approach third parties,

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10 Where the prospectus is available online, the Authority will normally only require a hard copy of the latest prospectus, and a link to previous prospectuses will normally be sufficient.
and definitely the parties to the merger transaction themselves, to request additional information. Refusal to provide such information is deemed a violation of the Antitrust Law, and can subject the offender to criminal and administrative proceedings.  

The time during which the Antitrust Authority waits for additional information will normally not be counted towards the 30-day deadline.

A decision to provide an approval for a merger transaction, whether unconditional or subject to conditions, requires consultation with the Mergers and Exemptions Committee (which, in connection with merger transactions, is a committee comprising three members appointed by the Minister of Economy from a list of civil servants and representatives of the general public, all of which have to be proficient in the relevant legal or economic field of antitrust law). A decision to reject a merger transaction does not require such consultation.

In practice, prior to reaching a decision to reject a merger transaction or to approve it subject to conditions, the Antitrust Authority will discuss the matter with the parties, who will normally be free to withdraw their merger notices and decide not to move forward with the merger transaction if the proposed conditions are not agreeable.

vi Merger transactions including restrictive arrangements

Under the Antitrust Law, arrangements that restrict the business conduct of one (or more) of the parties in a way that may limit or be detrimental to competition are known as restrictive arrangements. Restrictive arrangements are generally illegal unless approved by the Antitrust Court or provided with an exemption from the approval requirement by the Commissioner or under law (including specific block exemptions).

One of the block exemptions for restrictive arrangements provides an exemption for certain limitations that are ancillary to a merger transaction, primarily non-compete provisions, continued purchase or supply arrangements (for products and services supplied by the purchased entity) or other limitations that are required in order to maintain the economic value of the purchased entity, in all cases subject to certain conditions.

If the transaction also involves restrictive arrangements that do not fall within an applicable block exemption, the parties may request an exemption for such restrictive arrangements as part of the merger notices (both abbreviated and full form notices). The time for approval of such restrictive arrangements is 90 calendar days from the request, which period can be extended by the Commissioner for an additional 60 days (in the form of a written resolution and subject to the reasons being specified), and it can be further extended by the Antitrust Tribunal in special circumstances. Due to the possible time lapse between the approval of the merger transaction itself and the ancillary restrictive arrangements, if the parties wish to consummate the transaction prior to receiving the exemption, they may contractually decide not to apply the restrictive arrangements until they are approved, in which case the merger transaction itself can be consummated once

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11 A third party that did not comply with such request was recently fined by the Antitrust Authority. See: In Re: Commissioners Decision to Impose an Administrative Fine on Milano House Ltd (Antitrust Resolutions 500796; 2015).
an approval is received, and only the restrictive arrangements will be pending the further resolution of the Commissioner.

vii Publication of decisions
Once the Commissioner has made a decision, it will be publicly available on the website of the Antitrust Authority as well as in the official Antitrust Registry (and it will further be published in two daily newspapers in Israel). If the approval was subject to conditions, these will also be publicly available, although they may occasionally be redacted, primarily if they contain information that may be sensitive (such as a deadline to dispose of certain assets or limitations on pricing by the merged entity).

Along with the decision, certain parts of the merger notices will also be publicly available while certain parts of the merger notices will remain confidential. The cover letter, which is often attached to merger notices (and often contains additional relevant information for the review process), as well as the appendices of merger notices, will normally not be publicly available.

IV OTHER STRATEGIC CONSIDERATIONS
i Confidentiality of Israeli antitrust proceedings
As a competition authority, the Antitrust Authority is obviously very sensitive to matters of confidentiality of the proceedings as well as the sensitive information that is often provided to the Antitrust Authority as part of the review process. However, as previously noted, the review process will more often than not involve discussions with other market participants, and thus the existence of the merger transaction will no longer be confidential even though the transaction will still not have been consummated, which may end up not occurring at all if the approval is not granted. The Antitrust Authority typically does not agree to hold the review in complete confidentiality, and significant reasons and justifications would have to be presented for this to be considered.

If the merger transaction is not approved, the parties would normally know of this in advance and withdraw the merger notices, and thus they would not be part of the public registry. If the parties do not withdraw the merger notices, the resolution rejecting the merger transaction (as well as the non-confidential parts of the merger notices) will still be publicly available.

If the merger transaction is approved and a third party wants to challenge the approval (or its conditions, if any) in the Antitrust Tribunal, such third party may, under certain circumstances, have access to non-public information that was collected by the Antitrust Authority during the review process. However, such access would normally be limited by the Antitrust Authority and thus require a court order from the Antitrust Tribunal, which would also, of course, be mindful of the issue of confidentiality and sensitivity of material that is presented to the Antitrust Authority during a review process. Moreover, the parties to the merger transaction would in any case have the right to respond to such disclosure requirement prior to the disclosure of information, and even if information is eventually disclosed, disclosure would normally be limited to legal counsel and economic experts who in turn would be required to execute strict non-disclosure commitments.
ii Requesting an exemption from filing

In cases where the sole filing threshold is the market share threshold, which is triggered regardless of the transaction (i.e., that one of the parties has a market share in a non-related market that is greater than 50 per cent), another alternative to filing would exist if the market in which one of the parties has a market share that is greater than 50 per cent is completely unrelated to the markets that are relevant to the merger transaction. In such cases, the Antitrust Authority allows the filing of an ‘exemption request’, which can result in the parties being completely exempt from filing a merger notice. However, it should be noted that if the markets are not completely unrelated, the prospects of receiving such exemption are not high.

iii Pre-ruling application

The Antitrust Law enables the parties to approach the Antitrust Authority with a pre-ruling request. The advantage of such request is that it can be filed prior to execution of the transaction agreement. However, in order for such request to be filed, the parties would have to present good reasons for their request for a pre-ruling, rather than taking the regular course of executing the transaction agreement and then filing merger notices. Moreover, the most significant disadvantage of the pre-ruling procedure is that the decision is not binding upon the Antitrust Authority, which may provide positive indications as to the prospects of approving the merger transaction in the pre-ruling stage, but later reject it or subject it to conditions when the actual merger notices are filed.

For such reasons, the pre-ruling procedure is not commonly used.

V OUTLOOK AND CONCLUSIONS

The Antitrust Authority has recently proposed a bill (Bill) to amend the chapter in the Antitrust Law that deals with merger transactions. The Bill in its current form proposes certain significant amendments to the Antitrust Law in connection with merger control, such as expanding the definition of a foreign corporation, raising the turnover thresholds and adding a turnover requirement to the market share thresholds (so that the market share threshold will not be triggered by companies that may have a significant market share but do not have significant sales in Israel). It also proposes to extend significantly the time for review of a merger transaction by the Antitrust Authority. The Bill further clarifies that a merger transaction does not necessarily require a corporation as a party; a natural person can be deemed to be party to a merger transaction. Another significant proposed amendment is to apply the notification and approval requirements also to transactions that do not trigger any of the filing thresholds if there is a reasonable fear that, as a result of the merger transaction, competition in a certain market will be significantly adversely affected, or the public may be harmed due to changes in the price levels or the quality or quantity of products or services in the market. It is also proposed to enable parties to file merger notices even if none of the filing thresholds are triggered (currently, if none of the filing thresholds are met, parties are not permitted to file merger notices, and the Antitrust Authority may refuse to review a merger transaction that prima facie does not trigger any of the filing thresholds).
At the time of writing, the Bill is still being discussed, and it is in any event still subject to discussions and approval by Parliament. During the course of such discussions and approval process, it can be expected that at least some of the provisions that are currently proposed in the Bill will eventually be amended prior to their final enactment into law.
I INTRODUCTION

The Italian merger control regime was implemented with Law No. 287/1990 entitled ‘Provisions for the protection of competition and the market’ (Act). The Act was drafted on the basis of the ‘reciprocal exclusivity’ or ‘single barrier’ principles; thus, it applies only to concentrations that do not fall within the application of EU Merger Regulation No. 139/2004 (EU Merger Regulation), and that therefore do not have to be notified to the European Commission.

In July 1996, the Italian Competition and Market Authority (Authority) issued guidelines providing the general conditions of applicability of the merger control laws, as well as regulating certain procedural aspects (Guidelines).

Moreover, Decree of the President of the Republic No. 217/1998 (DPR 217/98) sets forth the procedural rules that must be complied with in carrying out investigations, which ensure the parties’ rights of due process, including the right to be heard and to have access to the documents of the proceedings.

The Authority is an independent body that deals with relevant concentrations. For certain industries, the provisions of the Act are enforced by the Authority with the cooperation of different government bodies. Section 20 of the Act provides that in reviewing concentrations involving insurance companies, the Authority must consult with IVASS, the sector regulator (which, according to Law Decree No. 95 of 6 July 2012, replaced ISVAP, the previous sector regulator) prior to rendering its decision. Section 20 of the Act (as amended by Law No. 303, 29 December 2006) also provides that, with regard to banks, merger control is under the responsibility of the Authority, while the
Bank of Italy is requested to carry on its assessment of sound and prudent management and issue its own authorisation (with reference to the same transaction).

In the case of a concentration resulting from a stock exchange takeover bid, the Authority must receive notification at the same time as the securities regulator, the National Commission for Companies and the Stock Exchange (CONSOB), prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for a cumulative turnover thresholds criteria for pre-merger notification was introduced by Section 5-bis of Law Decree No. 1/2012 (converted into Law No. 27/2012). Previously, the Act provided for alternative turnover thresholds.

The new regime prescribes that concentrations must be notified to the Authority when the aggregate gross turnover in Italy of the undertakings involved exceeds €492 million, and the gross turnover in Italy of the target exceeds €49 million.\(^2\)

Notification thresholds are subject to an annual adjustment to reflect inflation. Filing fees are not required.

The Act defines ‘concentrations’ to include mergers, share or asset purchases resulting in the acquisition of control over another undertaking, and the creation of concentrative, as opposed to cooperative, joint ventures.

The Authority considers that a preliminary agreement is not sufficient to create a concentration for the purposes of the Act.

Section 7 of the Act adopts the definition of control set forth by the Italian Civil Code (CC) for the purposes of Italian corporate law generally. Section 2359 CC recognises both *de jure* control (i.e., when a majority of the voting rights are held), as well as certain cases of *de facto* control (i.e., when, by reason of either voting rights or contractual links, one company exercises a dominant influence over the other).

Section 7 expands the definition of *de facto* control by providing that such control may exist in a variety of circumstances giving rise to the right to exercise decisive influence over the productive activity of an undertaking. Such rights may, *inter alia*, concern the ability to use all or a portion of the assets of the undertaking or involve special rights in terms of the composition of the administrative bodies of a company. The definition of control in Section 7 may also cover persons who are indirect holders of such rights. In various cases, the Authority has considered that control over a company is created by means of shareholders’ agreements, especially when a minority shareholder is given the right to appoint one or more members of the administration board, or when the by-laws require a certain voting quorum in the administration board that makes the participation and the vote of the director or directors appointed by the minority shareholder essential.

The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration.\(^3\) However, the Authority

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\(^2\) These figures apply for 2015.

\(^3\) The acquisition of intangible assets such as goodwill or trademarks could lead to a concentration. See the Authority’s Annual Report of 1994, pp. 135, 136; in particular for the insurance sector, see Decision No. 11775 of 6 March 2003, *Nuova Maa Assicurazioni/ Mediolanum Assicurazioni* and Decision No. 1852 of 16 March 1994, *Ticino Assicurazioni/Sis*.
considers that no concentration takes place when the target company does not conduct (nor has conducted or has plans to conduct) any economic activity, even if it owns some assets. However, should the non-active target company be granted authorisations or licences that are necessary to enter a given market, its acquisition is considered to be a concentration.  

With specific regard to joint ventures, the Authority distinguishes cooperative joint ventures from concentrative ones. Ventures with the principal object of coordinating the behaviour of otherwise independent undertakings are dealt with as ‘restrictive agreements’ rather than as ‘concentrations’ under the Act. Full functionality of the venture must be verified to establish that the venture is concentrative in nature. In this respect, to ascertain whether a joint venture is a full function venture, the Authority relies upon the criteria set forth in Communication 2008/C 95/01 of the European Commission (i.e., the carrying on of a stable basis of all the functions of an autonomous economic entity).

Note that, pursuant to Law No. 153/1994, concentrations that result in the direct or indirect holding (even if in only one major Italian city) of more than 25 per cent of the turnover for cinematographic distribution and, contemporaneously, of the number of cinemas active in the relevant geographic area, must be notified to the Authority.

The Act prohibits concentrations whose effect is to create or strengthen a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner.

Unlike the EU Merger Regulation, the Act contains no general presumption that a concentration affecting less than a given market share (25 per cent, as established in paragraph 32 to the preamble of the EU Merger Regulation in the current version) is compatible with the maintenance of competition on the relevant market. Nevertheless, the Authority has clarified through the Guidelines that for product and geographic markets that exceed certain thresholds, certain information must be given in addition to that required under the synthetic notification form.

The Authority considers six specific factors in determining whether a concentration would create or strengthen a dominant position in the market in such a way as to eliminate or reduce competition in a significant or lasting manner, as stated in Section 6 of the Act. These are:

\[ a \] the range of choice available to suppliers and consumers;
\[ b \] the market shares of the parties involved in the concentration and their access to sources of supply or market outlets;
\[ c \] the structure of the relevant markets;
\[ d \] the competitive situation of the national industry;
\[ e \] barriers to entry into the relevant market; and
\[ f \] the trends in supply and demand for the products or services in question.

in these cases, the contractual relationships of the companies were considered to be business divisions.


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To date, the Authority’s decisions show that it considers market shares, entry barriers and the degree of competitiveness in the relevant market to be the most relevant criteria in evaluating concentrations. The Authority also focuses on the opportunity for the parties to the concentration to preserve the market share that they would hold after the transaction as a factor to be taken into consideration in evaluating the competitive impact of a concentration. Such opportunity depends not only on the degree of competitiveness on the market and on the barriers to entry in the same, but also on other factors, such as the degree of evolution of the market or the retention of technological leadership, a vertical integration or important trademarks by the dominant operators. In cases where the market share in question is substantial, the Authority tends to look first at the competitive structure of the market, including the number of competitors and barriers to entry. In determining the scope of its examination, the Authority looks at the relevant product and geographic markets that it considers to represent, respectively, the smallest group of products and geographic area for which it is possible, having regard to the existing possibility for substitution, to create or strengthen a dominant position.

The Act also provides some exceptions to the general rule.

According to Section 5(2) of the Act, equity positions held by credit institutions, including insurance companies that participate in the underwriting of shares on the occasion of the incorporation of a company or the launching of a capital increase, are excluded from the definition of concentration, provided that the shares in question are sold within two years and the voting rights are not exercised during the period of ownership. This exemption is more restrictive than that available under Community law. In fact, Section 3(5)(a) of the EU Merger Regulation refers in general to a temporary purchase of securities with a view to reselling them. The Act also requires that the bank or financial institution in question abstain from exercising the voting rights attached to its shares, whereas the EU Merger Regulation allows such rights to be exercised as long as they do not result in any influence over the competitive behaviour of the target, in particular in certain circumstances, such as to prepare the disposal of the shares. It must be noted that the Authority has refused an application by analogy of Section 5(2) of the EU Merger Regulation in cases in which the temporary acquisition is made by an entity other than banks or financial institutions.

Moreover, undertakings that operate a legal monopoly (e.g., before the 1999 liberalisation, ENEL for electric energy distribution and, before the 1998 liberalisation, Telecom Italia for various telecommunications services) or under a special statutory mandate (or concession) are exempted from the provisions of the Act. However, this is true solely in respect of matters strictly connected to the performance of the tasks for which an undertaking has been granted its concession. In particular, Section 8 of the Act now provides that those undertakings shall operate through separate companies if they intend to trade on markets other than those on which they trade under monopoly. In addition, the incorporation of undertakings and the acquisition of controlling interests in undertakings trading on different markets require prior notification to the Authority. To guarantee equal business opportunities, when the undertakings supply their subsidiaries or controlled companies on different markets with goods or services (including information services) over which they have exclusive rights by virtue of the activities they perform, they shall make these same goods and services

Italy
II YEAR IN REVIEW

Among the most significant decisions during the past year were two proceedings: one concerning an alleged failure to observe the structural remedies imposed by the Authority at the time that a concentration was authorised; and the other concerning a merger authorised subject to the adoption of corrective measures.

In the first case, on 19 February 2014, the Authority started proceedings against Unipol for violation of the structural remedies imposed by the Authority at the time of Unipol’s acquisition of the insurance group Premafin. At the time of analysing the concentration (June 2012), the Authority found that it could lead to the post-merger entity holding a dominant position in the national and regional markets of damages insurance, with particular reference to the market of RC Auto (drivers’ liability). Such dominant position would permit the company to adopt price strategies independently from its competitors and to impose these prices on its clients. For such reason, the Authority authorised the concentration subject to the adoption of some structural remedies, inter alia, the divestiture by Unipol of some of its business to reduce its market share to a percentage not higher than 30 per cent of the Italian damages insurance market. The Authority established that such divestiture should occur by 19 December 2013. Despite such obligation, because Unipol did not perform the divestiture of the relevant business by that deadline, the Authority resolved to start proceedings to determine what sanction to impose on the company. During the proceedings, however, Unipol informed the Authority that on 15 March 2014 it had entered into an agreement with Allianz for the divestiture of some assets, which reduced its market shares in the national and regional markets of damages insurance to a percentage below 30 per cent. Unipol also informed the Authority that the delay in the performance of the divestiture occurred due to factors beyond the control of the company, namely the failure of the negotiations with the companies originally interested in the acquisition of the business. The Authority, having taken into account such circumstance and also the short delay of the dismissal,
resolved that Unipol did not violate the remedies imposed at the time the concentration was authorised and, thus, determined not to inflict any fine on the company.\(^7\)

In the second case, by Decision No. 25205 of 4 December 2014,\(^8\) the Authority authorised the creation of a joint venture controlled by Messaggerie and Feltrinelli, leading companies in the market of the distribution of books to bookshops and retail distributors (with a combined market share of approximately 50 to 60 per cent). The Authority found that the new entity could produce restrictive effects on small to medium-sized publishers who, due to the reduction of competition in the market, could be affected by a worsening of the economic and contractual conditions of distribution. As a result, the Authority resolved to authorise the concentration subject to the adoption of the following remedies (valid until 31 December 2016) in favour of small to medium-sized publishers (with a turnover not higher of €300,000):

\(a\) the joint venture should not terminate, or should extend until 31 December 2016, the distribution agreements entered into with small to medium-sized publishers at the time of the concentration, and should not apply worse conditions than those currently in force; and

\(b\) if requested to do so and subject to the recurring of some objective requisites, the joint venture should enter into distribution agreements with small to medium-sized publishers that do not have such agreements in place yet. Such agreements should provide the same conditions as those applied to publishers that already have a distribution contract in place and similar to those requesting (having regard to turnover, average book cover prices, percentage of returned goods).

### 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 1), 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 2), Section 16(8) of the Act provides that the Authority must inform the parties of its final decision within a maximum of 45 days, which period may be extended for a maximum of 30 days in the event that the parties have failed to provide any information available to them that has been requested by the Authority. Otherwise, the Authority may order suspension of the proceedings. The final decision prohibiting the concentration, clearing the concentration in its entirety or clearing the concentration with the imposition of remedies must be adopted within the above statutory time limit, but it may be communicated to the parties thereafter.

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The undertakings may accelerate the proceedings by contacting the Authority prior to the formal notification of the transaction and filing an informal document providing information on the same. That procedure anticipates the request for information at a preliminary phase, thereby avoiding delays during the formal proceedings.

The Authority may be made aware of a concentration by interested third parties, which may file a claim against a companies’ failure to notify. In such case, the opening of the investigation must also be communicated to the interested third parties (Sections 6(4) of DPR 217/98). In general, the Authority may also request hearings with third parties, which have the right to access the documents of the proceedings with the exception of those documents providing confidential data.

Third parties who feel aggrieved by a decision of the Authority to permit a merger have the right to initiate an appeal against that decision before the Lazio Court. In this respect, the administrative courts have recognised that competing companies have a qualified interest to oppose the decisions of the Authority, as such decisions may directly produce effects on their activity. Therefore, if the Authority authorises a merger that violates competitors’ rights, the competitors may appeal the decision before the administrative judge.9

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;

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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.
undertaking to reduce production capacity: the Authority may ask the parties to divest production capacity and related assets and personnel necessary to operate in a given market. The same objective can also be attained by means of a ‘conduct’ remedy, consisting of an undertaking by the parties to reduce production capacity for a given period;

• reduction of the scale of the business acquisition;

• undertaking by the parties not to commercialise products under a certain trademark; and

• transfer of brands and other intellectual property rights; and

b) behavioural remedies:

• grant competitors access to essential facilities and know-how; and

• create an internal committee responsible for the future compliance of the interested company with the competition law.

The Authority may expressly reserve the right to revoke its decision to clear the concentration and to impose fines for any failure to observe the prescribed undertakings.

Finally, as stated above, the Authority must prohibit a concentration that creates or strengthens a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner. If the Authority has not issued a suspension order and finds that a merger violates the provisions of the Act, it may issue an order to restore competition in the market. Such order may require divestiture of a company, business or assets that have been acquired.

Decisions of the Authority may be appealed within 60 days from their adoption before the Regional Administrative Court of Lazio, which also has exclusive appeal jurisdiction over administrative fines for infringements of the Act.

Appeals of the Authority’s decision may be made either by the parties to the merger in the case of an adverse decision or, as mentioned above, by third parties, including competitors, affected by a decision to permit a merger.

The Lazio Court may review the merits of the decision, but it may only uphold or overturn it; it may not amend or alter the Authority’s decision. In fact, the Lazio Court, like all other regional administrative tribunals of its kind in Italy, is able to undertake judicial review only with respect to the legitimacy of the administrative decision referred to it (i.e., determining whether the Authority has correctly applied the Act in each particular case). Decisions of the Court must take the form of either an approval of the decision of first instance or an order quashing such decision. While it may not alter or amend the decision, Law No. 205/2000 has afforded the Regional Administrative Court of Lazio the power to impose on the Authority a duty of compensation for the damage suffered by the affected parties.

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

IV OTHER STRATEGIC CONSIDERATIONS

The Authority is required to inform the European Commission of a concentration that it believes to be subject to Community regulation (Section 1(2) of the Act). In cases where
the European Commission has already commenced an investigation, the Authority must suspend its own proceedings, save in respect of aspects that are of ‘exclusive domestic relevance’ (Section 1(3) of the Act). In such way, it is ensured that the Act does not apply when the European Commission actually exercises its jurisdiction.

Moreover, the Act has been interpreted as having extraterritorial application. Insofar as concentrations involve companies without a permanent establishment in Italy, but that have sales in Italy exceeding the statutory thresholds either at the time of the transaction or during the previous three years, the concentration must be notified. The approach taken by the Authority is in line with the EU competition rules and the approach of both the European Commission and the European Court of Justice, which have adopted the ‘effects test’ regardless of where companies are based. Where the companies involved in the concentrations have subsidiaries in Italy, the Authority adopts the ‘business unit’ approach taken at the EU level, whereby the subsidiary’s behaviour is deemed to be decided by the parent company.

A more difficult question is that of the effective extraterritorial application of the various monetary sanctions set forth in the Act for failure to notify or for providing false or incomplete information. The Authority has fined foreign companies in some cases for failure to notify a concentration.

V OUTLOOK AND CONCLUSIONS

On 10 February 2014, the Authority published a proposal to amend the merger control regime by reducing the notification threshold concerning targets from €48 million to €10 million. Such proposal aims to make those concentrations that are exempt from notification under the regime currently in force (e.g., those involving the acquisition of a company (with a turnover that is lower than the current threshold) operated by large corporate groups, which may impact on the level of competition on the market (especially where the relevant market is local)) subject to the analysis of the Authority. From its analysis of the Italian market, the Authority has observed that the market is highly fragmented and characterised by the presence of small to medium-sized companies in which only few enterprises would reach the current notification threshold. Moreover, such proposed amendment is in line with the European practice (e.g., the regimes in force in Germany and Poland).

A second proposal aims to solve some issues concerning the calculation of turnover of the target company in the case of a merger or joint venture. In this respect, following the amendment of the merger control regime in 2013 and the application of a cumulative threshold, the Authority published a notice detailing the criteria for the calculation of the turnover of the target company in the case of a joint venture and merger. In the notice, the Authority provided that in the case of a joint venture, the transfer of a business and the related turnover by the incorporating companies to the joint venture should be kept out of the calculation of the turnover of the incorporating companies. In the case of a merger, the calculation of turnover should refer to both the undertakings concerned. Such criteria shall be overcome by the new proposal, which aims to simplify the procedure. In this respect, the amendment provides that concentrations shall be notified to the Authority when the turnover of at least two of the
undertakings involved in the concentration exceeds €10 million, with the understanding that the aggregate turnover of all the undertakings involved is higher than €489 million. This proposal is also in line with the European practice (e.g., with the regimes in force in Germany, France, Spain, Portugal, Denmark and Greece).

In this respect, companies participating in the public consultation have underlined that a reduction of just the threshold concerning targets may result in a burdening of the filing procedures, and also proposed that the Authority should modify the threshold concerning the overall turnover of the companies involved in the acquisition. Such a proposal aims to submit to the procedure of authorisation also those mergers concerning small to medium-sized enterprises that could nevertheless produce restrictive effects in regional and local markets. The Authority, having taken into account such proposals, resolved to continue the monitoring of the current merger regime at least until the end of 2014. No final resolution has yet been adopted in such respect.
I INTRODUCTION

Merger control was introduced in Japan by the 1947 Japanese Antimonopoly Act (AMA) together with Japan's first competition rules. Merger control is enforced by the Japan Fair Trade Commission (JFTC), which was established as an independent administrative office with broad enforcement powers and is composed of a chair and four commissioners. The JFTC has primary jurisdiction over the enforcement of merger control under the AMA.

i Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions (including joint ventures), mergers, joint share transfers, business 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., an acquirer merges with a target after acquiring 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 notifiable as long as they satisfy the thresholds for share acquisitions. Unlike the regime in the EU, Japanese law does not make a distinction between full-function and non-full function joint ventures. A notification is also required when a partnership (including a limited liability partnership) formed under Japanese law or under foreign laws acquires shares in another company through the partnership. The

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1 Yusuke Nakano is a partner, Vassili Moussis is a senior foreign counsel and Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune.

2 The JFTC uses the term ‘merger’ in its English translation of the AMA to describe what is called ‘amalgamation’ in many other jurisdictions.
controlling company of such partnership should file a prior notification if the filing thresholds are otherwise satisfied.³

Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.⁴

**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 who are transacting business (business entities) (excluding sales of goods where it is known that such goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and
- **c** sales amount derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that such goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature or characteristics.

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³ Article 10, paragraph 5 of the AMA.
⁴ A combined business group consists of all of the subsidiaries of the ultimate parent company. It should be noted that 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 the other company. The Merger Notification Rules specify detailed thresholds for ‘control’ to exist, which might be found even in cases where the ratio of beneficially owned voting rights is as low as, or even slightly lower 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’ aligns Japanese merger control with the merger rules of other jurisdictions, especially those of the EU.
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 in 2011).
⁷ Article 2, paragraph 1 of the Merger Notification Rules.
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.  

**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 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 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). It should be noted that a minority ownership of over 20 per cent may 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 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 is the whole business of the company or a substantial part of the business 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.

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8 Article 2, paragraph 2 of the Merger Notification Rules.
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 that involves two or more companies transferring their shares into a new holding company in exchange for shares from 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.
For corporate splits, there are a number of relevant thresholds depending upon the structure of the transactions, but the ¥20 billion and ¥5 billion thresholds described above (or lower thresholds) similarly apply.14

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions have to jointly file.15 On the other hand, in the case of a share acquisition or business transfer, only the acquiring company is responsible for the filing. There are no filing fees under the AMA.

ii Regulations and guidelines relating to merger control issued in the past year

Amendment of the Antimonopoly Act

In December 2013, the amendment bill of the AMA, which abolished the hearing procedure of the JFTC for administrative appeals, passed the Diet of Japan. This fundamentally revises the appeal procedure for JFTC decisions by:

a abolishing the JFTC’s hearing procedure for administrative appeals;
b abolishing the exclusive jurisdiction of the Tokyo High Court as the court that reviews at first instance any appeal suits pertaining to administrative hearing decisions of the JFTC;
c introducing a system where any first instance appeals pertaining to cease-and-desist orders, etc., shall be to the Tokyo District Court only (with a panel of three or five judges); and
d streamlining procedures for a hearing of opinions prior to issuing a cease-and-desist order and surcharge payment order to ensure increased rights to due process.

The amendment came into effect on 1 April 2015, along with the corresponding amendment of the related regulations. New rules on the procedures for hearing of opinions prior to the issuance of a cease-and-desist order and surcharge payment order, etc. (see (d) above), also came into effect on the same date, while the regulations relating to the JFTC’s hearing procedure for administrative appeals were abolished.

II YEAR IN REVIEW

During the 2014 fiscal year (from 1 April 2014 to 31 March 2015) (FY 2014), the JFTC conducted Phase II reviews in three cases: the integration between Zimmer, Inc (Zimmer) and Biomet, Inc (Biomet); the acquisition of shares of Chuetsu Pulp & Paper Co, Ltd (Chuetsu) by Oji Holdings Corporation (Oji); and the integration between Applied Materials, Inc (AMAT) and Tokyo Electron Ltd (TEL). The JFTC cleared the Zimmer and Biomet case in March 2015 and the Oji and Chuetsu case in May 2015 with conditions, while the AMAT and TEL case seems to have been withdrawn due to the

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.
termination of the parties’ business combination agreement. As of the date of this chapter, the Chuetsu and Oji case is still pending before the JFTC.

i Integration between Zimmer and Biomet

Zimmer and Biomet are both US-based companies that conduct medical device marketing business worldwide, including in Japan. The notified integration is expected to take two steps: a subsidiary of Zimmer to merge with the parent company of Biomet, whereby the parent company of Biomet becomes a surviving company; and Zimmer acquiring all the shares of the parent company of Biomet (transaction).

There is a wide range of overlapping products sold by both parties. Among these products, the JFTC carried out an in-depth review for several types of artificial joints for which both parties maintain a higher share in the Japanese market, and investigated the following five relevant product markets:

- artificial hip joints;
- artificial knee joints used for total knee arthroplasty (TKA);
- artificial knee joints used for unicompartmental knee arthroplasty (UKA);
- artificial shoulder joints; and
- artificial elbow joints.

For these product markets, the JFTC defined the relevant geographical market as ‘all regions of Japan’, by finding that medical institutions, as the users of these products, purchase the products (including both domestically-manufactured products and imported products) approved under the laws of Japan, via wholesalers in Japan.

With respect to artificial hip joints, the JFTC did not raise any concern as this comes under the safe harbour rules for horizontal business combination (for the safe harbour rules, see Section III.vii, infra). With respect to TKA and artificial shoulder joints, the JFTC found that, inter alia, more than one influential competitor (which means, in this context, competitors with 10 per cent or more of the market share) with a certain level of excess capacity will still exist even after the transaction, and concluded that the transaction would not restrain competition in any of the relevant markets in Japan.

With respect to UKA and artificial elbow joints, the JFTC examined the fact that the combined market share of Zimmer and Biomet, which actively competed in the respective markets in the past, would become as high as 90 per cent and 60 to 70 per cent, respectively, and that there will be a significant gap in respect of other competitors. The JFTC further asserted that entry pressure and competitive pressure from users or adjacent markets for these products is not active, and finally concluded that the transaction would result in creating a situation where the parties would be able to freely control the prices to a certain degree.

16 It was announced by TEL in a press release that there remained a gap between the views of TEL and AMAT and the view of the US Department of Justice, and it became apparent that such gap would not be able to be bridged: www.tel.com/news/2015/0427_003.htm.

When drawing the above conclusion, the JFTC referred to the results of an econometric analysis that showed that, if a transaction similar to the transaction hypothetically took place in FY 2011, the degree of increase in manufacturers’ prices in the following fiscal year for UKA and artificial elbow joints is estimated to have been higher than that for artificial hip joints, TKA and artificial shoulder joints. What is noteworthy about this decision is that the JFTC explicitly mentioned that it took into account the results of the econometric analysis based upon simulation to assess the impact of the contemplated transaction. The JFTC also made clear in one of the notes to the same decision that simulation results should only be interpreted as ‘supplementary information to the results of qualitative investigation’ and not as a ‘definitive conclusion on the effects of this consolidation’.

Based on the explanations on the points of issue by the JFTC, the parties submitted proposed remedies in relation to UKA and artificial elbow joints to the JFTC, which included divestiture of tangible assets and intellectual properties related to leading brands of the parties corresponding to a 50 per cent market share in the UKA market; and divestiture of tangible assets and intellectual properties related to leading brands of the parties corresponding to a 20 per cent market share in the artificial elbow joints market. As part of the conditions, the parties were required to find a third-party buyer of the divested business with adequate experience and capability in the orthopaedics and artificial joints business within a certain period of time, and to obtain an approval from the JFTC on the qualification of such buyer, or alternatively to ensure that an independent third party (divestiture trustee) will carry out the disposal of the above businesses.

Upon its assessment of the above remedy, the JFTC finally concluded that, on the premise that the above remedy would be implemented, the transaction would not substantially restrain competition in any particular fields of trade.

ii Acquisition of shares of Chuetsu by Oji

Oji and Chuetsu are both Japan-based companies that are engaged in manufacturing and selling paper and pulp products. Oji, one of the two largest paper manufacturing groups in Japan, which held nearly 10 per cent of the shares in Chuetsu, proposed to acquire additional shares in Chuetsu and thereby obtain 20.9 per cent of its voting rights (acquisition).

The JFTC reviewed about 35 product markets where Oji and Chuetsu compete with or have transactions with each other. Among these, it conducted an in-depth review of the markets for six types of paper products: tissue printing paper, art paper, carbonising base paper, unglazed craft paper for heavy-duty sack, specialty unglazed craft paper, and unglazed and bleached craft paper.

The relevant geographical market for the above products was defined as ‘all regions of Japan’, as the JFTC found that the buyers tended to procure the above-mentioned

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products regardless of region and that the prices of these products did not vary from region to region.

As a result of the acquisition, the combined entity would hold the top share in each of the above six product markets, and the combined market share in each market would range from 45 to as high as 80 per cent. In addition, the JFTC examined various other facts concerning the six relevant markets, including the following:

- \(a\) that the number of market players is limited or the market shares of a few players are highly concentrated;
- \(b\) that excess supply power of other paper manufacturers is generally limited;
- \(c\) that paper manufacturers are able to obtain price information of their competitors through distributors;
- \(d\) that demand fluctuations in the relevant market are limited and the relevant industry is less innovative; and
- \(e\) that paper manufacturers tend to raise their prices simultaneously.

Based on the above fact-finding investigation, the JFTC concluded that the acquisition would create a situation where the combined group and other competitors could easily coordinate their conduct, and thereby restrain competition in the relevant markets.

The parties then proposed various measures to respond to the JFTC’s concerns, including the following:

- \(a\) the parties each will independently operate the business relating to the above six products, and will obtain prior approval from the JFTC whenever they enter into any concentration or collaboration on these products;
- \(b\) the parties will not disclose confidential information relating to the above six products to each other;
- \(c\) the number of directors or employees that Oji can send to the board of directors of Chuetsu will be limited to one, and his or her capacity will be limited to that of outside director;
- \(d\) the parties will maintain internal employment regulations that clearly indicate that any violation of the AMA will be subject to disciplinary actions, and will conduct regular training sessions for the relevant directors and employees who are in charge of manufacturing and selling the above six products; and
- \(e\) the parties will report the implementation status of these remedial measures to the JFTC annually.

Based on the premise that Oji and Chuetsu will implement the above remedies, the JFTC concluded that the acquisition would not substantially restrain competition in the particular fields of trade thereby clearing the acquisition.

### Statistics of the JFTC’s activity

According to the JFTC, the total number of merger notifications filed in FY 2014 was 289.

Since the thresholds for notification were amended as of January 2010, from the previous general thresholds of ¥10 billion and ¥1 billion, to the new general thresholds of ¥20 billion and ¥5 billion, the number of transactions notified to the JFTC has
decreased rapidly. There are a few cases that were brought into Phase II review every year, while there were no formal prohibition decisions made by the JFTC. According to the JFTC’s statistics, the number of filings and the cases cleared after Phase II review is as follows:

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### III THE MERGER CONTROL REGIME

#### i Waiting periods and time frames

In terms of time frames, the standard 30-day waiting period will apply, which may be shortened in certain cases (see Section III.ii, *infra*). 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 re-starting the clock, if that proves necessary.

#### ii Parties’ ability to accelerate the review procedure

It is generally possible to accelerate the review process by way of submitting a written request to the JFTC. The Merger Guidelines\(^\text{19}\) 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.

#### 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\(^\text{20}\)). This means that third parties cannot even confirm whether a merger has actually been...

\(^{19}\) The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (31 May 2004 (as amended)).

notified, unless the case has moved on to Phase II. Apart from the above limited disclosure, although not timely, the JFTC usually discloses details of major merger notification cases as part of its annual review.

Rights to challenge mergers
Interventions by interested parties in JFTC proceedings have not historically been common; however, there was one case in which interventions were made by Japanese steel manufacturers before the JFTC in relation to the proposed hostile takeover attempt by BHP Billiton of Rio Tinto, first announced in 2007.

Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here. There are two ways for third parties to submit complaints to the JFTC in the course of a merger review: one way is to notify the investigation bureau of the JFTC of a possible breach of the AMA; and the other is to submit complaints to the mergers and acquisitions division of the JFTC.

In addition, as stated in the Policies for Merger Review, in the event that a merger review moves on to Phase II, the JFTC will publicly invite opinions and comments from third parties. Public hearings can be held if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings with third parties, including competitors and customers, in the course of its review, as it did in the review of the Zimmer and Biomet case (see Section II.i, supra).

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 information about, inter alia, the outlines of the contemplated order as well as the underlying facts and the list of supporting evidence to the potential recipients of such order in advance to give them an opportunity to review and make copies of the evidence (to the extent possible) and to submit opinions as to the possible order.

When the JFTC issues a cease-and-desist order, as explained in Section I.ii, supra, the parties to the transaction can now appeal to the Tokyo District Court (instead of resorting to the JFTC administrative hearing procedure, as was the case in the past) for annulment of the JFTC order.

v Effect of regulatory review
The JFTC frequently holds consultations with sector-specific regulators with regard to 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 takes into consideration relevant public and industrial policy issues when

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21 Article 45, paragraph 1 of the AMA.
22 Article 42 of the AMA.
23 Article 9 of the Rules on the Procedures of Hearing of Opinions.
ruling on a given transaction, without prejudice to the independence of its competition policy review and merger review. Among the various government ministries, the Ministry of Economy, Trade and Industry has been active in advocating competition policy, but depending on the specifics of each case, other ministries may also be involved.

vi Substantive review

The Merger Guidelines set out the various factors that may be taken into account by the JFTC when assessing the impact of notified transactions on the competitive situation. Specifically, the Merger Guidelines provide an analysis of the substantive test for each type of transaction (e.g., horizontal, vertical and conglomerate M&A transactions). One of the important parts of the substantive test analysis is the use of ‘safe harbours’ measured by the Herfindahl-Herschman Index (HHI) for each of the above three categories (see Section III.vii, infra). 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 actual impact on competition of the notified transaction.

The detailed method to define the ‘particular field of trade’ (i.e., relevant market) is also provided in the Merger Guidelines. Importantly, the Merger Guidelines were amended in 2007 to clarify that the geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business. Following the 2007 amendment, there have been several JFTC cases where the JFTC defined the relevant geographical market to extend beyond Japan. One involved TDK Corporation’s acquisition of Alps Electric Co, Ltd’s magnetic heads business in 2007, in which the JFTC found that the relevant geographical market consisted of the worldwide market for magnetic heads since magnetic head manufacturers sell their products at the same price regardless of the customers’ geographical locations. The JFTC reached a similar conclusion in many subsequent cases, including the merger of NEC Electronics and Renesas Technology in 2009, two HDD cases (Western Digital and Seagate Technology) in 2012, and the ASML and Cymer case in 2013. It is likely that the JFTC will continue to define geographical markets that extend beyond Japan when assessing notified transactions, depending on the actual conditions of competition.

vii Safe harbours

In the ‘safe harbour’ analysis, if any of the following conditions is satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:24

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

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24 Part IV, 1(3) and part V, 1(3) of the Merger Guidelines.
• the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150;

**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; or

**c** quasi-safe harbour for any transactions:
• there is also a ‘quasi-safe harbour’ that is common to any types of transactions, namely, 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 more in-depth analysis of the non-coordinated (or unilateral) and coordinated effects of the notified transactions.

**IV OTHER STRATEGIC CONSIDERATIONS**

**i Coordination with other jurisdictions**

*Cooperation between the JFTC and foreign competition authorities*

In principle, the JFTC is entitled to exchange information with competition authorities of other jurisdictions based on the conditions set out in the AMA. In addition, the JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union, Canada, the Philippines, Vietnam, Brazil, Korea and Australia. Furthermore, the JFTC propounded the establishment of an international cooperative framework for merger review at the 11th ICN Annual Conference held in April 2012, which was approved at that Conference. Under these agreements and frameworks, it is expected that various levels of information exchanges and discussions will be carried out between the participating authorities.

The JFTC has a good track record of closely working with other competition authorities. In the review of the acquisition of Sanyo Electric by Panasonic in 2009, the JFTC reported that 10 competition authorities reviewed the transaction, and that the JFTC worked with its counterparts in the US and the EU, in particular. Likewise, the JFTC exchanged information with various authorities in the two HDD cases in 2012, and in the business combination of ASML and Cymer and the Thermo Fisher and Life Technologies case in 2013.

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25 Article 43-2 of the AMA.

26 Recently, the JFTC concluded bilateral cooperation arrangements with the Administrative Council for Economic Defense of the Federative Republic of Brazil on 24 April 2014, with the Fair Trade Commission of the Republic of Korea on 25 July 2014, and with the Australian Competition and Consumer Commission on 29 April 2015, respectively.
Coordination among attorneys from various jurisdictions

As explained in Section IV.ii, infra, the JFTC abolished the voluntary consultation procedure (prior consultation procedure) as of 1 July 2011, which means that the substantive review of a proposed transaction would only start at the formal notification stage. In addition, as explained in Section III.i, supra, each of the Phase I and Phase II review periods cannot be extended even in cases where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock. This might cause difficulties, especially in global merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions at the end of the merger review procedure in various jurisdictions. Thus, coordination among Japanese and foreign attorneys is of even greater importance following the abolition of the prior consultation procedure.

Pre-filing consultation with the JFTC

Until the end of June 2011, notification materials were usually submitted to the JFTC under the prior consultation procedure, in which the substantive issues were discussed by the JFTC and the parties to the consultation before the formal statutory filing of a notifiable transaction. In contrast, upon the abolition of the prior consultation procedure in July 2011, the JFTC no longer provides its opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

At first, many practitioners considered that such rigid practice might cause difficulties, especially in global merger notifications. However, in practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials prior to formal filings. Interestingly, in almost all cases that the JFTC cleared recently after Phase II review, including the Zimmer and Biomet case and the Oji and Chuetsu case (see Section II.i and ii, supra), the JFTC made specific notes in its announcements that the parties had submitted supporting documents and opinions to the JFTC on a voluntary basis a few months prior to officially filing the notifications. It is understood that parties to complicated mergers make use of that informal procedure to try and alleviate any potential concerns early. So far, the JFTC seems to be receptive to such informal prior communications.

Special situations

Failing company doctrine

The Merger Guidelines recognise the ‘failing company doctrine’, and 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 finance 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.

The precedents in which the failing company doctrine was applied were the acquisition of Showa Aluminum Powder KK by Toyo Aluminium KK and the acquisition of Kishimoto Medical Science Laboratory by BML Inc in 2010. The JFTC cleared both transactions by taking into account, inter alia, the failing firm doctrine. More
specifically, with respect to the *Showa and Toyo* case, the JFTC cleared the acquisition on the grounds, *inter alia*, that Showa had excessive levels of debt and was unable to get finance for working capital, as well as because it was highly likely that Showa would withdraw from the relevant markets in the near future. The JFTC also mentioned that it would have been very difficult for Showa to enter into a merger with another candidate that would have a lesser impact on competition compared with the merger with Toyo.

**Minority ownership interests**

It should be noted that minority ownership of over 20 per cent of the issued shares in a company is notifiable regardless of whether the acquirer will take control of the target company (see Section I.i, *supra*). In addition, in the JFTC’s substantive review, any companies that are in a close relationship with an acquirer or a target may be deemed to be in a ‘joint relationship’. Accordingly, these companies could be treated as an integrated group for the purpose of the substantive analysis and, for example, the HHI will also be calculated based on the sales data of the integrated group as a whole. The joint relationship will be determined by taking into account various factors although, according to the Merger Guidelines, a minority shareholding of over 20 per cent and the absence of shareholders with the same or higher shareholding ratios would suffice to find such relationship.

**iv Foreign-to-foreign mergers**

The amendment to the AMA effective as of January 2010 has made foreign-to-foreign mergers between undertakings that have no Japanese subsidiary or branch office in Japan, but that have substantial domestic turnover in Japan, notifiable (see Section I.i, *supra*). As in BHP Billiton’s attempt to take over Rio Tinto through a hostile bid, the JFTC will not hesitate to fully investigate foreign-to-foreign mergers that may have a substantial impact on competition in Japan by cooperating and exchanging information with foreign competition authorities as necessary (see Section IV.i, *supra*).

**v Transactions below the notification thresholds**

It is important to note that, under the AMA, the JFTC can theoretically review any M&A transactions under the substantive test, regardless of whether the thresholds described above are met. The JFTC has actually investigated transactions that had not been notified to it, including foreign-to-foreign transactions such as the above-mentioned attempt by BHP Billiton to take over Rio Tinto through a hostile bid.27

**V OUTLOOK AND CONCLUSIONS**

**i Amendment of the AMA**

As mentioned in Section I.ii, *supra*, the amendment of the AMA finally came into force on 1 April 2015, which abolished the hearing procedure of the JFTC for administrative

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27 At the time, qualifying share acquisitions were subject to *ex post facto* reporting requirements.
appeals. Going forward, all appeals against JFTC cease-and-desist orders, etc., will be dealt with by the Tokyo District Court instead of through the JFTC’s administrative hearing procedure. This means that addressees of JFTC orders will be able to appeal to the Tokyo District Court, then to the Tokyo High Court and finally to the Supreme Court, thereby having potential access to three levels of judicial review.

ii Developments following the introduction of the new Merger Review Rules and Policies for Merger Review

Four years have passed since the amendments to the Merger Review Rules and the Policies for Merger Review were introduced in June 2011. These amendments primarily concern the procedural aspects of merger reviews by the JFTC, while some clarifications were also made to the substance of the JFTC’s review policies. Since these amendments, the JFTC has already cleared 13 cases following Phase II reviews, and has made some disclosures as part of its annual review about recent major cases it has handled. These disclosures have been welcomed by practitioners, as they have made the new merger filing procedures clearer and more predictable. However, there are still some areas where further clarification or improvements seem necessary. One such example of an apparent lack of clarity is the reference to the terms ‘input foreclosure’ and ‘customer foreclosure’ in the publication made by the JFTC about the ASML US and Cymer business combination cleared in May 2013. Neither of those terms appears in any of the JFTC guidelines. It is hoped that the JFTC will take action, including through the publication of new or updated guidelines, in these areas in the near future.
Chapter 20

KOREA

Sai Ree Yun, Seuk Joon Lee, Cecil Saehoon Chung, Kyoung Yeon Kim and Kyu Hyun Kim

I INTRODUCTION

The Monopoly Regulation and Fair Trade Act (MRFTA) is the primary antitrust statute and governs the merger control process in Korea. Under the MRFTA, the Korea Fair Trade Commission (KFTC) is the government agency that oversees the merger control process in Korea. Article 7(1) of the MRFTA sets forth the types of transactions (i.e., business combinations) for which a merger filing with the KFTC may be required. In addition, Article 12 of the MRFTA sets forth transactions that trigger a pre-merger filing requirement and those that trigger a post-merger filing requirement. In general, whether a merger filing is required under the MRFTA is examined under two jurisdictional tests: the size-of-transaction test and the size-of-party test. Whereas the size-of-transaction test applies only to certain types of transactions, the size-of-party test applies to all transactions. Under the MRFTA, there are five types of transactions:

a. interlocking directorate;
b. merger;
c. share acquisition;
d. business transfer (i.e., asset acquisition); and
e. formation of a new company (e.g., a joint venture).

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1 Sai Ree Yun, Kyoung Yeon Kim and Kyu Hyun Kim are partners and Seuk Joon Lee and Cecil Saehoon Chung are senior foreign counsel at Yulchon LLC. The authors would like to thank Tae Yong Kim, foreign attorney, and Ye Seul Yoo, associate at Yulchon LLC for their valuable assistance in preparing this chapter.

2 The Mergers & Acquisitions Division of the KFTC is in charge of merger control matters. The contact information for the Mergers & Acquisitions Division of the KFTC is: 95 Dasom-3ro, Sejong, Korea; Tel: +82 44 200 4363; Fax: +82 44 200 4399; www.ftc.go.kr.
Among these five types of transactions, interlocking directorates, mergers and the formation of a new company are not subject to the size-of-transaction test. The size-of-transaction test applies to share acquisitions and certain business transfers. With respect to a share acquisition, the size-of-transaction test is satisfied if:

a. the number of shares acquired pursuant to the proposed transaction is 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company; or

b. the acquirer becomes the largest shareholder of the target company, holding 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company, pursuant to the proposed transaction.

A business transfer involving the transfer of only a portion, and not all, of the business at issue is also subject to the size-of-transaction test, which is satisfied if the value of the business transfer is 5 billion won or more, or 10 per cent or more of the total assets of the transferor according to its financial statements at the end of the most recent fiscal year. On the other hand, a business transfer involving the transfer of all of the business at issue is not subject to the size-of-transaction test.

Even if a proposed transaction meets the size-of-transaction test, a merger filing with the KFTC is not required unless each of the relevant parties meets the size-of-party test. The size-of-party test is satisfied if either party to the transaction had consolidated worldwide assets or sales of 200 billion won or more during the most recently ended fiscal year; and the other party to the transaction had consolidated worldwide assets or sales of 20 billion won or more during the most recently ended fiscal year. These two thresholds (i.e., 200 billion and 20 billion won) have been established by the Enforcement Decree of the MRFTA.3

In addition, a local nexus test applies to a transaction where both parties to the transaction are foreign entities, or where the party with the filing obligation is a Korean entity and the counterparty is a foreign entity. Where both parties to a transaction are foreign entities (i.e., as in a foreign-to-foreign transaction), the local nexus test is satisfied if each party had Korean sales of 20 billion won or more during the most recently ended fiscal year. Where the counterparty to the party with the filing obligation is a foreign entity, the local nexus test is satisfied if the foreign counterparty had Korean sales of 20 billion won or more during the most recently ended fiscal year. When calculating a foreign entity’s Korean sales, inter-group sales between the foreign affiliate and its Korean affiliates are excluded to avoid double counting.

However, a transaction that satisfies the jurisdictional and local nexus tests need not be reported to the KFTC if it qualifies for an exemption under the MRFTA. The three most notable exemptions are for an interlocking directorate between affiliates, a share acquisition of which the parties are all specially related persons (i.e., affiliates), and

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3 Under a 2008 amendment to the Enforcement Decree, the thresholds were raised to the current figures to ease regulatory burdens faced by companies undergoing business combinations.
a transaction where either the acquirer or the target is an investment company or a fund that satisfies certain conditions.

Where a transaction satisfies the jurisdictional and local nexus tests and does not qualify for an exemption, a pre-merger or post-merger filing with the KFTC is required. A pre-merger filing is required for a merger, business transfer, share acquisition or establishment of a new company where either the acquirer or the target has consolidated worldwide assets or sales of at least 2 trillion won. However, in a business transfer transaction, the assets or sales of affiliates are not included in calculating the assets or sales of the target. For all other transactions, a post-merger filing is required. For a tender offer transaction, only a post-merger filing is required, even if the transaction satisfies the pre-merger filing requirement; specifically, the merger filing for a tender offer transaction must be made within 30 days after closing and does not trigger any waiting period.

A pre-merger filing may be made any time between the execution of the transaction agreement and prior to the closing date as long as the KFTC’s clearance is obtained prior to the closing date. If the parties to a transaction close the transaction prior to the KFTC’s clearance (gun jumping), they may be subject to an administrative fine imposed by the KFTC. Furthermore, the KFTC may also review a transaction on its own initiative even where the transaction does not satisfy the jurisdictional and local nexus tests if it determines that the proposed transaction may have a significant impact on the Korean market.

If the parties to a transaction fail to file a merger notification in violation of the Korean merger regulations, they are subject to a maximum fine of 100 million won under Article 69-2(1) of the MRFTA. The specific amount of a fine imposed by the KFTC is determined in accordance with the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification.

With respect to merger filing and review, the applicable statutes, regulations and guidelines are as follows:

a the MRFTA and the Enforcement Decree of the MRFTA;

b the Guidelines on Methods of Business Combination Notification;

c the Guidelines on Standards of Business Combination Examination;

d the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification;

e the Guidelines on Standards of Imposition of a Corrective Order Regarding a Business Combination; and

f the Guidelines on Imposition of Fines for Non-Performance of a Corrective Order Regarding a Business Combination.

II YEAR IN REVIEW

In 2014, the KFTC reviewed a total of 571 transactions, which represents a 2.4 per cent decrease from 2013. Of these transactions, 451 (approximately 79 per cent) were Korean entities’ acquisitions of Korean or foreign entities, while the remaining 120 transactions involved foreign entities’ acquisitions of Korean or foreign entities. Of these 120 transactions, 44 were foreign companies’ acquisitions of Korean entities, while the remaining 76 were foreign-to-foreign transactions that affected the Korean market, thus requiring merger filing in Korea.
In two transactions, the KFTC either blocked the transaction in its entirety or granted conditional clearance: the acquisition of Daemyung Optical (Daemyung) by Essilor Amera Investment Pte Ltd (Essilor) and the Item Bay/IMI transaction.

In the Daemyung/Essilor case, the parties had agreed to the proposed transaction in 2013. In May 2014, the KFTC blocked the transaction in its entirety. Under the MRFTA, the KFTC presumed that the transaction would result in an anti-competitive effect because the parties collectively would become the market leader in the Korean market for short focus lenses with a combined market share of 66.3 per cent, and in the Korean market for progressive lenses with a combined market share of 46.2 per cent; and because in each of the two relevant markets, the parties’ combined market share was substantially larger than the next leading competitor’s. Upon further investigation, the KFTC found that the transaction would likely eliminate competition in the relevant markets and also result in price increases and abuse of dominance by Essilor in the relevant markets. Concluding that no behavioural remedy would sufficiently address the anti-competitive effect of the transaction, the KFTC decided not to grant clearance for the transaction. This KFTC decision to block a proposed transaction in its entirety was its first since its October 2009 decision to deny Lotte Hotel’s proposed acquisition of Paradise Global’s duty-free retail business.

In the IMI/Item Bay case, the parties were the largest and second-largest companies in the online game items intermediary market in Korea, a market in which intermediaries such as the merging parties match buyers and sellers of online game items, including virtual characters, equipment and game money, that online game players use to play online games better. Online game items intermediaries charge commissions for each trade. The total trading volume is reportedly 1 trillion won and the total commissions approximately 40 billion won. This transaction was a post-merger notification transaction because neither party had assets or sales in excess of 2 trillion won. The parties consummated the transaction and filed a post-merger notification with the KFTC in June 2012. The KFTC was concerned that the transaction would create a de facto monopoly with a combined market share of up to 95.2 per cent and with increases in commission fees likely. However, at the same time, the KFTC acknowledged that, given the dynamics of the online game and online game items markets, the anti-competitive effect might be mitigated with an appropriate type of conditional clearance: the online game items market is an ancillary market to the online game market, which itself may be susceptible to rapid changes; and online games themselves may offer alternatives by allowing game players to trade game items directly with each other through an auction or bulletin sub-site within a particular online game site itself. In July 2014, instead of blocking the transaction outright, the KFTC announced its decision to grant conditional clearance. The KFTC prohibited fee increases in excess of consumer price increase rates and unfavourable changes to the user point accumulation system for three years. It also required the combined company to establish and implement a system to protect personal information and compensate the victims of a data security breach. Finally, the KFTC imposed an annual compliance report obligation. However, in its July 2014 decision, the KFTC also allowed the combined company to request modification of the corrective measures based upon any changes in the market conditions that occur after 1 January 2015. This case is significant because the KFTC applied the dynamics of the online game market to its analysis of the anti-competitive effect anticipated in this online game items intermediary market.
This merger enforcement action also constitutes the second time that the KFTC has imposed conditions when approving a proposed transaction in the internet sphere since its 2009 conditional approval of eBay’s acquisition of Interpark G-Market in which the KFTC required a ban on commission fee increases for three years and a requirement to establish small and medium-sized seller protection plans.

In all other cases that it reviewed in 2014, the KFTC granted unconditional clearance. However, this requires further examination. For example, in the merger between Thermo Fisher Scientific Inc and Life Technologies Corporation, the KFTC granted unconditional clearance on grounds that its concerns over any anti-competitive effect had been resolved by the parties’ agreement to abide by the commitments they made to the European Commission. In a different category, the KFTC did not have to render its decision in a proposed P3 shipping company network joint venture because the parties abandoned the transaction and withdrew the KFTC merger filing after MOFCOM’s June 2014 decision to block the transaction.

On the other hand, in 2014, the KFTC imposed fines amounting to 570 million won with respect to 38 transactions that were not reported or that were reported late. The figures represent a 138 per cent increase in the number of such cases compared with 2013, when the KFTC imposed 277 million won in fines with respect to 16 transactions that were not reported or that were reported late.

Some noteworthy KFTC merger cases to date in 2015 include the merger between Applied Materials Inc and Tokyo Electron Ltd; Microsoft’s acquisition of Nokia’s mobile device business; the three-part business swap transaction between GlaxoSmithKline (GSK) and Novartis; and SeAH Besteel’s acquisition of Posco Specialty Steel; and Bayer Korea’s acquisition of MSD Korea’s over-the-counter (OTC) drug business.

In the proposed (but now abandoned) Applied Materials/Tokyo Electron merger matter, the parties were the largest and third-largest suppliers of semiconductor manufacturing equipment, respectively. They signed the merger agreement in September 2013 and filed a pre-merger notification form with the KFTC in November 2013. The transaction was also subject to pre-merger notification requirements in other major jurisdictions, including the US, China, Japan and Taiwan. Given the parties’ market shares, under the applicable provision in the MRFTA, the KFTC started out with a rebuttable presumption that the merger could have a significant impact on the Korean semiconductor industry, and therefore from an early stage cooperated and coordinated its merger investigation with foreign competition authorities, including the US Department of Justice, China’s MOFCOM, the Japan Fair Trade Commission and the Taiwan Fair Trade Commission. The KFTC concluded that the remedies proposed by the parties were not sufficient, and that the merger could generate a substantial anti-competitive effect in the relevant market. Thus, the KFTC staff issued an examiner’s report (or statement of objections) recommending to the full KFTC Commission corrective measures including divestitures of overlapping business lines. However, in April 2015, faced with continuing competitive concerns in various jurisdictions, including Korea and the US, the transaction parties abandoned the merger. This was the second global merger case in which the parties abandoned the merger after the issuance of the KFTC examiner’s report. The first time this occurred was in 2010, when BHP Billiton and Rio Tinto abandoned their proposed transaction. This case again shows that, despite its occasional differences (e.g., the Microsoft/Nokia
transaction matter discussed below), the KFTC coordinates its review of cross-border merger transactions much more closely with foreign competition authorities.

In the Microsoft/Nokia case, Microsoft initially filed a pre-merger notification with the KFTC. After easily obtaining clearance in the US and Europe, and securing conditional clearance in some other jurisdictions, in response to continuing difficulties and delays in Korea, the merging parties restructured the transaction to render it a non-reportable transaction in Korea and promptly consummated the transaction. Unfazed, the KFTC continued its investigation, but this time as a post-consummation merger investigation. To resolve the matter, Microsoft, the acquiring party, formally requested that the KFTC open consent order proceedings. On 4 February 2015, the KFTC granted the request. This constitutes the very first time that the KFTC has decided to use a consent order in merger cases. On 19 May 2015, the KFTC announced a proposed consent order. Regarding standard essential patents (SEPs) for smartphone and tablets, it requires Microsoft, *inter alia*:

1. to license its SEPs for smartphones and tablets on fair, reasonable and non-discriminatory terms;
2. to refrain from seeking injunctions on SEPs both in Korea and abroad;
3. not to demand its SEP licensees to cross-license their non-SEPs to Microsoft in return for licences to Microsoft's SEPs; and
4. not to transfer its SEPs to a third-party purchaser unless the third-party purchaser agrees to abide by the same SEP licensing conditions of the consent order (i.e., conditions (a), (b) and (c)) and, if the third-party purchaser wants to re-transfer the SEPs it purchased from Microsoft to yet another subsequent third-party purchaser, the initial third-party purchaser agrees to demand that the subsequent third-party re-transfer purchaser also agrees to the same licensing conditions of the consent order.

Regarding non-SEPs for smartphones and tablets, the proposed consent order requires Microsoft:

1. to maintain the pre-acquisition (of Nokia’s handset business) per-device (i.e., smartphone or tablet) royalty rates or the current rates in the existing licences;
2. to maintain the same or realistically similar non-pricing licensing conditions;
3. not to transfer its non-SEPs to a third-party purchaser for five years;
4. after the five-year period, not to transfer its non-SEPs to a third-party purchaser unless the third-party purchaser agrees to abide by the same non-SEP licensing conditions of the consent order and, if the third-party purchaser wants to re-transfer the non-SEPs it purchased from Microsoft to yet another subsequent third-party purchaser, the initial third-party purchaser agrees to demand that the subsequent third-party re-transfer purchaser also agrees to the same licensing conditions of the consent order; and
5. not to seek injunctions on non-SEPs unless the potential licensee does not faithfully negotiate with Microsoft.

This proposed consent is to last for seven years (except for the provision on the transfer and retransfer of non-SEPs). Microsoft may petition the KFTC to modify or terminate the consent order, in part or in its entirety, if changed circumstances warrant it. Finally,
the proposed consent order requires Microsoft to submit an annual compliance report setting forth how it has complied with the terms of the order in the preceding year. The consent order explicitly applies to device (both smartphone and tablet) manufacturers whose corporate headquarters are in Korea. The ‘no injunction’ provision applies to injunctions in both Korea and abroad. After a 40-day public consultation period, the KFTC will decide in a plenary session whether to finally adopt the proposed consent order.

In the merger between GSK and Novartis, the parties agreed to a three-part transaction whereby GSK would acquire Novartis’ vaccine business; Novartis would acquire GSK’s cancer drug business; and GSK’s would form and obtain control of a newly created consumer health-care joint venture with Novartis. This global transaction was reported to 18 competition authorities around the world, and generated much scrutiny as one of the largest and most important global pharmaceutical mergers of the year. The KFTC, after carefully investigating the potential anti-competitive effect of the merger, issued unconditional clearance in January 2015.

In December 2014, SeAH Besteel agreed to acquire 52.16 per cent of Posco Specialty Steel and reported the planned acquisition to the KFTC. In March 2015, the KFTC found that the transaction would give rise to an anti-competitive effect in the Korean specialty steel market. Therefore, the KFTC imposed behavioural remedies on SeAH, namely limiting price increases of carbon steel bar, billet and round billet for three years, requiring it to supply a specific quantity of products to its competitor-buyers and prohibiting discrimination against competitor-buyers.

Bayer AG agreed to acquire the global OTC drug business of Merck & Co, Inc. In October 2014, Bayer Korea notified the planned transaction to the KFTC, which involved acquiring the related rights and assets of four different drugs (oral contraceptives, nasal allergy medicine, nasal spray and steroidal dermatological medicine) from MSD Korea as part of the overall global merger. In March 2015, after concluding that the merger would likely eliminate competition in the Korean oral contraceptive pill market, the KFTC required Bayer Korea to divest the oral contraceptive pill assets and rights it would acquire from MSD Korea to a pre-approved buyer who was not already handling Bayer Korea’s oral contraceptives. Moreover, Bayer Korea cannot have the third-party divestiture purchaser of the MSD Korea’s oral contraceptive business, or a distributor who is already a distributor of MSD Korea’s competing oral contraceptives, also distribute Bayer Korea’s competing oral contraceptives pills. The KFTC did not find any competitive concerns regarding the other three OTC drugs at issue, and granted unconditional clearance.

III THE MERGER CONTROL REGIME

The waiting period for the KFTC merger control review varies depending on the type of merger filing method employed. The Guidelines on Standards of Business Combination Examination provide a 15-day waiting period, in principle, for the following types of transactions that may qualify for the simplified review process:

\[ a \] transactions between affiliates;
\[ b \] transactions that do not form any controlling relationship (within the target);
c conglomerate mergers by small or medium-sized companies (i.e., companies that do not belong to a business group whose consolidated total assets or turnover amount to 2 trillion won or more);

d a conglomerate merger where no product or service substitutability exists between the parties due to the particular nature of the relevant market; or

e participation in the establishment of a private equity fund or transaction involving an asset-backed securitisation company

The waiting period for the ordinary pre-merger filing is 30 days from the date of filing of notification, but the KFTC may, on its own initiative, extend the waiting period for an additional 90 days, if necessary. The KFTC’s current practice is that, if it views the case as having no effect of restraining competition, it usually clears the transaction within one month (or two months in certain cases) from the date of filing of the notification.

With respect to confidentiality issues, the materials submitted at the time of filing of the notification and thereafter to the KFTC are protected from disclosure to third parties. If a third party requests access to or a copy of such materials, the KFTC must obtain the prior consent of the submitting parties. The submitting parties are recommended to insert a statement in the notification to such effect.

The KFTC is permitted to impose several remedies if it determines that the transaction restrains competition. Under Article 16(1) of the MRFTA, the KFTC may:

a prohibit the relevant transaction altogether;
b order the total or partial disposal of assets, shares, or both;
c restrict the scope or method of operation of the relevant entity;
d order the resignation of relevant directors;
e order the transfer of business;
f order the relevant parties to disclose the fact that they have received the corrective order; and

g any other necessary measures.  

If the parties fail to comply with the corrective measures, the KFTC may impose a penalty of not more than 0.03 per cent of the relevant amount of transaction day5 pursuant to Article 17-3 of the MRFTA. Further, under Article 67(6) of the MRFTA, failure to comply with corrective measures is punishable by a prison sentence of up to two years or a criminal fine not exceeding 150 million won.

In certain cases, the parties may apply for reconsideration of the KFTC’s decision to the KFTC or appeal the KFTC’s decision (or reconsidered decision if the parties had applied for reconsideration) to the Seoul High Court. Both options may be instituted simultaneously. The application for reconsideration must be made within 30 days from the issuance of the KFTC’s written decision. The KFTC is required to reconsider its

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4 On 22 June 2011, the KFTC announced its standard for merger remedies, in which it highlighted its preference for structural remedies over behavioural remedies in merger cases.

5 For example, the value of the relevant business combination refers to the aggregate amount of value of acquired shares and debts in the case of a share acquisition, and the value of the relevant businesses in the case of a business transfer.
decision within 60 days from the date of receipt of application pursuant to Article 53 of the MRFTA. The relevant parties may also file an appeal before the Seoul High Court within 30 days from the issuance of the KFTC’s written decision or reconsidered decision. The Seoul High Court’s decision may be appealed to the Supreme Court.

Where the transaction falls under the ambit of responsibilities of other government agencies, such as the Korean Communications Commission or the Financial Services Commission, under the relevant statutes, such as the Electrical Communications Business Act or the Financial Industry Structure Improvement Act, Article 12(4) of the MRFTA provides that the merger filing requirements under Article 12(1) of the MRFTA are not applicable to the relevant transaction. These transactions do not, however, entirely avoid the review of the KFTC, because those other government agencies are still required, under Article 12(4), to discuss and consult with the KFTC regarding the potential competition-restraining effect of the relevant transaction during the review process.

IV OTHER STRATEGIC CONSIDERATIONS

When making worldwide merger filings in various countries, including Korea, parties need to consider the specific merger filing thresholds and waiting periods for each country. For example, as explained above, Korea imposes the merger filing obligation for the establishment of a joint venture company if it satisfies the jurisdictional and local nexus tests. As a result, where both parents of the joint venture are foreign entities, if they satisfy not only the size-of-transaction and size-of-party tests but also the local nexus test, which requires both foreign entities to achieve turnover or sales in Korea of 20 billion won or more, the transaction must be filed with the KFTC.

The KFTC in principle reviews the reportability of each transaction or step in a series of transactions that may constitute a ‘single transaction’ in other jurisdictions. As a result, an ancillary transaction (e.g., parties’ joint establishment of a paper company or an acquisition vehicle) preceding a main transaction may require a separate merger filing in Korea even though it may be exempt from merger filing obligations in other jurisdictions. Thus, parties to a series of transactions should check at the very outset whether any of the transactions requires a separate merger filing in Korea.

With respect to foreign-to-foreign transactions, in December 2011, the KFTC issued a manual on cooperation with foreign competition authorities in reviewing cross-border mergers subject to notification in multiple jurisdictions. It provides for a greater degree of cooperation with major competition authorities around the world, including the establishment of a cooperation system and the exchange of relevant information and opinions on market definition, analysis of anti-competitive effects and proposed corrective measures regarding the transaction at issue among the concerned jurisdictions.

The parties to the transaction are recommended to submit as much relevant information as possible regarding the proposed transaction and the relevant market at

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6 Article 12(4) of the MRFTA reads as follows: ‘The provisions of Article 12(1) shall not apply if the head of the [other government] administrative agency concerned has consulted in advance with the KFTC regarding the business combination under the relevant statutes.’
the time of filing in order to reduce the waiting period. If the parties wish to find out the KFTC’s position on the competitive effect of the proposed transaction earlier than the typical notification period, they may apply for the discretionary advanced filing procedure under Article 12(9) of the MRFTA. Under this procedure, the parties may be permitted to make a merger filing even prior to the execution of the relevant agreement as long as they submit sufficient information about the proposed transaction. Under the procedure, the relevant parties will be required to file a formal re-notification after the execution of the agreement. However, such re-notification only needs to be brief, and the KFTC usually takes about a week or two to review the formal re-notification and confirm that no material change has been made to the details of the proposed transaction explained in the discretionary advanced filing. This procedure would be useful for parties wishing to close the proposed transaction shortly after the execution of the agreement.

Finally, the failing firm defence is available in Korea, and the parties may request an expedited review if the filing specifies that the relevant target entity is facing bankruptcy. However, the requirements to avail oneself of such defence are very strict.

V  OUTLOOK AND CONCLUSIONS

In a February 2014 report to the President of Korea, the KFTC formulated two important policy goals pertaining to mergers. First, the KFTC announced that it will ease its merger regulation to promote corporate innovation and merger activities. To that end, the KFTC stated that it plans to propose by the end of 2014 an amendment to the merger control portion of the MRFTA. Then, in December 2014, the State Council of Korea passed the KFTC’s proposed amendment to the MRFTA. The proposed amendment provides for merger filing exemptions for:

a  the establishment of certain types of companies with little anti-competitive effect, namely private equity funds, special purpose vehicles and shipping investment companies;

b  a merger or business transfer between affiliates whose assets or sales are less than 2 trillion won; and

c  minor-scale interlocking directorates.

The proposed amendment, if enacted, is expected to reduce the KFTC’s merger review caseload by approximately 17 per cent.

Regarding the second merger enforcement policy goal, 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 industry structures, to reinforce its merger review efforts with respect to global transactions with substantial impact on the Korean market. Such inter-jurisdictional cooperation appears to be well under way, as the KFTC has cooperated with foreign competition authorities with respect to recently announced major transactions, including the Microsoft/Nokia merger, the P3 Network joint venture, the GSK/Novartis transaction and the Applied Materials/Tokyo Electron merger. Therefore, parties to global transactions triggering merger filings in multiple jurisdictions including Korea should expect the KFTC to be in possession of some of the information provided to other competition authorities by the parties.
Chapter 21

LITHUANIA

Giedrius Kolesnikovas and Michail Parchimovič¹

I INTRODUCTION

Mandatory pre-merger notification is required under Lithuanian law if the concentration fulfils the turnover thresholds described later in this section. However, the Competition Council (CC) also has the authority to review transactions that fall below the threshold where it is likely that the concentration will result in the creation or strengthening of a dominant position or the substantial restriction of competition in a relevant market. In Lithuania, pre-notification consultations with the competition authority are encouraged and are almost inevitable in practice.

Merger control rules were first introduced in Lithuania in 1992 by the Competition Law of the Republic of Lithuania (Competition Law).² Subsequently, the Competition Law has been revised as a result of Lithuania’s accession to the European Union, and the merger regime was largely aligned with the EU model. This development was related to procedural changes in EU competition law (which came into effect through Council Regulation 1/2003 on 16 December 2002), and the harmonisation of the national laws of Member States with EU competition law.

The major amendments regarding Lithuania’s accession to the EU included:

a the abolition of the seven-day term for the submission of a notification on intended concentration,³ and a requirement for the CC to be notified prior to the implementation of a concentration; and

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² Lithuanian Official Gazette, 1992, No. 29-841.
³ The running of the term starts from the earliest of the following: an instruction or a proposal to acquire shares or assets, or an acquisition of the title or the right to dispose of assets.
changes to the substantive test for assessing the compliance of a concentration with the provisions of the Competition Law – the CC now has the right to refuse clearance not only when a concentration is likely to create or strengthen a dominant position, but also if the intended concentration imposes a significant restriction of competition in a relevant market.

The Competition Law describes the term ‘concentration’ as either a merger when one or more undertakings terminates its independent activity and is joined to an undertaking that continues its operations; or when a new undertaking is established from two or more undertakings that terminate their activity as independent undertakings.

Moreover, a concentration is deemed to exist also in the case of the acquisition of control. More specifically, acquisition of control exists when one and the same natural person (or persons) is already controlling one or more undertakings, or when one undertaking – or more than one undertaking, by agreement, jointly – sets up a new undertaking (except in cases where a new undertaking does not perform all the functions of an autonomous undertaking), or gains control over another undertaking by acquiring an enterprise or part thereof, all or part of the assets of the undertaking, shares or other securities, and (or) voting rights, either by contract or by any other means.

A concentration shall not be deemed to arise when commercial banks or other credit institutions, intermediaries of public trading in securities, collective investment undertakings or management companies managing them, and insurance companies acquire one-third or more of the shares in a company for the further transfer of them, provided that:

4. They do not exercise voting rights in respect of those shares;
5. Transfer of the shares takes place within a year of the date of acquisition; and
6. The acquiring undertaking informs the CC about such acquisition within one month.

According to the Competition Law, ‘control’ means any right that entitles a legal or natural person to exert a decisive influence on the activity of an undertaking. The definition also includes the following: the right of ownership to all or part of the assets of an undertaking or the right to use all or a part of such assets; and other rights that permit exertion of a decisive influence on the decisions of the undertaking or the composition of its personnel. A presumption of control shall not exist if one-third of the total voting power in the undertaking is owned by a controlling person. The one-third control requirement is actually stricter than the one-half control threshold defined in Article 5(4) of Council

4. The notion of control was supplemented by amendments to the Competition Law of 1 May 2012 to further align it with the EU competition model.
5. Joint ventures are caught by this part of the ‘control’ definition.
6. The one-third of shares criterion was introduced by amendments to the Competition Law on 1 May 2012, replacing the previous requirement for one-quarter of shares.
7. The one-third control threshold was introduced by amendments to the Competition Law on 1 May 2012, replacing the previous threshold of one-quarter control.
Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR). These requirements shall be used for any purpose other than establishment of control (i.e., establishment of related undertakings, calculation of aggregate income) (Ruling of the CC No A502-1668/2012 of 1 March 2012).

The CC has adopted the Resolution on Approval of the Procedures for Submission and Examination of Notification of Concentration and Calculation of the Aggregate Turnover (Guidelines), which sets out the regulation of concentration in greater detail.\(^8\)

Merger control in Lithuania is carried out by the CC, which is the primary authority dealing with Lithuanian merger control cases, and which handles all merger control notifications. Other relevant authorities are the Vilnius Regional Administrative Court, to which the CC’s resolutions in merger transactions may be appealed; and ultimately the Supreme Administrative Court of Lithuania, which may overrule the decisions of the Vilnius Regional Administrative Court.

Transactions that are subject to mandatory notification and clearance in Lithuania may not be implemented until they have been reviewed and permitted by the CC (this is the standstill obligation). The Competition Law requires that parties to a concentration notify the CC of the transaction when the following two cumulative turnover thresholds are met:

\[\begin{align*}
a & \quad \text{the combined aggregate income of the undertakings participating in the concentration exceeds €14.5 million in the preceding business year; }^9 \\
b & \quad \text{the aggregate income of each of at least two undertakings concerned exceeds €1.45 million in the preceding business year.}
\end{align*}\]

Due to the EU one-stop shop principle, when a concentration meets the threshold for notification at EU level, no notification at national level is required.

Implementation of a notifiable concentration without permission of the CC may be subject to fines, which can be as high as 10 per cent of each of the parties’ gross annual income in the preceding business year. No agreements or actions related to concentrations and made by the participating undertakings or controlling parties are valid if they are executed before clearance is obtained, unless they are approved by the CC at a later date.

It is noteworthy that on 18 January 2012, the government adopted Resolution No. 64 establishing a new methodology for setting the amount of fines imposed for the infringement of the Competition Law (Resolution on the setting of the amount of fines).\(^10\) This Resolution resembles the 2006 Guidelines on the method of setting fines

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8 Resolution of the Competition Council of the Republic of Lithuania of 27 April 2000, No. 45, as amended.

9 An increased combined aggregate income of 50 million litas was introduced by amendments to the Competition Law on 1 May 2012, replacing the previous threshold of 30 million litas. The amendments to the Competition Law as of 25 September 2014 converted these amounts to euros due to Lithuania joining the eurozone on 1 January 2015.

imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. The revised Resolution on the setting of the amount of fines seeks to individualise and set up a more transparent mechanism while establishing the size of the fine. The Resolution on the setting of the amount of fines envisages that fines may be based on up to 30 per cent of the company’s annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement. Moreover, it aims to deter infringers by the imposition of higher fines on recidivists.

The Competition Law does not stipulate any exemptions to the notification requirements; in fact, the CC has the power to intervene against any concentration that falls below the notification thresholds, where there is no obligation to notify. In such cases, the CC may intervene by ordering the submission of a complete notification within the 12-month period following the implementation of a concentration if the concentration is likely to result in the creation or strengthening of a dominant position or a significant restraint of competition in the relevant market. The latter option was introduced to assess competition issues in smaller markets. In practice, however, the CC exerts this power perhaps only once or twice per year.

No legislation exists dealing specifically with foreign mergers. The Competition Law explicitly states that it also applies to the activities of undertakings registered outside Lithuania if the said activities restrict competition in the domestic market. However, the aggregate income of a foreign undertaking (registered outside Lithuania) participating in a concentration that may affect the Lithuanian market is assessed based only on the income received from the sales of its products in Lithuania.

Sector-specific merger control legislation applies to banks and other financial intermediaries, insurance companies, broadcasters and others. Such legislation requires the approval or consent of the relevant official supervisory body, which should be obtained prior to the implementation of the concentration.

The aggregate turnover of certain undertakings (insurance companies, collective investment companies and management companies, as well as undertakings of foreign states) is calculated in a different manner. For instance, if a participant in the concentration is an insurance undertaking, the value of premiums will be calculated, rather than the aggregate income.

II YEAR IN REVIEW

In 2013, the CC granted 29 approvals to implement concentrations and one approval to perform separate concentration actions. In addition, the CC started one supervision proceedings on its own initiative and obliged an undertaking concerned to submit a notification.

According to the Financial Analytics Association, 78 transactions were made in 2013 (13 more than in 2012). Even though the number of transactions has increased,
there are many factors restricting the faster growth of the merger market. In particular, the Lithuanian market still lacks attractive investment targets. In addition, unfavourable and volatile legal regulation (especially in the tax area and employment matters), as well as instability in the finance sector (including the recent bankruptcy of two major banks), significantly contribute to uncertainty and caution among investors. Thus, while the past year has seen quite a lot of activity, the number of transactions remains lower. This can be seen from the table below, which shows that in 2013 the number of notifications received and total permissions granted were among the lowest seen in the past eight years:\[^{13}\]

<table>
<thead>
<tr>
<th>Concentrations</th>
<th>2007</th>
<th>2008</th>
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<td>Notifications received</td>
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<td>42</td>
<td>40</td>
<td>46</td>
<td>31</td>
<td>31</td>
<td>48</td>
</tr>
<tr>
<td>Total authorisations granted</td>
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<td>52</td>
<td>47</td>
<td>33</td>
<td>49</td>
<td>29</td>
<td>29</td>
<td>49</td>
</tr>
<tr>
<td>Refusals to issue authorisations</td>
<td>1</td>
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The fees for examination of notifications on concentration were increased on 13 June 2012\[^{14}\] and converted to euros on 15 December 2014. According to the Resolution of the Lithuanian Government No. 692 (as amended by the Resolution of the Lithuanian Government No. 1442), the fees payable by undertakings for the submission and processing of merger notifications differ depending on the annual combined aggregate income of the undertakings participating in the concentration in the business year before the implementation of concentration, and are as follows:

\(a\) if the combined aggregate income is less than €28.962 million, the fee is €1,621;  
\(b\) if the combined aggregate income is between €28.962 and €144.81 million, the fee is €2,316; and  
\(c\) if the combined aggregate income is more than €144.81 million, the fee is €3,243.

As regards notable sanctions, the CC, in its resolution of 12 May 2014, imposed a fine of 11,817,700 litas on UAB Lukoil Baltija for once again implementing a concentration without notifying the CC. This sanction is the biggest fine the CC has ever imposed for the implementation of a transaction without prior clearance having been obtained. UAB Lukoil Baltija, the Lithuanian subsidiary of Russian oil company OAO LUKOIL, entered a joint venture agreement with UAB Baltic Petroleum. The CC established that as a result of setting up the joint venture, UAB Lukoil Baltija overtook the control of several gas stations and that the concentration meets the threshold set out in the Competition Law. This resolution of the CC has been appealed to the Vilnius Regional Administrative Court, and the case is pending.

However, on 10 June 2014, the CC imposed the largest fine seen in Lithuania to date, in an amount of 123,096,700 litas, on OAO Gazprom for its failure to comply

\[^{13}\] Based on information provided in the 2010 Annual Report of the Competition Council of the Republic of Lithuania, p. 9.  
\[^{14}\] Lithuanian Official Gazette, 16 June 2012, No. 67-3421.
with merger conditions. In 2014, the CC allowed Gazprom to acquire AB Lietuvos dujos shares conditioned on Gazprom not hindering Lithuanian buyers from purchasing natural gas from other suppliers. Having received a complaint from AB Lietuvos energijos gamyba, the CC opened an investigation. AB Lietuvos energijos gamyba sought to implement a natural gas swap agreement, according to which natural gas that had been acquired more cheaply in Western Europe would be imported into Lithuania. The CC announced that in the course of the investigation, the CC’s experts had established that Gazprom’s refusal to negotiate with AB Lietuvos energijos gamyba regarding such a swap agreement for 2013–2015 had created obstacles for AB Lietuvos energijos gamyba to purchase natural gas from another provider, and thus breached the merger condition. The CC considered the conditions imposed on Gazprom as crucial for clearing the merger. In no uncertain terms, the conditional clearance required Gazprom to refrain from creating barriers for Lithuanian buyers attempting to purchase natural gas from other suppliers. In the CC’s opinion, Gazprom’s refusal to negotiate the natural gas swap agreement deprived AB Lietuvos energijos gamyba of the potential to purchase cheaper natural gas used by the Lithuanian company to producing heat and electricity. This, according to the CC, could have negatively affected Lithuanian electricity and heat consumers, because more expensive natural gas purchased from Gazprom could have resulted in higher heating and electricity prices. This resolution of the CC has been appealed to the Vilnius Regional Administrative Court, and the case is pending.

Moreover, one recent merger notification was withdrawn pursuant to preliminary findings of the CC that the merger would impede effective competition on the relevant markets. The CC submitted a preliminary assessment that the outcome of an acquisition of 100 per cent of UAB Tolimojo keleivinio transporto kompanija by UAB Kautra would result in the creation or strengthening of a dominant position or a significant restraint of competition in a market of regular long-distance passenger transport routes. Disregarding the fact that the preliminary assessment of the CC as regards other relevant markets was favourable to the undertakings concerned, UAB Kautra decided to withdraw its notification.

In addition, the examination of one merger was terminated even though the acquiring undertaking, AB Axis Industries, was still intending to purchase up to 100 per cent shares of UAB Elgamos grupė. This was caused by an internal dispute between shareholders of UAB Elgamos grupė. As a result of the dispute, shareholders controlling more than two-thirds of the shares of UAB Elgamos grupė refused the deal, although the rest of the shareholders were willing to conclude the transaction. Thus, the CC did not establish any clear intentions of AB Axis Industries and UAB Elgamos grupė to conclude sale and purchase agreements.

Finally, 2014 is remarkable for the number of conditional clearances imposed by the CC. In particular, on 9 October 2014, the CC cleared the acquisition of 100 per cent of AB Lietuvos draudimas shares by PZU SA. The merger was cleared conditioned upon PZU SA selling the part of its business carrying out activities in Lithuania in two markets: insurance of land vehicles (except for railway vehicles) and property insurance. Furthermore, on 5 December 2014, the CC reached a similar conclusion in the acquisition of Įmonių grupė Alita, AB by UAB Mineraliniai vandenys. The CC found that the merger would restrict competition in the markets of certain alcoholic beverages.
Thus, the CC cleared the merger conditioned upon UAB Mineraliniai vandenys selling its vodka and bitter production and trade businesses.

III THE MERGER CONTROL REGIME

In line with the EUMR, the Competition Law requires that concentrations exceeding certain income thresholds be filed with the CC prior to the implementation of the transaction. A mandatory notification must be made after:

a the submission of a proposal to conclude the agreement; or acquire shares or assets;

b an instruction to conclude the agreement;

c conclusion of the agreement; or

d the acquisition of the right of ownership; or the right to dispose of certain assets.

A notification can be filed even when there is only a clear intention to conclude a contract or to make a public offer to buy stock. These provisions reflect those of the EUMR.

A standard form of notification should be lodged with the CC jointly by all of the parties taking part in a concentration. In the case of the acquisition of control, notification must be submitted by the acquiring party. The Competition Law allows the CC four months in total to examine the submitted notification if it is in accordance with the established requirements. If commitments are offered, the examination period may be extended for an additional month at the request of the notifying parties. However, in practice the CC clears the majority of mergers within a month of filing.

The time limit commences the day after the receipt of a complete notification. The CC immediately notifies the parties in writing if the notification is incomplete, in which case the term for the examination begins to run after the CC is provided with a complete notification.

There are no fast-track procedures; moreover, pursuant to the Competition Law, the CC is not explicitly empowered to render advance rulings. Nevertheless, the parties can approach the CC prior to the filing of the notification. To accelerate the review procedure, the parties may enter into pre-merger consultations with the CC. The aim of the consultations is to reduce the scope of the notification and to clarify matters of crucial importance to the CC in the review process for the clearance of transactions; it is common for undertakings to seek advice from the CC that will significantly improve the quality of the notifications, which in turn speeds up the CC’s process of rendering a final decision.

The CC publishes all notifications received and decisions made in the Official Gazette and on its website (kt.gov.lt), specifying the nature of the concentration and the parties concerned. All interested persons have a right to submit their opinions about the intended concentration during the two weeks following publication. Interested persons are:

a parties submitting a notification on concentration;

b other persons participating in the concentration;

c natural or legal persons, as well as public organisations, whose interests are affected by the intended concentration; and

d public and local authorities.
Persons who have submitted written objections to the intended concentration are notified of the anticipated decision, the date of the procedural meeting of the CC examining the issue, and the time limit allowed to submit additional requests and explanations to the CC.

Persons who have submitted objections to the intended concentration in writing have the right to familiarise themselves with the materials related to the case (except for information that is commercially sensitive or secret), submit comments, and submit a request to participate in and be heard at the meeting of the CC. The CC, upon completing the examination of the notification, may:

a. allow unconditional implementation of the concentration;
b. impose conditions upon the concentration to prevent the creation or strengthening of dominance or substantial restriction of competition; or
c. block the implementation of the concentration and impose an obligation on the undertakings or controlling persons concerned to perform actions restoring the previous situation or to remove the consequences of the concentration.

If the CC does not render a decision within the allowed time, undertakings have the right to implement their concentrations under the conditions defined in their notifications.

An undertaking under investigation may appeal to the CC against the actions of any authorised investigating officers within a 10-day period from the date of the disputed actions, and the CC must make a decision within 10 days of receipt of this complaint. The undertaking has the right to lodge a complaint with the Vilnius Regional Administrative Court if the CC’s decision is unsatisfactory or if no decision is issued during the 10-day period; however, such complaint will not stop an ongoing investigation.

All decisions rendered by the CC may be appealed to the Vilnius Regional Administrative Court within 20 days of receipt of the decision or its publication on the CC’s website. An appeal does not stop the implementation of a decision unless the Court decides otherwise. Within 14 days of the publication of the decision by the Vilnius Regional Administrative Court, it may be further appealed to the Supreme Administrative Court of Lithuania.

**IV OTHER STRATEGIC CONSIDERATIONS**

The CC cooperates with the European Commission and national competition authorities within the European Competition Network (ECN) and the European competition authorities. Through the ECN, the information-exchange process is coordinated in cross-border mergers. The CC seeks to render decisions that are in line with the merger control practice of the European Commission.

In the recent *UAB SCA Packaging* case, the court, having confirmed the Council’s approval to implement a concentration, expressly stated that the CC, in rendering its decision, had reasonably relied on a practice of EU institutions. The court went on to state that the fact that relevant decisions were made prior to Lithuania’s accession to the EU did not eliminate the state’s obligations to follow the established judicial and
administrative practice in the relevant fields. A unified position on economic matters is a cornerstone of EU membership.\(^{15}\)

In the international arena, the CC also maintains close links with other competition authorities through the International Competition Network. In the context of growing globalisation and with regard to cooperation with other jurisdictions in reviewing cross-border mergers in 2010, the CC entered into a bilateral cooperation agreement with the Agency of the Republic of Kazakhstan for Competition Protection; another agreement on cooperation between Lithuania and the Antimonopoly Committee of Ukraine was concluded in 1997. However, these agreements have not yet been implemented in practice in any cross-border merger case, and so far there has been no exchange of information between the relevant competition authorities.

The CC also takes economic efficiencies into account in the review process. Pursuant to the Guidelines on the Establishment of a Dominant Position adopted by the CC,\(^{16}\) when assessing the effects of a concentration on the relevant market the CC will also take into account any well-grounded explanations from the undertakings concerning any efficiencies that are beneficial to consumers. However, neither the Guidelines nor practice provide much guidance, and cases that do contain such guidance are extremely rare.

Finally, the CC shares its best practices and expertise with foreign colleagues. In particular, on 4 April 2014, the Ministry of International Cooperation (Egypt) announced that a consortium of German and Lithuanian competition authorities has been selected to implement the EU Twinning project on building the capacity of the Egyptian Competition Authority. In addition, representatives from the Georgian Competition Agency took part in a study visit to the CC in December 2014.

V  OUTLOOK AND CONCLUSIONS

Overall, the implementation of a concentration without prior notification to the CC is considered a serious violation of the Law on Competition, regardless of whether competition has been restricted because of the implementation of the concentration.

There were no major amendments to the Lithuanian merger control regime in 2014.

\(^{15}\) Decision of the Vilnius Regional Administrative Court from 16 December 2010 in administrative case No. I-1546-426/2010.

\(^{16}\) Lithuanian Official Gazette, 2000, No. 52: 1516.
I INTRODUCTION

Merger control supervision is delegated by virtue of law to the Commission for Protection of Competition (Commission). The Commission is an independent autonomous state authority with the capacity of a legal entity. It consists of a president, four members and an expert department. The Commission:

a determines rules and measures for the protection of competition and measures for the establishment of effective competition;

b gives its opinion on draft laws and other acts that regulate issues related to economic activity, which may influence competition in the market;

c either upon a request from Parliament, the government, other state authorities or undertakings, or ex officio, the Commission shall provide expert opinions regarding issues in the areas of competition policy, protection of competition in the market and the awarding of state aid; and

d cooperates with other state authorities regarding issues related to the protection of competition, and exchanges any necessary data and information for such purpose.

The Commission is also in charge of international cooperation related to the implementation of Macedonia’s international obligations, and participates in the implementation of projects in cooperation with both international authorities and the authorities of the European Union.

In cases of merger control, a system of pre-merger notification applies.

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It should be noted that the Law on Protection of Competition also applies to foreign-to-foreign transactions if any of the thresholds stated below are met.\(^3\)

Under the Law, a pre-merger notification must be submitted if:\(^4\)

a the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, on the world market exceeds €10 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts and gained in the business year preceding the concentration, and where at least one participant is registered in Macedonia (i.e., has a legal presence in Macedonia either directly or through a subsidiary);

b the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, in Macedonia exceeds €2.5 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts and gained in the business year preceding the concentration; or

c the market share of one of the participants in the concentration is more than 40 per cent, or the aggregate market share of the participants in the concentration is more than 60 per cent in the year preceding the concentration.

The aggregate turnover consists of the revenues from the sale of goods produced during the regular operation of an undertaking, as well as the revenues from services that the undertaking provides within its regular operations, after deducting sales rebates, value added tax and other public taxes directly related to the turnover. If one of the participants is an associated undertaking, then the aggregate turnover on the level of a group of undertakings will be taken into consideration, but revenues generated from the sale of goods or the provision of services, or both, among such undertakings shall not be taken into consideration.\(^5\)

In the case of an asset deal, regardless of whether the parts are established as separate legal entities, only the revenue from the assets subject to acquisition shall be taken into consideration when calculating the turnover generated by the undertaking selling such assets.

Two or more transactions carried out between the same entities or undertakings during a two-year period shall be deemed as one and the same concentration performed on the date of the last transaction.

The aggregate turnover of banks, saving houses and other financial institutions shall be determined according to the aggregate turnover generated from their day-to-day operations; in the case of insurance companies, the aggregate turnover shall be determined according to the value of the gross calculated premiums of the participants for the business year preceding the concentration.

The law does not set a specific term for filing a notification, but provides that the participants in the concentration shall be obliged to submit a notification to the Commission prior to its implementation and following the conclusion of the merger agreement: that is, the announcement of a public bid for the purchase or acquisition of a majority participation in the basic capital of an undertaking.

\(^3\) Article 3 of the Law on Protection of Competition.

\(^4\) Article 14(1) of the Law on Protection of Competition.

\(^5\) Article 16 of the Law on Protection of Competition.
The participants may notify the Commission regarding their serious intention to conclude an agreement (including, but not limited to, a letter of intent, term sheet or similar) or, in the case of a public bid, when they have publicly stated their intention to participate therein, provided that such agreement would result in the creation of a concentration in accordance with the law.

Creation of a joint venture that carries out the activities of an autonomous economic entity on a long-term basis shall also be deemed to be a concentration.

The Commission shall especially take into consideration the following with regard to a concentration:\(^6\)

\[a\] the need to maintain and develop effective competition on the market or a substantial part of the market, especially in terms of the structure of all markets concerned and the existence of competitors or potential future competitors having a head office both in and outside Macedonia; and

\[b\] the market position of the undertakings concerned and their economic and financial power, the market supply and the alternatives available to suppliers and users for the purpose of market supply, as well as their access to the supply (i.e., the markets, legal and other barriers to enter into and exit from the market, supply and demand trends for the relevant goods or services, the interests of consumers and any technological and economic developments), provided that the concentration is of benefit to consumers and does not represent an obstacle for the development of competition.

The law stipulates relevant exemptions. Therefore, concentrations of undertakings shall not be deemed concentrations when:

\[a\] banks, saving houses and other financial institutions or insurance companies whose day-to-day activities include legal activities and trading with securities temporarily acquire securities with an intention to resell them within a period of one year as of the moment of their acquisition, and provided that the voting rights arising from those securities are not exercised with the intention of influencing the competitive behaviour of the undertaking on the market. On a special request, the Commission may extend this one-year period, provided that the acquirer proves that it could not sell the securities due to justified reasons. No appeal or lawsuit for the initiation of an administrative dispute shall be allowed against this conclusion;

\[b\] control is conducted by a representative of the company under a bankruptcy procedure or liquidation procedure at undertakings established outside Macedonia by persons performing a corresponding function in accordance with the legislation under which the undertaking has been established; or

\[c\] the investment funds acquire capital interest in undertakings, provided that they exercise the acquired rights only with the aim of maintaining the full value of their investment and provided that they do not influence the competitive behaviour of the undertaking on the market.

\(^6\) Article 17 of the Law on Protection of Competition.
The law provides for misdemeanour liability in cases of implementation prior to a clearance decision or in cases of failure to notify. In such cases, the fortifying party may be punished by the Commission with a monetary fine of up to 10 per cent of its worldwide turnover.

During 2014, no specific by-laws were adopted by the Commission. Nor have any significant amendments been made to the Law on Protection of Competition.

II YEAR IN REVIEW

As published on the Commission’s website,\(^7\) in 2014 the Commission has cleared the first joint venture established in Macedonia, which was in the tobacco industry.

In addition, the trend of notifying concentrations in which individuals are acquirers has developed during the past year. There have also been many acquisitions by local players in the market for providing services of transfer of audiovisual content to end-users and providing broadband internet services, many notifications in telecommunication sector, and notified concentrations in the local banking sector. In addition, the Commission has acted on and adopted decisions in foreign-to-foreign mergers.

At the time of writing, the Commission’s report for 2014 has still not been published. However, pursuant to the 2013 report, 18 notifications were filed, 17 of which have been cleared by the Commission. In 2014, based on information available on the Commission’s website, the Commission has adopted decisions on 30 notified concentrations.

During the first months of 2015, the Commission began a Phase II investigation in one telecommunication case. It also entered into a memorandum for cooperation with the Ministry of Interior to develop mutual programmes and projects; exchange methodologies, information and experience; organise seminars; prepare regulations; and organise training sessions.

The Commission has also established the practice that, in cases of cancelled or terminated transactions or concentrations that have been notified to and cleared by the Commission, the notifying party shall request an annulment of the decision. Otherwise, the market share of the target would still be attributed to that notifying party.

III THE MERGER CONTROL REGIME

No concentration that meets any of the thresholds set by the law may be implemented before it is approved by the Commission, or before the relevant deadlines for the Commission to issue a decision have passed.

The Commission should decide upon a notification within 25 business days from the date of receipt of a complete notification (Phase I). Phase I may be extended for an additional 10 working days if the notified concentration is to be cleared subject to conditions and if the parties are willing to undertake commitments.

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\(^7\) www.kzk.gov.mk.
In the case of a disputable concentration, the Commission will open an in-depth assessment of a concentration (Phase II). This applies in cases where a concentration may significantly prevent, restrict or distort competition. The term for a Phase II investigation is 90 working days from the day of initiation of an in-depth assessment. The Commission is obliged to either clear a concentration conditionally or unconditionally, or prohibit the concentration. This investigation term can be extended to 105 working days.

Each of the above deadlines can be extended for up to an additional 20 working days by the Commission with the agreement of the participants in the concentration.

However, the statutory deadlines are not binding on the Commission when, as a result of circumstances for which one of the participants is responsible, the Commission has to request additional information or conduct inspections.

If the Commission does not make any decision within the set deadlines in any of the phases, the concentration is considered to be compliant with the law.

A concentration cannot be conducted prior to the submission of a notification to the Commission or, following the submission of a notification, until a decision is adopted that the concentration is in accordance with the law or the participants have undertaken relevant commitments accepted by the Commission, or if the Commission fails to meet the deadline for clearance of a transaction within the statutory deadlines.

However, there will be no suspension of a public bid for the purchase of securities or a series of transactions of securities, including ones that are convertible into other securities intended for trading on the market in accordance with the law, if a notification is submitted without any delay to the Commission; and the acquirer of the securities does not exercise the voting rights on the basis of these securities, or does so only to the extent necessary for maintaining the full value of its investment, and on the basis of a decision for exemption from the obligations.

Namely, on the request of a party that has submitted a notification, the Commission may decide to allow an exemption from the suspension obligation. The request must be elaborated. When deciding upon such request for exemption, the Commission shall, inter alia, take into consideration the effects of the suspension of a concentration over one or more undertakings, participants or over a third party, as well as the threat to competition caused by the concentration.

The exemption may be conditioned by requirements and obligations imposed for the purpose of ensuring effective competition. Such exemption may be required and allowed at any time, either prior to a notification or following a transaction by public bid for the purchase of securities or a series of transactions of securities.

The decision regarding an exemption shall be issued by the Commission within 15 calendar days as of the date of receipt of the request along with the required documents.

The law provides for a very detailed procedure in cases where the President of the Commission does not issue a decision within a given term, including involvement of State Administrative Inspectorate and other authorities. In any case, if the President does not adopt a decision within the given time frame, the requesting party may initiate an administrative dispute before the competent court. The procedure in the Administrative Court shall be urgent.

Regarding examination of the case files, Article 56 of the Law on Protection of Competition provides that only the parties to the procedure before the Commission shall have the right to examine the case files and to make, at their own expense, transcriptions
or copies of the whole case or certain documents. Therefore, the Law on Protection of
Competition does not provide for the right of third parties to have sight of the files.

A request for examination should be in made in written form. The President
of the Commission should approve such request through a separate administrative act
(conclusion). In the conclusion, the President shall determine the date and hour of the
examination, which should be performed within a period of 15 calendar days as of the
date of receipt of the request for the examination of the files.

In accordance with the Law on Protection of Competition, the participants in
the procedure shall not be entitled to perform an examination, transcription or copy of
the draft decisions of the Commission, the minutes, or audio and audiovisual recordings
of Commission sessions, any internal instructions and comments about the case, any
correspondence between the Commission and the European Commission or the other
institutions of the European Union, or other documents that constitute a business or
official secret.

‘Business secrets’ shall in particular mean something that, by law or other
regulations, is determined to be a business secret; and that constitutes a business secret
when the Commission accepts such classification.

The Commission shall accept the classification of data as a business secret provided
that the data have economic or market value, and their disclosure or use may lead to the
economic advantage of the other undertakings.

The following criteria shall in particular apply to the evaluation of the data:

\[ \begin{align*}
  a & \text{ the extent to which the data is known outside the undertaking;} \\
  b & \text{ the extent to which measures for the protection of data secrecy have been taken in}
       \text{ the undertaking; and} \\
  c & \text{ the value of the data for the undertaking and its competitors.}
\end{align*} \]

The following, as a rule, shall not be deemed a business secret in terms of the provisions
of the Law:

\[ \begin{align*}
  a & \text{ publicly available data: that is, data that are publicly announced on the basis of}
       \text{ another regulation or decision of the managing bodies of the undertaking;} \\
  b & \text{ data older than five years, regardless of whether they have been considered a}
       \text{ business secret in the past;} \\
  c & \text{ the revenues contained in the undertaking’s annual financial and statistical}
       \text{ reports that do not constitute a business secret because they have been publicly}
       \text{ announced; and} \\
  d & \text{ any data and documents being of decisive importance for the decisions of the}
       \text{ Commission.}
\end{align*} \]

When submitting data classified as a business secret, the undertaking shall be obliged
to justify such classification of the data as a business secret by giving objective reasons.

No legal remedy is allowed against a conclusion to reject the request for
examination of the acts and files.

The Law on Protection of Competition allows for interested parties to provide
their comments, opinions and remarks in relation to a concentration within the time
period determined by the Commission, which is usually 10 calendar days from the day of
announcement of the summary of a notification on the Commission’s website. However,
it does not provide third parties with a right to challenge a Commission's decision on a concentration; only the parties to the procedure may challenge the Commission's decision on a merger.

The Commission's decisions are final. Lawsuits to initiate an administrative dispute before an administrative court must be submitted within a period of 30 calendar days from the date of receipt of the decision, but such suit shall not postpone the enforcement of the decision.

Mergers are supervised only by the Commission; no other authority may conduct a concurrent review of a merger. Decisions of the Commission may be subject to a review by the Administrative Court under the terms and conditions further provided in this chapter. However, such judicial review does not suspend the enforceability of the Commission's decision.

IV OTHER STRATEGIC CONSIDERATIONS

Based on current experience, in cases of multi-jurisdictional merger transactions and notifications that may involve the Macedonian market, it is important to note that prior research of the fulfilment of the relevant thresholds should be undertaken. This is especially important due to the formality of the thresholds, the absence of the possibility of a self-assessment of the competitive influence of a certain transaction if the formal thresholds are met, the relatively low values of the turnovers set as thresholds and the market size.

V OUTLOOK AND CONCLUSIONS

The Macedonian merger control regime may be considered to be complete and detailed. The law and related by-laws and guidelines follow the relevant rules of the European Union and European Commission. With regard to mergers, notwithstanding that Macedonian practice is still developing, the Commission has established relevant practices in almost all important areas, including in the imposition and practical implementation of behavioural remedies. Therefore, in our view, the coming year will bring further practical experience and improvements in the overall practical development of our merger regime environment, not only with regard to the Commission's actions, but also with the expert contribution of notifying parties and their counsel.
Chapter 23

MALAYSIA

Jeff Leong

I INTRODUCTION

Takeover and merger activities in Malaysia are governed by provisions contained in Division 2 Part VI of the Capital Markets and Services Act 2007 (CMSA 2007), which took effect on 1 April 2010. Along with this new Division 2 Part VI of the CMSA 2007, and on the recommendation of the Securities Commission Malaysia (SC), in order to accommodate the development of the capital market during the past 12 years, the Minister of Finance introduced the Malaysian Code on Take-Overs and Mergers 2010 (2010 Code) on 15 December 2010 to replace the Code on Take-overs and Mergers 1998. However, neither the CMSA 2007 nor the 2010 Code provide for a merger control regime in Malaysia.

The SC is the regulatory authority established to regulate takeovers and mergers of companies in accordance with the CMSA 2007 and the 2010 Code. In its administration of the 2010 Code, the SC may from time to time issue rulings pertaining to the interpretation of the 2010 Code, and on the practice and conduct of persons involved in or affected by a takeover offer, merger or compulsory acquisition. As such, the SC issued the Practice Notes on the 2010 Code to replace the practice notes that interpreted the 1998 Code. The SC has also issued the Guidelines on Contents of Applications relating to Take-overs and Mergers to facilitate the submission of applications to the SC pursuant to the CMSA 2007 and the 2010 Code.

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2 Section 217(1) of the CMSA 2007.
3 Section 15(1)(d) of the Securities Commission Act 1993 empowers the SC to regulate the takeovers and mergers of companies; Section 220 of the CMSA 2007 empowers the SC to take actions in cases of non-compliance with the 2010 Code.
4 Section 377 of the CMSA 2007.
Essentially, the review of a proposed merger by the SC focuses merely on the compliance with the provisions of the takeover laws and regulations in Malaysia under the CMSA 2007 and the 2010 Code.

The Malaysian Competition Act 2010 (CA 2010) was introduced following the Prime Minister’s unveiling of the new economic model in March 2010, which aims to double Malaysia’s per capita income by 2020 by transforming the Malaysian economy through eight strategic reform initiatives, including a programme of liberalisation and deregulation to promote a competitive domestic economy.

The CA 2010, which came into effect on 1 January 2012, applies to all commercial activities undertaken within Malaysia and those outside of Malaysia that have an effect on competition in the Malaysian market, save for commercial activity regulated under the Communications and Multimedia Commission Act 1998, the Energy Commission Act 2001 and the Petroleum Development Act 1974, as well as the Petroleum Regulations 1974 (insofar as the commercial activities regulated under these pieces of legislation are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore Malaysia).

Competition law plays an important part in the context of merger deals and transactions as it attempts to bring about the benefits of competition by tackling barriers to entry in the form of cartels, abuse of a dominant position and anti-competitive mergers. Most countries have incorporated a merger control regime in the context of competition law, and the competition commission will be entrusted with the role of administering merger control. However, contrary to other jurisdictions and as a latecomer to competition law, Malaysia implemented the CA 2010 with no express provisions for merger control provisions. The CA 2010 focuses purely on anti-competitive agreements and abuses of dominant position.

The Malaysia Competition Commission (MyCC) was established as an independent body to enforce the CA 2010. It falls within the ambit of the Ministry of Domestic Trade, Co-Operatives and Consumerism and is chaired by the former Chief Judge of Malaya, Tan Sri Dato’ Seri Siti Norma Yaakob. The MyCC is made up of nine people and is currently supported by an executive arm of seven officers. The main role of the MyCC is to protect the competitive process for the benefit of businesses, consumers and the economy.

Despite the absence of merger control provisions, as well as mandatory or optional reporting or filing to the MyCC for a clearance decision on a merger transaction, the MyCC has publicly stated that this does not prevent the MyCC from investigating collaborative activities arising from mergers, and to determine whether such activities are anti-competitive.

Nonetheless, merger parties are expected or encouraged to undertake self-assessments of their business conduct, procedures, management and control systems to ensure that a proposed merger is in compliance with the CA 2010. The MyCC has expressly stated that it will not entertain any application for guidance or pre-consultation on the possible anti-competitive effects of a merger transaction. Accordingly, parties who

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5 Section 3 of the Competition Commission Act 2010.
intend to undertake a merger will have to bear the antitrust risk. This is an evergreen risk, as the transaction is subject to the possibility of an investigation by the MyCC at any time.

II YEAR IN REVIEW

In view of the fact that there is no merger control review in Malaysia, merger deals sealed in Malaysia have not been scrutinised by any authorities in the context of competition or antitrust law.

Based on analysis by Thomson Financial, Institute of Mergers, Acquisition and Alliances, the deal volume of the merger and acquisition market in Malaysia dropped to US$20 billion in 2013 from US$23.5 billion in 2012, although the total number of deals remained at an approximate total of 600 deals in both years.\(^6\) In the first half of 2014, the SC considered 71 submissions under the 2010 Code, and one application for acquisition/reverse takeovers and restructurings was approved.\(^7\) The only types of submission to the SC consist of clearance of offer documents, exemptions from mandatory offer obligations, clearance of independent advice circulars, eligibility to act as independent adviser for takeover proposals, and other ancillary applications or related decisions. None of these submissions are in relation to a merger control review.

A number of notable deals were successfully clinched in the active Malaysian market recently.

In early 2013, Malaysian Resources Corp Bhd sealed a cash and share swap deal worth 729 million ringgit with Gapurna Sdn Bhd. Under this deal, Gapurna Sdn Bhd will gain a 16.8 per cent equity stake in Malaysian Resources Corp Bhd, and Gapurna Sdn Bhd’s Chief Executive Officer will be appointed as the new managing director of Malaysian Resources Corp Bhd.

Another deal where the parties opted for a share swap instead of merger was the share swap between Tune Air Sdn Bhd and Khazanah Nasional Berhad, which is the largest shareholder of Malaysia Airlines, in the third quarter of 2011. In this share exchange arrangement, the state investment arm, Khazanah Nasional Berhad, took a 10 per cent stake in the leading low-cost courier AirAsia, while Tune Air Sdn Bhd, the investment vehicle of AirAsia, took a 20.5 per cent stake in Malaysia Airlines.

However, due to a lack of support from shareholders, the two companies agreed to call off the cross-holding of shares and to revert to the original major shareholding structure of both companies after only eight months, as this controversial share swap, which was crafted for the benefit of the country’s aviation industry, had failed to revive Malaysia Airlines. Nevertheless, after the termination of this share swap, the collaboration pact between these two airlines is not entirely determined; the parties have entered into supplementary agreements to jointly explore and set up a special purpose vehicle for procurement and joint venture companies to provide aircraft component maintenance support as well as repair services with the aim of saving costs.

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\(^7\) Capital Market Statistics, SC Scorecard & Statistics of Submissions Approved by the SC in Q1-Q2, 2014.
The investment banking and broking industry in Malaysia has also taken a new turn in recent years with a few merger activities to boost regional footprints. The smaller banking groups are being seen tying up with local and worldwide presences.

A successful merger took place between RHB Investment Bank Bhd (RHB) and OSK Investment Bank Bhd in April 2013. With this merger, RHB became the largest stockbroker and investment bank in Malaysia by assets. The 1.95 billion ringgit merger deal also marks RHB’s entrance into Indonesia, Hong Kong and Cambodia, and will strengthen its positions in Singapore and Thailand. It was reported that as at August 2013, RHB employed approximately 3,600 staff, its shareholders’ fund amounted to more than 2 billion ringgit, and that it had a comprehensive network of close to 100 offices in seven countries across the ASEAN regional block and Hong Kong.

Another major deal was the completion of the acquisition by Affin Holdings Bhd of the investment banking, asset management and futures dealing assets of Hwang-DBS (M) Bhd for 1.36 billion ringgit in April 2014. This acquisition, which is set to boost the stockbroking market share of Affin Holdings Bhd, involves the taking up of a 100 per cent stake in Hwang-DBS Investment Bhd for 1.09 billion ringgit, a 70 per cent stake in Hwang Investment Management Bhd and a 49 per cent stake in Asian Islamic Investment Management Sdn Bhd for 262 million ringgit, and a 100 per cent stake in HDM Futures Sdn Bhd for 13 million ringgit. It is expected that the merged entity will become the second-largest brokerage house in Malaysia based on combined trade value and volume. It will also emerge as a top five asset manager in Malaysia based on assets under management.

However, the merger activities in the investment banking and broking industry in Malaysia took a downturn in the second half of 2014 and the first quarter of 2015. Reportedly, a proposed mega-banking merger of three financial institutions in Malaysia, namely CIMB Group Holdings Berhad, RHB Capital Berhad and Malaysia Building Society Berhad, was called off earlier in 2015 due to economic conditions.

Other notable deals that were successfully clinched in the active Malaysian market recently are as follows:

In January 2014, Prudential Financial Inc and Bank Simpanan Nasional (BSN) completed their purchase of a 100 per cent stake in Uni.Asia Life Assurance Berhad (UAL) for a total cash consideration of 518 million ringgit. BSN, a statutory body incorporated in 1974 under the purview of the Ministry of Finance, is a government-owned bank in Malaysia. Following this acquisition, UAL will have the opportunity to develop customised solutions for BSN’s customers and develop a more integrated bancassurance platform that fully leverages BSN’s distribution network and customer base so as to transform BSN into one of Malaysia’s leading conventional bancassurance providers.

In February 2014, SapuraKencana Petroleum Bhd, through its wholly-owned subsidiary, SapuraKencana Energy Inc, acquired the entire equity interest in Newfield Malaysia Holdings Inc for US$895.9 million. Following this acquisition, SapuraKencana Petroleum Bhd would hold all the shares of Newfield Malaysia Holdings Inc and its subsidiaries, including their equity interest in eight production-sharing contracts and one alliance contract in Peninsular Malaysia, Sabah and Sarawak.

In October 2014, the cash-rich plantation conglomerate, Felda Global Ventures Holdings Berhad (Felda), completed an acquisition of a 100 per cent equity interest of Asian Plantations Ltd, a Singapore-based plantation company that is listed on
the Alternative Investment Market of the London Stock Exchange (AIM), for a cash consideration of 568 million ringgit. Pursuant thereto, Felda has delisted Asian Plantations Limited from the AIM. With this acquisition, Asian Plantations Ltd, which owns 24,622 hectares of oil palm plantations through its five wholly-owned estates in Miri and Bintulu, Sarawak, will increase Felda’s landbank by 7 per cent and will thus boost crude palm oil production and introduce a younger crop profile.

In January 2015, Malaysia Airports Holdings Bhd (MAHB) acquired a 40 per cent equity stake in two Turkish airports, namely Istanbul Sabiha Gokcen International Airport Investment Development and Operation Inc and LGM Airport Operations Trade and Tourism Inc, for €279.23 million. It is believed that, following these acquisitions, the Sabiha Gokcen International Airport, which is owned by MAHB, will be a launch pad for MAHB to expand into global markets due to its strategic location covering both Asia and Europe.

The most recent deal was the acquisition by Sime Darby Bhd, the world’s top oil palm planter by land size, of all the shares in New Britain Palm Oil Ltd, a company listed in London Stock Exchange and Papua New Guinea, at an approximate consideration of US$1.74 billion. This acquisition added another 135,000 hectares of land in Papua New Guinea, bringing Sime Darby Bhd’s total land bank to almost 1 million hectares spread across five countries. As a result of this acquisition, New Britain Palm Oil Ltd was delisted from the London Stock Exchange effective 25 March 2015.

Although there have recently been various merger transactions, as mentioned above, the only transaction that triggered an investigation by the MyCC was the share swap deal between Malaysia Airlines and AirAsia – and that was not even a merger transaction.

The MyCC acted on its own accord to initiate this investigation in early 2012 due to public outcry over the collaboration arrangement. A letter of complaint was also received by the MyCC on 24 February 2012 from the Federation of Malaysian Consumers Association. It is believed that one reason behind the investigation was the amount of public interest in this share swap deal between two leading airlines in Malaysia, as evidenced by the concerns raised by Parliament, trade unions and the Malaysian public. The MyCC’s investigation focused on whether the deal involves an abuse of monopoly or the formation of a cartel in the country’s aviation industry.

On 31 March 2014, the MyCC announced that both Malaysia Airlines and AirAsia have infringed Section 4(2)(b) of the CA 2010 by entering into a collaboration arrangement that has the clear objective of sharing the market in relation to aviation services. The MyCC is satisfied that the collaboration arrangement allows both Malaysia Airlines and AirAsia to operate freely within separate market segments, and provides both airlines the freedom to impose higher prices to maximise their commercial revenue and profitability without any competition. Accordingly, the MyCC imposed a financial penalty of 10 million ringgit on Malaysia Airlines and AirAsia respectively. Following the decision, both airlines have appealed to the Competition Appeal Tribunal. This appeal is currently at the hearing stage.

Another notable 2014 deal was the acquisition by Australia’s SeekAsia Ltd (SEEK) of the entire online employment businesses of Malaysia-based job portal JobStreet Corporation Bhd (JobStreet), one of the largest online employment companies in the South-East Asia region, at a purchase price of 1.89 billion ringgit. However, this
deal was subject to regulatory approval in Singapore and the approval of JobStreet’s shareholders, but not the MyCC’s purview. The Competition Commission of Singapore (CCS) found that this acquisition, which includes the acquisition of JobStreet.com Pte Ltd (JobStreet Singapore), will substantially lessen competition in the market for online recruitment advertising services in Singapore as it brings together the top two online recruitment advertising service providers in Singapore, JobsDB.com.sg (being SEEK’s platform) and JobsStreet.com.sg (being JobStreet’s platform). Nonetheless, the CCS, in November 2014, granted approval of the merger conditioned upon the implementation of and compliance with the behavioural and divestiture commitments offered by SEEK and accepted by the CCS after conducting market consultations.

According to the then Chief Executive Officer of the MyCC, Shila Dorai Raj, the fact that the MyCC ‘is not empowered to examine mergers and acquisitions’ does not prevent it from checking the collaborative activities arising after mergers and whether those activities are anti-competitive. As at May 2015, it was reported that the MyCC has investigated 51 cases; of these, 18 have been solved or closed.

The then Minister of Domestic Trade, Cooperatives and Consumerism, Datuk Seri Ismail Sabri Yaakub, offered an assurance that there will be no influence by any parties, including the government, on any investigation or decision made by the MyCC, as the MyCC is an independent body.

III THE MERGER CONTROL REGIME

There are no express and comprehensive rules and regulations on merger control in Malaysia. Parties who wish to undertake a merger should nevertheless comply with the provisions in the CA 2010.

Section 4 of the CA 2010 prohibits anti-competitive agreements, while Section 10 prohibits the abuse of a dominant position. The MyCC is empowered to probe and enforce the general anti-competitive provisions of the CA 2010, which means that the MyCC may conduct market reviews or an investigation whenever it is of a view that a merger may lead to a monopoly or abuse of power.

In moving the Bill, the then Minister for Domestic Trade, Co-operatives and Consumerism, Datuk Seri Ismail Sabri Yaakub, outlined that:

This Bill does not contain substantive provisions regulating the control over merger and acquisition activities. This was decided upon after taking into account input from agencies, such as the Securities Commission Malaysia and the Central Bank of Malaysia, in encouraging the development of capital markets in Malaysia. This is also in line with the national policy of encouraging mergers and acquisitions among businesses in order to strengthen the domestic economy and to advance global corporate competitiveness. This should not be a major concern at the moment as our studies show that countries such as the European Union only introduced merger and acquisition control thirty years after their competition law was first enacted. Likewise, Indonesia only did so ten years afterward and Singapore, three years afterward.⁸

In short, the decision not to regulate control over mergers and acquisitions in light of the CA 2010 was motivated partly by the government’s policy of encouraging mergers to strengthen the domestic economy and develop global competition.

Perhaps it can be inferred that this is one of the government’s means of protecting or assisting local firms to compete with more established foreign firms, particularly in sectors perceived as being ‘too big to be allowed to fail’, such as Malaysia Airlines, which the government has repeatedly rescued using national funds. This in itself is an ominous indicator of the tradition of interventionist government industrial policy, which entrenches the expectation that the government will be on hand to make up for the shortcomings of major domestic corporations.

The absence of merger regulations was justified as follows: ‘Although this Bill does not restrict mergers and takeovers, we will regulate what happens after the merger or acquisition to ensure that if there is monopoly power arising, it is not abused by the company concerned.’

From the above, it is clear that the CA 2010 does not serve as a pre-emptive measure against the possible abuse of competition.

It has been suggested that, in the absence of an express merger control regime, the MyCC or any affected party could challenge a proposed merger on the basis that it is a horizontal or vertical agreement that has ‘the effect of significantly preventing, restricting or distorting competition’ under Section 4 of the CA 2010. It should then be possible to trigger the MyCC’s power to give any direction it deems appropriate, including halting the merger.

Nonetheless, the MyCC may grant ‘relief of liability’ in the form of an individual exemption for the infringement of anti-competitive agreement prohibition if, in the opinion of the MyCC:

\begin{itemize}
\item[a] there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
\item[b] the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
\item[c] the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
\item[d] the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.
\end{itemize}

The onus of proving these conditions conjunctively for the relief of liability lies on the parties undertaking the anti-competitive merger.

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9 Id, p. 149.
10 Professor Ian McEwin, managing partner of Competition Consulting Asia LLP.
11 Section 40 of the CA 2010.
12 Section 6 of the CA 2010.
13 Section 5 of the CA 2010.
For instance, Nestlé Sdn Bhd applied to the MyCC for an individual exemption to exclude its pricing policy, called the Brand Equity Protection Policy, from the infringement definition of the CA 2010. However, after a series of discussions with the MyCC, Nestlé withdrew its application. The major concern of the MyCC was the element of resale price maintenance, which prevents resellers from setting their prices independently, and which could potentially lead to increased prices for consumers. Therefore, as requested by the MyCC, Nestlé agreed to comply in dismantling the said pricing policy and issued notices to the trade on the same.

Alternatively, a proposed merger could also be challenged under Section 10 of the CA 2010 if the merged entity abuses its dominant position. Contrary to the outright legislative prohibition on anti-competitive mergers, the main difficulty in this approach is that the party opposing the merger would have to prove the anti-competitive effects instead of the enterprises having to justify the merger.

Pursuant to the CA 2010, there are three ways in which an investigation can be initiated by the MyCC: on the MyCC’s own initiative, on the direction of the Minister or following a complaint by any affected party. Hence, any person or enterprise who believes that an enterprise is engaging in an anti-competitive merger may lodge a complaint to the MyCC to investigate whether such merger infringes the CA 2010.

It is also noteworthy that the MyCC Guidelines on Complaint Procedures are not exhaustive and do not set a limit on the investigation and enforcement activities of the MyCC. The CA 2010 confers extensive investigation powers on the MyCC, as it provides the officers of the MyCC investigating any offence under the CA 2010 with all or any of the powers of a police officer in relation to police investigations in seizable cases as provided for under the Criminal Procedure Code.

The Competition Appeal Tribunal was established pursuant to the CA 2010 as a specialised court to hear appeals against a decision made by the MyCC, whether it is a direction, finding of non-infringement or decision of infringement. Any enterprise or person whose interest is directly or indirectly affected by any decision made by the MyCC can file a notice of appeal with the Competition Appeal Tribunal, whose decision shall be ‘final and binding on the parties to the appeal’. An appeal must be filed within 30 days from the date of such decision.

Pending the appeal, the MyCC’s decision will still be binding and enforceable until and unless the Competition Appeal Tribunal grants a stay of the decision. On appeal, the Competition Appeal Tribunal may confirm, vary or set aside decisions of the MyCC, remit the matter to the MyCC for further consideration or make any other

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14 Section 14 of the CA 2010.
15 Section 15 of the CA 2010.
16 Section 17(2) of the CA 2010.
17 Section 44 of the CA 2010.
18 Section 51 of the CA 2010.
19 Section 51(2) of the CA 2010; and the MyCC’s ‘Competition Act 2010 – Handbook for the General Public’, July 2012.
20 Section 53(1) of the CA 2010.
decisions that the MyCC itself could have made.\textsuperscript{21} A decision made by the Competition Appeal Tribunal may, with the leave of the High Court, be enforced in the same manner as a judgment or order to the same effect.\textsuperscript{22} The decision by the Competition Appeal Tribunal is final and binding on the parties to the appeal.\textsuperscript{23}

The CA 2010 also allows an enterprise or person whose interests are directly or indirectly affected by the enterprises that have engaged in the prohibited anti-competitive practices to take private action in a court of law.\textsuperscript{24}

IV OTHER STRATEGIC CONSIDERATIONS

The CA 2010 does not follow its European ancestors. In Malaysia, any commercial activity that has an effect on competition in any market in Malaysia, regardless of where the anti-competition action is implemented, will come under the purview of the CA 2010. This is similar to the approach taken by the United States, which adopts the ‘effect’ doctrine in its competition law regime. This ‘effect’ doctrine captures any behaviour that has an effect on the market.

On the other hand, the EU adopts the ‘implementation’ doctrine, which holds that the EU has jurisdiction if the anti-competitive action is implemented within the EU. In such instance, an enterprise will be subjected to the EU competition law regime as long as the anti-competition action takes place within the EU market.

Therefore, it seems clear that a Malaysian enterprise can be subject to foreign competition regimes, while a foreign enterprise can also be subject to the CA 2010.

Despite having stated in its guidelines that relevant economic markets can extend to beyond a single country, the MyCC does not clarify further on how it will consider and deal with these foreign competitors, or explain the requisite standard of effect the behaviour of these foreign competitors must have on a market in Malaysia.

Notwithstanding the lack of merger control regime in Malaysia, perhaps it is comforting to note that the SC is obliged under the 2010 Code to take into account ‘the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market’ while administering the Code and exercising its powers under the CMSA 2007.\textsuperscript{25} It is arguable, therefore, that the SC may possibly go one step beyond to scrutinise the anti-competitive effect in addition to reviewing a proposed merger solely in the context of compliance with the 2010 Code and the CMSA 2007. However, whether the SC will adopt such radical approach remains to be seen.

\begin{footnotesize}
\begin{enumerate}
\item Section 58(2) of the CA 2010.
\item Section 59 of the CA 2010.
\item Section 58(3) CA 2010.
\item Section 64 of the CA 2010.
\item Section 217(5) of the CMSA 2007.
\end{enumerate}
\end{footnotesize}
V OUTLOOK AND CONCLUSIONS

As Malaysian companies are looking to expand into other parts of Asia and make their mark on the world stage, we expect to see merger and acquisition activities in Malaysia continuing to rise. While Malaysian companies will still acquire other local companies to power their expansion plans, acquisitions outside of Malaysia have become a more attractive growth route for many to enhance their regional or even global standing.

Further, with the possible increase in opportunities that will be offered following the creation of the single market under the ASEAN Economic Community\(^{26}\) by the end of 2015, we expect to see more companies making cross-border forays.

TA Global Bhd’s subsidiary, Maxfine International Limited, proposes to acquire Trump International Hotel and Tower in Canada for a cash consideration of 293.71 million ringgit. The proposed acquisition is expected to be synergistic to the TA group and to further enhance its hospitality in major cities around the world.

On the other hand, Westports Holdings Bhd, the leading port operator in Malaysia, is eyeing a suitable merger and acquisition target particularly in the ASEAN region that would enable growth to the benefit of terminal operators in Malaysia. Westports had reportedly expressed interest in exploring mergers and acquisitions in India, Indonesia and Myanmar even prior to its listing in the second half of 2013.

Merger laws are a very important determinant of merger activities, but merger regulation \textit{per se} does not have an effect on merger activities. Nonetheless, one study shows that the better the quality of the law (as measured by the severity of the penalties and the notification requirements imposed on the parties), the higher the frequency of cross-border acquisitions of domestic firms, and the higher the frequency of domestic acquisitions by domestic firms.\(^{27}\)

Therefore, sound merger regulations and enforcement must be observed to promote competition by establishing controls in the merger process, and to put limits on the concentration of economic powers that will result in market dominance.

To date, there is no news regarding the incorporation of a merger control regime in the Malaysian competition law context.

Nonetheless, in view of the agreement reached between ASEAN leaders in 2007 on the establishment of the ASEAN Economic Community by the end of 2015, the ASEAN Regional Guidelines on Competition Policy, 2010 (Guidelines) have been completed by the ASEAN Experts Group on Competition. These Guidelines aim to ensure that ASEAN is a highly competitive economic region as envisaged in the ASEAN Economic Community Blueprint, in particular through the introduction of a nationwide competition policy and law by 2015.

Pursuant to Chapter 3 of the Guidelines, the coverage of the nationwide competition policy may include a prohibition on anti-competitive (horizontal and

\(^{26}\) The ASEAN Economic Community will not only transform ASEAN into a region with free movement of goods, services, investment and skilled labour as well as a freer flow of capital, but also into a highly competitive region that is fully integrated with the global economy.

\(^{27}\) ‘The Effect of Merger Laws on Merger Activity: International Evidence’, Professor Arturo Bris, Associate Professor Christos Cabolis and Venessa Janowski.
vertical) agreements, abuse of dominant position (market power), anti-competitive mergers and other restrictive trade practices.\textsuperscript{28}

Therefore, should the government intend to implement a comprehensive regulation of the marketplace in the interest of consumers and business that is in line with the competition policy of the ASEAN Economic Community, the adoption of a merger control regime in the CA 2010 is inevitable in the near future.

Meanwhile, the enforcement of CA 2010 and the administration of the MyCC should also be scrutinised. The then Chief Executive Officer of the MyCC has also announced that the MyCC will no longer adopt a soft approach to enforcement.

However, the MyCC’s focus in 2015 will be on small to medium-sized enterprises, pharmaceuticals, professional bodies and bid-rigging issues. The then Chief Executive Officer of the MyCC has declared that one of the principle aims of the MyCC is to create a culture of compliance by raising awareness of the benefits the law can bring. As such, it is disappointing to note that there is no indication that the MyCC will focus on investigating the anti-competitive effect of merger and acquisition transactions in the competition law context this year. Due to this, it is hard to envisage a competitive domestic economy in Malaysia will be achieved in the short term.

Having only recently implemented the CA 2010, competition law and policy in Malaysia remain in relative infancy. The impact of the CA 2010 is still subject to speculation and the scrutiny of many, including public and private sector enterprises, professional advisers and even consumers. It can only be a matter of time before the breadth and depth of the CA 2010 will be tested, and we await such development with interest.

\textsuperscript{28} The Guidelines, Chapter 3: Scope of Competition Policy and Law.
Chapter 24

MEXICO

Rafael Valdés Abascal and José Ángel Santiago Ábrego

I INTRODUCTION

The Federal Law of Economic Competition became effective 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 (LFCE or Competition Law) in 2014. The Federal Economic Competition Commission (CFCE or Commission) enforces the Competition Law in all areas of the economy, except the telecommunications and broadcasting sectors, where the LFCE is enforced by the Federal Telecommunications Institute (IFT).

Under the LFCE, pre-merger notification is mandatory when certain thresholds are met. Since 2014, a notified transaction must be approved by the CFCE or IFT before consummation. Under LFCE, 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 2015, pre-merger notification is required when:

\( a \) the transaction amounts to more than 1,261.8 million pesos in Mexican territory;\(^2\)

\( b \) an economic agent acquires 35 per cent or more of the assets or capital stock of an economic agent who has assets or annual sales of at least 1,261.8 million pesos; or

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2 18 million times the minimum wage for the Federal District (minimum wages).
c the acquired assets or capital stock amount to more than 588.84 million pesos,\(^3\) and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 3,364.8 million pesos.\(^4\)

The assets and sales taken into account are the ones located or originated in Mexican territory.

Failure to file can result in a fine of between 350,500 pesos\(^5\) and 5 per cent of the parties annual sales.

The LFCE provides certain exemptions to the pre-merger notification requirement. Some general examples of these are:\(^6\)

\(a\) intra-corporate transactions;

\(b\) acquisitions of capital stock by an acquirer who holds control of the company since its incorporation or when such control has already been approved by the CFCE or IFT;

\(c\) 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.

Approved transactions may not be subject to further investigation unless the approval has been based on false information, or the approval has been subject to conditions and the parties do not comply with such conditions.

Transactions not surpassing the thresholds or falling under the exemptions may not be investigated after a year following their consummation. Transactions not subject to mandatory pre-merger notification may be voluntarily reported in order to seek approval and eliminate the possibility of further investigation.

It is important to mention that the ninth transitory provision of the new Federal Law of Telecommunications and Broadcasting\(^7\) states that as long as preponderant economic agents\(^8\) exist in the telecommunications and broadcasting sectors, mergers between concessionaries (i.e., telecommunications and broadcasting operators) will not require previous authorisation from the IFT whenever:

\(a\) 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;

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\(3\) 8.4 million minimum wages.

\(4\) 48 million minimum wages.

\(5\) 5,000 minimum wages.

\(6\) It is important to bear in mind that some specific requirements need to be met to fall into each of the exemptions.

\(7\) Effective as of 13 August 2014.

\(8\) Preponderant economic agents are agents that have a national share of more than 50 per cent in the corresponding sector.
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.

This type of transaction will require a post-closing notice instead of the pre-merger notification filing.9

II YEAR IN REVIEW

In 2014, the CFCE concluded reviews of 119 pre-merger notifications with the following outcomes: 106 transactions were authorised, six transactions were conditioned to comply with undertakings and seven did not conclude their process.

In the first trimester of 2015, the CFCE concluded reviews of 48 pre-merger notifications with the following outcomes: 47 transactions were authorised and one transaction was conditioned to comply with undertakings.

Of the 2014 conditioned cases, the Continental/Veyance Technologies transaction merits mention. The approval of this merger was conditioned upon the sale of a manufacturing plant of air dampers owned by Veyance Technologies and located in San Luis Potosi, Mexico.

Continental, the buyer, is a German company dedicated to the development, production and commercialisation of components for the manufacture of cars, trucks and industrial equipment. Veyance Technologies, the target, is an American company dedicated to the production and commercialisation of, inter alia, rubber components for cars. The CFCE determined that the merger did not represent a risk to competition in, inter alia, the industrial hose market or the market of conveyor belts for textile heavy use.

However, it determined that the merger represented a risk to competition in the air dampers market. The CFCE considered that, as a consequence of this merger, the number of competitors would be reduced from three to two and that the market share of Continental would have been increased considerably in this market. In its analysis, the CFCE also determined the existence of several entry barriers.

The analysis of this merger is an example of collaboration between the competition authorities of Mexico, the United States and Canada. Such cooperation was required, as the merger had impact in the North American Free Trade Agreement region (as the assets of both companies were located in all three countries that form the region).

Another important 2014 case was the Alsea/Vips case. The approval of this merger was conditioned on the deletion of the exclusivity clauses contained in 54 leasing agreements executed with mall operators, owners and developers; and agreeing not to impose exclusivity clauses on any mall in the future.

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9 This notice must be filed before the IFT within 10 days following the closing. The IFT will have 90 days to investigate the merger and, if substantial market power in the relevant market exists, such authority will be entitled to impose measures in order to protect competition.
Alsea, the buyer, is a Mexican company that operates globally known restaurant chains. Walmart Mexico, the seller, is the largest retailer in Mexico, and was the owner of Vips, a Mexican restaurant chain.

Even though the CFCE’s analysis determined that there were no significant entry barriers in the chain restaurant market, it found that the exclusivity clauses imposed on mall operators, owners and developers were creating a barrier to entry for competitors. The CFCE determined that such exclusivity clauses did not have the objective of creating efficiencies; instead, they were meant to keep competitors out of the malls in which Alsea operates restaurants.

Another recent case worth mentioning, the Bio Pappel/Scribe case, concluded in the second trimester of 2015.

Bio Pappel, the buyer, is a Mexican company that owns several subsidiaries that produce recycled fibres for paper, and that produce and commercialise paper used for printing, writing and boxing. Scribe, the target, is a Mexican company that owns several subsidiaries that produce raw materials for paper, and that produce and commercialise paper used for printing and writing, toilet paper and facial tissues.

The CFCE determined that the merger did not represent a risk in several paper and paper-related markets. However, it determined that the merger did represent a competition risk in the cut bond paper market, as the parties are able to promote antidumping investigations into imports from countries that represent the most important import sources of this product (the United States, Finland, Indonesia and Portugal). The CFCE also considered that this industry has successfully obtained favourable resolutions in this matter in the past.

Given this, the parties offered the CFCE the following undertakings, which will remain in force for 10 years: not to request from the Economics Ministry of Mexico or any other authority any kind of antidumping investigations regarding the cut bond paper market; and not to promote, support, participate in or provide information to studies or investigations undertaken by other economic agents with the objective of requesting antidumping investigations in the cut bond paper market.

The CFCE accepted the undertakings offered by the parties and approved the merger.

The IFT’s public information on merger control activity is not as complete as that of the CFCE. Notwithstanding, it may be inferred that during 2014 and the first trimester of 2015, the IFT concluded reviews of six pre-merger notifications, and that all those notified transactions were approved. It may also be inferred that the IFT initiated four investigations in order to determine the existence of illegal mergers.\(^{10}\)

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\(^{10}\) Such investigations must be related to transactions that were not notified; transactions that were approved based on false information; or transactions that were authorised conditioned on undertakings that the parties did not comply with (see Section I, supra). All four cases subject to investigation must have been consummated transactions.
III THE MERGER CONTROL REGIME

The notification must be filed by the parties involved in the transaction (e.g., buyer and seller), although a common representative must be appointed to act on behalf of the parties before the CFCE or IFT. There are no filing fees.

The initial filing must provide, in general:

- some corporate and financial information and documents (articles of incorporation, by-laws, capital structure, corporate charts, 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.

The above information and documents, described in Article 89 of the LFCE, are commonly known as ‘basic information’.

Within a 10-business day period, the CFCE or IFT may request basic information that was not provided in the initial filing, and this must be submitted within a 10-business day period.

By reviewing the basic information, the CFCE or IFT should be able to determine whether the transaction raises competition concerns, in which case the CFCE or IFT would issue an additional information request to proceed with a deeper analysis of the concentration effects.

The additional information request may be issued and notified to the parties within a 15-business day term after the parties’ compliance with the basic information request, or after the initial filing if such basic information request was not issued. The additional information request may include any kind of economic information that the authority deems necessary to analyse the effects of the transaction (through a description of each product and its substitutes, production processes, costs, investment amounts, distribution options, suppliers, clients, prices, market shares per product, etc.), and in many cases it must be provided in a high level of detail. This information must be submitted within a 15-day term that is extendable under duly justified causes.

If the notifying parties fail to comply with the information requests, it is legally understood that the notification was not filed. However, the transaction may be notified again, in which case the procedure would start from the beginning.

The CFCE or IFT shall issue its decision within a 60-business day period after the parties’ compliance with the additional information request or their compliance with the basic information request (if an additional information request was not issued), or after the initial filing (if no basic or additional information requests were issued). In exceptionally complex cases, this 60-business day term may be extended for up to 40 additional business days. The CFCE or IFT decision may consist of approving, with or without conditions, or prohibiting the transaction. If a decision is not issued within the established time frames, the notified transaction is deemed approved. The approval of the transaction will be valid for a six-month period, which may be extended for another six months when justified causes for a delay are offered by the parties. The transaction may not be closed after the expiration of said periods, unless a new notification is filed and the CFCE or IFT issue a new approval. The parties shall provide the CFCE or IFT
with documents evidencing the transaction’s formalisation within 30 business days after closing.

During the notification process, if the concentration raises competition concerns, the CFCE or IFT shall inform the parties about these at least 10 business days before the case is included for decision in the Board of Commissioners’ agenda. No later than one business day after the case has been included for decision in the Board of Commissioners’ agenda, the parties may offer undertakings to prevent the risks found by the authority. The above-mentioned 60 or 40-business day terms will start to count again from the day the proposed undertakings are filed. Although it is rarely recommended, parties can also offer undertakings from the beginning of the process (i.e., with the initial filing), in which case these terms will not be interrupted.

The CFCE and IFT are empowered to request information from third parties who may be related to the market where the concentration takes place or has effects, and are also empowered to request information from other authorities. Such information shall be provided within a 10-business day term, which is extendable for another 10 days when justified. The CFCE frequently uses this power.

The LFCE does not acknowledge the legal standing of affected third parties to challenge approval decisions issued by the CFCE or IFT in a pre-merger notification process. However, third parties may submit their concerns and provide information and documents, which shall be taken into account by the Commission when issuing its decision.

During the notification process, access to the file is restricted to any person that is not one of the notifying parties. Once the process is concluded, the Commission shall publish its decision, excluding any information classified as confidential, and any person may have access to the rest of the non-confidential information contained in the file, through a specific petition filed under the law of transparency.

It is important to mention that the LFCE establishes that some specific types of transactions (e.g., when the acquirer party does not participate in the target’s relevant market or related markets) are considered as non-harmful mergers. For these cases, the LFCE establishes a ‘fast-track’ pre-merger notification procedure. The parties must provide with the filing the basic information and the arguments that sustain the transaction being considered a non-harmful merger. Within a five-business day period, the CFCE or IFT official in charge of the procedure shall determine whether the ‘fast track’ procedure is applicable. If so, in the following 15-business day period the Board of Commissioners may confirm whether the transaction is a non-harmful merger and approve it. If a decision is not issued within this time frame, the transaction is deemed approved. When the official in charge of the procedure or the Board of Commissioners determines that the basic information is incomplete or that the transaction does not comply with the requirements to be considered as a non-harmful merger, the transaction will be reviewed under the ordinary procedure.

**IV OTHER STRATEGIC CONSIDERATIONS**

Even when the parties believe that a merger is not expected to produce competition risks, sometimes it is recommended to provide with the filing the economic information that
evidences it. Even though the parties are not obligated to provide such information at that time, providing it may avoid a request for additional information, thereby speeding up the process.

It is also recommended that parties approach the CFCE or IFT during the early stages of the process and hold meetings with the officers in charge of a case. The purpose of such meetings will be to answer any questions and to explain every aspect of the transaction. By holding these meetings, the scope of the basic information request and an additional information request may be reduced.

CFCE or IFT decisions may be challenged before federal courts via *amparo*, which is a trial aimed at revoking the unconstitutional decisions of any authorities. In the case of CFCE and IFT decisions, such trials are held before federal district judges and circuit courts specialised in competition, telecommunications and broadcasting that were created under the constitutional amendments of 2013. An *amparo* trial has no specific time frame for its conclusion, and in some cases may last for more than a year. As such, in certain cases, it is recommended to file a new notification offering suitable undertakings instead of challenging a CFCE or IFT decision before the federal courts.

**V OUTLOOK AND CONCLUSIONS**

On 2 December 2012, when he was just starting the current administration, President Enrique Peña reached a political agreement with the three largest parties in order to perform several structural reforms that included enhancing the enforcement of competition law and policy; and improving the telecommunications and broadcasting law, and enhancing its enforcement. As a consequence, some amendments to the Constitution were approved by the legislative bodies in 2013. Among the most important changes are the following:

- the former Federal Competition Commission and Federal Telecommunications Commission (both agencies within the executive branch) were replaced by the new autonomous constitutional entities (CFCE and IFT, respectively);
- five former commissioners were replaced by seven new commissioners for each entity;
- the power to enforce the LFCE in the telecommunications and broadcasting industries was transferred to IFT;
- the CFCE and IFT were empowered to issue LFCE regulations. Before the constitutional reform, LFCE regulations were issued by the President;
- new federal courts specialised in competition, telecommunications and broadcasting were created;
- the reconsideration appeal was eliminated, and CFCE and IFT decisions may only be challenged through *amparo* trials before the specialised federal courts.

To implement this constitutional reform, a new Federal Law of Economic Competition and a new Federal Law of Telecommunications and Broadcasting were enacted in 2014. On 10 November 2014 and 12 January 2015, respectively, the CFCE and IFT issued their competition law regulations. On 14 May 2015, the CFCE issued a revised procedure for calculation and the corresponding criteria for measurement of market concentration levels.
The following changes derived from the new legal framework are relevant to the merger control regime:

- **a** Concentrations surpassing the monetary thresholds require approval from the CFCE or IFT prior to consummation. No agreement or legal act executed to formalise a transaction will be valid without said authorisation;
- **b** A new stage of the notification procedure, under which the parties may offer undertakings in order for the concentration to be approved, was created;
- **c** The time frame to request basic information was extended from five to 10 business days, and the time frame to issue a decision was extended from 35 to 60 business days. As a consequence, in complex cases a notification procedure may last seven months, plus the time required by the parties to gather and submit any requested information. In those cases where the parties propose undertakings, the procedure may last about one year;
- **d** Generation of competition barriers as a consequence of a proposed transaction was included as a cause to object the transaction. Acquiring or increasing substantial market power, as well as acquiring the ability to displace other economic agents or to perform monopolistic practices, remain as causes to object the transaction; and
- **e** The Herfindahl–Hirschman Index is still applicable for the analysis of the market concentration levels and the proposed transaction effects. However, the Dominance Index, which acknowledges positive effects on competition derived from mergers between small players, has been eliminated.

According to the new Federal Law of Economic Competition, the CFCE and IFT shall issue new merger guidelines, although the ones issued by the former Federal Competition Commission are applied in practice by the new agencies. We are unlikely to see any major changes in the new merger guidelines, but we expect that they will provide clarification on the meaning and scope of the ‘competition barriers’ concept (which was included in the new Law and is different from the ‘entry barriers’ concept). Until then, uncertainty on how this concept will be considered as a cause for objecting a transaction will continue.

By the end of 2013, the Senate ratified the seven commissioners appointed by the President for each agency. The constitutional amendments provide that, from 2016, one commissioner will be replaced each year, and the new commissioners will hold office for nine years as of the date of their ratification by the Senate. Under this scheme, we do not foresee any major or abrupt alterations in the policies of the CFCE or IFT.
Chapter 25

NETHERLANDS

Gerrit Oosterhuis and Weijer VerLoren van Themaat

I INTRODUCTION

Dutch merger control is similar to European merger control, certainly as regards the substantive rules. Thus, the Dutch concept of a concentration is similar to the definition of a concentration as laid down in the EU Merger Regulation (EUMR). It includes the acquisition of control and the possibility to influence strategic decisions of the target. Furthermore, the concept of undertakings concerned and the methodology of allocating turnover to the undertakings concerned are identical. Moreover, the European Commission’s decision practice and the Commission’s Consolidated Jurisdictional Notice are closely followed by the Dutch Authority for Consumers & Markets (ACM, formerly the Dutch competition authority, NMa) when it comes to, for example, the full functionality of a joint venture or the geographical allocation of turnover.

Mergers meeting the jurisdictional thresholds as laid down in the Dutch Competition Act (DCA) must be notified to the ACM. In general, a concentration must be notified to the ACM if the combined worldwide turnover of all undertakings concerned is more than €150 million in the calendar year preceding the concentration,

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1 Gerrit Oosterhuis is a counsel and Weijer VerLoren van Themaat is a partner at Houthoff Buruma.
2 The ACM is the result of the merger between the NMa, the Dutch Consumer Authority and the telecoms authority OPTA. The merger was effectuated as per 1 April 2013. As the authority functions under the name the ACM at the time of publication, this name is used in this review. Some of the case names – prior to 1 April 2013 – still refer to the NMa.
3 Decision NMa, 7 September 2010 (Transdev/Veolia, Case 6957).
4 Decision NMa, 3 May 2010 (Amlin/Dutch State, Case 6843). For a discussion of the EUMR, the Consolidated Jurisdictional Notice and the decision practice of the European Commission, please refer to the European Union chapter.
and at least two of the undertakings concerned each achieved at least a €30 million turnover in the Netherlands. Various sector-specific thresholds are discussed in Section III, infra.

Concentrations meeting the thresholds must be notified prior to completion and may not be implemented during the review period. Failure to notify may result in large fines.

II YEAR IN REVIEW

i Workload
The ACM received 75 notifications and reached 72 decisions in 2014, slightly less than in 2013 (91 notifications and 85 decisions). The majority of notifications resulted in one-page short decisions. Only eight Phase I decisions were substantiated (with reasons, down from 15 in 2013). The overwhelming majority of these involved the health-care sector (six), with the remaining two concerning production and distribution.

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 preparation of notifications burdensome and the notification process unpredictable. The ACM partially makes up for the ‘guidance deficit’ by publishing informal guidance letters addressed to parties seeking guidance on the interpretation of the merger rules, but it published only two in 2014, down from four in 2013 and 10 in 2012.

Three notifications required a Phase II investigation, of which one was cleared without remedies in Phase II, one required remedies and one still awaits a final decision.

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7 Decision ACM 18 December 2014 (Geberit-Sanitex), Case 14.1154.22
8 Decision ACM 17 September 2014 (Inter-Sprint-Van den Ban), Case 14.0843.22.
9 Compared with two notifications that required a Phase II investigation in 2013.
10 Decisions ACM of 6 May 2014 (Phase I) and 31 October 2014 (Phase II) (KPN-Reggefiber), Case 14.0672.24.
An exemption from the mandatory waiting period has been granted three times, two of which concerned the health-care sector.\textsuperscript{13} The ACM did not impose any fines for a failure to notify a concentration.

**ii Infringements of formal obligations and legal proceedings**

The District Court of Rotterdam upheld the decision of the ACM in the *Dutch Rusk* case. In this case, the ACM refused to grant a licence for the concentration of two parties that produced, *inter alia*, rusks for sale to the retail channel. The ACM had defined a very narrow product market of rusks only. Contrary to certain Commission decisions, it held that the upstream product market included both branded and private label products. On this market, the parties had a share of 70 to 80 per cent. The parties had offered to divest a rusk production line, which remedy was refused by the ACM.\textsuperscript{14} The District Court confirmed that the ACM had been entitled to do so, as it had sufficiently demonstrated the risk that a buyer of this line would not remain active on the market in the medium term because the investment would be recuperated very quickly.\textsuperscript{15}

The ACM also won in the *NS* case. It had allowed Dutch incumbent railway undertaking NS to acquire the business unit for travel information from the rail infrastructure operator ProRail.\textsuperscript{16} This made NS responsible for all travel information on the Dutch rail network. Rival railway undertakings feared discrimination by NS and appealed. The District Court held that the ACM was right to conclude that sufficient guarantees were provided for competitors even without a structural remedy. Procedurally, the NS had restructured the transaction during the notification process and submitted an amended notification form to the ACM, as is customary in the Netherlands. The District Court held that this practice is legitimate.\textsuperscript{17}

**iii Phase I decisions**

The ACM carefully investigated whether the acquisition of sanitary ceramics producer Sanitec Oyi by Geberit, a large producer of plastic sanitary products such as flush systems, would allow the parties to bundle their complementary products. It held that there was indeed an incentive to bundling, but that foreclosure was unlikely as several multinational competitors were also capable of bundling and remained (potential) competitors.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{14} Decision NMa 14 December 2012 (*Continental Bakeries–AA ter Beek*), Case 7321.
\item \textsuperscript{15} Rotterdam District Court 27 February 2014 (*AA ter Beek BV and Continental Bakeries BV et al v. ACM*), Case ROT 13/691, ECLI:NL:RBROT:2014:1323.
\item \textsuperscript{16} Decision NMa 3 October 2012 (*NS Reizigers–Reisinformatie ProRail*), Case 7436.
\item \textsuperscript{17} Rotterdam District Court 16 October 2014 (*Arriva Openbaar Vervoer et al v. ACM*), Case ROT 12-4974, ECLI:NL:RBROT:2014:8351.
\item \textsuperscript{18} Decision ACM 18 December 2014 (*Geberit–Sanitec*), Case 14.1154.22.
\end{itemize}
In the merger between the Noorderboog and Isala hospitals, the ACM found hardly any overlap between the areas where the patients of these respective hospitals came from. They were each other’s closest competitors in only five out of 22 municipalities. The health-care insurers did not expect any difficulties in keeping the merged entities’ behaviour in check, and the ACM allowed the concentration.\textsuperscript{19}

In the merger between the Rijnland and Diaconessenhuis Leiden hospitals, the ACM found considerably more overlap than in the Noorderboog/Isala case, as 60 to 70 per cent of the patients of Rijnland and Diaconessenhuis Leiden came from municipalities where the hospitals were each other’s closest competitors. Nevertheless, the ACM found that that the competitive pressure from the peripheral working areas would suffice to keep the merged entity in check throughout its entire working area and allowed the concentration.\textsuperscript{20}

The ACM examined the home-care market when Tzorg wanted to acquire the home-care activities of Careyn and Zuwe Zorg. The ACM analysed the effects on separate markets for home care per municipality. The parties had relatively high market shares of 30 to 90 per cent in the relevant municipalities. However, the ACM found that there was at least one credible alternative home-care supplier active in each municipality, and that this was sufficient to discipline the merged entity taking into account the fact that contracts for home care are awarded through tendering.\textsuperscript{21}

\textbf{iv} \hspace{1em} \textbf{Phase II cases}

Reggefiber Holding and Dutch telecoms incumbent KPN had joint control over fibre-optic cable company Reggefiber Group. At the creation of this joint venture, the NMa had imposed a number of conditions, including access and non-discrimination obligations, which would lapse if KPN would acquire sole control. The ACM wanted to investigate in depth whether this would allow KPN to foreclose its competitors from access to fibre-optic cables.\textsuperscript{22} In Phase II, the ACM considered that KPN would be subject to regulatory telecoms obligations, including pricing ceilings and non-discrimination obligations. Consequently, it held that KPN would have an incentive to foreclose its competitors, but would not be able to do so thanks to regulatory obligations.\textsuperscript{23}

The Persgroep, a publisher of mainly national newspapers, notified its intention to acquire Mecom, a publisher of mainly regional newspapers, in 2014. The ACM found that to readers, national and regional newspapers are hardly competing products. However, the ACM found it necessary to investigate in depth any consequences on the

\begin{itemize}
  \item \textsuperscript{19} Decision ACM 13 February 2014 (\textit{Isala–Noorderboog}) Case 13.1465.22.
  \item \textsuperscript{20} Decision ACM 19 February 2014 (\textit{Stichting Zorggroep Rijnland–Stichting Diaconessenhuis Leiden}), Case 13.1462.22.
  \item \textsuperscript{21} Decision ACM 22 May 2014 (\textit{Tzorg–Careyn HZ BV–Zuwe Zorg BV}), Case 14.0504.22.
  \item \textsuperscript{22} Decision ACM 6 May 2014 (\textit{KPN–Reggefiber}), Case 14.0217.22.
  \item \textsuperscript{23} Decision ACM 31 October 2014 (\textit{KPN–Reggefiber}), Case 14.0672.24.
\end{itemize}
markets for advertising space and for the printing and distribution of newspapers, and sent the case into Phase II. 24

In the last case that went into Phase II in 2014, the intended hospital merger between Albert Schweitzer Ziekenhuis and Rivas, the ACM found that the parties were each other’s closest competitors. 25 In addition, the health-care insurers were concerned of a worsening of their bargaining position. This was an important reason for the ACM to require a licence for the transaction, in line with its guidance document regarding the assessment of health-care mergers. 26

v Exemptions from the standstill period
The ACM granted an exemption of the mandatory standstill period before closing of a concentration is permitted on three occasions. One case, exceptionally, did not concern a bankruptcy. The ACM granted an exemption because the target hospital had an acute liquidity problem and the ACM was convinced that the hospital’s business would be irreparably damaged during the waiting period. 27

In two cases where the ACM granted an exemption of the standstill period, it did so with limitations. 28 The ACM found that the financial power of the buyer was necessary to save the business of the target, but also that it was likely that the ACM would want to perform a Phase II investigation due to the risks for effective competition posed by the proposed concentrations. Hence, the parties were prohibited from integrating their organisations in any way before the ACM would have taken a final decision. Both cases concerned the health-care sector.

vi Lifting of remedies
In 2009, the ACM allowed two regional hospitals in the province of Zeeland to merge to near monopoly, but imposed a pricing ceiling. 29 In 2012, the merged hospital, Admiraal de Ruyter Ziekenhuis (ADRZ), requested the ACM to lift this remedy based on changed market circumstances. The ACM found that the market share of ADRZ had declined

25 Decision ACM 18 March 2014 (Stichting Albert Schweitzer Ziekenhuis/Stichting Rivas Zorggroep), Case 13.1464.22. The parties submitted a request for a licence in Phase II on 9 September 2014. At the time of writing, the ACM had not yet issued a decision.
26 In this document, the ACM sets out that it will give much weight to the opinion of patient organisations and health-care insurers when assessing mergers. It is not published in English. See ‘Beoordeling fusies en samenwerkingen ziekenhuiszorg’ at www.acm.nl/nl/download/publicatie/?id=12037 for the Dutch language version.
29 Decision NMa 25 March 2009 (Ziekenhuis Walcheren/Oosterscheldeziekenhuizen), Case 6424.
only slightly, that the health-care insurers felt they still lacked the power to discipline the ADRZ and that the pricing ceiling formed only a minor administrative burden. ADRZ’s request was denied.30

When Nordic Capital Fund VII acquired wheelchair manufacturer Handicare in 2010, Nordic Capital Fund V already owned rival wheelchair manufacturer Permobil. For the concentration to take place, Handicare had to divest a substantial part of its business and was prohibited from buying back the divested business for a period of 10 years.31 After Nordic Capital Fund V sold Permobil to a third party in 2013, Nordic Capital requested that the ACM lift the buy-back prohibition under the remedies. In the absence of precedents, the ACM decided on the basis of the facts and the Commission’s Revised Remedies Notice that the buy-back prohibition could indeed be lifted. Handicare proceeded to reacquire the business that it had divested in 2010.32

III  THE MERGER CONTROL REGIME

i  Merger control thresholds

Article 29 DCA provides that a concentration must be notified if:

a the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration;33 and

b of this turnover, at least two concerned undertakings each achieved at least €30 million in the Netherlands.

Alternative jurisdictional thresholds exist for the following undertakings.

Health-care undertakings

All concentrations involving at least one health-care undertaking must be notified to the Dutch Healthcare Authority (NZa). For the purpose of the health-care specific test carried out by the NZa, a health-care undertaking is defined as an undertaking employing or contracting more than 50 health-care providers (persons).34 The NZa evaluates, inter

31 Decision NMa 10 December 2010 (Nordic Capital–Handicare), Case 6900.
33 This amount was €113.45 million until the Act for the streamlining of market surveillance by the ACM, which includes this change, entered into force on 1 August 2014. The new threshold corrects the amount of €113.45 million introduced in 1998 for inflation purposes and should (slightly) lower the administrative burden for businesses.
34 The relevant amendment to the Health Care (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014. Decree dated 17 December 2013, establishing the effective date of the Act of 27 November 2013, consisting of amendments to the Health Care (Market Regulation) Act, the Patients’ Rights (Care Sector) Act and several other Acts related to the timely identification of risks regarding the continuity of care as well as the tightening of procedures to ensure the quality and accessibility of health care; Government Gazette 2013, 522.
alia, the accessibility and quality of services and their integration plans. If the NZa advises positively, the transaction must be notified to the ACM if it meets the thresholds explained below.

For the purpose of the control by the ACM, a health-care undertaking is an undertaking that achieves at least €5.5 million turnover through health-care services. A concentration between two or more health-care 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.35

Insurance companies
In the case of insurance companies within the meaning of the Act on Financial Supervision, Article 31(2) DCA now stipulates that the general thresholds of Article 29(1) apply. Turnover will be calculated on the basis of gross premiums written.36

Credit and financial institutions
For credit and financial institutions within the meaning of the Act on Financial Supervision, Article 31(1) of the DCA states that instead of turnover, income items must be used (analogous to those defined in Article 5(3)(a) of the EUMR).

Pension funds
Any type of pension fund (including industry-wide pension funds, occupational pension funds and company pension funds) will be regarded as an undertaking for competition law purposes. The turnover of pension funds will be determined on the basis of the gross premiums written in the previous calendar year.

ii Investigation phases

Notification phase
The Dutch procedure consists of two phases. In Phase I, the ACM will investigate upon notification whether there are reasons to assume that the concentration may impede effective competition in certain markets (notification phase). If there are no such reasons, the authority will clear the concentration, after which the concentration may be completed. Once the decision on the notification is issued, a filing fee of €17,450 is imposed, regardless of the outcome of the decision.

35 These thresholds will continue to apply until at least 1 January 2018. Decision of 19 October 2012, amending the decision of 6 December 2007 regarding the temporary lowering of the thresholds for health care mergers, Government Gazette 2012, 515.
36 The Act for the streamlining of market surveillance by the ACM, which includes this change, was adopted on 24 June 2014 and most provisions entered into force on 1 August 2014. Previously, a complicated lower threshold applied.
**Licence phase**
If the ACM has reason to assume that competition may be impeded, it decides that the concentration requires a licence, which will be granted only after a further investigation in Phase II (licence phase).

In contrast with the European procedure, in the Netherlands, Phase II only starts if and when the parties involved request a licence. Such request requires a new notification in which more detailed information is provided to the authority about the parties and the relevant markets. Upon this request, the authority will conduct an additional investigation and either clear or prohibit the relevant concentration. Before prohibiting a concentration, the authority will provide the parties (and sometimes third parties) with an overview of the relevant competition concerns (points of consideration) and will provide the parties (and sometimes third parties) with the opportunity to give their reactions on these points. Once the decision on the licence request is issued, a filing fee of €34,900 is payable, regardless of the outcome of the decision.

Both the notification for Phase I and the request for a licence must be submitted in Dutch. Annexes, such as letters of intent or share purchase agreements, or annual reports, may be submitted in English.

**Clearance by the Minister of Economic Affairs, Agriculture and Innovation**
If a concentration is prohibited, there is a (theoretical) possibility – which has never been undertaken to date – of requesting the Minister of Economic Affairs, Agriculture and Innovation to grant a licence due to serious reasons of general interest.

**iii Duration procedure and waiting period (standstill obligation)**
Phase I is a 28-day review period, whereas Phase II has a maximum duration of 13 weeks. However, these periods may be suspended if the authority asks formal questions requiring additional information on the concentration. Due to this possibility of suspension, the review period can be very lengthy. As an extreme example, the 28-day period (Phase I) was suspended for 261 days in the case of *Cooperatie Vlietland/Vlietland Ziekenhuis*.

There are no requirements for pre-notification.

**Exemption waiting period**
As previously indicated, the concentration may not be completed during the review period. However, there are some exceptions to the prohibition on implementing a concentration prior to clearance, 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

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37 Decision NMa 18 February 2010 (*Cooperatie Vlietland/Vlietland Ziekenhuis*), Case No. 6669.
granted within several working days. Once the exemption is granted, the concentration may be completed before the authority clears it.

In both of the above-mentioned cases, the concentration must be unwound if it is subsequently prohibited by the authority.

iv Other procedural aspects

Third parties

The notification of a transaction is always published in the Government Gazette. In this communication, third parties are invited to comment on the contemplated concentration. Although third parties are requested to respond within seven days, information provided later may also be used in the procedure. The authority also actively gathers information by sending out questionnaires or by interviewing third parties.

Information received from third parties will generally be communicated to the parties concerned to provide them with the opportunity to respond. Generally, the authority will reveal the third party's identity.38

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.39 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,40 but does require, inter alia:

a the proposal to be in writing;
b a detailed description of the nature and size of the remedy;
c a note on how all indicated competition concerns will be eliminated;
d if applicable, the steps required to divest a part of the undertaking and the timeline for such;
e a non-confidential version of the proposal to be attached; and
f a timely filing of the proposal.

Nevertheless, there are some differences between the procedures in the two phases. First, in the notification phase the remedy proposal should be handed in a week prior to the deadline of the ACM decision, whereas this is three weeks in the licence phase. In addition, whereas a concentration cleared under conditions in the notification phase

38 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).
39 Remedies guidelines 2007. This section is based on these guidelines.
40 In its guidelines, the authority does refer to model texts from the European Commission.
may not be completed until the remedy is effectuated – effectively creating a ‘fix it first’ obligation – this limitation does not apply to remedies accepted in the licence phase. In both cases, however, effectuation of the remedies must be within the time frame stipulated in the proposal. If the parties fail to meet this deadline, the concentration will require a licence (remedies in the notification phase) or the concentration will be deemed to have been completed without a licence (remedies in the licence phase). In general, any failure to comply with remedies once the concentration has been completed is punishable by heavy fines. 41

**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. On the basis of Articles 2.5 and 2.6 of the 2014 ACM Fining Policy Rule, 42 the ACM generally calculates its fines on the basis of 1.25 per cent or 3.75 per cent of the total Dutch turnover in the preceding financial year for the buyer; however, the ACM has substantial leeway to increase the resulting amount of the fine if it deems it to be too low.

v  **Appeals and judicial review**

**Merger control decisions**

Each phase ends with a decision, which can be appealed before the District Court of Rotterdam by any party directly affected by the decision, including the parties involved in the concentration, and usually also competitors, customers and possibly suppliers. Further appeal against a judgment of the Rotterdam District Court can be lodged with the Regulatory Industrial Organisation Appeals Court (CBb).

Third parties directly affected by the decision do not have access to the authority’s file, but they can request information from the authority on the basis of the Government Information (Public Access) Act when the merger control procedure has been completed. Information that is generally not provided to third parties under this Act includes confidential business information and internal memos of the authority.

**Sanction decisions**

Before imposing a fine, the ACM draws up a statement of objections on which parties may comment (in writing or orally). After this, the ACM will take a decision against which a notice of objection can be filed with the ACM. An appeal can be lodged against the ACM’s decision (on administrative appeal) to the District Court of Rotterdam. An appeal can be lodged with the CBb against the District Court’s decision.

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41 For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.

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. Consequently, it is better to err on the side of caution. In cases of unprecedented situations, it is possible to seek informal guidance from the authority through its ‘informal observations’. Although not binding, these informal observations provide relative certainty that the authority will not act otherwise in the specific case, provided that the information provided in the informal procedure was correct and complete.

V OUTLOOK AND CONCLUSIONS

The merger of the NMa with the telecom regulator OPTA and the Consumer Authority was effectuated per 1 April 2013. Some changes to the powers of the authority, such as the increase in merger thresholds and the possibility to exchange information with other government agencies, entered into force on 1 August 2014.43

Since the merger, the ACM is clearly placing more priority on consumer protection than on the competitive structure of the market. This is, so far, of small consequence in the field of merger control, where the ACM generally remains quite realistic in its analyses.

The main challenge for private parties remains how to deal with the tendency of the ACM to refuse to conduct more substantial investigations during Phase I, obliging parties to offer radical remedies to prevent a time-consuming Phase II investigation.

Another major challenge is the health-care specific merger test of the NZa, which proves to be a heavy administrative burden. It, for example, requires parties to have detailed integration plans ready even before the ACM has approved the transaction, which defies transactional logic – especially in cases with significant overlap. There is hope for more efficiency going forward, as the performance of the health-care specific test will be transferred to the ACM.44

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.45

A legislative proposal is pending to raise the fining ceilings of the ACM considerably. The absolute maximum would be raised from €450,000 to €900,000. The relative maximum amount for cartel infringements would become 10 per cent of the turnover of the infringing group, multiplied by the number of years that the cartel lasted up to a maximum of four years. All maximum fines would double in cases of recidivism. Notably, the last change would affect fines for late filing.46

43 See footnote 33.
44 Letter of the Minister Health, Welfare and Sport of 6 February 2015, 723296-1333115-Z.
45 See the NS case discussed in Section II.i infra.
46 Legislative proposal of 14 April 2015 to change a number of laws in the working space of the Ministry of Economic Affairs, concerning a raise of the maximum fines applicable to the ACM, TK 2014/15, 34190. It is not certain that the proposal will be adopted, as the European Commission reacted sceptically and the Council of State advised in the negative.
I INTRODUCTION

i Relevant law

The Commerce Act 1986 (Act) sets out the competition law framework and establishes New Zealand’s competition law authority: the Commerce Commission (Commission). The Commission is an independent statutory authority, and there is minimal scope for government involvement in its decision-making.\(^2\)

Section 47 of the Act prohibits acquisitions that ‘would have, or would be likely to have, the effect of substantially lessening competition in a market’. However, there is no compulsory notification regime; the Commission, if it objects to an acquisition, must take proceedings in court to block the transaction or impose penalties for breaching Section 47, or both. Merging parties may, if they desire legal certainty, apply to the Commission for clearance or authorisation of the transaction, which immunises the transaction from subsequent challenge by either the Commission or third parties under Section 47.\(^3\) For further information regarding the voluntary notification regime, Section III, infra.

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1 Neil Anderson is a partner, Simon Peart is a senior associate and Sebastian Templeton is a solicitor at Chapman Tripp.

2 The Minister of Commerce may transmit to the Commission a statement of economic policy of the government, but the Commission is required only to have regard to it.

3 The Commission grants clearance where it is satisfied that a transaction is not likely to substantially lessens competition. Alternatively, parties may apply for authorisation of a transaction that substantially lessens competition if they can establish that it results in public benefits that outweigh the anti-competitive detriment. For more information, see Section III, infra.
In 2013, the Commission published revised guidelines outlining how it assesses transactions under Section 47. These guidelines are available on the Commission’s website.

ii Qualifying transactions

Section 47 does not expressly require a change in control to trigger the prohibition on anti-competitive acquisitions. All that is required is an acquisition of ‘assets of a business or shares’ that would have, or would be likely to have, the effect of substantially lessening competition in a market.

‘Assets of a business’ include intangible assets such as intellectual property, contractual rights (such as franchises or management contracts), know-how and customer lists. ‘Shares’ also has an extended meaning, and includes beneficial and equitable interests in shares, the power to control the exercise of voting rights at company meetings, the power to control the acquisition or disposal of shares, and perpetual debentures.

The Act does not prescribe a minimum threshold for share acquisitions; hence, acquisitions of minority interests may be caught by the prohibition. However, in practice, an acquisition of a minority stake would need to confer some degree of control over the target to give rise to a lessening in competition. The Commission’s approach is to ask whether the acquisition of the minority stake (and any attendant control rights, such as board representation) gives rise to a ‘substantial degree of influence’ over the target, which in turn is defined as the ‘ability to bring real pressure to bear on the decision-making process’ of the target.

That question arose recently in Connor/Acurity, which related to hospital services in the Wellington region. In that case, the ultimate acquirer – Evolution – increased its stake in the target Acurity (via Connor, an acquisition vehicle) from 11.7 to 25 per cent, which also conferred attendant rights on Evolution to appoint board members and exercise veto rights over certain strategic matters (not disclosed in the public version of the decision). Evolution stated its intention to be a ‘hands-on’ owner and operator. Together, those factors led the Commission to conclude that Evolution was likely to be able to exercise a substantial degree of influence over Acurity.

In its guidance, the Commission states that stakes as low as 10 per cent may confer a substantial degree of influence if the remaining shares are widely held.

iii Joint ventures

Joint ventures are subject to the merger control regime, but only where they involve the acquisition of assets or shares. Purely contractual joint ventures involving no acquisition of assets or shares are considered under Section 27 of the Act, which prohibits contracts, arrangements or understandings that substantially lessen competition.

iv Foreign-to-foreign transactions

Foreign-to-foreign transactions are subject to New Zealand’s merger control regime if they ‘affect a market in New Zealand’. The Commerce (Cartels and Other Matters)
Amendment Bill – currently under consideration in Parliament – would strengthen enforcement powers against foreign companies that directly or indirectly acquire interests in New Zealand companies (see Section V, infra).

v Overseas Investment Act 2005
Certain transactions are regulated by the Overseas Investment Act 2005 (OIA). The OIA provides that, to acquire certain New Zealand assets, an ‘overseas person’ must first obtain the consent of the Overseas Investment Office.

The OIA applies to acquisitions by overseas persons of 25 per cent or more direct or indirect ownership or control (or both) of interests in:

a ‘significant business assets’ (where the total expenditure involved, price paid or gross value of the assets (including shares) exceeds NZ$100 million);

b ‘sensitive’ and ‘special’ New Zealand land;

c farm land; and

d fishing quota.

vi Industry-specific merger control
Industry-specific prohibitions on aggregation are rare. One example, however, is the Fisheries Act 1996, which places limits on a firm’s ability to aggregate holdings of fishing quotas.

II YEAR IN REVIEW

i Notifications in 2014
In 2014, 14 applications for clearance were registered, although two related to the same transaction (Connor/Acurity, discussed further below). By comparison, 11 applications were registered in 2013 and 12 in 2012.

Of the 14 applications for clearance registered in 2014, 12 applications were cleared, with Connor/Acurity the only clearance granted subject to divestment undertakings; and two were declined: Connor/Acurity (initially) and Reckitt Benckiser/Johnson & Johnson⁶ (see further below).

The Commission received only one application for authorisation in 2014 (Cavalier/NZWSI);⁷ no determination had been reached in this matter at the time of writing.

The Commission does not publish statistics on the number of mergers that were discussed with the Commission but not followed with a formal application (informal notification discussions are addressed further in Section III, infra).

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⁷ Cavalier Wool Holdings Limited and New Zealand Wool Services International Limited (decision pending).
ii Average time frames for clearance applications
Connor’s second application in Connor/Acurity was cleared in one working day under unique circumstances, as described further below. As regards all 14 applications received in 2014:

a the Commission issued final determinations for the 12 applications that were cleared in an average of 49 working days;

b the Commission issued final determinations for the two applications that were declined in 73 working days (Connor/Acurity) and 223 working days (Reckitt/Johnson); and

c in eight cases, the Commission issued a public statement of preliminary issues. In those eight instances, the Commission’s final determination took approximately 79 working days, compared with approximately 42 working days in the six cases where no statement was issued.

iii Applications for merger clearance
We briefly set out several of the key clearance decisions below.

Connor/Acurity
Connor/Acurity involved concentration in the markets for hospital services in the Wellington region (see Section I, supra, for a discussion of the structure of the transaction).

The Commission initially declined the application for clearance on the grounds that Evolution’s and Acurity’s hospitals competed with each other. The Commission focused on surgical procedures on a procedure-by-procedure basis, rather than focusing on the provision of hospital facilities. The acquisition would have left some surgical procedures only offered by the related entities, and the remaining private hospital in Wellington was unlikely to be able to expand to offset the reduction in competition for those procedures. The Commission also found that the acquisition would give medical insurance providers fewer hospitals to play off against each other, affecting the price they could negotiate and harming consumers.

One week after the Commission’s decision declining clearance, the parties filed a second application with undertakings that, post-acquisition, Evolution would sell down its stake in Connor to a maximum of 11.7 per cent. This effectively restored Evolution’s pre-acquisition beneficial interest in Acuracy, meaning no change in competition. The merger was cleared on that basis one working day after the second application was filed.8

The Connor/Acurity applications highlight one of the nuances of the New Zealand merger clearance regime – that the Commission is able to grant clearance subject to divestment undertakings but not subject to behavioural undertakings. Once the application was declined, the parties’ only real option was to agree a structural divestment undertaking.

8 The rationale for continuing with the transaction in this revised form is that it allowed the takeover of Acurity (a listed company) by Connor to go ahead.
Reckitt Benckiser Group plc and Johnson & Johnson
In May 2014, Reckitt Benckiser Group Plc (owners of Durex) applied to acquire Johnson & Johnson’s K-Y brand of personal lubricants. The Commission declined the application in late April 2015, over 11 months after it was registered – significantly longer than the usual time frame.

The acquisition of the K-Y brand was a global merger, and a number of foreign regulators had approved the acquisition at the time of the Commission’s final determination.9

The application was declined due to the limited number of suppliers of personal lubricant in New Zealand, combined with the fact that supermarkets and pharmacies were considered unlikely to expand suppliers or take other action if the merged Durex and K-Y brands raised prices.

Vector Limited and Arc Innovations Limited10
In September 2014, Vector Limited applied to acquire 100 per cent of the shares in Arc Innovations Limited. Vector and Arc were two of the major suppliers of advanced electricity meters and related metering services to electricity retailers in New Zealand. The Commission cleared the acquisition.

The Commission concluded that there was not ongoing competition in the market, but rather competition occurred at periodic rounds of tenders. At the time of the application for clearance, all major electricity retailers had, or had almost, concluded long-term supply contracts, none of which Arc had won. As a result, the Commission made its assessment based on the likely state of competition at the expiry of the existing metering contracts.

The Commission cleared the acquisition because it considered that by the next bidding round there would be significant changes in meter technology. Changes in technology would partially offset incumbency advantages, since the new investment required for incumbents would be similar to that of a new entrant. Furthermore, the Commission found that the fact of several major tenders occurring at a similar time (i.e., bringing significant volume to the round) further incentivised new entrants at each round.

Expedia Inc and Wotif.com Holdings Limited11
In July 2014, Expedia Inc applied for clearance to acquire Wotif.com, an Australian-based online travel agent with a substantial brand in Australia and New Zealand. Expedia also applied for clearance from the Australian Competition and Consumer Commission. The Commission cleared the merger in November 2014.

The Commission found that the proposed merger would effectively reduce the number of firms providing online travel agency from three to two (leaving Expedia and Priceline – owner of Booking.com). However, the Commission emphasised the dynamism of the online booking markets. In particular, the Commission noted that metasearch sites

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9 The transaction does, however, remain under review in some other jurisdictions, including in the United Kingdom.
10 [2014] NZCC 36.
such as TripAdvisor and Google Hotel Finder were playing an increasingly important role in the online market, which could constrain the merged entity.

Of particular note, the Commission defined separate markets for online and ‘bricks-and-mortar’ travel agents (although the online presence of ‘bricks-and-mortar’ agents was relevant to online markets).

iv Applications for merger authorisation
The Commission received only one application for authorisation in 2014. This was the first application for authorisation in New Zealand since May 2011.

Cavalier Wool Holdings Limited and New Zealand Wool Services International Limited
In October 2014, Cavalier Wool Holdings Limited applied for authorisation to acquire the wool scouring business of New Zealand Wool Services International Limited. No final determination has been released at the time of writing.

In 2011, the Commission granted authorisation for an acquisition involving substantially the same assets. The 2011 decision was appealed to the High Court. The High Court allowed the Commission’s decision to stand, although it found that the Commission had overstated the benefits of the transaction. The merger ultimately was not completed and the authorisation expired.

The Cavalier application requested authorisation for a merger to monopoly in the North Island and South Island markets for wool scouring, and in the national market for wool grease. Cavalier Wool has argued that there will be public benefits from rationalising the wool scouring industry, and that the merged entity will continue to face constraint from overseas scouring.

In March 2015, the Commission released a draft determination indicating that it will likely grant authorisation. A public conference was held in June, and the Commission has indicated that it expects to make a final determination on the application on 28 August 2015.

Of particular note in its draft determination, the Commission has undertaken a substantial review of the ‘Australian experience’ in the wool scouring industry and assessed the competitive constraint of scouring in China and the rest of Asia. The willingness to look overseas for precedent and emerging markets may encourage participants in other primary sectors considering applying for authorisation to restructure.

v Strategic importance of developments in 2014
The headline cases outlined above demonstrate several key points that may be of strategic value to merging parties planning their approach to the Commission.

First, in Reckitt Benckiser/Johnson & Johnson, the Commission confirmed its willingness to diverge from the views of other national competition authorities in the disposition of multi-jurisdictional transactions. The Commission declined clearance in April 2015, despite the fact that the deal had gone ahead unchallenged in a number of jurisdictions, including the United States and Australia, and at least one other major jurisdiction’s review (that of the UK Competition and Markets Authority) remains ongoing. This may undermine the expectations of some that authorities in smaller jurisdictions will tend to ‘fall into line’ with the larger authorities in relation to
multi-jurisdictional deals. The Commission justified its departure on the basis that the specific market conditions in New Zealand warranted a different result to that which might have been reached elsewhere.

On the other hand, the Commission has eschewed a rigid focus on market share and has shown itself willing to approve deals at relatively high levels of concentration. In Vector/Arc, notwithstanding a narrow competitive field of only three major players, the Commission was prepared to countenance the removal of Arc as an independent competitive force on the basis that the long-term contracting arrangements in the market meant that competition was ‘played out’ as of the date of the acquisition. The Commission considered that, by the time these contracts became contestable again, developments in technology would offset the incumbency advantage enjoyed by the merging parties, suggesting that the transaction was unlikely to lessen competition. In Expedia/Wotif.com, the Commission similarly referred to the dynamic nature of the online travel agency market in justifying a reduction from three to two major competitors.

III THE MERGER CONTROL REGIME

i Merger notifications

There are two formal routes for notification to the Commission. Parties can apply for ‘clearance’, which the Commission will grant if satisfied that the transaction is not likely to substantially lessen competition. The Commission must be ‘satisfied’ before it will grant clearance, and hence can decline clearance if it is left in doubt as to the competitive effects of the transaction. The onus is therefore on the parties to adduce sufficient evidence to satisfy the Commission.

Alternatively, if the transaction is likely to lead to a substantial lessening of competition, the parties can apply for ‘authorisation’, which the Commission will grant if it is satisfied that the transaction will result in such a benefit to the public that it should be permitted, notwithstanding the lessening of competition.

The notification regime is voluntary and non-suspensory. However:

a a notification cannot be made for a transaction that has already completed;

b once a notification has been filed, it would be unwise to proceed with the transaction unless and until clearance is received. The Commission would look very unfavourably on the parties proceeding with the transaction while a clearance application is pending; and

c once filed, it is also inadvisable to withdraw the application. In New Zealand Bus Ltd v. Commerce Commission,12 the Court of Appeal noted, in the course of a discussion as to the appropriate penalty for a breach of Section 47 of the Act that:

[... ‘it is distinctly unwise not to complete the clearance process. It really should be an all-or-nothing situation: go to the Commission and complete the clearance procedure, or do not go at all because anything in between is fraught with risk. [...] It is to take an unusually large and potentially very expensive risk not to go through the process, once initiated’.

The Commission has published the concentration ‘indicators’ below which it considers a clearance application (or investigation, if no application was made) would be unlikely to be required:

a  where, post-merger, the three-firm concentration ratio is less than 70 per cent, and the parties’ combined market share is less than 40 per cent; or

b  where, post-merger, the three-firm concentration ratio exceeds 70 per cent, but the parties’ combined market share is less than 20 per cent.

The Commission prescribes the information that must be included in applications for either clearance or authorisation. The relevant forms are available on its website. The information requirements for authorisations are more onerous than for clearances, reflecting the additional need to outline and quantify detriments and benefits expected to result from the transaction. Parties often submit a draft in the first instance and then develop the application in the course of pre-notification discussions with the Commission.

Finally, although the Commission states that it cannot give ‘informal’ clearances or authorisations, it is usually prepared to engage in informal discussions with the parties to a transaction to discuss ‘potential areas of concern’ in order to assist the parties in deciding whether a notification would be advisable.

ii  Time frames

The Commission encourages the parties to engage in pre-notification discussions on the basis of a draft notification, before the timetable officially begins. However, pre-notification discussions are typically not prolonged.

The Act provides that the Commission must issue a decision on a clearance application within 10 working days, unless the applicant agrees to a longer period. In practice, the need to ‘satisfy’ the Commission as to the effects of the transaction means that parties invariably agree to a longer ‘indicative timeline’ of 40 working days. However, the Commission may seek additional time extensions and, if refused, the Commission may decline the application on the grounds that it is unsatisfied.

The Act sets a 60-working day deadline for deciding authorisation applications. Again however, the Commission routinely seeks a longer period. Its guidelines indicate that 70 to 80 working days is usually required to reach a decision.

Details regarding the average timing of clearance applications in 2014 are set out in Section II, supra.

There are no special timing provisions for dealing with tender offers or listed takeovers. However, the Commission has shown itself willing to accommodate external timing pressures (e.g., Takeovers Code deadlines) within reason.

iii  Rights of third parties

The Commission typically solicits the views of interested third parties (e.g., customers, competitors and suppliers) when considering a notification. The Commission also publishes a version of the notification (with confidential information redacted) on its website for public comment.
Only third parties that participate in a Commission-convened conference in relation to the notification are permitted to appeal the Commission’s eventual decision. The Commission is entitled, but not obliged, to convene a conference in the course of its consideration of the notification. Conferences are often convened in the case of authorisation applications, but rarely for clearances. Accordingly, the scope for tactical appeals by competitors is very limited.

iv Remedies and appeals

The Commission will consider remedies proposed by the parties to resolve competition concerns. However, the Commission can only accept structural remedies (divestment of assets or shares); it cannot accept behavioural remedies.

The Commission encourages applicants to propose remedies as early as possible in the process. It is possible to propose remedies at the outset, in the notification itself, but typically parties offer remedies later in the process once the Commission has outlined its specific concerns (generally around 15 to 25 working days into the Commission’s assessment period). The Commission will test proposed remedies with interested third parties, so the later remedies are proposed the greater the likelihood it will impact on timing of the final decision.

The Commission will examine the proposed remedies and determine whether the divestment will in principle resolve its competition concerns. The Commission’s remedies process assumes that divestment will occur after the Commission issues its final decision, and accordingly the Commission considers the risk that the divestment package will not be viable (or will not attract purchasers), that the competitive effectiveness of the assets may erode before the divestment is completed or that an acceptable purchaser is unlikely to be available. While the Commission does not expressly impose ‘upfront buyer’ requirements, identifying a suitable divestment purchaser during the course of remedies discussions is a practical way of addressing these risks (as is including a buyer approval condition in the remedies offer).

It is up to the applicant to propose a post-decision timetable for completing divestments, but the Commission’s guidelines indicate that six months is the usual starting point. However, the Commission notes that a shorter period may be necessary to preserve the value of the divestment package, in which case it may be necessary to agree a shorter period. The Commission will keep the divestment deadline confidential in order to limit the scope for potential purchasers to game the divestment negotiations.

Appeals against Commission decisions are limited to acquirers, targets and third parties that participate in a Commission-convened conference (if any). Appeals are to the High Court in the first instance.

IV OTHER STRATEGIC CONSIDERATIONS

As New Zealand’s merger control regime is voluntary, the key strategic consideration is whether to apply for clearance, or whether to proceed with the transaction without notification. The advantage of applying for clearance is legal certainty – neither the Commission nor any third party can seek to impeach the transaction on grounds that it lessens competition if a clearance has been granted.
However, there are several strategic disadvantages to applying for clearance.

First, although the Commission endeavours to complete its review within 40 working days, the timetable – particularly in difficult cases – can be both prolonged and uncertain. For example, the Commission’s assessment of Reckitt Benckiser/Johnson & Johnson lasted 11 months before the Commission’s eventual decision declining clearance. Uncertainty over likely timing is an important consideration when deciding whether to include New Zealand’s (voluntary) regime as a condition precedent to completion.

Second, in a clearance application, the onus is on the applicant to satisfy the Commission that the transaction is not likely to substantially lessen competition. In cases where the evidence is ambiguous, or other market participants provide conflicting evidence, it can be very difficult to meet the required standard. If the Commission is left in doubt as to the likely effects of the merger, it is entitled to decline clearance. As the Court of Appeal has said, ‘the Commission […] should grant a clearance only if satisfied that a substantial lessening of competition is not likely. […] It is open to the Commission […] to decline a clearance and say that, ‘we are not sure and therefore we are not satisfied that there will be no substantial lessening of competition’’.13 However, if the parties do not apply for clearance, the onus is on the Commission in an enforcement proceeding to establish positively that a substantial lessening of competition is ‘likely’. Accordingly, there is arguably an evidential gap between what is required in a clearance context and what is required in an enforcement context. This suggests that there may be cases where there is strategic value in defending an enforcement proceeding rather than proactively seeking clearance (e.g., where the evidence as to likely effect is ambiguous).

V OUTLOOK AND CONCLUSIONS

i Proposed legislative changes

The Commerce (Cartels and Other Matters) Amendment Bill, currently under consideration, would strengthen enforcement powers against foreign acquirers who directly or indirectly acquire controlling interests (20 per cent or more of the equity or voting rights) in a New Zealand company, where the acquisition has the likely effect of substantially lessening competition. In such circumstances, the Commission would be able to seek orders from the courts directly enforceable against the New Zealand company affected by the foreign-to-foreign transaction.

The Bill would also codify a 40-working day period for the Commission’s consideration of clearance applications (although that would likely be subject to an ability to agree extensions).

Finally, the Bill would prevent third parties – even those participating in a Commission-convened conference – from appealing a Commission decision in relation to a clearance application.

ii Pending notifications

On 28 April 2015, Pfizer Inc applied for clearance to acquire Hospira Inc. Both parties supply various prescription pharmaceuticals in New Zealand. The application is part of a global merger.

On 2 June 2015, Z Energy Limited (petroleum) signalled its intention to purchase 100 per cent of the shares in Chevron New Zealand, subject to clearance from the Commission. Z Energy’s application for clearance was registered with the Commission on 1 July. This promises to be an important merger clearance decision for New Zealand in 2015.

Z Energy purchased the New Zealand downstream assets of Shell in 2010. The proposed acquisition, if it proceeds and is cleared, would see Chevron exit the New Zealand downstream fuel market. In addition to Z and Chevron, Exxon Mobil and BP currently operate in New Zealand alongside a number of local downstream brands.
I INTRODUCTION

Principally, mergers by private or public companies in Nigeria are regulated by the Securities and Exchange Commission (SEC) with the primary law regulating such mergers being the Investments and Securities Act 2007 (ISA) and the Rules and Regulations of SEC (SEC Rules). Additionally, the listing rules of the Nigerian Stock Exchange (Listing Rules) contain regulations guiding merger transactions by public listed entities. The provisions governing schemes of arrangement are contained in the Companies and Allied Matters Act 2004 (CAMA).2

Further, other sector-specific laws regulate merger transactions, and the prior approval of the relevant sector regulator is required for a change of control. The relevant sector-specific laws include;

a the Banks and other Financial Institutions Act 2004,3 which regulates the financial sector, requires the approval of the Central Bank of Nigeria;

b the Nigerian Communications Act 2003, which regulates the telecommunications industry, requires the approval of the Nigerian Communications Commission;

c the Insurance Act 2003, which regulates the insurance industry, requires the approval of the National Insurance Commission;

d the National Broadcasting Commission Act,4 which regulates the broadcasting sector, requires the approval of the National Broadcasting Commission; and

e the Electric Power Sector Reform Act 2005, which regulates the electricity sector, requires the approval of the Nigerian Electricity Regulatory Commission.

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Notably, these laws and guidelines are binding on companies in the relevant industries in addition to the SEC Rules.

II YEAR IN REVIEW

From January 2014 to the date of writing, the SEC has received nine merger applications, of which four mergers were approved, and others are pending. It is noteworthy that none of the merger applications received by the SEC during this period has been denied by the regulator.

i Approved mergers

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Year of approval</th>
<th>Mode of settlement</th>
<th>Strategic impact recorded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merger of Afriland Properties Plc and Heirs Real Estate Limited</td>
<td>2014</td>
<td>Share exchange</td>
<td>The company has recorded an operating income of 595 million naira for the year ending 31 December 2013, showing growth of 2,495 per cent above the 22.945 million naira posted in 2012. Profit before tax rose by 1,177 per cent from 33.26 million naira in 2012 to 424.75 million naira in 2013*</td>
</tr>
<tr>
<td>Merger of Planet Capital Limited Emerging Capital Limited and Strategy and Arbitrage Limited</td>
<td>2014</td>
<td>Share exchange and cash considerations</td>
<td>It is expected that the merger will promote an efficient and more effective business operation following the combination of the inherent strengths of each of the companies for improved operational efficiency and an expanded product range</td>
</tr>
<tr>
<td>Merger of Nigerian Breweries Plc and Consolidated Breweries Plc</td>
<td>2014</td>
<td>Share exchange</td>
<td>With the conclusion of the merger, benefits accruable include cost saving from the consolidation of supply and distribution networks of both companies as a result of improved operational efficiencies arising from integrated operations. The merger of Nigerian Breweries and Consolidated Breweries is also a boost to the equities market, as former shareholders of Consolidated Breweries Plc, which was not listed in the Nigerian Stock Exchange, now have the opportunity to trade their shares on the floor of the Exchange</td>
</tr>
<tr>
<td>Merger of Africosmectic Ltd and Grey De Kouroun Nig Limited (small merger)</td>
<td>2015</td>
<td>In a small merger, the merging entities are required to inform the SEC at the conclusion of the merger</td>
<td>Small merger</td>
</tr>
</tbody>
</table>

ii  Pending mergers

a  Proposed merger between Femi Johnson Limited & Insurance Brokers of Nigeria limited;
b  scheme of merger between United Mortgage Ltd and Spring Mortgage Plc;
c  merger of LMB Stockbrokers Limited and Portfolio Advisers Limited;
d  proposed merger between Transcorp Ughelli Power Limited and Ughelli Power Plc; and
e  proposed merger between Expatcare Health International Limited and Capex Medicare Limited.

III  THE MERGER CONTROL REGIME

i  Introduction and definition of a merger

A ‘merger’ is defined in Section 119 of the ISA as ‘any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate’. The SEC Rules also define mergers in similar terms and make a distinction between ‘horizontal mergers’ (i.e., mergers involving direct competitors) and ‘vertical mergers’, which involve mergers between firms in non-competitive relationships. The ISA provides further that a merger may be achieved in any manner, including through a purchase or lease of the shares, interest or assets of the other company in question, or an amalgamation or other combination with the other company in question. Where the merger is effected on a share exchange basis, no capital gains tax will be payable; the Capital Gains Tax Act\(^5\) exempts gains accruing on the disposal of stocks and shares from tax.

Section 118(1) of the ISA provides that all mergers in Nigeria shall be subject to the prior review and approval of the SEC. This applies irrespective of whether the merging entities are public or private companies.

Particularly, the ISA and the SEC Rules provide certain exemptions to the requirement to obtain SEC approval. Merging entities are not required to notify the SEC regarding mergers, but must inform the SEC at the conclusion of mergers in the following cases:

a  transactions that involve holding companies acquiring shares solely ‘for the purpose of investment’, and not the use of those shares by voting or otherwise to cause or attempt to cause substantial restraint of competition, or that tend to create monopoly in any line of business enterprise (that is, a holding company that intends to acquire the shares of its subsidiary for investment purposes only); and

b  ‘small mergers’.

\(^5\) Chapter CI, Laws of the Federation of Nigeria.
ii Merger thresholds

There are three categories of mergers for the purposes of SEC approval; SEC Rule 232(B) provides that the threshold for each category of merger shall be determined by reference to the assets or turnover, or a combination of both the assets and turnover, in Nigeria of the merging entities. The lower threshold for ‘small mergers’ is below 250 million naira, the threshold for ‘intermediate mergers’ is between 250 million naira and 5 billion naira, and the threshold for ‘large mergers’ is above 5 billion naira.

Small mergers

Section 122(1) of the ISA provides that a party to a small merger is not required to notify the SEC of the merger unless it is specifically required by the SEC to do so, and may implement the merger without the SEC’s approval. The parties may, however, voluntarily notify the SEC of the merger. SEC Rule 230 further specifies that in a small merger, the merging entities are not required to notify the SEC of that merger but shall only inform the SEC at the conclusion of the merger.

The SEC may, within six months after the small merger has been implemented, require the parties to notify the SEC of the merger in the prescribed manner and form if, in the opinion of the SEC, the small merger may substantially prevent or lessen competition, or cannot be justified on public interest grounds. A party to a small merger required to notify the SEC of the merger must take no further steps to implement the merger until it has been approved or conditionally approved.

Within 20 working days after all parties to a small merger have fulfilled all their notification requirements in the prescribed manner and form, the SEC may either:

a extend the period within which it has to consider the proposed merger by a single period not exceeding 40 working days and, in that case, must issue an extension certificate to any party that notified it of the merger; or

b after having considered the merger, notify the parties:
   • that the merger has been approved;
   • that the merger has been approved subject to any conditions;
   • if the merger has not already been implemented, that the merger is prohibited from being implemented; or
   • if the merger has already been implemented, a declaration that the merger is prohibited.

If the SEC has not notified the parties of its decision upon the expiration of the 20 working day-period or the extension thereof, the merger shall be deemed as having been approved, subject to Section 127 of the ISA. Section 127(1) of the ISA provides that the SEC reserves the right to revoke its own decision to approve or conditionally approve a merger of any size on any of the following grounds: its decision was based on incorrect information for which a party to the merger is responsible, the approval was obtained by deceit, or a company concerned in the merger has breached an obligation attached to the decision.

If the merger is approved by the SEC, the parties can apply to the Federal High Court for the merger to be sanctioned, after which the merger will become binding on
the companies in question. The Court may, in the order sanctioning the merger or a subsequent order, make provision for any or all of the following matters:

a the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
b the allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company that under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
c the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
d the dissolution, without winding up, of any transferor company;
e provision to be made for any persons who, in such manner as the Court may direct, dissent from the compromise or arrangement; and
f such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or merger shall be fully and effectively carried out.

An order for the dissolution, without winding up, of any transferor company will only be made where the whole of the undertaking and the property, assets and liabilities of the transferor company are being transferred into the transferee company, and the Court is satisfied that adequate compensation has been made with respect to the employees of the company to be dissolved. Where an order provides for the transfer of property or liabilities, the property or liabilities shall be transferred to and become the property or liabilities of the transferee company; in the case of property, if the order so provides, it will be freed from any charge that by virtue of the compromise or arrangement ceases to have effect.

Every company in relation to which a merger order is made is required to deliver a copy of the order to the SEC for registration within seven days after the making of the order. Thereafter, a notice of the order must be published in the Gazette and in at least one national newspaper. The SEC is also required to publish a notice of the decision in the Gazette, and issue written reasons for its decision if it prohibits or conditionally approves a merger or if it is requested to do so by a party to the merger.

**Intermediate and large mergers**

Section 123 of the ISA provides that in the case of intermediate or large mergers, the primary acquiring company and the primary target company are required to each provide a copy of the notice of that merger in the prescribed manner and form to any registered trade union that represents a substantial number of their respective employees, or to the employees concerned or to representatives of the employees concerned if no such registered trade unions exist.

With respect to intermediate mergers, Section 125(1) of the ISA provides that within 20 working days after all the parties to the merger have fulfilled all of their notification requirements in the prescribed manner and form, the SEC, after having considered the merger, may issue a certificate in the prescribed form approving the merger, subject to any conditions prohibiting the implementation of the merger. The SEC may extend the period within which it has to consider the proposed merger by a period of not more than 40 working days. If the SEC has not issued a certificate upon the
expiration of the 20 working day-period or of the extension, the merger shall be deemed to have been approved. The SEC is thereafter required to publish a notice of the decision, and issue written reasons for its decision if it prohibits or conditionally approves the merger or if it is requested to do so by a party to the merger.

Section 126 of the ISA requires the SEC, after receiving notice of a large merger, to refer the notice to the Court, and within 40 working days after all parties to the merger have fulfilled all the prescribed notification requirements, to forward to the Court a statement indicating whether implementation of the merger is approved, approved subject to any conditions or prohibited.

SEC Rule 423 provides that the SEC shall only approve a merger where it is satisfied that the merger is not likely to cause substantial restraint of competition or tend to create a monopoly in any line of business enterprise; and that the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tend to create monopoly in any line of business enterprise, or that although the contemplated merger is likely to restrain competition, one of the parties to the merger has proved that it is failing.

In considering a merger, the SEC is required, in accordance with Section 121(1) of the ISA:

a to initially determine whether the merger is likely to substantially prevent or lessen competition; and

b where it appears that the merger is likely to substantially prevent or lessen competition, it shall also have to determine:

• whether the merger is likely to result in any technological efficiency or other pro-competitive gain that will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

• whether the merger can be justified on substantial public interest grounds.

When determining whether a merger is likely to substantially prevent or lessen competition, the SEC will assess the strength of competition in the relevant market, and the probability of whether, after the merger, the company will behave competitively or cooperatively in the market, taking into account any factor that is relevant to competition in that market, including:

a the actual and potential level of import competition in the market;

b the ease of entry into the market, including tariff and regulatory barriers;

c the level and trends of concentration, and history of collusion, in the market;

d the degree of countervailing power in the market;

e the dynamic characteristics of the market, including growth, innovation and product differentiation;

f the nature and extent of vertical integration in the market;

g whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

h whether the merger will result in the removal of an effective competitor.
In determining whether a merger can be justified on substantial public interest grounds, the SEC is required to consider the effect that the merger will have on a particular industrial sector or region, employment, the ability of small businesses to become competitive and the ability of national industries to compete in international markets.

After its initial determination, the SEC may grant an approval in principle to the merger and direct the merging companies to make an application to the court to order separate meetings of the shareholders of the merging companies to obtain their concurrence to the proposed merger. If a majority representing not less than 75 per cent in value of the shares of members being present and voting either in person or by proxy at each of the separate meetings agree to the scheme, the scheme shall be referred to the SEC for approval.

In a merger, the most important factor is gaining the support of the majority shareholders. The Nigerian regulators and courts do not require any evidence that the scheme is supported by a majority of the minority shareholders, but only that a majority of those present at each of the separate meetings approves the scheme. In calculating the 75 per cent majority, the court also does not usually exclude any shares already held by the offeror of the target company.

iii Documents to be submitted to the SEC
Irrespective of whether prior approval of the SEC is required, the following documents must be submitted to the SEC in respect of all mergers:

- resolution of the shareholders of the companies approving the restructuring;
- a copy of the certificate of incorporation of the affected companies certified by the company secretary;
- Corporate Affairs Commission (CAC) forms outlining the particulars of the directors and the allotment of the shares of the affected companies;
- ‘no objection’ letters from relevant regulatory authorities (where applicable); and
- an information memorandum containing the following:
  - directors of the companies;
  - profile and share capital history of the companies;
  - shareholding structure of the companies;
  - directors’ beneficial interests;
  - status of the subsidiaries after the restructuring;
  - status of the shares of the restructured companies;
  - status of the employees of the restructured companies;
  - percentage or level of involvement of the combined companies (if they have similar products) in the industry; and
  - any other information or document required by the SEC from time to time.

iv Required professional parties
Merger applications must be filed by separate financial advisers that are registered with the SEC as an issuing house or by the solicitor for each of the merging companies. In the case of small mergers, a single financial adviser may be used.
v Procedure for obtaining SEC approval for mergers

The procedure for obtaining the approval of the SEC with respect to a merger is set out in SEC Rule 425 as follows:

a a merger notice (that is, a pre-merger notice) must be filed for evaluation with the SEC;
b once the SEC has given its ‘approval in principle’, an application must be filed in the Federal High Court seeking an order to convene a court-ordered meeting;
c after the passing of the resolution by the respective shareholders at the court-ordered meeting, an application must be filed with the SEC for formal approval of the merger; and
d post-approval requirements must be complied with.

In practice, the procedure for carrying out a merger is as follows:

a the proposed merger must be considered and approved in principle by the boards of the merging companies;
b ‘direction’ and ‘clearance’ for the merger must be obtained from the Federal Inland Revenue Service;
c the approval of the sector regulator must be obtained, where applicable;
d a pre-merger notice must be issued to the SEC;
e an application must be made to the Federal High Court to sanction the proposed merger and to obtain an order of the Court for separate general meetings of the merging companies;
f a referral must be made to the SEC for approval where the merger scheme is approved by at least three-quarters of the members (either in person or by proxy) of the merging companies at their separate meetings; each merging company will be required to pass a resolution approving the terms of the merger;
g upon approval of the merger scheme by the SEC and members of the merging companies, either company may then apply to the Court to sanction the scheme; and
h upon approval by the Court, the court order sanctioning the scheme must be published in the Gazette and at least one national newspaper, a copy of the court order must be filed with the SEC within seven days of obtaining the order and a copy of the court order must be filed with the CAC (the companies’ registry).

Pre-merger notice

The SEC Rules require that the pre-merger notice to be filed with the SEC shall contain a letter of intent signed by the merging companies, accompanied by board resolutions of the companies supporting the merger; and a detailed draft write-up of the proposed transaction, including all the background studies relating to the merger and the justification for the merger, including:

a detailed information about the product lines or operations of the companies;
b a list of the major competitors in that product market and the market position or market share of each company;
c the structure and organisation of the companies;
d revenue information about the operations of the companies;
an analysis of the effect of the transaction on the relevant market, including the post-transaction market position of the acquiring or surviving company; and

an information memorandum detailing the proposed transaction, including the following information:

• the products or services that the merging entities sell or provide in, into or from Nigeria. In addition, any products or services considered by buyers that can be reasonably substituted for a product or service provided in, into or from Nigeria by parties to the merger must be identified;

• for each identified product or service, the geographic area or areas in Nigeria in which the merging entities sell;

• for each identified product or service, the contact details of the top five producers or providers in each identified geographical area with the largest estimated turnover in value, and their estimated share of the total turnover during the last financial year;

• for each identified product or service, the turnover in each of the identified geographical areas during the past financial year;

• for each identified product or service, the contact details for the merging entities’ five customers with the largest aggregate purchases in value during the last financial year in each of the identified geographical areas; and

• the business relationship among the merging entities in terms of the products or services they sell to one another, as well as the value of those products and services sold during the last financial year.

The note shall also indicate whether the merger will involve the transfer of all or part of the assets, liabilities and undertakings, including real and intellectual property rights, or the transfer of shares or other interests.

Where a company involved in the merger transaction claims that it is failing, the following documents shall also be forwarded to the SEC:

• financial information demonstrating that the firm will be unable to meet its financial obligations in future;

• information indicating that the failing firm would reasonably be expected to exit the market unless the merger is implemented;

• the latest financial statement of the companies;

• certificate of incorporation of the merging companies;

• extracts of board resolutions of the merging companies authorising the merger duly certified by a director and the company secretary;

• a copy of the letter appointing the financial adviser or advisers;

• a copy of the certificate of incorporation certified by the company secretary;

• CAC certified true copy of the particulars of the directors;

• letter of ‘no objection’ from company regulators (where applicable);

• the audited accounts of the merging entities for the preceding five years (or the number of years any of the companies have been in operation if less than five years); and

• the applicable merger notification fee per merging company (for intermediate and large mergers).
In the case of an intermediate or large merger, a copy of the pre-merger notice shall also be forwarded to any registered trade union that represents a substantial number of its employees, or the employees concerned or representatives of the employees concerned if no such registered trade unions exist.

The following additional information must be disclosed in an information memorandum:

- the actual and potential level of import competition in the relevant industry;
- the ease of entry into the industry, including tariff and regulatory barriers;
- the level and trends of concentration and any history of collusion in the relevant industry;
- the degree of countervailing power in the market;
- the dynamic characteristics of the relevant industry, including growth, innovation and product differentiation;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
- whether the merger will result in the removal of an effective competitor; and
- any other information that the SEC may require.

In addition to the above-listed documents, SEC Rule 428 provides that before an application for a court-ordered meeting is made for intermediate and large mergers, the following documents should be filed for the review and clearance of the SEC: letters of consent signed by an individual or duly notarised, financial reports for the preceding five years (or the number of years the company has been in existence where it has been in existence for less than five years) and any other document that may be required by the SEC.

**Formal approval of the SEC**

After the SEC has given a favourable response to the pre-merger notification, a formal application for approval of a proposed merger is to be filed accompanied by the documents listed below (where any of the documents has been previously filed with the SEC, they may be incorporated by proper reference provided that they were filed within six months of the present application and found acceptable by the SEC):

- extract of the minutes of the court-ordered meeting of the merging entities in support of the merger duly certified by a director and the company secretary. The extract must show that the consideration was approved by a majority of shareholders representing not less than three-quarters in value of the shares of members voting either in person or by proxy;
- two copies of the scheme document duly signed by the parties to the merger;
- evidence of the executed resolutions passed at the separate court-ordered meetings;
- scrutineer’s report showing the result of voting and total number of votes cast;
- stamped power of attorney of the directors who were absent from the separate court-ordered meetings (where applicable);
- evidence of a clearance letter from the Federal Inland Revenue Services regarding any tax liability (where applicable);
amended copy of the memorandum and articles of association of the resultant company (where applicable);
CAC form showing particulars of directors;
CAC form showing allotments (for private companies) only;
reporting accountants’ report on the financials and forecasts of the merging entities;
evidence of payment of the processing fee;
any relevant SEC form; and
post-approval requirements.

SEC Rule 430 sets out the requirements that must be met by merging entities following the approval of the SEC and the sanction of the court. The applicant for merger approval is required to:

- obtain the court order sanctioning the scheme;
- file a copy of the court order sanctioning the scheme with the SEC within seven days of the court making the order;
- file a copy of the newspaper in which the court order was published;
- file a statement of the actual cost of the scheme;
- file a notification of the completion or otherwise of the exercise within three months of the court order; and
- file summary reports of the scheme in respect of the following:
  - arrangement relating to employees of the acquired company;
  - settlement of shareholders;
  - utilisation of monies injected into the company, if any;
  - treatment of dissenting shareholders;
  - submission of gazetted copy of the court sanction;
  - evidence of allotment of shares; and
  - evidence of settlement of severance benefits of employees (where applicable).

vi Post-merger inspection

A post-merger inspection is required to take place three months after the SEC has granted approval. The post-merger inspection is carried out by the SEC to ascertain the level of compliance with the provisions of the scheme documents.

The documents required to be inspected include:

- the board minutes book;
- original certificate of incorporation of the resultant company (where applicable);
- copy of the amended memorandum and articles of association (where applicable);
- severance benefits of employees of the dissolved companies;
- final settlement of shareholders;
- dispatch of share certificates;
- settlement of debts;
- report of shareholders’ representatives in the merger; and
- any other document that may be required by the SEC from time to time.
The overall approval process (i.e., from submission to the SEC of an application for merger approval to the sanction of such merger by the Federal High Court) can take anywhere from three to six months.

Section 127(1) of the ISA provides that the SEC reserves the right to revoke its own decision to approve or conditionally approve a merger of any size:

- if the decision was based on incorrect information that a party to the merger has provided;
- if the approval was obtained by deceit; or
- if a company concerned in the merger has breached an obligation attached to the decision.

A party aggrieved by any action or decision of the SEC may institute an action or appeal against such decision to the Investments and Securities Tribunal (Tribunal). Appeals from the Tribunal lie to the Court of Appeal and further to the apex court in Nigeria – the Supreme Court of Nigeria.

vii Penalties

Although the ISA and the SEC Rules do not provide specific penalties on non-notification of a relevant merger, Section 303 of the ISA gives the SEC the power to impose a general penalty of not less than 100,000 naira and a further sum of 5,000 naira every day that the violation continues.

If the SEC considers that a transaction raises competition concerns, it can block the transaction or allow it to proceed subject to conditions. The ISA specifically gives the SEC the power, in addition to imposing other sanctions, to break up a company into smaller entities (and to forward its decision to the Federal High Court for sanctioning, having first written to the company, reviewed the company’s response and if necessary affording senior officers of the company opportunities to defend their position) so that its operations will not cause a substantial restraint of competition. Thus, for example, the SEC may allow a transaction to proceed on condition that the parties divest part of their businesses. There is no guidance on whether the SEC could impose other conditions (such as price regulation), although it appears that the SEC has broad discretion with regard to what conditions it imposes.

IV OTHER STRATEGIC CONSIDERATIONS

The merger rules do not apply to merger transactions that take place outside Nigeria, even where the merging companies have affiliates or subsidiaries in Nigeria. In addition, the concept of a ‘hostile’ takeover transaction is not recognised under the ISA or the SEC Rules, and no particular rules exist to aid a party in a hostile takeover. The laws regulating mergers in Nigeria are extensive; such transactions must be undertaken in full compliance with these laws to avoid any sanctions, which can be far-reaching and include the imposition of administrative fines on entities and the unwinding of transactions.
V OUTLOOK AND CONCLUSIONS

In 2014, the Nigerian economy became the largest in Africa and the 26th largest in the world. The economy expanded by 89 per cent to 80.3 trillion naira following the rebasing of its GDP. This highlights the immense growth potential of the Nigerian economy, a factor that may contribute to attracting foreign investments.

Although 2015 commenced at a rather slow pace due to, inter alia, the global decline in oil prices and the apprehension that preceded the country’s general elections, there is still hope of achieving positive results in the economy’s growth. It is expected that the sale of generation companies and distribution firms by the federal government to private investors will create additional room for investors to participate in the power sector and ultimately drive merger and acquisition activities throughout 2016 and beyond. In the banking sector, it is anticipated that the Asset Management Corporation of Nigeria will dispose of the last bridge bank in 2015, while Skye Bank Plc and Heritage Bank are expected to merge with previously acquired bridge banks.

Mergers are also predicted among indigenous oil companies as they seek to enhance their financial capability to purchase oil and gas assets anticipated to be available for disposal by international oil companies in 2015.
Chapter 28

NORWAY

Thea Susanne Skaug and Fredrik Alver

I INTRODUCTION

Mergers and acquisitions (concentrations) are subject to control under Chapter 4 of the Norwegian Competition Act of 5 March 2004 No. 12 (Competition Act). More detailed provisions on notification requirements are provided in the Regulation on notification of concentrations of 11 December 2013 No. 1466 (Regulation on Notification) and the Regulation on Partial Exceptions from the Rule on Suspension of Concentrations of 9 March 2009 No. 0292 (Regulation on Exceptions). The Norwegian Competition Authority (NCA) has also issued best practice guidelines for merger control proceedings and guidelines on notifications of a concentration. Relevant legislation and guidelines are available in English on the NCA’s website.

Norway is part of the Agreement on the European Economic Area 1992 (EEA Agreement), and has implemented Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation) as part of the Agreement. Therefore, mergers with an EU or EEA dimension are governed exclusively by EU or EEA merger control provisions, and are not subject to national merger control. A one-stop shop approach applies under the EEA Agreement.

The first instance in respect of merger control in Norway is the NCA, with the Ministry of Trade, Industry and Fisheries (Ministry) as the appeal body. Furthermore, in cases involving public principles or issues of major significance to society, the government may approve a concentration that the NCA has intervened against.

Concentrations are subject to mandatory notification if the undertakings concerned have a combined annual turnover in Norway exceeding 1 billion Norwegian

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kroner and at least two of the undertakings concerned each have an annual turnover in Norway exceeding 100 million Norwegian kroner. There is no deadline for filing. However, concentrations are subject to an automatic standstill obligation pending the outcome of the NCA’s investigation. The NCA has the authority to review transactions below the notification thresholds; thus, the effects on competition must always be assessed in a merger case.

These notification thresholds are the result of amendments to the Competition Act that came into effect 1 January 2014. Prior to this date, the thresholds were significantly lower (the undertakings concerned having a combined annual turnover in Norway exceeding 50 million Norwegian kroner and at least two of the undertakings concerned each having an annual turnover in Norway exceeding 20 million Norwegian kroner), leading to a significant drop in the number of merger notifications in 2014.

II YEAR IN REVIEW

i Notifications and decisions

In 2014, the NCA received 89 notifications, and so far in 2015 has received 18 notifications. The number of notifications has decreased since 2013 due to the increased turnover thresholds that became effective on 1 January 2014. Between January 2014 and May 2015, the NCA has intervened in five cases. In four of these cases, the NCA approved the concentration subject to conditions (remedies), whereas one case has been entirely prohibited. To date, the NCA has required a mandatory notification for a merger below the notification thresholds in one case. Additionally, the NCA has imposed administrative fines in five cases for breach of the standstill obligation.

Norsk Gjenvinning AS/Avfall Sør Bedrift AS (decision of 24 June 2014)
The NCA prohibited a merger between two of the largest Norwegian waste and recycling companies. It was stated that the merging parties were each other’s largest competitors in an already highly concentrated market. If the two largest players were to merge, competitors would have limited possibilities to respond to the merged entity’s market behaviour. The NCA also feared that customers would have limited purchasing power. The parties did not propose any remedies to address NCA’s concerns.

Nortura SA/Prima Gruppen (decision of 22 October 2014)
The NCA approved Nortura’s acquisition of the slaughter house Prima Slakt AS and 49 per cent of the shares in the vertically integrated meat processing company NorPri AS, subject to conditions. The NCA was worried that the acquisition would create an anti-competitive concentration in the animal slaughter market and the meat processing market. The parties proposed several remedies to address the NCA’s concerns, such as letting Prima Group retain the majority of the shares in NorPri AS, and obligations on Nortura and the seller, Prima Group, aimed at keeping Prima Group as a viable competitor in the downstream markets.
Telia Sonera/Tele2 (decision of 5 February 2015)
The NCA approved TeliaSonera’s acquisition of Tele2’s Norwegian entities subject to conditions. TeliaSonera and Tele2 are two of the three largest companies in the mobile phone market in Norway. The NCA found that the concentration would limit competition, as the market of mobile telephony was already highly concentrated. The merging parties offered a package of remedies, consisting of the sale of Tele2’s mobile and network operator, Network Norway, to newcomer ICE. TeliaSonera also agreed to a national roaming and service provider agreement with ICE. The agreement will run for six years. Finally, ICE purchased three Tele2 stores and receives beneficial rates for site sharing with TeliaSonera.

Coop/ICA (decision of 4 March 2015)
The NCA approved Coop’s takeover of the supermarket chain ICA in Norway subject to conditions. The takeover has created the second-largest supermarket chain in Norway with approximately 31 per cent market share. ICA’s exit from Norway has reduced the number of major supermarket chains in the country from four to three, and was only allowed after the parties offered to sell 93 of ICA’s 550 stores to its rivals.

Referrals to and from the European Commission
Norway is part of the EEA, which has similar rules regarding referrals to and from the Commission as those applying to Member States of the EU.

There were no referrals to or from the European Commission in 2014.

ii Fines for breach of the standstill obligation
A breach of the standstill obligation may be subject to administrative fines or criminal sanctions (see Section III, infra). The NCA actively enforces breaches of standstill obligations. The maximum administrative fine is 10 per cent of the worldwide annual turnover of the company. In 2014, the NCA fined four companies in various markets between 200,000 Norwegian kroner and 700,000 Norwegian kroner each for breaching the standstill obligation.

In February 2014, the NCA issued a fine of 25 million Norwegian kroner on NorgesGruppen, the largest grocery chain in Norway, for breach of a standstill obligation with regard to the acquisition of 13 lease property contracts from ICA. This is the largest fine imposed for breach of the standstill obligation under the Norwegian Competition Act. The NCA closed the substantial part of the transaction regarding the substantive merger control.

III THE MERGER CONTROL REGIME
i Mandatory filing
The mandatory filing system applies to any ‘concentration’ between undertakings. The definition corresponds to the definition of concentration in the Merger Regulation and comprises mergers, acquisitions of control on a lasting basis (de facto and de jure), including control of minority positions in given circumstances (see Section IV.ii, infra), and the creation of a full-function joint venture (JV). The rules on JVs correspond to
Article 3(4) of the EU Merger Regulation, and the Commission's case law is relevant when assessing the criteria.

There are no turnover thresholds for the NCA to invoke its power to intervene as such. However, pursuant to Section 18, paragraph 2 of the Competition Act, concentrations are subject to mandatory notification if:

a) the undertakings concerned have a combined annual turnover in Norway exceeding 1 billion Norwegian kroner; and

b) at least two of the undertakings concerned each have an annual turnover in Norway exceeding 100 million Norwegian kroner.

'Turnover' within the meaning of the Competition Act corresponds to the wording 'sales income' in the Act of 17 July 1998 No. 56 on accounting, and must be interpreted against this background. Revenue must be allocated according to where the customer is located. This means that sales to customers abroad will not impact the relevant turnover, while revenue originating from sales to Norwegian customers from abroad will impact the relevant turnover when assessing the duty to notify a merger.

In addition to mandatory notification above the thresholds, the NCA has imposed a duty individually on 10 large national companies (Norske Shell, Norsk Gjenvinning, Nor Tekstil, NorgesGruppen, Plantasjen, Sector Alarm, Securitas Direct, Amedia, Stat ole Fuel and Retail, and Telenor) to inform the NCA of any potential transactions they may be involved in, notwithstanding the notification thresholds. The 10 selected companies all operate in markets that have been identified by the NCA as concentrated; the NCA thus intends to follow these markets closely. The imposed duty consists of sending a short and simple notice to the NCA with information on any upcoming transactions, and a short description of the merger and the expected time frame for its implementation.

ii Procedure and timetables

There is no deadline for filing in Norway. Thus, the notification may be filed at any stage in the transaction period, provided that the transaction can be described sufficiently accurately to fulfil the content requirements of a standardised notification. If the conditions for a concentration change after the submission of the notification, and such changes are material to the NCA's assessment, a new notification must be submitted.

The NCA publishes a brief notice of all received notifications on its website. Further, any third party may ask for access to the notification, and the NCA is obliged to give such access, except access to information regarding trade secrets. The parties are required to clearly state the parts of the notification that must be regarded as trade secrets, in addition to a reasoned statement regarding why that specific information must be regarded as such. It is not sufficient to give a general statement for the notification itself; rather, there must be one reasoned statement for each piece of information that is to be kept from public access. The clock will not start until the parties have submitted this information to the NCA. In 2014, the NCA had comments regarding the reasoning or lack of reasoning in almost 30 per cent of the notifications.

The parties to a concentration must determine whether the relevant notification thresholds are met and whether EU or Norwegian law applies. The party (or parties) acquiring control is responsible for notifying the NCA. This means that both parties are
responsible in a classic merger filing, the buyer is responsible in an acquisition and the controlling parents are responsible in the case of joint control.

A simplified notification procedure is an option in three scenarios:

a the merger is a JV with sales in Norway of 100 million Norwegian kroner, and the assets that are transferred to the JV have a value below 100 million Norwegian kroner;

b a party undertakes sole control in a company where it previously had joint control together with one or more other parties; and

c mergers or acquisitions (sole or joint) where there is no horizontal or vertical overlap, or if there is a horizontal overlap and the joint market share does not exceed 15 per cent, or if there is a vertical overlap and the parties’ joint market share does not exceed 25 per cent.

If the merger qualifies for a simplified notification procedure, the content requirements of the notification are greatly reduced. A simplified notification must contain the names and addresses of the parties, information on the nature of the transaction, a description of the involved companies, and the name on the five most important customers, suppliers and competitors on the relevant market. Additionally, the parties must describe why the conditions to use the simplified procedure are applicable. Relevant documentation, such as annual reports and financial statements, must be enclosed. In March 2015, the Ministry suggested clarifying in the Regulation that the obligation to identify business secrets also applies to simplified notifications.

Once notified, certain procedures and timetables apply. The clock starts the day after a complete and final public version of the notification is received by the NCA. As a starting point, Phase 1 lasts for 25 working days from the time of notification. If remedies are offered within the first 20 working days, Phase 1 will be extended by 10 working days. This means that Phase 1 can last a maximum of 35 days.

At the end of Phase 1 there are three alternative ways to progress. First, if the NCA approves the transaction after an initial review, it may give written notice that the case is closed and that the transaction can be implemented. Second, the NCA may come to a decision where any remedies put forward by the parties are accepted, and the transaction may be given a conditional clearance. The third option is that the NCA initiates a Phase 2 investigation. For this, the NCA must show that there are ‘reasonable grounds to believe’ that the transaction would create, strengthen or significantly impede competition.

In Phase 2, the NCA shall as soon as possible, or 70 working days after receipt of the notification at the latest, either confirm the remedies suggested by the parties or issue a statement of objections (SO). If remedies are offered later than 55 working days after the notification, Phase 2 will be extended by an equivalent amount of working days. For example, if remedies are offered on day 65, the deadline will be extended by 10 days, bringing the total to 80 working days from the time of notification.

The parties have 15 working days to respond to the SO, and the NCA then has 15 working days to reach its final decision. If remedies are offered after a reasoned proposition is sent to it, the NCA has an extra 15 working days to make its final decision. This means that the maximum time frame of the procedure is 100 days; this may stretch to 130 working days if all possible extensions are given.
There are no remedies available to speed up the process in general. That said, the NCA is always under an obligation to reach its decision as soon as possible. In addition, there is the possibility of a short-form notification and pre-notification discussions with the NCA, which could speed up the process.

If no decision is made within the applicable deadline, the transaction is automatically cleared. A clearance letter is normally sent to the parties to confirm the clearance. If the transaction is cleared in Phase 2, such letter is always sent. If the NCA decides to intervene, it can either prohibit the transaction or approve the transaction subject to conditions proposed by the parties (remedies). The deadlines set out above are suspended if the notification fails to fulfil the information requirements, and if any of the undertakings concerned fail to comply with written requests to provide information by a specific date. The parties are to be notified of any suspension of deadlines. The deadline continues to run once the NCA or the Ministry has received the requested information.

iii Pre-notification contacts and meetings under the process
Informal contact with the NCA pre-filing is possible, and also encouraged. In complex cases, pre-notification contact is strongly advised by the NCA. However, the NCA will not give any legally binding decisions at this stage.

The complexity of the relevant case will determine whether fewer or more meetings should be held. The form of the meetings (e.g., in attendance, by telephone or videoconference) will depend on what the NCA considers to be appropriate in the individual case.

iv Third-party access to the file and rights to challenge mergers
Third parties are regularly involved in merger procedures before the NCA, primarily as sources of information. As mentioned above, the NCA is required to publish a brief notice of all concentrations being notified on its website. The notice shall contain information concerning the identity of the undertakings concerned, the transaction and the affected markets, in addition to the date of submission. The purpose of this notice is to encourage third-party comments. Third parties may also ask for access to a non-confidential version of all notifications filed with the NCA. Third parties are not entitled to access trade secrets in such documents or other documents prepared for the NCA’s internal use. Consequently, the parties have to enclose a proposal for a public version of the notification when submitting a notification. The NCA will also normally discuss the information identified as confidential with the parties before giving third parties access to the information.

Additionally, the NCA may order third parties to provide information and comments to the notification. The NCA may carry out an informal market test by telephone or e-mail to third parties, or in more complicated cases may send a formal request to selected third parties in order to obtain relevant information. A decision by the NCA regarding the right to access the notification (e.g., refusal of access) may be appealed to the Ministry. The appeal must be addressed to the Ministry, but sent to the NCA. If the NCA does not reverse its decision, it must then forward the appeal to the Ministry. Both the NCA and the Ministry must consider independently what type of information constitutes trade secrets. According to former practice and preparatory
works to the amendments in the Competition Act, very little information is regarded as trade secrets.

v Resolution of authorities’ competition concerns, appeals and judicial review
The NCA shall intervene against mergers that will create or strengthen a significant impediment of competition contrary to the purpose of the Competition Act. The purpose of the Act is to further competition, and thereby contribute to the efficient utilisation of society’s resources. In March 2015, the Ministry suggested changing from the current substantial lessening of competition (SLC) test to the significant impediment to effective competition (SIEC) test. The proposal is currently the subject of a hearing.

After the NCA has considered the notification, further third-party information and market inspection, it will decide whether to clear the concentration (in either Phase 1 or Phase 2) or to intervene. The NCA may intervene by way of a reasoned administrative decision. Such decisions may include prohibitions, orders or conditional approvals, including:

a) prohibiting a concentration or an acquisition, and providing detailed terms and conditions that must be fulfilled to achieve the purpose of the prohibition;

b) ordering a disposition of shares or holdings acquired as part of a concentration or an acquisition; or

c) requiring the parties in question to meet terms and conditions essential to ease restrictions to competition.

The parties may propose and negotiate all kinds of remedies, both structural and behavioural, with the NCA. It is possible to propose remedies at any stage of the regulatory process. This will, however, normally occur after the NCA has investigated the case for a period and has made a preliminary statement on its serious objections to a transaction. The NCA will normally examine the market effect of the proposed remedies (e.g., by consulting third parties). According to the recent amendments of the Competition Act, the notifying parties must suggest relevant remedies themselves. The NCA tends to accept behavioural remedies in quite a lot of cases. Failure to comply with the remedies will constitute failure to observe a decision of the NCA, and will be subject to administrative fines of up to 10 per cent of the turnover of the parties or criminal fines or imprisonment.

Subject to the parties’ proposal, the NCA may appoint a trustee to oversee the parties’ compliance with the structural and behavioural remedies.

vi Standstill obligation
A concentration cannot be implemented until the NCA has cleared the merger (also referred to as the standstill obligation). The standstill obligation applies to both compulsory and voluntary notifications. The standstill obligation also applies if the NCA has required a notification below the notification thresholds.

The NCA may issue an interim order prohibiting implementation of the concentration, or may order alternative measures, if there are reasonable grounds for assuming that the concentration may create or strengthen a significant restriction of
competition, and a temporary prohibition is necessary to ensure the effectiveness of any potential intervention contemplated by the NCA.

vii Sanctions

If a transaction that meets the notification thresholds is not notified to the NCA, this failure will be subject to sanctions pursuant to Chapter 7 of the Competition Act. The same applies if a transaction is implemented despite a prohibition decision or in breach of a condition or obligation imposed by a conditional clearance decision.

Section 29 of the Competition Act states that a company violating Section 18 (notification of mergers) is subject to administrative fines. Pursuant to Section 32, any company breaching Section 18 through culpable negligence or intent may be subject to personal fines or imprisonment.

Failure to notify (breach of the standstill obligation) may result in administrative fines of up to 10 per cent of the annual worldwide turnover of the liable undertakings. Failure to comply with the NCA’s decision or submission of incomplete or false information may be subject to administrative fines or criminal sanctions. As previously mentioned, in 2014, the NCA issued fines in four cases of between 200,000 Norwegian kroner and 700,000 Norwegian kroner for breaching the standstill obligation. In addition to this, the NCA also fined one company in the grocery market 25 million Norwegian kroner for breach of the standstill obligation.

viii Effect of regulatory review

Some merger cases are subject to the supervision of both the NCA and the Norwegian Media Authority (NMA). The NMA is a supervisory and administrative body at the state level, and is in charge of enforcing the Act on Broadcasting, the Regulation on Broadcasting and the Media Ownership Act in Norway. The NMA and the NCA evaluate different legal aspects of concentrations in merger cases. However, in some cases their assessments overlap, and they will normally cooperate and share relevant information for an efficient evaluation. A concentration in a merger case may be prohibited or approved on conditions by either the NMA or the NCA, or by both. The government has proposed removing the NMA’s competence in merger cases. The proposal suggests that media ownership should only be regulated by the Competition Act. This change would be made possible because the government has also suggested that merger control be altered to consumer standards where consideration of media diversity is important. With this change, media companies will only have one law and one authority to deal with when participating in mergers and acquisitions. If this proposal is adopted, such change will most likely come into effect during 2015.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

When an acquisition is considered by the European Commission, the NCA will initially not consider the concentration. However, the NCA may assist the Commission in its inquiry, or ask the Commission to have the case transferred to the NCA if it primarily
affects Norwegian interests. Further, the NCA may transfer a case from the Norwegian jurisdiction to the Commission’s jurisdiction.

ii Special situations

**Notification of a minority acquisition of an undertaking**

The acquisition of a part of an undertaking that does not lead to control of the undertaking (minority acquisition) is not subject to mandatory notification. However, the NCA shall, under the same conditions as those for an acquisition of control, intervene against such transaction if it finds that the acquisition will ‘create or strengthen a significant restriction of competition’. The NCA may order a notification of an acquisition of an undertaking within three months after the agreement is final. The undertaking may also choose to voluntarily submit a notification.

**Possible review of transactions below the notification thresholds**

As noted above, the NCA has the power to intervene in any merger, notwithstanding the notification thresholds. The substantive condition for the NCA to require a notification below the notification thresholds is that it finds reasonable grounds to assume that competition may be affected, or if specific considerations require that the NCA must examine the merger further. As such, and notwithstanding the notification thresholds, a merger must always be assessed on its substance, including a preliminary analysis of the relevant market. The main reason behind the NCA wanting this power to require notifications and intervene below thresholds is its priority to protect the local and niche markets.

To protect undertakings’ legal certainty, a review of transactions below the notification thresholds can be initiated no later than three months after a final agreement is signed or control is acquired, whichever occurs first. If the NCA chooses to intervene, it must give a reasoned statement on why these criteria are fulfilled in each transaction.

The NCA’s power to intervene and review transactions below the thresholds leaves parties to transactions in a state of uncertainty for three months. As such, prior to the completion of a concentration, the parties should assess the risk of intervention by the NCA. In order to achieve a quicker clarification, the parties may actually choose to submit a voluntary notification.

If the NCA intervenes in a transaction below the notification thresholds, the ordinary procedural rules for merger filings will apply.

It should be noted that the standstill obligation also comes into effect in such situation. This means that if a merger is already completed, and the NCA intervenes within three months, the involved parties must freeze any steps taken in relation to implementing the transaction. Because the NCA has the power to reverse all measures already carried out by the parties if the transaction is found to harm competition in the relevant market, it is important for the parties to a planned transaction below the notification thresholds to assess the risk of being caught by the NCA, and to consider a voluntary notification to achieve clearance.
Norway

iii Exemption from the standstill obligation
The standstill obligation may be suspended on a case-by-case basis due to a regulation on a partial exemption from the standstill obligation. The partial exemption applies to public bids or series of transactions in a regulated market. The parties are only entitled to transfer the securities in question, and the acquirer is not entitled to exercise any voting rights. Thus, the acquirer is still prohibited from exercising any kind of control over the target company. The standstill obligation may also be completely or partially suspended if the concentration is necessary for a party’s further operation (e.g., by preventing insolvency). Suspension is applied, at the NCA’s own discretion, in urgent cases where the standstill obligation will lead to serious negative effects for the parties in the concentration.

V OUTLOOK AND CONCLUSIONS

i Legislative changes to the regulatory framework
Following legislative changes to the Competition Act that came into effect from 1 January 2014, the Norwegian merger control framework has reached a threshold level that is more in line with the other Nordic countries. The previous regime was found to be ineffective, and resulted in a huge number of notifications. Under the new regime, there are still a fair number of notifications (21 at the time of writing), including several notifications below the thresholds. This highlights the risk analysis that must be undertaken by parties prior to completing a merger, and market players must be aware that the NCA is keen to protect the local and niche markets.

ii Other matters relating to the Norwegian regulatory system
The NCA already had the power to intervene in minority acquisitions under the previous merger control regime, but it will be interesting to see how it will use such power in the future, given the recent discussions regarding this topic in other European countries. To date, there have been no examples of such interventions.

In November 2014, a public law committee delivered a public report suggesting, inter alia, the establishment of an administrative appeal body for NCA decisions in merger control cases. The proposal has been the subject of a hearing and this is pending with the Ministry. The Ministry has suggested some further amendments to the Competition Act, including a harmonisation with the SIEC test under the EU Merger Regulation (see Section III.v, supra).
I  INTRODUCTION

While Polish merger control, in terms of substance and procedure, is becoming similar to that of the EU, and the Polish competition authority, the Office for Competition and Consumer Protection (OCCP), benefits from the decisional practice of the European Commission and the EU courts, there are still differences that need to be observed in the case of concentrations having nexus to Poland or executed by undertakings active in Poland. This is particularly important considering the relatively low merger control thresholds triggering the merger filing obligation in Poland.

The entry into force of the amendment to the Polish Act on Competition and Consumer Protection (ACCP) on 18 January 2015 introduced some important changes to the Polish merger control rules aimed, inter alia, at further harmonisation with the EU Merger Control Regulation, and was awaited by many business and practitioners. The key amendments resulted in excluding from the notification obligation many concentrations not having an actual impact on competition within Poland, the introduction of two-phase proceedings and a statement of objections. However, as presented below, there are still some important aspects where Polish merger control rules differ from those provided by EU law.

It should be noted, however, that the OCCP, while still being rather formalistic, has indicted a practice of increased openness and transparency in its relationships with business, which was reflected in the issuance of guidelines on the rules of contact with

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2 The text of the ACCP as well as the secondary legislation and merger control guidelines issued by the OCCP are available in Polish on the authority’s website (see https://uokik.gov.pl/prawo.php).
undertakings. The guidelines outline the right of the undertaking to also be heard, where possible, in an unformalised manner. Economic analyses seem to play a more important role in the assessment of merger cases, which is reflected in the increased involvement in merger control cases of the market analysis (economic) department of the OCCP.

### Jurisdiction

An analysis as to whether a prior merger clearance of the OCCP for a given transaction is necessary requires a short assessment and answers to the following questions:

**a** whether a transaction amounts to a concentration, i.e., whether it constitutes:
- a merger of two or more independent undertakings;
- the acquisition by one or more undertakings, whether by purchase or subscription of shares or securities; or through any other means of direct or indirect control over one or more other undertakings;
- the creation of a joint venture;
- the acquisition of part of a business of another undertaking (i.e., an asset sale of part of a business);\(^4\)

**b** whether turnover thresholds are exceeded:
- the combined worldwide turnover of the undertakings involved in the concentration and their entire groups exceeds €1 billion for the year prior to notification; or
- the combined Polish turnover of the undertakings involved in the concentration and their entire groups exceeds €50 million for the year prior to notification;

**c** whether notification exemption applies:
- \textit{de minimis} exemption – no filing is triggered if the Polish turnover of the following does not exceed €10 million in any of the two financial years preceding the concentration:
  - the target – in the case of the acquisition of control; or
  - none of the undertakings participating in the concentration (their capital groups) – in the case of a merger or the creation of a joint venture; or
  - the part of the business to be acquired.

In the case of an acquisition of control or an acquisition of part of the business between the same parties in a series of transactions executed over two years, the total turnover of the undertakings to be acquired and the acquired business is taken into account. The purpose of this provision is to prevent avoiding merger notification by slicing the transaction into parts each falling within the notification exemption; and

**d** specific concentrations outside merger control review:

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4 Differently from the EU Merger Regulation, under the ACCP an acquisition of part of a business constitutes a form of concentration separate from the acquisition of control over an undertaking.
• an acquisition or holding of securities by a financial institution with a view to reselling them, provided that the resale takes place within one year and the financial institution does not exercise the shareholder’s rights;
• an acquisition or holding of securities on a temporary basis, with a view to securing claims, provided that the undertaking does not exercise the shareholder’s rights;
• a concentration during bankruptcy proceedings, unless control is taken over or part of the business acquired by a competitor;
• intra-group concentrations.

ii Joint ventures

In Poland, differently from the EU Merger Control Regulation, a joint venture does not have to perform on a lasting basis all the functions of an autonomous economic entity to be caught by the merger notification obligation. Thus, if the relevant thresholds are met, all joint ventures are notifiable to the OCCP, irrespective of whether they are ‘fully functional’ or not.

Furthermore, a joint venture is deemed to arise even if only one undertaking will exercise (sole) control while the remaining undertakings establishing the joint venture will have non-controlling stakes. Given that a joint venture can also be created on the basis of an existing company, this may lead to practical problems with the differentiation between an acquisition of a minority shareholding in an existing company (which is not notifiable to the OCCP) or the acquisition of joint control and the creation of a joint venture. This problem was noticed by the OCCP, which in its latest guidelines on the criteria and procedure for notifying the intention of concentration stated that a creation of a joint venture on the basis of an existing company takes place when the company, although existing, was not operational, or if it is intended that post-acquisition an operational company will substantially change or expand its business profile. Otherwise, the transaction should be qualified as an acquisition of joint control (which may be notifiable to the OCCP) or as an acquisition of a minority shareholding that does not constitute a concentration.

A notification obligation may also arise if an existing joint venture, which could have been previously cleared by the OCCP, is to substantially change or expand its scope of operations.

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5 A distinction between an acquisition of joint control and an establishment of a joint venture may be relevant given different undertakings whose Polish turnover is taken into account for the purposes of an assessment of the de minimis exemption.
6 Polish version available at the OCCP’s website (see: https://uokik.gov.pl/wyjasnienia_i_wytyczne.php).
II YEAR IN REVIEW

i Conditional decisions

Interesting developments in Polish merger control include the OCCP’s decisions concerning retail and wholesale trade. That sector is currently undergoing a process of consolidation in Poland and, given the local scope of the relevant geographical markets for undertakings active in retail or wholesale trade, the combined market shares of the parties to a concentration on such small markets may sometimes exceed the threshold over which the ACCP presumes dominance (i.e., 40 per cent). This in turn results in conditional decisions imposed by the OCCP.

In principle, the OCCP prefers to address identified competition concerns through structural remedies. Behavioural remedies are only present to make the structural remedies effective. A recent example of structural remedies is the 2014 decision concerning the acquisition of the chain of Real hypermarkets by Auchan. That decision was the result of the partial referral from the European Commission to the OCCP of part of a larger concentration involving the acquisition of Real hypermarkets in Poland, Romania, Russia and Ukraine.

A review by the OCCP lasted approximately 10 months, and the authority granted its clearance decision to Auchan upon the condition that eight hypermarkets of Real would be divested by Auchan to an independent and viable buyer within an 18-month period from the date of completion of the transaction. When stipulating such conditions, the OCCP stated, verbatim, that Auchan needs to divest all rights to the specific locations of Real hypermarkets, including in particular their ownership, right of perpetual usufruct, and lease or tenancy agreements. The condition imposed on Auchan was fulfilled in 2015, when it obtained the OCCP’s approval to sell these locations to Schiever.

The Real/Auchan decision constitutes a textbook example of the OCCP’s approach to conditional decisions and their performance in practice (i.e., divestiture to a viable buyer that is accepted by the OCCP within 12 to 18 months from the completion of the transaction, accompanied by an obligation to provide the authority with a report on the fulfilment of that condition). Against that background, as a seminal case announcing the somewhat new approach of the OCCP to remedies, is the recent case concerning wholesale trade in tobacco products, namely the acquisition of a number of tobacco wholesale depots from Kolporter by KDWT, which is a member of the Eurocash capital group active in Poland in wholesale and retail trade.

In that decision, the OCCP decided to accept a condition in the form of a carveout (i.e., the exclusion of one of the wholesale depots from the scope of the transaction before its completion). The OCCP put particular emphasis on the scope of assets being

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8 Case COMP/M.6822.
10 Decision of the OCCP No. DKK – 121/2014 of 18 September 2014.
11 In addition, the notifying party resigned from the acquisition of three wholesale depots.
carved out, and indicated specifically that it should embrace all tangible and intangible assets related to a given wholesale depot, such as:

- rights to the real estate on which the depot was located;
- contracts with employees, sales representatives, suppliers and customers;
- equipment of the depot; and
- the database of local customers, together with a history of their purchases.

In the grounds of this decision, the OCCP expressed its view that the carveout solution would be much more effective in practice. To substantiate this statement, the OCCP compared the carveout condition to its previous conditional decisions issued in transactions involving the Eurocash capital group and involving divestiture. It underlined that in one such case, out of the 12 wholesale depots that were divested to an independent and viable buyer, currently only four are running. In the OCCP’s view, keeping a problematic depot with the seller would make it possible to better protect competition on the market and avoid any problems with finding an appropriate buyer. Given that statement, it might be assumed that the OCCP will be more inclined to accept carveout-like remedies in the future.

ii Joint ventures

As mentioned above, the Polish merger control regime captures a wide range of transactions classified as joint ventures. In particular, changes to the scope of an already existing joint venture are also deemed as notifiable concentrations within the meaning of the ACCP. This is supported by a recent example of the expansion of the scope of activities of BuyIn, which is a joint venture between the telecommunications operators Orange and T-Mobile. Despite the fact that the establishment of BuyIn in 2011 was already notified to the OCCP, which eventually granted its unconditional consent, Orange and T-Mobile had to notify to the OCCP of their intention to expand the scope of BuyIn’s business operations into new areas, and received a clearance in 2015.

iii Fines

The OCCP rarely imposes fines within the framework of the merger control regime; therefore, all instances of such fines are of particular interest to practitioners. The recent decision of the OCCP imposing a fine on BP Europe for closing before clearance must be noted in particular, because it may well become an important precedent for the future. In that case, BP Europe filed with the OCCP a notification of its intention to acquire assets comprising one petrol station together with a restaurant and a shop located on the same property. However, the OCCP stated that in fact the acquisition of assets took place six months before the notification was made, namely when BP Europe concluded a tenancy agreement with the owner of the petrol station. In the OCCP’s view, by concluding a tenancy agreement, BP Europe effectively acquired control over said petrol station.

As a general rule under the ACCP, an acquisition of part of some assets constitutes a separate form of concentration from an acquisition of control over an undertaking. While the acquisition of control over an undertaking may take place by any means (e.g., by contract), the acquisition of part of some assets should be considered as their purchase (and not the acquisition of the contractual rights (e.g., from the tenancy)). Thus, the above decision of the OCCP is at least controversial and, in the absence of any guidelines as to which rights account for an acquisition of assets, this may lead to legal uncertainty as to whether in given circumstances a concentration has already taken place.

The decision has been appealed to the court of competition and consumer protection, which has not yet reviewed the case.

III THE MERGER CONTROL REGIME

i Responsibility for filing

Once the jurisdictional test is met, the notification to the OCCP is mandatory and must be made prior to closing. A notification can be filed as early as the actual intention of the parties to concentrate can be shown. Filing can be made based on a conditional agreement, but also based on a memorandum of understanding, letter of intent, heads of terms or a similar document sufficiently expressing the intention of the parties to the transaction (press releases or a statement of one party are not sufficient). Pre-notification consultations with the authority are possible in problematic cases.

Which party (parties) is responsible for filing depends on the type of concentration: in the case of a merger or the creation of a joint venture, all parties to the transaction must notify; and if the concentration constitutes an acquisition of control or an acquisition of part of a business, the acquiring undertaking is responsible for filing.

In the event of the acquisition of joint control, all undertakings acquiring such control must notify (but not the undertaking already exercising joint control or changing its control from sole to joint control). The notification can be made jointly or separately by each of the undertakings acquiring joint control.

ii Review period

In line with the EU merger control rules, the amendment to the ACCP introduced two-phase proceedings.

The Phase I review period is one calendar month. Phase II lasts an additional four calendar months. The OCCP may decide on Phase II by way of a procedural,
non-appealable decision that requires justification. Such decision may be issued in the event of:

- particularly complex matters;
- matters where there is a reasonable likelihood that the concentration will result in a significant impediment to competition; or
- matters requiring a market survey.

Any additional questions from the authority\(^\text{17}\) stop the clock until answers are given by the notifying parties. Thus, the actual review period (both in Phase I and Phase II) may last longer than the statutory periods.\(^\text{18}\) In fact, in particularly problematic cases the proceeding may last up to six to nine months.

### iii Suspension obligation

The parties are prohibited from closing a notifiable transaction without the OCCP’s clearance. A breach of this suspension obligation or a failure to notify at all may result in fines imposed on undertakings obliged to notify a transaction\(^\text{19}\) amounting to up to 10 per cent of their worldwide turnover. In practice, the fines imposed by the OCCP are lower than the maximum amount permitted by law, and to date have typically ranged from €2,000 to €20,000. There is no sanction of invalidity; however, if an implemented concentration results in a significant restriction of competition, the OCCP may, in addition to fines, impose remedial measures (divestment).

There is an exemption from the suspension obligation that relates to a public offer for the acquisition or exchange of shares notified to the OCCP, provided that the acquirer does not exercise the voting rights attached to those shares, or exercises those rights only with a view to maintaining the full value of its capital investment or to avoid serious harm to the undertakings involved in the concentration.

### iv Third-party rights

Third parties (e.g., competitors), customers and suppliers of the parties to the concentration do not have a right to formally intervene (e.g., they do not have access to files or the right to lodge an appeal). However, they may submit unsolicited comments in relation to an intended concentration or have the opportunity to present their views.

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17 The OCCP may ask additional questions even if the notification is formally complete, and it often benefits from this right.

18 In the second half of 2014, the authority was preparing itself for the new statutory review periods introduced by the amendment of shortening the actual review periods. Pursuant to information on the authority’s website, in the last quarter of 2014, of 36 decisions issued in unproblematic cases, 20 decisions were issued before the lapse of a month (the average review period was 24 days). In that period, both in unproblematic and in problematic cases, the proceedings lasted on average approximately 42 days, which is a significant improvement when compared with 58 days in 2013.

19 Fines are not imposed on vendors.
observations on the occasion of a market survey conducted by the OCCP in the course of the merger proceeding.

v Substantive assessment
The substantive test applied by the OCCP is whether the intended concentration would lead to a significant impediment to competition, in particular by creating or strengthening a dominant position on the market. There is a rebuttable presumption that an undertaking enjoys a dominant position if it has a share exceeding 40 per cent of the market. In principle, in relation to horizontal mergers, the OCCP does not identify a significant impediment to competition below a 40 per cent market share threshold. In its guidelines on assessing notified concentrations, the OCCP distinguishes between horizontal, vertical and conglomerate effects and, in relation to all three categories of effects, the OCCP may take into account both unilateral and coordinated effects.

vi Resolution of competition concerns
In matters where there is a reasonable likelihood that the concentration will result in a significant impediment to competition, the OCCP presents a statement of objections together with its justification. The OCCP may also propose conditions upon which it will clear the concentration. The conditions may also be proposed by the notifying party or parties.

During the subsequent 14 calendar days an undertaking may submit its position in relation to the statement of objections or conditions proposed by the OCCP. Upon an application of the notifying party or parties, the 14-day period may be extended by the OCCP by no more than an additional 14 days.

A statement of objections will allow an undertaking to become acquainted with the OCCP’s view of the case in question, and therefore make it possible to propose modifications to the planned concentration so as to ensure its compatibility with competition law. In practice, a statement of objections should precede the submission of conditions.

A lack of response from the notifying party or parties to the conditions proposed by the OCCP or the refusal of their acceptance, as well as the OCCP’s refusal to accept the conditions proposed by the undertaking, results in the issuance of a prohibitive decision.

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20 The equivalent of the ‘significant impediment to effective competition’ test applied at the EU level.
21 There was one exception where the OCCP prohibited a horizontal merger even though the combined market share of the undertakings concerned was below the 40 per cent threshold (Decision DKK-12/11, Empik/Merlin).
22 Polish version available at OCCP’s website (see: https://uokik.gov.pl/wyjasnienia_i_wytyczne.php).
vii Appeals and judicial review

A decision of the OCCP is appealable to the court of competition and consumer protection (via the OCCP) within one month from the date of that decision having been served. The appeal may be filed by the party or parties to the concentration, the public prosecutor or the Ombudsman.

Where the OCCP considers an appeal justified, it may revoke or change the decision in its entirety or in any part without sending the case files to the court, and it will immediately notify the party concerned by sending a new decision that may be appealed by that party.

IV OTHER STRATEGIC CONSIDERATIONS

i Joint ventures

As already mentioned above, the approach to joint ventures in the Polish merger control regime might create for the parties to a given concentration notification an obligation that is actually not necessary for the purpose of protecting competition in Poland. In many cases, the creation of a joint venture established and active in another part of the world by large capital groups may technically require notification to the OCCP. This is due to the broad notion of ‘joint venture’ (which includes both full function and non-full function joint ventures) and the wide scope of the ‘domestic effect’ test in Poland (which is met if at least one of the capital groups taking part in the concentration achieves turnover on the territory of Poland) as well as to the relatively low turnover thresholds. Recent amendments to the ACCP, in particular the introduction of the de minimis threshold for concentrations in the form of a joint venture, did not provide much support in this respect.

This issue is particularly important given that the definition of a joint venture is not related to the notion of joint control. For this reason, sometimes even the acquisition of a minority stake might lead to a notifiable concentration. Unfortunately, the OCCP is not willing to change its approach and interprets the ACCP provisions in this respect in a strict manner.

ii Process

Amendments to the ACCP that came into force in January 2015 were designed specifically to allow the OCCP to better allocate its resources, in particular by introducing two-phase merger control proceedings. This also resulted in the shorter review period for simple, non-problematic concentrations reviewed in Phase I (which in general can last up to one month). In practice, according to the OCCP’s statistics, the average time frame for

23 Regional court in Warsaw.
24 Namely the exclusion from the notification obligation of transactions where none of the capital groups involved in the creation of the joint venture held more than €10 million in two financial years preceding the concentration.
review in 2014 was 58 days, while in the first three months after the amendments came into force, this was only 28 days. Should this trend be maintained, the OCCP should be able to better focus on truly complex and problematic transactions.

In terms of the merger control process, it should also be noted that the OCCP is becoming more willing to consult with other public entities on their assessment of a given transaction. A recent decision in the insurance sector, in which the largest Polish insurance company, PZU, acquired a local competitor from the direct insurance channel Link 4, 26 is a good example of that phenomenon. In that case, the OCCP not only surveyed the parties’ competitors, but also consulted the Polish insurance services regulator (the Polish Financial Supervision Authority) as well as the Polish Insurance Ombudsman. That approach of the OCCP should be taken into account particularly by parties to transactions involving regulated sectors, such as financial services, telecommunications or energy.

V OUTLOOK AND CONCLUSIONS

After the recent amendments became effective in January 2015, the Polish merger control regime has become more efficient, allowing the OCCP to better allocate its resources and focus on more complex transactions and at the same time shorten the statutory period of review for simple cases from two to one month. Furthermore, the greater involvement of the OCCP’s internal economists in merger control cases as well as an increased openness in discussions with parties to transactions are widely perceived as very promising trends for the future.

However, the above-mentioned amendments do not address all of the issues, and therefore do not give sufficient comfort of legal certainty to the parties. For example, Poland might still be one of those jurisdictions in which the obligation to notify a transaction is required, even though no impact on competition in the Polish market is involved.

I INTRODUCTION

Law 19/2012, of 8 May (Competition Act) is the main regulation applicable to Portuguese merger control. It is enforced by the Portuguese Competition Authority (Authority), which was created in 2003 by Decree Law 10/2003, of 18 January.

According to the Competition Act, a concentration is deemed to exist when a change of control in the whole or parts of one or more undertakings occurs on a lasting basis as a result of:

- the merger of two or more previously independent undertakings or parts of undertakings;
- the acquisition, directly or indirectly, of control of all or parts of the share capital or parts of the assets of one or various undertakings, by one or more persons or undertakings already controlling at least one undertaking; or
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (a full-function joint venture).

Control is defined as any act, irrespective of the form it takes, implying the possibility of exercising a decisive influence over the activity of an undertaking on a lasting basis, whether solely or jointly. It results, inter alia, from the acquisition of all or part of the share capital, the acquisition of ownership rights or rights to use all or part of an undertaking’s assets, or the acquisition of rights or the signing of contracts that confer a decisive influence on the composition, voting or decisions of the undertaking’s corporate bodies.

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1 Ricardo Bordalo Junqueiro is of counsel and Marta Flores da Silva is an associate lawyer at Cuatrecasas, Gonçalves Pereira, RL.
Concentrations must be notified to the Authority if they meet one of the three alternative jurisdictional thresholds set out in the Competition Act:

a. the parties’ aggregate Portuguese turnover exceeds €100 million and the individual Portuguese turnover of each of at least two parties exceeds €5 million;

b. there is the acquisition, creation or reinforcement of a national market share exceeding 50 per cent; or

c. there is the acquisition, creation or reinforcement of a national market share exceeding 30 per cent but lower than 50 per cent and the Portuguese individual turnover of at least two parties exceeds €5 million.

In 2014, the new statutes of the Authority were adopted (Decree Law 125/2014, of 18 August). They maintain one important merger control rule already present in the previous statutes: the possibility of appealing a prohibition decision to the Minister of Economy (as described below). Other important merger control (procedural) rules have been adopted by the Authority in the past few years in several regulations and guidelines, and these are discussed throughout the chapter.

On a subsidiary basis, the Administrative Procedure Code (Decree Law 4/2015, of 7 January) is applicable to the merger control procedures conducted by the Authority, rules of the Administrative Courts Procedure Code (Law 15/2002, of 22 February) apply to the judicial review of the Authority’s decisions in administrative proceedings concerning merger control, and the misdemeanours regime (under Decree Law 433/82, 27 October, as amended) applies on a subsidiary basis to administrative offence proceedings regarding merger control.

The merger control regime in Portugal closely follows the European Union merger control regime. Mergers meeting the thresholds of the European Merger Regulation (EUMR), although having effects in Portugal, are subject to the exclusive jurisdiction of the European Commission (Commission).

II THE MERGER CONTROL REGIME

The acquisition of a minority shareholding is only deemed a concentration if it confers control, either sole or joint, on the acquirer, and will only be notifiable if it meets the notification thresholds.

A concentration does not exist where:

a. the acquisition of shareholdings or assets is performed by the insolvency administrator within the context of an insolvency procedure;

b. the acquisition of shareholdings as mere collateral; and

c. the acquisition by credit institutions, financial institutions or insurance companies of shareholdings in undertakings held on a temporary basis and acquired with a view to reselling the shareholdings, provided they are not to be held on a lasting basis and no voting rights are exercised in respect of such shareholdings.

The acquisition by the state of a controlling shareholding in a credit institution, or the transfer of its business to a transition bank as ordered by the Bank of Portugal, is also not considered to be a concentration (Article 20(1) of Law 63-A/2008, of 24 November).
The calculation of the turnover under the Competition Act closely follows the EUMR, including the replacement of the turnover by the sum of a set of items in the case of banking and insurance undertakings.

Since two of the notification thresholds are based on the market share, some uncertainty may arise. Special attention is necessary in these cases, as the Authority has proved to be extensive in its interpretation of the parties’ market share threshold. In particular, this can be met by the target company alone (even in the absence of overlap between the parties).

Two or more concentrations between the same natural or legal persons within a period of two years, even when individually considered as not being subject to prior notification, are considered a single concentration subject to prior notification when the concentrations together reach the turnover thresholds.

Although not a concentration, the creation of a joint undertaking not performing all the functions of an autonomous economic entity may still be subject to the Act, and assessed as a restrictive practice, if it has as its object or effect the coordination of the competitive behaviour of independent undertakings, beyond the aim of creating the joint undertaking.

i Local effects test
Concentrations that take place or may produce effects in the Portuguese territory must be notified if one of the three thresholds mentioned in Section I, supra, is met. It is sufficient that at least one of the parties has direct or indirect sales in Portugal (even through an agent or distributor), even if any of the parties are established or have assets in Portugal. Foreign-to-foreign transactions must be notified if the jurisdictional thresholds are met.

Prior notification is mandatory, with no exceptions, for concentrations meeting the notification thresholds.

A concentration subject to mandatory notification must not be implemented prior to being notified and authorised (or before a specified lapse of time) by the Authority.

There are two exceptions to the obligation of non-implementation of the merger:

- a public offer of acquisition or exchange notified to the Authority may be implemented before a decision by the Authority provided the acquiring party does not exercise the voting rights inherent in the shareholding, or exercises them merely with a view to protecting the full value of its investment on the basis of a derogation previously granted; and
- before or after the notification filing, the notifying parties may submit a reasoned request to the Authority for a derogation from the obligation of no prior implementation. The Authority will analyse the consequences of suspending the operation (or of suspending the exercise of voting rights by the undertakings concerned) and the negative effects of the derogation on competition and may, if necessary, add to the derogation conditions or obligations destined to ensure effective competition. A complaint can be lodged against the decision to accept or reject the request for a derogation, but no appeal is admissible. To date, there have been very few derogation decisions, as the Authority is very restrictive in
the granting of such waivers (derogations were, recently, granted for reasons of imminent bankruptcy²).

**ii Substantive assessment**

The substantive assessment applied by the Authority is the significant impediment to effective competition test (SIEC), as set out in the EUMR. Concentrations likely to give rise to a SIEC in the domestic market or in a substantial part of it will be prohibited.

To determine the effects of the concentration on the structure of competition, the Authority will take into consideration the structure of the relevant markets, the position of the undertakings and their competitors in the relevant markets, the purchaser’s market power, potential competition and the existence of barriers to entry.

The Authority’s assessment can also include the consideration of any technical and economic progress that does not constitute an impediment to competition, provided there are efficiency gains that benefit consumers resulting directly from the concentration (efficiency defence), as well as the control of essential facilities by the parties and the possibility of access to these facilities provided for competing undertakings.


A decision authorising a concentration is considered to cover the restrictions directly related to the implementation of the concentration and necessary for it. Some of the ancillary restraints included in authorised concentrations include non-compete obligations between the seller and the acquirer in order to preserve the value of the acquired business, non-solicitation of customers and workers, and non-compete obligations between a joint venture and parent companies.

**iii Filing of the notification**

The notification must be filed by the undertaking or undertakings or person or persons acquiring control. The parties involved in a full merger or in the creation of a joint venture are responsible for jointly notifying the merger. In submitting the notification, the notifying parties are required to use the notification forms of Regulation 60/2013 on the notification forms, of 14 February, which sets the procedural rules for merger notifications. Since 2009, merger notifications can be submitted electronically.

Notifications only become effective with the payment of the filing fee (as defined in Regulation 1/E/2003 on merger control procedure fees, of 25 July). An additional filing fee, corresponding to 50 per cent of the base fee, must be paid upon the opening of a Phase II investigation.

**iv Consequences for not filing**

There are serious consequences for not filing a concentration subject to mandatory notification. The most important consequence is the lack of production of legal effects for transactions implemented before notification and clearance. Transactions implemented in breach of a prohibition decision are null and void. The Authority may also revoke a

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concentration that has been implemented in disregard of a decision of non-opposition imposing conditions or obligations.

The Authority may impose on the notifying parties fines of up to 10 per cent of the turnover of the year immediately preceding the final decision issued by the Authority for each of the undertakings concerned. Persons holding positions in the managing bodies or responsible for the supervision of the relevant department may also be held responsible, with fines of up to 10 per cent of their annual income applying.

In cases of failure to notify, a periodic penalty payment of up to a maximum of 5 per cent of the average daily turnover in the year immediately before the decision can be imposed for each day of delay.

If the Authority becomes aware of a concentration subject to mandatory filing being implemented within the prior five years that was not previously notified, it can initiate ex officio proceedings, in which case the filing fees double.

The Authority can order the separation of the undertakings or of any aggregated assets, including the unwinding of the transaction or cessation of control, or take all the measures deemed necessary to restore the situation that existed prior to the concentration.

In situations in which a notified concentration was implemented before clearance, the Authority can order that the parties who acquired control immediately suspend their voting rights, that the board of directors not undertake any act that is not an act occurring in the ordinary course of managing the business, and can prohibit the disposal of shareholdings or parts of the assets of the acquired undertaking. Penalties for implementing an operation before express or tacit clearance by the Authority are similar to the ones levied for failure to notify.

In December 2012, the Authority issued one decision for breach of the prior notification obligation, in the ex officio Farminveste/Pararede case, which concerned the acquisition, in June 2008, of sole control of Glintt – Global Intelligent Technologies, SGPS, SA by Farminveste – Gestão de Participações, SGPS, Lda. Three undertakings were fined €150,000 for implementing a concentration before receiving clearance. This decision was later quashed by the Competition, Regulation and Supervision Court (Competition Court) on grounds of infringement of the defendants' defence rights.

v Procedure
There is no fixed deadline for the notification filing; however, concentrations meeting the notification thresholds must not be implemented prior to being notified and authorised, or before a tacit decision is made by the Authority (standstill obligation).

The merger may be notified after the execution of the relevant agreement or, in the case of public offers of acquisition or exchange, following the date of the preliminary announcement of the public offer, or of the announcement of the acquisition of a controlling shareholding in an undertaking with shares listed on a regulated stock

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3 Fines are calculated according to the Authority's Guidelines on setting fines, of 20 December 2012.
4 Case 47/2009 – Farminveste/Pararede.
market. Concentrations resulting from a public procurement procedure may be notified after the definitive tender selection and before the public contract is signed off.

Concentrations may be also notified before the execution of the relevant agreement (voluntary notification) when the parties to the concentration offer a serious intention to conclude an agreement (e.g., by signing a letter of intent or a memorandum of understanding) or, in the case of a public offer of acquisition or exchange, where they have publicly announced their intention to make such an offer.

The notifying parties may, on a confidential and informal basis, enter into pre-notification contacts with the Authority up to 15 days before the expected notification date, according to the procedure set down in the Guidelines on pre-notification procedure (of 27 December 2012). Such contacts are designed to help determine whether the transaction is subject to notification, to identify which information needs to be provided and to explore possible competition concerns. The aim is to avoid possible suspensions for information requests, thus allowing for a quicker assessment of the concentration. As this pre-notification phase is not mandatory, there is not much information available on the estimated length of these pre-notification contacts, but in practice they take at least one month.

The assessment of a concentration may involve two phases (Phases I and II).

The standard initial phase is Phase I, during which the Authority will assess whether the concentration will result in SIEC in the relevant markets. Within 30 working days (extendable if information requests are made), the Authority must conclude Phase I and decide that the case does not amount to a concentration; clear the concentration (with or without commitments); or open an in-depth investigation (Phase II) if it has serious doubts that the concentration will result in SIEC. The majority of concentrations in Portugal are decided in Phase I.

Phase II investigations must be concluded within a maximum time limit of 90 days from the date when the notification becomes effective. In practice, a period of 30 (or more) working days for Phase I, and a period of 60 working days for Phase II, respectively, are common. Upon request by the notifying party or with its agreement, the global time limit can be extended by the Authority for a period of up to a maximum of 20 working days. Within 75 working days from notification, the Authority hears the notifying parties and interested parties (unless the Authority intends to adopt a non-opposition decision without imposing conditions).

At the end of Phase II, the Authority may adopt either a clearance decision (with or without commitments) or a prohibition decision. Prohibition decisions can only be adopted in Phase II, with the exception of the merger in the Ongoing/Prisa/Media Capital case, which was prohibited in Phase I following the binding negative opinion of the media regulator (see below).

5 To date, there have been only five prohibition decisions in Portugal: Arriva/Barraqueiro (Case 37/2004, 25 November 2005); Petrogal/Eso (Case 45/2004, 14 December 2005); Brisa/AEO/AEE (Case 22/2005, 7 April 2006); TAP/SPDH (Case 12/2009, 19 November 2009); and Controlinvest/ZON Optimus/PT (Case 4/2013, 31 July 2014).

6 Case 41/2009 – Ongoing/Prisa/Media Capital.
Both the 30 and the 90-working day deadlines may be suspended if requests for additional information are made by the Authority, if parties offer commitments (suspension for 20 working days), and in the case of a prior hearing of the notifying parties or of interested third parties having submitted observations.

If no decision is adopted within the time limits (including suspensions), a non-opposition decision is deemed to have been made (tacit decision). To date, there were only three tacit decisions, all in 2003 (the year of the Authority’s creation). Despite the rule of tacit decision, the Authority does not seem to fear this possibility: in 2013, the notifying parties to the acquisition of Sport TV appealed to the Competition Court claiming that a tacit approval had occurred (due to the issuance of a legal opinion by the media regulator after the expiration of the deadline established), which the Authority rejected. The Competition Court agreed with the Authority.

The notifying party can at any time withdraw the notification as well as renounce its rights or legally protected interests, except in those cases stipulated in law.

vi Accelerating the procedure

Since 2012, a simplified procedure has been available for concentrations that, on a preliminary assessment, do not pose significant impediments to competition. Under Regulation 60/2013, concentrations where there are no horizontal overlaps, concentrations where the combined market share does not exceed 15 per cent (or 25 per cent if the share increase is not higher than 2 per cent) in horizontal mergers, or concentrations where the combined market share does not exceed 25 per cent in vertical or conglomerate mergers, may be notified using the simplified notification form, which requires a lower level of information to be provided to the Authority.

In July 2007, the Authority adopted its Simplified Procedure Guidelines, setting out a simplified (and faster) decision procedure available for concentrations that are not likely to raise competition concerns, such as concentrations that do not entail a significant change to the competitive structure of the market (no overlap), concentrations that have no significant horizontal or vertical effects (or negligible effects), or concentrations that do not amount to a concentration subject to mandatory pre-notification.

Pre-notification contacts with the Authority can substantially reduce the need for information requests, which stop the clock. Additionally, a voluntary notification is possible whenever the parties to the concentration offer a serious intention to conclude an agreement, which can also anticipate a decision by the Authority.

The notifying parties may offer commitments in Phase I when necessary to gain the approval of the Authority. In the *Kento*Unitel*Sonaecom/ZON*Optimus case, the merger between Optimus (the third-largest mobile player in Portugal) and ZON (the pay TV market leader), was decided in Phase I, with the offering of commitments by the notifying parties.

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7 Case 5/2013 – *Kento*Unitel*Sonaecom/ZON*Optimus.
vii Third-party rights
Within a time limit of five working days counting from the day when the notification becomes effective, the Authority will, at the expense of the notifying party, publish the key elements of the concentration in two daily national papers and set a time limit of no less than 10 working days for interested third parties to submit observations. Interested third parties that submit concerns regarding the concentration are considered opposing parties and are entitled to intervene in the prior hearing.

Prior to the adoption of any decisions (non-opposition or prohibition decisions), third parties that have already intervened in the procedure shall be heard. The prior hearing suspends the time periods for the adoption of the decision. Third parties opposing the transaction may also access a non-confidential version of the Authority’s file in both Phases I and II. Information regarding the internal affairs of the parties may be considered by the Authority to be confidential if disclosure of such information to interested parties or third parties could cause serious damage.

Third parties can appeal Authority decisions adopted in the context of merger control.

viii Remedies
The notifying parties may, at any time in Phase I or II, on their own initiative or after an informal invitation from the Authority, submit commitments with a view to ensuring that effective competition is maintained. Remedies can only be submitted by the parties, which must negotiate them with the Authority.

The Authority recommends that, in Phase I, parties submit commitments within 20 working days from notification and in Phase II, within 40 working days following the decision to open an in-depth investigation.

The submission of commitments suspends the time limit for the adoption of a decision for a period of 20 working days counting from the first working day following the submission of commitments and expiring on the day that the notifying party is informed of the Authority’s decision to accept or refuse such commitments.

The Authority will refuse commitments whenever it considers that the submission is a delaying tactic, or that the commitments are insufficient to remedy the competition concerns. A complaint may be lodged against the refusal decision, but no autonomous appeal is allowed.

The authorisation of a concentration with remedies may be subject to conditions or obligations that are designed to maintain effective competition.

The Guidelines on Remedies (of 28 July 2011) set out detailed procedural rules on the proposal, negotiation and implementation of remedies, in line with the Commission’s practice. Commitments may include structural (such as divestments) or behavioural commitments. Both were already accepted by the Authority. Behavioural remedies are normally accepted by the Authority (even in decisions where divestitures have been imposed), although in its Remedies Guidelines it declares that divestitures are preferable to behavioural commitments.

Non-compliance with the remedies is subject to consequences that include:

- the opening of an investigation of the breach;
- fines of up to 10 per cent of the company’s turnover;
possible revocation of the clearance decision; and
the agreements related to the merger being considered null and void.

ix Appeals
Merger control decisions are appealable to the Competition Court as special administrative judicial cases. Appeals must be lodged within three months of a merger’s notification (although when the decision is null and void, there is no time limit for the appeal). The appeal does not have a suspensive effect unless such provision is established in the interim measures duly handed down.

Rulings handed down by the Competition Court in administrative cases are appealed to the Lisbon Appellate Court within 30 days of the appealed ruling. Appeals focusing on issues of law must be lodged directly to the Supreme Court of Justice.

Appeals against rulings by the Lisbon Appellate Court are lodged at the Supreme Court of Justice and must be limited to issues of law. These appeals do not have suspensive effect.

According to publicly available information, to date, only the prohibition decision in the Arriva/Barraqueiro case (still pending) and the clearance decision in the Arena Atlântida/Pavilhão Atlântico case (appeal lodged by a third-party competitor) have been appealed.

In a recent appeal before the Competition Court, the notifying parties requested the annulment of the Authority’s decision to initiate an in-depth investigation based on the argument that the approval of the Controlinveste*ZON*PT/Sport TV*PPTV*Sportinveste merger had occurred by tacit consent. The appeal was denied by the Competition Court.

Under the Statutes of the Authority, prohibited merger decisions may also be appealed by the notifying parties to the Minister for the Economy within 30 days from the notification of the prohibition decision. The Council of Ministers may overturn a prohibition based on fundamental national economy interests that override the competition concerns of the concentration. This appeal has only been used once, in the Brisa/AEA case, a decision that had originally been prohibited as it would create a market share of more than 75 per cent in some transport routes.

x Regulatory review
The Authority has exclusive competence to decide on concentrations subject to mandatory prior notification. However, concentrations in markets subject to sectoral regulation (such as telecommunications, energy, transport, postal services, financial services, capital markets, insurance, health and media) are also subject to sector-specific legislation, which may involve additional assessment by the relevant regulatory authority.

The Authority, prior to making a final decision, must request the opinion of the sectoral regulatory authority, setting a reasonable time limit for its response. In

8 Created by Law 46/2011, of 24 June.
9 Case 37/2004 – Arriva/Barraqueiro.
10 Case 38/2012 – Arena Atlântida/Pavilhão Atlântico.
11 Case 22/2005 – Brisa/AEA.
general, with the exception of Entidade Reguladora para a Comunicação Social, the media regulator, such opinions are not binding. However, when the opinion is binding, the time limit for the Authority to adopt a final decision is suspended. The absence of such binding opinions does not, however, prevent the Authority from adopting a final decision.

In the Ongoing/Prisa/Media Capital case, a concentration that involved the acquisition of joint control of Media Capital, which is active in the television and radio sectors, the Authority prohibited the merger even though it raised no competition concerns, following the negative binding opinion of the media regulator, which considered the concentration to be likely to restrict media plurality and freedom of speech.

Mergers in particular sectors (such as insurance, banking and media) must also be approved by the relevant regulatory authorities.

III YEAR IN REVIEW

According to the Authority’s website, 43 concentrations were notified to the Authority (against 40 concentrations notified in 2013) in 2014, two of which were deemed not to be subject to mandatory pre-notification. Forty-one were authorised in Phase I without conditions. There was one prohibition decision in 2014, concerning a merger notified in 2013.

Three are worth further discussion:

i Suma/EGF

On 14 November 2014, consortium Serviços Urbanos e Meio Ambiente, SA (Suma) notified the acquisition of sole control of Empresa Geral do Fomento, SA (EGF) in the context of its privatisation.

On 7 March 2015, the Authority initiated an in-depth investigation as, taking into consideration the information gathered in Phase I, it considered that the proposed merger raised issues regarding whether the merger would result in a SIEC in the market for the collection of solid waste, for which the municipalities are responsible. In particular, for the Authority, the proposed merger could lead to market foreclosure as a result of the integration, into a single group of companies, of the complementary activities of collection and treatment of solid urban waste in the sector. Given the importance of this sector, a considerable number of third parties presented their observations, including municipalities, competitors and clients.

ii JCDecaux/Cemusa

The acquisition of the sole control of Cemusa Corporación Europea de Mobiliario Urbano, SA (Cemusa), which is active in outdoor advertising, by JCDecauxEurope

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12 See footnote 6.
13 Case 37/2014 – Suma/EGF.
14 Case 15/2014 – JCDecaux/Cemusa.
(JCDecaux), the largest worldwide outdoor advertising company, was notified to the Authority on 2 May 2014.

On 7 August 2014, the Authority initiated an in-depth investigation in which it considered whether the proposed merger raised serious concerns by causing a SIEC by increasing market concentration, competitive closeness between the undertakings concerned, and the existing barriers to entry and to expansion.

Aiming to address the concerns identified by the Authority in Phase II, JCDecaux submitted an initial remedies package on 10 February 2015, followed by a new package on 10 March. Both packages were rejected by the Authority. As a result, on 18 March 2015, JCDecaux applied to withdraw its notification proceedings, which was granted by the Authority on 19 March 2015.

Again, this was a transaction that attracted significant third-party opposition.

iii Controlinveste*ZON*PT/Sport TV*PPTV*Sportinveste\textsuperscript{15}

On 28 January 2013, the acquisition of joint control by Controlinveste Media – SGPS, SA, NOS SGPS (NOS (initially ZON SGPS)) and Portugal Telecom, SGPS, SA (PT) over Sport TV Portugal, SA (Sport TV), Sportinveste Multimédia, SGPS, SA e PPTV – Publicidade de Portugal e Televisão, SA (PPTV) was notified to the Authority. PT and NOS are electronic communications firms and the two main pay-TV players in Portugal (comprising 90 per cent of the market). Sport TV is the leading provider of premium sports channels for pay TV.

The Authority initiated an in-depth investigation on 22 August 2013 and, on 31 July 2014, following an 18-month review, adopted a decision prohibiting the merger.

The Authority concluded that the merger would create a SIEC, in terms of customer and input foreclosure and coordinated effects, in the markets for broadcasting rights for premium sports content, paid premium sports content channels, and premium sports content for internet and mobile communications and downstream markets.

The Authority claimed that the merger would increase the ability and the incentive of NOS and PT to foreclose the market for paid premium sports content channels and for TV broadcasting rights for premium sports content. The Authority also found that the vertical integration resulting from the merger was likely to foreclose access by NOS and PT’s competitors at the downstream level to paid premium sports content channels. The Authority thought there was a the risk of coordinated effects.

After a market test, the commitments offered by the parties were considered by the Authority as insufficient to set aside these competition concerns.

These proceedings lasted for more than a year and a half, making them one of the longest the Authority has had to deal with. This prolonged time frame was due to the number of interested third parties that opposed the merger, to the renegotiation of possible commitments, and to various procedural challenges that delayed the adoption of a decision.

\textsuperscript{15} Case 4/2013 – Controlinveste*ZON*PT/Sport TV*PPTV*Sportinveste.
IV OTHER STRATEGIC CONSIDERATIONS

Under Article 9 of the EUMR, the Authority has in several cases referred concentrations with a Community dimension to the Commission. The latest request, filed on 5 March 2015, concerned the acquisition by Altice, a multinational cable and telecommunications company, of the Portuguese and Hungarian assets of PT Portugal SGPS, which the Commission rejected.

Several concentrations meeting the notification thresholds of the Act have been referred to the Commission under Articles 4(5) and 22(4) of the EUMR.

Under the EUMR, the Authority has a regular and intensive cooperation agreement in place with the Commission and the national competition authorities of the other EU Member States (in particular, the Authority and the Spanish Competition Authority hold monthly meetings). It also takes part of the European Competition Network, the International Competition Network and the European Competition Authorities Association.

Moreover, both the regular and simplified forms require the notifying parties to indicate if and in which other national competition authorities the notified concentration has also been filed.

V OUTLOOK AND CONCLUSIONS

In its Priorities for the competition policy for 2015 (of 30 December 2014), the Authority establishes, as its priorities in the context of merger control, optimising the merger control analysis process and reducing the duration of investigations in complex cases, with the objective of earlier identification and discussion of possible competition concerns, thus allowing for the submission of remedies earlier in the proceedings. There is no pending legislation in the context of merger control.

Due to the financial crisis in Portugal, the number of notified transactions has been drastically reduced. It remains to be seen whether this trend will continue in 2015.
Chapter 31

ROMANIA

Carmen Peli, Manuela Lupeanu and Mihaela Ciolan

I INTRODUCTION

The merger control regime was introduced in Romania by the Law on Competition No. 21/1996 (Competition Law). The Romanian Competition Council (CC) is the authority empowered to apply the Competition Law. In addition, the Supreme Council for the Country’s Defence (SCCD) can oppose transactions that raise risks from a defence policy perspective. The Competition Law was amended substantially in August 2010 by Government Emergency Ordinance No. 75/2010, which introduced a number of important changes in the area of merger control, including a new substantive test for assessing merger impact (the significant impediment of effective competition (SIEC) test), the ability of merging parties to notify their intention to merge, longer deadlines for the CC to take decisions and a revised authorisation fee. The Competition Law was republished in 2014, but its provisions continue to be amended. Among significant changes, the CC will now be required to obtain a judicial authorisation to inspect any premises belonging to undertakings being investigated or to their management or employees.

Under the domestic antitrust rules, an economic concentration is performed through the merger of previously independent undertakings, the creation of a full-function joint venture or the acquisition of control of an undertaking. Transactions above the following thresholds must be examined and approved by the CC:

a  the worldwide aggregate turnover of the parties (e.g., the purchaser and the target) and their groups exceeds €10 million; and
b  at least two of the involved undertakings have each registered a turnover in Romania of €4 million.

1 Carmen Peli is a founding partner, Manuela Lupeanu is a senior associate and Mihaela Ciolan is an associate at PeliFilip.
These jurisdictional thresholds establish the CC’s competence to conduct a review, and the CC cannot review mergers that do not meet the thresholds. Economic concentrations occurring outside Romania are subject to notification if the above thresholds are exceeded, the clearance of the CC being actually required both for economic concentrations involving foreign undertakings with Romanian affiliates, and for concentrations where the parties do not have a Romanian corporate presence but are reaching the turnover thresholds on the Romanian market through direct sales.

The CC’s secondary legislation on the merger control system is included mainly in the Regulation regarding the economic concentrations approved by the Competition Council Order No. 385/2010 (Merger Regulation). The Merger Regulation brought practical and procedural clarification with respect to some aspects of merger assessment. In addition, further harmonisation with the EU merger rules was achieved through Instructions on matters regarding the concepts of economic concentration, merging parties, full-function joint ventures and turnover, and Instructions on ancillary restraints; the Instructions generally mirror the European rules. Order No. 688/2010 (Instructions on remedies) contains rules applicable to remedies offered by merging parties in response to a commitments decision. Guidelines on the calculation of the authorisation fee for merger-clearance procedures have been implemented by Order No. 400/2010. The CC has also enacted Rules on access to files in merger clearance procedures.

In 2014, further amendments brought the national merger control rules in line with the updates to the European merger control regime made by the European Commission at the end of 2013, and have a focus on:

- the importance of pre-notification discussions;
- increasing transparency by publishing a notice of transactions notified and falling under the merger rules; and
- the increased application of the simplified procedure.

In line with the European rules, a relevant market is now considered to be affected if the parties to a merger have a combined horizontal market share of 20 per cent or more, or a combined vertical market share of 30 per cent or more.

The Competition Law contains a presumption of dominance for a company or companies exceeding a 40 per cent market share. However, the clearance test under the merger control rules is no longer the creation or strengthening of a dominant position as a result of which competition might be significantly restricted or distorted, but a more complex analysis on the basis of which concentrations that do not reach ‘dominance’ might still be deemed to substantially lessen competition. In its practice, the CC seems

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3 An example is Decision No. 29 of 26 June 2013 regarding the takeover by MVM Zrt Ungaria of E.ON Földgáz Trade Zrt Ungaria, E.ON Földgáz Storage Zrt Ungaria and Powerforum Zrt Ungaria.
to have lately focused its analysis on whether the economic concentration would likely lead to price increases.\(^4\)

The clearance procedure still includes a Phase I analysis, and if the CC suspects that the clearance test will not be met, it will start a Phase II investigation. Most transactions are cleared under Phase I, with very few so far having undergone a Phase II investigation.

**II YEAR IN REVIEW**

**i General considerations**

**Statistics**

In 2013, Romania’s GDP grew at one of the highest rates in Europe, and its inflation rate decreased.\(^5\) Furthermore, according to a barometer prepared by Ernst & Young based on publicly available information, in 2014 Romania registered the most significant increase in volume for mergers and acquisitions in central and south-east Europe.\(^6\) However, this growth is not reflected in the number of economic concentrations that have been subject to merger control by the CC, as not all of them fell under the Romanian merger rules. In 2014, the number of economic concentrations cleared by the CC has slightly increased, amounting to 42 mergers\(^7\) compared with 2013 (37 mergers), while to May 2015, only four economic concentrations gained final clearance.\(^8\) No merger prohibition decisions have been issued since 2001. No cases required a Phase II clearance procedure in 2014. The last case requiring such in-depth analysis was the takeover of Hollywood Multiplex Operations by Cinema City International NV in 2012; the CC found that the combination between the two raised serious competition concerns that could not be eliminated through the commitments submitted by the acquiring party. However, the parties abandoned the transaction, and the investigation was closed without any decision being issued.

During 2014 and up to May 2015, the CC dealt with transactions in various sectors, particularly in the fast-moving consumer goods retail, financial sector, energy and real estate sectors. Other sectors analysed by the CC were IT, media and courier delivery services, engineering consultancy services, agribusiness, waste management, do-it-yourself and port operation services.

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\(^4\) In 2013, the CC started to use new methods of economic analysis prior and post clearance in its analysis of concentrations in the retail sector: the gross upward pricing pressure index for *ex ante* analysis, and the difference in differences (DID) method applied in *ex post* analysis. For more details regarding the methods, see Romanian Competition Journal No. 2-2013, www.consiliulconcurentei.ro/uploads/docs/items/id9047/rrc_nr_2-2013.pdf.

\(^5\) 2013 Competition Council: Annual Report.


\(^7\) 2014 Competition Council: Annual Report.

\(^8\) www.consiliulconcurentei.ro/ro/documente-oficiale/concurenta/decizii.html.
Trends and predictions
In 2014, the Romanian market for transactions was dynamic, with acquisitions made by certain investment funds, the exit of others and consolidations in certain sectors. A number of transactions were also undertaken as necessary financial reorganisations and restructurings of companies.

An important recent trend on the Romanian market is the consolidation of the financial sector, where major transactions have occurred in the banking, insurance and leasing segments. Two transactions cleared by the CC in 2013 – Citibank/Raiffeisen Bank and RBS Romania/Unicredit Tiriac Bank, which concerned the sale of retail products and clients’ portfolios – showed the banks’ need to concentrate on the retail sector. This trend continued in 2014, with OTP Bank Romania taking over Millennium Bank and Unicredit Tiriac Bank acquiring the corporate portfolio from RBS Romania, while in 2015, Banca Transilvania acquired control over Volksbank Romania.

In 2014, the CC issued two decisions that reflect the authority’s approach to the application of the Instructions on remedies. In the Agrana Zucker/Zaharul Liesti and Lemarco Cristal transaction, the CC gave its clearance based on behavioural commitments (a commitment to transfer the import licences for cheap raw sugar to other producers in Romania and not to acquire any other sugar factory in Romania for a period of five years). However, in the Mega Image/Angst Retail transaction, the commitments accepted by the authority concerned the structure of the transaction (the assignment of two retail stores, after the parties gave up the acquisition of one retail store).

The high volume of transactions is likely to continue in 2015, with several transactions expected in the financial sector, as well as in the telecommunications, energy and medical services markets.

Few privatisations are expected in 2015. The privatisation of CFR Marfa (the national rail freight transport operator), which began in 2013, has not yet been accomplished. The process is expected to be re-launched in 2015, with the aim of being finalised most probably in 2016, as agreed with the International Monetary Fund. Another privatisation, which began in 2014, involves a significant state-owned company, Posta Romana (the national operator of postal services); this privatisation is expected to be accomplished by the end of 2015.

Lack of transparency
CC merger clearance decisions still do not generally indicate the merging parties’ market share or any other economic or market data that could serve as guidance for further practice. In 2014, the CC did publish several decisions where the ranges of the parties’ market shares are mentioned (thus giving an implicit indication of the authority’s reasoning), while in others it indicated certain market shares or the Herfindahl–Hirschman Index.

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9 For more details about the transaction, see Section IV, infra.
10 For more details about the transaction, see Section III, infra.
11 See footnote 6.
level before and after the transaction; however, this does not yet constitute a general practice regarding transparency in decisions.

ii Mergers in the courier delivery services market

In 2013, the CC cleared the acquisition of Cargus by Abris Capital Partners, a leading mid-market private equity fund. Cargus is the first courier delivery company in Romania, founded in 1991 and acquired by Deutsche Post DHL in 2008. For DHL, the transaction represented the spin-off of its operations in Romania and followed the company’s strategy, which aims to focus on its international services.

To ensure a successful transition process, the parties have concluded six transitory agreements, creating a supply relationship under which Cargus continues to offer certain services to DHL. An interesting feature is that only four agreements have been considered as representing ancillary restrictions, while the agreements regarding authorised sales and cargo transportation services and handling at dispatching centres were not considered to be directly related and necessary to the implementation of the transaction. These latter agreements remain to be evaluated under Article 5 of the Competition Law.

Abris Capital Partners continued its investments in the courier delivery services market by its acquisition of Urgent Curier, cleared by the CC in May 2014. Cargus and Urgent Curier have merged and currently function under the name Urgent Cargus, occupying the second position in the local courier delivery services market.

iii Merger in the daily consumer goods retail sector cleared with commitments

In November 2014, Mega Image SRL, a member of Delhaize Group, obtained a clearance decision for the acquisition of assets of Angst Retail. The transaction concerned the transfer of the retail sale activity performed in 20 stores located in Bucharest and Ilfov (including equipment, stocks, employees, goodwill) and the right to use these stores. When submitting the notification, Mega Image was already the largest retail chain in Romania, having 353 shops, of which 176 were supermarkets (123 in Bucharest) and 177 were ‘Shop&Go’ stores similar to the traditional stores (150 in Bucharest).

Market definition and assessment

The CC analysed the impact of the transaction on the relevant markets of the retail sale of consumer goods at the upstream level on the supply market where the retailers act as buyers; and at the downstream level on the retail market, where it considered that the traditional stores and discounters act on the same market with hypermarkets and supermarkets, while the cash and carry distribution channel is not part of this market as its target is mostly formed of other retailers and not final consumers.

12 Decision No. 8 of 18 February 2013 regarding the takeover of Cargus International SRL by Mardeto Investments SRL.
13 Decision No. 20 of 27 May 2014.
14 Decision No. 46 of 14 November 2014 regarding the takeover of assets of Angst Retail by Mega Image.
In its analysis, the CC considered that the different store formats (hypermarkets, supermarkets, traditional retailers, discounters) compete with each other as such, irrespective of the selection of products they carry.

At the geographical level, the CC took into consideration a catchment area of 10 minutes by car for all Angst stores. With respect to a possible extension of the geographical area, the CC analysed the overlap between three stores – in Amzei, Perla and Academiei – based on the density and the placement of the relevant stores as well as the characteristics of central Bucharest (where the stores are located), which contains a high density of buildings and intensive pedestrian traffic.

**Structural remedies**

As certain concerns were identified for the stores located in Bucharest (Amzei, Perla and Academiei), the parties agreed not to acquire the store in Perla, and committed to assign the Amzei and Academiei stores or other stores within the Mega Image network located in the same area that had sales in 2013 equal or higher to the sales of the Amzei and Academiei stores. Furthermore, Mega Image committed not to subsequently acquire influence over the assigned properties for a period of 10 years.

iv **Merger in the white sugar market cleared with commitments**

In the context of the full deregulation of the sugar market in the European Union as of 2017, Agrana Zucker acquired two sugar production units from Lemarco SA. The transaction involved the two leading retail white sugar market players in Romania and was approved by the CC with conditions six months after notification. Notably, the notification was made based on a letter of intent stating that a sale and purchase agreement was to be executed only if the CC authorised the merger in a form satisfactory for Agrana.

**Market definition and assessment**

The CC analysed the impact of the transaction on the white sugar market in two segments: industrial and retail. For the retail sector, a significant increase was found, with no other competitor having more than 10 per cent market share following the transaction. The CC considered that market share levels are necessary, but not sufficient, to identify a dominant position. Thus, it also took into account the stability of parties’ market shares over time and the market shares of competitors, and performed a thorough analysis of the barriers to entry on the market.

The main barrier identified was the access to raw materials for the production of sugar (sugar beets and sugar cane). While beet production is limited due to national quotas established at EU level and distributed to different producers, access to sugar cane is restricted by both pricing and non-pricing barriers and requires import licences. As the two sugar production units had import licences for sugar cane (CXL import licences),

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15 Decision No. 33 of 26 August 2014 regarding the takeover by Agrana Zucker of assets of Zaharul Liesti SA and Lemarco Cristal (both companies being under the sole control of Lemarco SA).
the CC was concerned that the acquirer could limit competitors’ access to cheap raw material, thus strengthening its dominant position.

**Remedies**

Given the concerns identified by the authority, Agrana proposed the following commitments:

- the transfer to authorised sugar processors with production units in Romania of CXL import licences\(^{16}\) that may be obtained based on the permanent activity refiner status of the two production units acquired, until 30 September 2017; and
- an obligation not to acquire any other sugar factory in Romania for a period of five years.

The transfer of licences had to be made without payment and in a non-discriminatory manner. The CC considered that the transfer of import licences to other producers insured such producers’ access to alternative sources of cheap raw material, and thus will enable them to compete effectively with Agrana. However, if no producers accept the import licences,\(^{17}\) Agrana is permitted to use them, and will have to submit an annual report to the CC within 30 days of the end of the market year.\(^{18}\) The report must include information on the raw sugar imported based on these import licences as well as information regarding the quarterly wholesale average price of white sugar from other sources.

**v Particular market definition and market strength assessment**

**Strauss Coffee BV/Cia Iguaçu de Café Soluvel\(^{19}\)**

In July 2014, the CC cleared the acquisition by Strauss Coffee BV and Strauss Romania SRL of assets of Cia Iguaçu de Café Soluvel and Panfoods Romania, respectively:

- the Amigo and Café Especial trademarks;
- the intellectual property rights attached to or related to such trademarks;
- the exclusive right to use the formula for preparing Amigo classic coffee products;
- the domain name; and
- the stock of bulk coffee products and finished goods.

Although in its previous decisions the CC left open the exact definition of the coffee market, in this case it performed a more-in-depth assessment, leading to a distinction between the roasted and ground coffee market and the soluble market (including instant

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17 Producers reportedly had a rather short amount of time to respond to the offer of import licences, as the commitments were sent in final form to the authority on 15 July, and the acceptance of licences by the interested competitors were to have been received by 31 August.
18 A market year was defined by the authority as lasting from October to September in each calendar year.
19 Decision No. 25 of 9 July 2014 regarding the takeover of Amigo brands by Strauss Coffee BV and Strauss Romania SRL.
coffee and coffee mixes), with a further segmentation depending on the sale channel, retail and away-from-home levels. In addition to the arguments provided by the acquirer sustaining this market definition, the CC requested the opinion of competitors in the coffee market regarding the interchangeability of instant coffee and coffee specialties (mixes). The competitors confirmed and sustained such interchangeability of both segments due to use of the same production process, with mixes containing 10 to 15 per cent instant coffee, and consumers regarding both products as substitutable after taking into consideration their quality and effects. The CC also took into account a study performed by a third party, regarding ‘instant and mixes territories’ and performed a stationarity analysis\(^{20}\) of relative prices of soluble coffee, including mixes and coffee specialties.

With a market share below 25 per cent after the transaction, Strauss Coffee occupied second place on the soluble coffee market in Romania, after Nestlé, and consolidated its products portfolio on the retail soluble coffee in Romania. No significant barriers to entry were identified in the market; in the past five years, several companies have placed products in the market, while most retailers have introduced their own private label coffee.

### vi Ex post analysis of the Lidl/Plus merger\(^{21}\)

In November 2010, the CC cleared the takeover by Lidl Romania GmbH of Plus stores.\(^{22}\) Lidl, a member of the Schwarz group, operated in Romania through 53 Kaufland stores (hypermarkets), while the target was active through 103 stores (discounters). The relevant markets identified were the upstream market of supply of consumer goods and the downstream retail market.

At the downstream level, the CC identified five local markets where the parties had combined market shares exceeding 30 per cent and even 45 per cent. The CC cleared the transaction without requesting commitments despite these high shares. In 2012, however, it decided to perform an *ex post* analysis of the merger, and published a report in December 2013 in this respect.

### Method used in the analysis

For the *ex post* assessment, the CC used mainly the DID method, but also considered the ‘before and after the implementation of the merger’ situation. The DID method was based on a comparison of two groups: the treated group and the control group.

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20 The stationarity analysis represents a type of economic analysis used by the CC when assessing the *Strauss Coffeee/Amigo* merger, and comprises the study of data on prices evolution for substitutable products collected for a specific period of time (monthly prices for three to five years).

21 Decision No. 46 of 1 November 2010 regarding the joint takeover of Pludi Market (Plus), Tengelmann Real Estate International Romania SCS and Tengelmann Real Estate International SRL by Lidl Romania GmbH.

**Ex post assessment**

The CC focused on Kaufland’s behaviour in relation to its prices on five relevant markets where the aggregated share of the parties exceeded 25 per cent. These prices were compared with other 11 Kaufland stores, while Lidl’s behaviour after the authorisation of the concentration was not taken into account. The CC limited its analysis to 11 categories of products. The five stores were considered the target group, and the 11 remaining stores, the control group. The evolution of prices applied by Kaufland in the target group was compared with the prices used by the control group. In most of the cases (representing 67.3 per cent of the total), the prices evolved in a similar way. Therefore, the hypothesis according to which Kaufland could decide to raise prices in the local markets where its group market power increased after the Lidl/Plus transaction was not confirmed.

**Conclusions of the report**

The CC concluded that two years after the acquisition of Plus by Lidl, the Schwarz group had strengthened its position both on the upstream supply market and on the downstream retail market for consumer goods. However, this position did not allow the group to indulge in independent behaviour in relation to its competitors or its customers.

### III THE MERGER CONTROL REGIME

The current merger control regime, in force since 1997, was amended in August 2010 and October 2014, leading to greater harmonisation with the European regime. These are updates of the rules on the merger-clearance procedure after Romania’s accession to the EU in 2007.

#### i Clearance procedure under the Merger Regulation

As per the rules in force, economic concentrations exceeding the thresholds must be submitted for approval to the CC. Economic concentrations have to be notified ‘promptly’ following the conclusion of the relevant agreement, the announcement of the public bid or the takeover of the controlling shares prior to their implementation. Failure to notify a transaction and implementation of the concentration before its authorisation (i.e., gun jumping) are subject to a fine between 0.5 and 10 per cent of the parties’ turnover in the financial year prior to the fining.

The Merger Regulation also allows the involved firms to notify the CC of their intention to merge at any time prior to the conclusion of the transaction. The parties would, however, need to provide sufficient evidence of such intention (e.g., a memorandum of understanding, a gentlemen’s agreement, pre-agreements, framework agreements). This provision is expected to be frequently used by firms involved in economic concentrations.

The parties must submit a standard notification form accompanied by attached relevant documentation. The content of the notification form is in line with that used in the procedure before the European Commission. In October 2014, Competition Council Order No. 438/2014 was published, reflecting the recent changes made by the European Commission. The CC may ask questions, and it regularly uses this right. Upon receiving the notification form and the supporting documents, the CC has 20 days...
to review it and, if necessary, to request additional information from the parties. Such information must be submitted within 15 days of the date of the request, with a possible further five days’ extension upon reasonable justifications. If after the expiry of these terms the information provided is not sufficiently clear, the CC can impose fines. Once the parties provide all necessary information, the notification will be declared complete (the CC will immediately communicate the date upon which the notification became complete and effective to the parties). Under the Merger Regulation, the CC has 45 days after the notification becomes complete to decide whether the concentration comes under the scope of the merger rules; does not raise serious antitrust concerns; or raises competition doubts.

Once the entire procedure is finalised, the CC shall issue:

a a non-approval decision if the merger raises serious competition concerns;

b a decision clearing the merger if it ascertains that the analysed transaction is not deemed to create or to consolidate a dominant position threatening competition on the relevant national markets; or

c a commitment decision, which will necessitate remedies being fulfilled by the parties; these will be chosen from a series of remedies provided within the Instructions on remedies (e.g., the divestment of a part of the business, the termination of exclusive arrangements or the transfer of an important technology).

The Merger Regulation also provides a simplified clearance procedure that can be used in limited circumstances and, in any case, only if the aggregate market shares of the parties do not exceed 20 per cent (horizontal relations) or 30 per cent (vertical relations). In its past practice, the CC was reluctant to use this procedure even for relatively small transactions, and the assessment of how the transaction affects the ‘normal course of competition’ requires as much information and time as the regular procedure. In 2014 however, 50 per cent of economic concentrations were analysed by the CC under the simplified procedure.23 Nevertheless, the CC remains free to start the analysis under the simplified procedure and continue it under a full clearance structure, as it did in one case in 2014.24

ii Enforcement of the SIEC test

In contrast to the dominance test established by the former rules, the Merger Regulation establishes that the assessment test for an economic concentration is the SIEC test: assessing whether an economic concentration significantly impedes effective competition on the Romanian market or on a substantial part of it, particularly following the creation or strengthening of a dominant position. The CC will thus take into account various criteria for assessing the merger, such as:

a the relevant market structure;

b actual or potential competition;

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23 See footnote 7.

24 Decision No. 11 of 18 March 2014 regarding the takeover of Compania Romprest Service SA by Europrest Invest SRL and Premium Management Team SRL.
iii Presumption of dominance above a 40 per cent market share

One major amendment to the Competition Law in 2011 related to the introduction of the presumption of dominance for companies holding a market share of over 40 per cent.

Although the CC does not sanction a dominant position per se (only an abuse of such market power on the relevant market), the burden of proof is on the company presumed to be dominant; once the presumption is made, the company has to rebut it.

iv Access to the file

During the review procedure, access to the file is allowed only to the merging parties (i.e., the buyer’s and seller’s shareholders and the merging company’s managers). The Instructions on the access to the file preclude the access for third parties unless the CC considers it is necessary for the third parties to submit their observations; such right does not, however, allow third parties access to confidential information. The instructions on the access to the file have a narrow interpretation of what constitutes confidential information, but it generally covers business secrets and any sensitive information that would severely compromise the merging parties’ activity if disclosed. A redacted version of the confidential documents and information must be prepared by the party, pointing out their sensitiveness. In October 2013, the CC published guidelines on the confidentiality of documents that include practical information on this topic.

In practice, the CC routinely invites third parties (i.e., the parties’ competitors or commercial partners, regulatory authorities or any other interested entities) to submit observations or any other comments or information whenever a new submission for merger approval is addressed to the CC. Interested third parties may challenge the final decision under the regular procedure regarding the resolution of administrative disputes. To our knowledge, only one clearance decision\(^{25}\) has been challenged in court by a third party (in 2012). It was finally dismissed by the High Court of Cassation and Justice in November 2014, as the acquirer abandoned the transaction and thus no potential competition risks on the market could justify the interest of the claim.

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\(^{25}\) Decision No. 48 of 29 August 2012 regarding the takeover of Simcor Var SA by Carmeuse Holding SRL, contested by Holcim SA.
Gun jumping

The initiation of a merger clearance procedure stops a transaction and the parties cannot take any further measures to implement it. The Merger Regulation makes no further reference to ‘reversible’ or ‘irreversible’ steps that can be taken by the acquirer with respect to the target, but lists only the actions that might be considered ‘irreversible’ after implementing a concentration:

- directing the acquired undertaking to enter or exit a market or change its scope of activity;
- using the voting rights granted by the acquired shares to replace the directors, to approve the costs and expenses budget, the business plan or the investment plan of the target;
- changing the corporate name of the acquired entity;
- restructuring, shutting down or spinning off the acquired undertaking or its assets;
- laying off employees of the acquired undertaking;
- terminating material agreements of the acquired undertaking or causing the same to go public; and
- listing the acquired undertaking on a stock exchange.

Whenever the CC finds proof of gun jumping, a fine of up to 10 per cent of the turnover in Romania from the year preceding the infringement decision may be applied. The parties may, however, ask the CC to grant derogation and allow implementation of the transaction before its clearance if sufficiently strong financial or economic arguments are made. In April 2013, the CC granted such derogation for the first time in three years for the takeover of Bank of Cyprus Romania by Marfin Bank Romania. The CC based its decision on the economic situation of the bank, the emergency situation of its clients and the general economic interest of avoiding the possible contagion effect of distrust in banks. Another derogation was granted in January 2015 to Banca Transilvania for the takeover of Volksbank, which was in a fragile financial situation that put at risk all its contractual partners, especially consumers having contracted loans in Swiss francs. Specific to this transaction was also the fact that the target’s main shareholder was part of a group in an ongoing substantial reorganisation procedure in Austria that had decided to quickly cease its banking activity and exposure in Romania. Thus, a ‘lock box’ mechanism was implemented in the sale purchase agreement stating that no price adjustment can be made after signing, with the transfer of benefits and risks to the acquirer thereby occurring at signing. The target had to perform its business activity until closing during the normal course of business, with the observance of clear parameters and within certain limits regarding exceptional operations.

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26 As per Decision No. 5 of 27 January 2015, the Swiss franc to euro rate increased by more than 80 per cent during 2008–2014.
vi  Challenging CC decisions
A CC decision may be challenged by the parties before the Bucharest Court of Appeal within 30 days of its communication. The Court of Appeal's decision may in turn be reviewed by the High Court of Cassation and Justice. The execution of a CC decision can be suspended by the Bucharest Court of Appeal only if a fee is paid in accordance with the Code of Fiscal Procedure (currently, the fee can amount up to 20 per cent of the fine established through the contested decision).

vii  Authorisation fees
The calculation of the authorisation fee level was changed in June 2011; its value varies from €10,000 to €25,000. The levels depend on the target company's turnover or the merging parties' cumulative turnovers if a new full-function joint venture is created. For transactions where the target or the parties to the joint venture have a turnover exceeding €250 million, the authorisation fee is capped at €25,000, which will benefit large transactions.

viii  Timing of the procedure
In theory, it should only take between two and three months for the CC to clear a merger raising no dominance concerns; in 2014, the CC generally cleared the economic concentrations in 1.8 months. Nevertheless, these time frames have been substantially exceeded in some cases. The parties may often be able to accelerate the procedure by consulting with the CC prior to the filing, correctly preparing the notification form, promptly responding to the CC's requests for information and being proactive in proposing solutions (reports, commitments, etc.) to alleviate the concerns of the case-handling team.

IV OTHER STRATEGIC CONSIDERATIONS

One of the amendments to the Competition Law that took place in August 2011 provided that the government can prohibit by decision – if proposed by the SCCD – mergers with potential impact on national security. Defence, infrastructure, energy or electronic communications have in the past been areas of concern for SCCD and might – at least theoretically – need such approval. The CC instructions provide that even transactions below the de minimis threshold should be notified to SCCD. This new provision raised some confusion for market players as it does not provide further details as to the areas or size of the transactions that would be subject to this scrutiny, nor does it exclude any risk of regulatory overlap between the CC and the government.

The CC has increased its level of expertise in the merger control process by undertaking complex assessments even in cases of economic concentrations with a less significant impact on the market.

The CC continues its restrictive approach when assessing ancillary restraints to economic concentrations. The CC seems determined to scrutinise strictly and block the provision of any non-compete clauses imposed on vendors, restrictions in licence agreements, non-disclosure undertakings ancillary to mergers and agreements that may be indicative of a restriction of competition. In its recent decisions, the CC has begun
Romania

to expressly mention that the parties involved in the economic concentration have to self-assess their ancillary restraints and that the authority will perform an assessment only if required to do so by the parties. This seems to imply that if not expressly required, the CC will not perform an assessment of the ancillary restraints, and thus the clearance decision will not cover these.  

While encouraging firms to request preliminary (informal) consultation before merger notification, the CC shows no leniency to gun jumping, with two substantial fines applied in 2011 to acquiring parties implementing mergers before due clearance. The CC sanctioned one case of gun jumping in both 2012 and 2013. In 2014 and up to May 2015, the CC had not applied sanctions for gun-jumping practices, and in 2014 had started only one investigation for such practices on the media communication services market. The small number of cases of gun jumping in the past few years may indicate that parties have become more cautious regarding the early implementation of mergers.

In 2014, the CC was subject to a peer review performed by the OECD. In the OECD’s report, it was suggested that notification thresholds could be reviewed.

V OUTLOOK AND CONCLUSIONS

Signs of market dynamism are being seen in several sectors, predominantly in the banking industry, energy sector, real estate and fast-moving consumer goods. This trend is expected to continue, with a special interest in agribusiness, medical services and IT. The dynamism of the market will be ensured by investors reaching the end of their investment period and foreseeing their exit, which will imply the correlative entrance on the Romanian market of other investors or producers wishing to take over businesses existing on the market, while other actors will likely continue their expansion and consolidation of their position on the market. The beginning of 2015 already saw one of the most significant transactions in several years, namely the takeover by CRH of the business of Lafarge in Romania as part of the divestment commitments undertaken towards the European Commission in the context of the global Holcim/Lafarge merger.

27 See for example, Decision No. 12 of 25 March 2015 regarding the takeover by Dalli Production Romania of assets of Detergenti SA.
28 See footnote 2.
I INTRODUCTION

The principle law regulating merger control in Russia is still Federal Law No. 135-FZ dated 26 July 2006 ‘On Protection of Competition’ (Competition Law). The sole agency in charge of its enforcement is the Federal Antimonopoly Service of Russia (FAS). Decrees of the government, administrative regulations of the FAS and other by-laws may only specify and regulate details regarding certain issues.

The merger control rules and thresholds with regard to financial institutions differ from those provided for other undertakings. Financial institutions include credit, insurance and microfinance institutions, and other institutions rendering financial services. The thresholds for such institutions are established by the government either on its own or together with the Central Bank of Russia. In October 2014, a new Governmental Decree revising the assets value of financial institutions for the purposes of merger control was adopted.

Depending on the parties and the transaction’s character, in addition to being subject to the merger control rules and thresholds, a transaction with a foreign element may require other regulatory clearances under separate grounds and a filing procedure. Such filings are provided for by, *inter alia*, Federal Law No. 57-FZ dated 29 April 2008 ‘On Procedures for Foreign Investments in Companies Having Strategic Importance for National Defence and State Security’ (Strategic Investments Law) and the Federal Law No.160-FZ dated July 09, 1999 ‘On Foreign Investments in the Russian Federation’ (Foreign Investments Law). For further details, see Sections II and V, *infra*.

The number of foreign undertakings that applied for clearance amounted to approximately 15 per cent of the total number of notifications filed (299 notifications)

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in Russia in 2014. Only seven foreign undertakings were rejected for clearance. Rather than competition concerns, the reason for rejection is commonly failure to provide information in the absence of which the FAS cannot make a decision, or providing misleading information that is important for its decision-making process.

II YEAR IN REVIEW

i Transactions with foreign investments

In 2014 the FAS cleared a number of global transactions, including Holcim/Lafarsh, AMEC/Foster Wheeler, Nestlé/Galderma and Bosch/Siemens. Despite the current political environment, the Government Commission on Monitoring Foreign Investments (Commission) continues to approve transactions involving foreign investment in Russian companies. For example, the Commission has approved deals by investors such as Abbott Laboratories, Blitz F14-206, Fresenius, Palfinger and Liebherr.2

ii Approach to mergers on the pharmaceuticals market

The FAS maintains a conservative approach regarding mergers in the pharmaceuticals market. The regulator defines the product boundaries of pharmaceutical drugs based on their international non-proprietary name (INN), and under this assumption will issue conditional clearance. Thus, for example, if there are no generics available in Russia, the original drug manufacturer should be declared as having a dominant position on the market. Where a transaction is entered into between manufacturers of pharmaceutical drugs having the same INN, the regulator either prohibits the transaction or issues a conditional clearance (with structural or behavioural remedies). The European approach regarding the potential interchangeability of pharmaceutical drugs based on their health-care effect, and accordingly the extension of the product boundaries, has not yet been supported by the FAS. By way of illustration, examples of such transactions include Nestlé/Galderma and Pharmstandard/NPO Petrovax Pharm.

iii Statistics

According to the FAS’ Analytical Department, 1,928 notifications were considered in 2014, of which 1,899 were cleared. Of these, 154 (i.e., less than 10 per cent) were granted conditional clearance. The remedies that were imposed are mostly behavioural.

iv Legislative developments

A package of amendments to the Competition Law and other relevant laws (Fourth Antimonopoly Package) is still under consideration. The first reading at the State Duma has taken place, and the legislators supported those amendments cancelling the Russian Register of companies with market share exceeding 35 per cent (Register) and introducing new procedures for joint venture approvals.

During the almost two decades that the Register has been maintained by the FAS, there have been continuous debates about whether it should be abolished. Currently, merger notification is required if a buyer or target (or any company within their groups) is listed in the Register, regardless of actual assets or turnover. In recent years, many foreign companies or their subsidiaries have been listed in the Register, including Novo Nordisk, Roche, Hoffmann-La Roche, Baxter Healthcare, Eli Lilly, Fresenius and Edwards Lifesciences. Under the Fourth Antimonopoly Package, the Register will be cancelled, and a filing requirement for any firm listed in the Register will no longer exist. This change will reduce the administrative burden on businesses and decrease the number of notifications submitted, especially in the Russian jurisdiction.

The Fourth Antimonopoly Package also proposes bringing joint venture agreements under the merger control procedures. If the Package is adopted, joint venture agreements between competitors will be subject to prior notification if asset or turnover thresholds are met. Currently, companies seeking legal certainty can submit agreements that will potentially restrict competition to the FAS for review. The amendments will make notification mandatory. This would mean that if foreign companies are planning to establish a joint venture related to Russia with foreign or Russian partners, a preliminary assessment should be undertaken to determine whether the joint venture is subject to an obligation to notify.

III THE MERGER CONTROL REGIME

Under the Competition Law, generally, the following transactions are subject to merger control: mergers and takeovers, incorporation of a company (if its charter capital is paid by shares or assets, or both, of another company), and the acquisition of shares, assets and controlling rights. The Competition Law has extraterritorial effect, and is applicable to foreign-to-foreign transactions with certain peculiarities specified below.

There are two forms of merger control: pre-closing clearance and post-closing notification. The latter has been significantly changed by amendments to the Competition Law effective as of 30 January 2014. Post-closing notifications are now only applicable to intra-group transactions. There is an exception: intra-group transactions between companies connected directly or indirectly by 50 per cent share ownership are not subject to any form of merger control.

Filing thresholds differ according to the type of merger control transaction, although there is an additional threshold for foreign companies. Triggering events are generally the same for both Russian and foreign targets, although there are certain peculiarities for the latter.

The filing thresholds (turnover and assets test) are as follows:

a) for mergers, takeovers and the incorporation of a company (if its charter capital is paid by shares or assets, or both, of another company) the following thresholds apply to both Russian and foreign companies:

• the combined worldwide value of assets of the parties (and their groups) according to the latest accounts exceeds 7 billion roubles, or their combined worldwide revenue exceeds 10 billion roubles; or
• the parties (or their groups’ members) are listed separately in the Register;
for the acquisition of shares, assets and controlling rights, the following filing thresholds apply to both Russian and foreign companies: 

- the combined worldwide value of assets of the acquirer (with its group) and the target (with its group) according to the latest accounts exceeds 7 billion roubles, or their combined worldwide turnover in the last business year exceeds 10 billion roubles; and
- the worldwide value of the assets of the target (with its group) according to the latest accounts exceeds 250 million roubles; or
- one of the entities (the acquirer, target or any entity from their groups) is included separately the Register.

As regards foreign companies, there is an additional threshold: a foreign company should have supplied goods to Russia in an amount exceeding 1 billion roubles during the year preceding the transaction closing. This threshold embodies principles similar to the effects doctrine and is aimed at excluding foreign-to-foreign transactions with only a very insignificant effect on competition in Russia. However, if a foreign target company has a Russian subsidiary or assets, the 1 billion roubles threshold is not applicable and the transaction can be subject to merger clearance.

Filing thresholds for financial organisations are different, and are set from time to time by the government or by the government and the Central Bank of Russia.

The following triggering events (substantive test) are general and relate to both Russian and foreign targets:

a) mergers and takeovers;
b) incorporation of a company (if its charter capital is paid by shares or assets, or both);
c) acquisition of controlling rights (to determine business activity or to perform the functions of an executive body); and

d) acquisition of assets (fixed production assets or intangible assets, or both, located or registered in Russia, the book value of which exceeds 20 per cent of the total book value of the fixed production assets and the intangible assets of the selling company).

As regards Russian targets, there is the following specific triggering event: acquisition of more than 25, 50 or 75 per cent of the voting shares in a Russian joint-stock company, or of one-third, one-half or two-thirds of the participatory shares in a Russian limited liability company.

As regards foreign targets there is the following specific triggering event: acquisition of more than 50 per cent of the voting shares of a foreign company.

In practice, one of the most common triggering events for foreign-to-foreign transactions is acquisition of controlling rights or, as specified by the Competition Law, rights to determine business activity or to perform the functions of an executive body of an undertaking. This triggering event usually occurs if a foreign target has a Russian subsidiary or a foreign subsidiary with large Russian turnover. The notion of such ‘controlling rights’ for the purposes of merger control is not defined by the Competition Law. There are also no official guidelines or clarifications with regard to their precise scope. The general provisions of the Competition Law contain only a definition of
‘control’ that includes both merger control and restrictive agreements as the disposal of more than 50 per cent of the voting shares or exercising functions of an executive body. Based on a comprehensive interpretation of the Competition Law and case law, the following rights may count as ‘controlling’ rights for merger control purposes: the rights to determine decisions of an undertaking and to give binding instructions or otherwise exercise control (inter alia, through blocking its management decisions), and veto rights (negative control). In practice, whether such rights are to be acquired is determined on case-by-case basis taking into account all the circumstances of a particular transaction. The final decision is vested with the FAS.

The Competition Law does not provide for any special foreign exemptions. As previously mentioned, an additional turnover threshold (of 1 billion roubles) and a higher trigger for share deals (more than 50 per cent) are the qualifying elements, and are aimed at excluding transactions that will have a very insignificant effect on competition in Russia. As such, if a foreign target does not generate significant turnover in Russia, or does not have any Russian subsidiaries or assets, the foreign-to-foreign transaction should not be subject to Russian merger control.

The Competition Law does not provide for pre-notification discussions, and official communication only commences once the filing is submitted. The statutory waiting period for a pre-closing clearance is 30 calendar days starting from the date of the notification submission (similar to Phase I). If the filing is incomplete or documents are provided not in correct form, the filing is considered incomplete and will be returned to the applicant.

The initial period may be prolonged, upon the FAS’ decision, for up to two months for further consideration and submission of additionally requested data if there are any competition concerns and an in-depth review is required (similar to Phase II).

In 2012, the FAS was empowered to prolong the consideration period until the structural remedies imposed on a company were fulfilled as pre-closing conditions, after which the final approval is granted. In such cases, the term for the implementation of the structural remedies can be up to nine months. Thereafter, within 30 calendar days, the FAS will review the documents confirming compliance with the structural remedies and, if confirmed, grants clearance.

It should be noted that prolongation due to structural remedies is a very rare practice, and is used only if a transaction seriously impedes competition in Russia. In 2014, the regulator used this mechanism in three cases only. As a rule, transactions are cleared within the initial 30-day period, or within three months in the case of an in-depth review.

Upon review of the notification, the FAS shall grant an unconditional clearance; clear the transaction with remedies (behavioural or structural); or reject clearance. As regards conditional clearances, the FAS still tends to impose behavioural rather than structural remedies. Clearance is rejected in very few cases, and mostly due to non-compliance with the formal reporting requirements rather than due to competition
concerns. According to official statistics, only about 1 per cent of notifications are rejected.3

There is no official procedure under the Competition Law for parties to accelerate the review process. However, if a transaction does not raise competition concerns, the FAS may clear it before the expiration of the initial 30 calendar day waiting period in accordance with an official request submitted by the applicant.

The Competition Law does not grant rights to any third parties to access merger control files, and provides that information containing commercial secrets received by the FAS under the merger control process should not be disclosed to any third parties except in those cases where such disclosure is expressly provided by the law. Theoretically, the FAS may pass confidential information to other government agencies in the event of an official request from such agencies. The unauthorised disclosure of information containing commercial secrets by FAS officers may incur civil, administrative or criminal liability under the law. Information submitted to the FAS, if marked with a confidentiality sign, should be subject to a special treatment regime under which only the FAS case handler responsible for considering the filing and the heads of the respective FAS departments are authorised to review it. Such information cannot be disclosed to any third parties, and FAS officials are mostly very careful in their handling of confidential information.

Third parties also have limited ability to take part in a review process and no rights to challenge mergers in court. Under the Competition Law, the FAS shall publish on its website information only about transactions subject to a prolongation of an initial waiting period for an in-depth review. In such cases, third parties have a right to provide information on the transaction's influence on competition. However, there are no clearly stated respective obligations on the FAS' side, and no procedure is in place for third parties to provide comments on the proposed transaction. Under the Competition Law, only the FAS is authorised to challenge mergers. Therefore, if third parties wish to challenge a merger, they must first approach the FAS.

If the FAS has any competition concerns, as a rule these are resolved by behavioural or structural remedies. Despite the fact that the latter became available as a pre-closing condition in 2012, the FAS continues to favour behavioural remedies to resolve competition concerns.

There are no statutory procedures or special guidelines regarding which remedies should be applied in any given situation. The procedure for arriving at an appropriate remedy lacks transparency, and competitors or other interested parties may take advantage of this lack of transparency and attempt to influence the FAS. Strictly speaking, the FAS is not under a duty to inform an applicant about potential remedies. As a result, the applicant may first learn of proposed remedies on the last day of the waiting period or shortly before receiving a conditional clearance. In practice, this means that an applicant must be prepared to make important business decisions within a tight time frame. As a rule, for large deals, the FAS tends to negotiate remedies to ensure compliance and increase the acquirer's performance level. However, this is solely down to goodwill on the part of the FAS, and not because of any statutory obligation.

FAS merger control decisions are subject to judicial review. If the undertakings concerned do not agree with the conditional clearance or rejected clearance, they have a right to bring a claim to a commercial (arbitrazh) court. In practice, there is rather a good chance that parties can appeal FAS decisions, mostly due to inherent peculiarities and drawbacks in the decision-making process (i.e., lack of transparency, economic analysis, and involvement of an applicant and third parties) and the decisions themselves, which are commonly very short (one or two pages) and do not contain sufficient argumentation.

The Competition Law provides for a suspensory regime, and formally does not allow for any possibility of derogation from such suspensory regime. Upon completion of the notification review, the FAS must issue a decision; there is no such statutory option available whereby the transaction is considered cleared upon expiration of the waiting period without the regulator’s reaction, or that the waiting period can be terminated early. This strict suspensory effect sometimes causes problems for foreign undertakings, especially when timing is essential and Russian clearance is the only condition precedent left.

The transaction should be implemented within one year from the date of clearance; otherwise, the validity period of the clearance decision expires, and the transaction must be cleared again.

Despite the fact that the FAS is the sole agency in charge of merger control under the Competition Law, clearances of other state agencies under other laws can also be required for a transaction that is subject to merger control, and one transaction can require several regulatory clearances. The Central Bank of Russia has the authority to grant clearance in cases of acquisitions of credit institutions’ shares or participation interests. The Commission, which is chaired by the Prime Minister, is authorised to clear such transactions under the Strategic Investments Law and the Foreign Investments Law, which is similar to the Committee on Foreign Investment in the United States.

It should be noted that Russia’s merger control regime is closely related to the special regulation of foreign investors’ transactions regarding Russian companies engaged in activities of strategic importance for national defence and state security (strategic companies). Such transactions are regulated by a special law, the Strategic Investments Law, and require a separate clearance procedure. In particular, transactions regarding strategic companies are considered over a longer waiting period and require pre-closing approval of the Commission. Documents must be submitted through the FAS, which makes a preliminary assessment, collects opinions from other agencies, prepares a set of documents and circulates them to the Commission. In cases where a transaction is subject to clearance under both the Competition Law and the Strategic Investments Law, no clearance under the Competition Law can be issued unless approved by the Commission. Moreover, a transaction rejected by the Commission (this happens rarely) cannot be cleared by the FAS.

IV OTHER STRATEGIC CONSIDERATIONS

Although the Competition Law and by-laws are frequently amended, there are still a number of issues that lack regulation or are still unsettled. One such issue is the non-compete clause in sale and purchase agreements (SPAs) under merger and acquisition
Russia

(M&A) transactions. A non-compete clause may be considered to violate Article 11.4 of the Competition Law, which prohibits agreements between legal entities that lead or can lead to restriction of the competition. However, there are no official guidelines with regard to non-compete clauses within the framework of M&A transactions. Taking into account international practice, in 2013 the FAS issued Guidelines on Assessment of Joint Ventures, clarifying under what conditions a non-compete clause may be justified in joint-venture agreements without contradicting the Competition Law. However, the Guidelines do not cover share purchases or other agreements used in M&A, and may be applied by analogy only. Therefore, it is entirely possible that such clause may constitute grounds for initiation of a separate investigation or for clearing a transaction with a condition to remove this from the SPA, or both. In theory, the FAS may also reject clearance where a transaction can potentially be considered as restricting competition by hindering market access to the target, which is usually subject to a non-compete obligation. The Competition Law provides for a separate filing procedure for the approval of agreements containing restrictive clauses that may be applied to mitigate possible risks. During consideration of such filing, the applicant is required to justify to the regulator that such agreement is permissible under legally listed grounds, respond to the regulator's concerns and provide sufficient evidence. This procedure may be undertaken in parallel with the merger control notification consideration.

The applicability of the hold-separate agreement concept in Russia also remains unresolved. For various reasons, global transactions may need to be closed prior to being cleared by the FAS. Under the suspensory regime set out in the Competition Law, a transaction cannot be closed without obtaining clearance from the regulator, or the acquirer is subject to an administrative fine of up to 500,000 roubles. An administrative fine of between 15,000 and 20,000 roubles may also be imposed on the CEO of the acquirer depending on the character and gravity of the violation. If it is discovered that a transaction implemented without clearance has resulted, or may result, in the restriction of competition in Russia, the FAS may also bring a claim to invalidate the transaction in court, although this rarely occurs in practice, and the restriction of competition as a result of the transaction must be proved. Because a hold-separate agreement would allow the maintenance of de jure and de facto control over the Russian assets pending FAS clearance, this mechanism would be very useful. As such, it seems likely that the regulator may view such mechanism positively, as it ensures compliance with Russian law without holding up the implementation of a transaction on a global level.

Foreign companies often ask whether a merger control filing is needed when the Russian target is under bankruptcy or liquidation. Under Russian bankruptcy and corporate legislation, a company shall be considered liquidated only after the relevant record is introduced into the companies register (Unified State Register of Legal Entities). Liquidation takes about a year. As such, as long as the register contains information on the Russian target, the proposed transaction is subject to clearance (provided the filing thresholds are met).

Under Federal Law No.160-FZ dated 9 July 1999 ‘On Foreign Investments in the Russian Federation’ (Foreign Investments Law), foreign states, and international organisations or organisations controlled by them, are subject to a further, separate filing when they acquire, either directly or indirectly, more than 25 per cent of Russian companies or the right to block decisions of such companies’ managing bodies. Such
transactions should be cleared under the procedure provided by the Strategic Investments Law. In addition to the merger control notification (if required), the above-mentioned applicants must also submit a separate notification regardless of the nature of the business activity performed by the Russian target company. Exceptions have been provided under the Foreign Investments Law exclusively for the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development and the International Investment Bank, as well as other organisations listed by the government.

In transactions that involve the establishment of control by foreign investors over strategic companies, the activity of such foreign investors should be checked very carefully. To determine whether the activity of a Russian target is strategic, it is not sufficient merely to check if it the target possesses any licences. Despite the fact that most activities referred to in the Strategic Investments Law require licences, certain activities are not necessarily subject to licensing but, due to their nature, still have strategic importance for national defence and domestic security. Thus, for example, in the Schlumberger/EDC transaction, a decision to submit the transaction to the Commission was made based on the conclusion that drilling activities are an integral part of minerals exploration, development and mining, and that such activities may have significance for state security even though the services themselves are not subject to licensing.

V OUTLOOK AND CONCLUSIONS

The FAS endeavours to follow the European approach and best foreign practices in merger control. It generally demonstrates a friendly approach, understanding and openness to parties involved in complicated transactions. In most cases, notifications are considered within the initial 30-day waiting period, and timelines are complied with.

A number of issues, some of which are discussed above, have not yet been settled from the legal point of view. The expert community, in particular the Non-Commercial Partnership for Competition Support, is actively involved in lawmaking, the establishment of consistent practices and advocacy, including explanatory works. The Guidelines on the Assessment of Joint Ventures is the first document that was drafted in close cooperation between the Partnership and the regulator.

In the coming year, guidelines elaborating non-compete clauses and hold-separate agreements are planned. The FAS has also prepared amendments to the current legislation that provide for the electronic filing of notifications, which should significantly optimise the filing process and the filing review monitoring. They are expected to become effective along with the Forth Antimonopoly Package (see Section II, supra).
Chapter 33

SERBIA

Rastko Petaković

I. INTRODUCTION

The Serbian Competition Commission is well known locally for its track record of imposing fines for antitrust infringements. In late 2009, a new law came to effect authorising the Competition Commission to impose fines directly; however, no one expected that by 2014 the total amount of fines it has imposed would reach approximately €40 million.

Outside Serbia, the Competition Commission is best known for being one of the jurisdictions consistently considered in multi-jurisdictional filings. Despite its relatively small population (around 7 million), Serbia has had a disproportionate number of merger control cases – more than 100 a year on average since the enactment of the first EU-modelled competition law in 2005. Because of its low notification thresholds, European and global transactions involving at least one party with a material business interest in Serbia need to be pre-notified to the Competition Commission in Serbia.

This experience in dealing with merger control cases has helped the authority develop its capacity and gain a better understanding of how markets work. It is now well equipped to handle the most complex cases and deal with them within a relatively short time frame. Additionally, it has consistently shortened the review period in more straightforward cases.

The Competition Law of 2009 moved the Serbian antitrust regime closer to EU law (the case law of the EU courts, the European Merger Regulation (EUMR) and various implementing regulations). The Law was amended in November 2013 to overcome the procedural deficiencies that were realised in practice since 2009 (for instance, the longer period of the statute of limitations for imposing fines). The 2013 amendments to the Law did not involve changes to the merger control thresholds; however, amendments changed

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the deadline for the issuance of merger clearances in inquiry proceedings (Phase II). The Competition Commission is now required to issue its decision in an inquiry proceeding within four months from commencing the Phase II procedure. The substantive regime is to a large extent identical to the regime introduced by the first EU-modelled competition law, the Competition Law of 2005. Thus, the current regime mostly meets the standard of review that exists in the EU.

Since 2008, the Serbian competition rules have been formally exposed to the influence and case law of the EU. Under the stabilisation and association agreement (SAA) with the EU, Serbia formalised its commitment to harmonise its legislative framework with that of the EU.

The Central European Free Trade Agreement (CEFTA), similar to the SAA, envisions the application of EU competition law principles and rules to all matters in which trade among the member countries may be affected. Therefore, while Serbian competition law normally would not apply to sales outside Serbia, the CEFTA rules will, together with the laws of Serbia and the laws of the EU, which the national authorities are obliged to follow. While the Commission considered the CEFTA area as a free-trade zone in its merger review practice, there has been no case law so far regarding competition infringements in cross-border trade between member countries.

The Competition Commission, which is seated in Belgrade, is composed of two decision-making bodies, the President and the Council, which are appointed by Parliament. The Council consists of the President and four other members. The Commission is an independent regulatory body that is authorised to implement the law, and is responsible exclusively to Parliament.

The President of the Commission, inter alia, represents the Commission, signs conclusions on commencement of inquiry proceedings, issues decisions in fast-track procedures and decides on appeals against conclusions issued by the case handlers.

Parties may appeal the Competition Commission’s decisions to the Administrative Court, which may either set aside the Commission's decisions or take full jurisdiction over the matter and replace the Commission's decision with its own. The Administrative Court is normally required to test the Competition Commission’s findings and hear evidence on the issue, although it rarely takes any such action. The Administrative Court’s judgments are final, but the parties may appeal them to the Supreme Court of Cassation, which can only decide on points of law.

Since 2006, the Competition Commission has blocked two transactions and has imposed remedies in 16 other cases. With regard to remedies, it has imposed remedies even in foreign-to-foreign transactions. Previously, such remedies had been more behavioural in nature, but recently it has negotiated more complex structural remedies.

Certain specific rules and regulations, including the occasional deviation from the general competition law regime, are contained in the appropriate sector legislation; for example, banking regulations (specific merger thresholds that concurrently have to be approved by the National Bank), telecom rules (ex ante regulation and special rules regarding significant market power operators), public health norms (maximisation of drug prices), media laws ('disruption of media pluralism') or even local ordinances in certain cases (fixing of local taxi and public transport fares).
II YEAR IN REVIEW

Merger control still represents numerically the most significant part of the Commission’s practice, accounting for the majority of its decisions (100 in 2014). Most of these (e.g., around 98 per cent in 2014) resulted in summary decisions, which suggests that the thresholds are too broad under the Competition Law. However, there have been a few Phase II proceedings, with particular scrutiny being applied to the airline industry, the cement, concrete and aggregates production industry, and the paper packaging production industry. Transactions involving local assets need not, however, be the decisive factors in the estimation of the necessity of an inquiry. Besides market shares, a merger is always evaluated in the light of the effects that it can cause after its implementation, so high market shares do not automatically mean that a merger will be thoroughly investigated or that conditions will be imposed.

The end of 2012 and the beginning of 2013 are noteworthy in the development of the Serbian merger control system. 2012 marked the first year that the Competition Commission issued clearances with commitments (conditional clearances) under the new competition law. One involved the kiosks markets (in seven Serbian cities), while the second referred to the acquisition of a major distributor of prepaid telecoms services. In March 2013, the Commission issued another conditional clearance concerning the sugar industry. In December 2013, the Commission cleared a merger in the FMCG market in which the third market player acquired the second. In all four horizontal mergers concerned, the Competition Commission relied on the EC merger control guidelines, model texts and best practices for behavioural measures and divestiture commitments. Additionally in 2014, the Competition Commission issued two more conditional clearances: the first related to the airline industry, and the second related to the cement, concrete and aggregates production industry.

The Competition Commission previously decided in two cases to block concentrations. The first decision (Primer C/C Market) was issued in 2006, soon after the first Serbian competition law came into force. The prohibition decision of the nascent competition authority was surprising not only to the applicant, but also to the whole profession. The case is now pending at the Administrative Court of Serbia, following two competition authority decisions not to allow the merger. However, as the merger has already been implemented, and all the statutes of limitations for imposing potential fines have expired, it is unlikely that a new potential competition authority’s prohibition decision will have much effect.

The second prohibiting decision (Sunoko/Hellenic Sugar) was issued by the Competition Commission at the beginning of 2012. The Administrative Court annulled the authority’s decision on procedural grounds; the case was reinitiated, and the Competition Commission finally decided to clear the transaction with commitments.

The main reason for disallowing a merger is assumed creation or strengthening of the acquirer’s dominant position in the relevant market. However, even though such mergers can raise serious competition concerns, the authority may decide not to prohibit the transaction, but rather to clear the merger with commitments imposed on the acquirer (conditional clearance) or without any commitment whatsoever.

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

i Notable cases

**Stampa Sistem/Futura Plus**
The first merger clearance with commitments after the enactment of the Competition Law (2009) was issued on 22 November 2012. The transaction involved the acquisition by Stampa Sistem Belgrade of its major competitor in the kiosks market, Futura Plus. The Commission initiated proceedings, during which it concluded that the parties’ combined market share in seven Serbian municipalities would be above 40 per cent, which would lead to Stampa Sistem having a dominant position in the seven municipalities.

The Commission imposed a behavioural measure on the acquirer, Stampa Sistem, which is not allowed to increase the number of its kiosks (either owned or rented) in three Belgrade municipalities (Vracar, Savski venac and Zvezdara), and in the four remaining provincial municipalities (Backa Topola, Apatin, Indjija and Becej). The acquirer is also obliged to appoint a monitoring trustee, to be approved by the Commission. The behavioural measure applies for three years.

The commitments can be amended in the event of significant changes in the market; namely, if the acquirer’s combined market share in the seven municipalities drops below 30 per cent, the acquirer can require the Commission to amend the clearance decision accordingly. The clearance decision does not specifically provide for the manner in which the decision should be amended, but one would expect that the conditional clearance could be overturned and a decision without commitments could be issued instead, as the parties’ combined market share would no longer exceed 40 per cent.

**Centrosinergija/Lanus**
A clearance with behavioural and divestiture commitments concerning the acquisition of sole control by Centrosinergija d.o.o. Belgrade over Lanus d.o.o. Belgrade was issued on 19 December 2012. The transaction concerned the acquisition by one of the major distributors (Centrosinergija) of prepaid services of two of the three Serbian mobile operators of its major competitor (Lanus). (Centrosinergija is an affiliated company of the above-mentioned Stampa Sistem.)

In this case the Commission, for the first time since its establishment in 2006, imposed a divestiture commitment: Centrosinergija must divest between 3,500 and 4,000 GPRS terminals that provide prepaid telecoms services.

The behavioural measure involves the acquirer’s commitment that it will implement an ‘objective and balanced’ policy of rebates towards its sub-distributors. The clearance decision includes specific percentages of rebates that should be implemented for each particular group of Centrosinergija’s sub-distributors. The Commission also imposed on the acquirer a duty to appoint both monitoring and divestiture trustees (with the Commission’s subsequent approval).
Sunoko/Hellenic Sugar Industry
In March 2013, the Competition Commission cleared the acquisition by the leading sugar producer Sunoko of its major competitor Hellenic Sugar Industry (i.e., the target’s two Serbian sugar plants). The Commission imposed both structural and behavioural measures.

The acquirer committed to dispose of one of the target’s two sugar factories based in Serbia. The acquirer agreed that it (i.e., its affiliated entities) will not, during the 10-year period from the divestiture, acquire control over the divested sugar plant.

The Commission also imposed behavioural measures on the acquirer including:

- every six months (until the liberalisation of the Serbian sugar trade), it must inform the Commission about the company’s total volume and value of sale of sugar in both domestic and foreign markets;
- inform the Commission of the company’s average wholesale sugar price;
- provide a review on the investments made in the target company; and
- provide information on the effectuated changes in the wholesale prices of sugar applied towards specific categories of customers.

The acquirer must also appoint both monitoring and divestiture trustees (with the Commission’s subsequent consent).

Agrokor/Mercator
In December 2013, the Commission cleared the acquisition of control by Agrokor, one of the leading regional companies, of its major competitor, Mercator. The concentration mainly affects the market of FMCG. The acquirer committed to divest 24 stores, mainly in the province of Vojvodina and in Belgrade. Agrokor also committed to behavioural remedies in informing the Commission of the contracts with its major suppliers. Agrokor must also appoint monitoring, divestiture and managing trustees.

Holcim/Lafarge
Holcim submitted to the Commission a merger notification for the acquisition of sole control of Lafarge, a French company. Both companies are active on the market for the production of cement. In 2014, the Commission issued a conditional clearance under which Holcim must sell its entire business in the Republic of Serbia.

Alitalia/Etihad Airways
Alitalia and Etihad Airways jointly submitted a merger notification in 2014 related to the creation of a full-function joint venture named ‘New Alitalia’. According to the Commission’s conditional clearance, 51 per cent of the shares are held by Alitalia and 49 per cent by Etihad Airways, with each party having joint control. The Commission determined that there are overlaps between the national airline Air Serbia (Etihad Airways holds 49 per cent of shares in Air Serbia and has joint control with the Republic of Serbia) and Alitalia in the passenger air transport market, specifically on the Belgrade–Rome (Fiumicino) route. The Commission issued a conditional clearance requiring both structural and behavioural measures. The applicants are required dispose of slots in Fiumicino and Belgrade airports covering the Belgrade–Rome route, so that the other airlines can be involved in the air transport of passengers on this route. Additionally,
the applicants must inform the Commission about their activity in the relevant market through key business indicators.

### III THE MERGER CONTROL REGIME

#### i Definition of concentration

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

- **a** mergers and other status changes;
- **b** acquisition of direct or indirect control by one or more undertakings over another undertaking or part of an undertaking; or
- **c** full functional joint ventures, where full functionality is interpreted similarly to the EUMR’s interpretation (e.g., creation of a new undertaking by two or more independent undertakings that will exercise joint control over the new undertaking, but that will be independent from its shareholders and have full access to the market).

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

The following are not concentrations:

- **a** temporary acquisitions of shares by banks and other financial institutions in the course of regular business activities, assuming they intend to dispose of the shares and assuming there is no change of control on a lasting basis;
- **b** acquisitions of shares by investment funds, assuming the shares are used only for maintaining the value of the business;
- **c** cooperative joint ventures; and
- **d** acquisition of control by a bankruptcy administrator.

#### ii Merger control thresholds

Merger filings are mandatory in Serbia if either of the following two thresholds are met:

- **a** the combined annual turnover of all the parties to the concentration realised on the world market in the previous accounting year exceeds €100 million, where at least one of the parties to the concentration had an annual turnover exceeding €10 million in the Serbian market; or
- **b** the combined annual turnover of at least two parties to the concentration on the Serbian market exceeded €20 million in the previous accounting year, where at least two of the parties to the concentration each had an annual turnover exceeding €1 million in the Serbian market.

The Competition Law also applies to foreign-to-foreign mergers, in which case the same jurisdictional thresholds apply. Therefore, there is no local effects doctrine prescribed under the Competition Law. The Competition Commission has in many cases thus far examined and issued clearances in foreign-to-foreign transactions. It has taken a very strict and formalistic approach in this respect, and it requires mandatory filing whenever either of the two thresholds is met. Normally, foreign-to-foreign mergers without any
competition concerns in the local Serbian market will be processed through a Phase I proceeding.

Additional rules may apply for certain sectors (i.e., banking, insurance, telecommunications and media).

iii Procedure

Filing deadlines
The merger notification must be filed with the Competition Commission within 15 calendar days of the date of entering into the agreement, the announcement of the public offer or the acquisition of controlling shares, whichever takes place first. If the parties do not file in a timely manner, the Competition Commission may impose fines ranging from €500 to €5,000 for each day of late filing. The filing can be made based on a letter of intent, or any similar document showing both parties’ serious intent to enter into the transaction. The Commission has so far been reluctant to accept unilateral declarations or commitments as valid proof of this.

Pre-notification discussions
The Competition Law does not provide for pre-notification discussions with the Competition Commission. However, informal discussions with the authority are possible, although still very rare. The duration of informal discussions would depend on the complexity of the case in question. Any representations made orally by the Commission are not legally binding on them.

Length of review
The length of review depends on whether the Commission decides on implementing fast-track (Phase I) or inquiry proceedings (Phase II). For Phase I, the statutory deadline is one calendar month after filing a complete merger notification. Phase II can only be initiated after the Phase I proceeding has expired; the Commission then has a time frame of four calendar months to issue a decision in this case. If the Commission does not issue a decision either clearing (conditionally or unconditionally) or forbidding the merger within the above-cited deadlines, the merger is considered to be cleared.

Standstill obligation
The law prescribes a standstill obligation, i.e., the parties must suspend the implementation of the transaction until the clearance is issued, or until the statutory deadlines have expired.

Mandatory stay of the concentration does not prevent the implementation of a takeover notified to the relevant authority pursuant to the law regulating the takeover of joint stock companies, or the law regulating privatisations, under the condition that the notification of concentration is made in a timely manner, that the acquirer of control does not execute its managing rights based on the acquired rights, or that it does so only for the purpose of maintaining the full value of investments and based on a special approval obtained from the Commission.
Confidential information
Information regarding the merger control proceedings may be classified as confidential and shall not be published by the Commission if the party proves that it shall suffer substantial damage due to publication of such information. The decisions of the Commission, apart from information classified as confidential, are regularly published on its website.

Merger clearances with commitments
Since its establishment in 2006 and up to the very end of 2009, most of the work of the Competition Commission encompassed merger filings. Restrictive agreements and abuses of dominant position were very rare. Furthermore, the merger clearance decisions were very short, simple and without detailed elaborations. The procedure before the competition authority usually lasted no longer than one month.

However, as the Competition Commission became more experienced (i.e., regarding the market structures, the main players, and all the actual and potential competition concerns that can arise from the concentrations between two or more undertakings), it began to use all of the legal tools that it possesses, including in-depth procedures, conditional clearances and, finally, prohibitions of concentrations.

The competition rules have still not been properly developed within the meaning of merger control. There are only very general provisions contained in Serbia’s competition law that enable the Competition Commission to issue conditional clearances. To date, no guidelines, best practices or model texts have been adopted by the Competition Commission for the purpose of issuing conditional clearances.

The first ‘conditional’ clearances in Serbia were issued more than six years ago. In their form, the Competition Commission’s conditional decisions were very similar to its regular (unconditional) clearances. All of the conditional clearances were issued by way of simplified procedures, even though one would expect that an in-depth procedure be initiated once the competition authority reached the conclusion that conditions and obligations must be imposed. In those cases, the Competition Commission would simply conclude, at a certain stage of the review process, that the merger filing could neither be cleared nor prohibited, but rather that certain conditions had to be imposed on the applicant. Such conditions were those that the competition authority found to be most appropriate in the case in question, and unfortunately usually imposed without any consultations with the applicant itself. Among the numerous legal issues inherent in such approach, the following two were most significant:

a) there were no legal rules that the competition authority should have followed during the process of the issuance of the conditional clearance; and

b) the applicants were not aware of the possibility that a conditional clearance decision could be issued – they found out about such imposed conditions only after receipt of the decision.

However, in the Stampa Sistem/Futura Plus case, the Competition Commission followed the basic EU merger control rules that apply to clearances with conditions and obligations. This was the first case that encompassed negotiations between the competition authority and the applicant, and the applicant’s proposal of both structural
and behavioural measures led to the issuance of a merger clearance acceptable to the competition authority.

**In-depth merger control procedure (Phase II)**

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

In addition, the Competition Commission could formally commence an in-depth procedure:

a if the parties have not submitted all the relevant data and documents that are mandatory under the respective merger control regulations; and

b if the parties to the concentration have seriously opposed interests and, for that reason, it can be expected that one of the parties (specifically the target) will not provide all the relevant data and documents for the competition authority’s review.

When the Competition Commission commences an in-depth (Phase II) procedure, the applicant still cannot know what direction the Commission’s enquiries during the Phase II procedure will take. It is common for the authority to contact the parties’ main competitors, their largest suppliers and buyers in order to assess what their expectations of the concentration in question are (i.e., whether the competitors, suppliers and buyers estimate that their position will be degraded or perhaps improved by the implementation of the concentration).

Further, the competition authority may sometimes commence an in-depth procedure if the target is a real or presumed dominant player. Even though this is still rare in practice, one should be aware of such possibility even if the acquirer has no or a very limited presence on the local market where the target is presumed to be a dominant player (for example, this occurred when Delhaize Group acquired Delta Maxi during in 2011).

**Fees and penalties**

The applicant must pay a fee for the issuance of the clearance in summary proceedings amounting to 0.03 per cent of the total worldwide annual income realised by the merging parties (capped at €25,000). The fee for the issuance of a merger clearance in the inquiry proceedings is set at 0.07 per cent of the total annual income realised by the merging parties (capped at €50,000). If the Commission rejects the notification on procedural grounds, the fee is €500; should the Commission prohibit a transaction, the fee for issuance of such a decision is €1,200.

Implementing a concentration that was not notified or not cleared can result in a fine of up to 10 per cent of the infringing undertaking’s total annual turnover realised on the Serbian market in the year prior to the start of the proceedings. Late filings may be sanctioned with a procedural penalty amounting to between €500 and €5,000 for each day of failing to file the notification within the prescribed 15-day deadline. The procedural penalty is also capped at 10 per cent of the infringing undertaking’s total annual turnover.
To date, we are not aware of any fine having been imposed in Serbia for not notifying a merger, but in 2015, the Competition Commission imposed a procedural penalty of €143,500 for failing to deliver requested data and documents to the Competition Commission. However, from the beginning of 2011, the Competition Commission started to impose fines for abuses of dominant position and restrictive agreements (the fines amounted to approximately €40 million; so far, such fines have been imposed solely against domestic companies), and it can be expected that fines for the implementation of mergers without clearance could soon be imposed in Serbia as well in quite significant amounts. In addition, in 2013 the Commission published a statement in which it publicly announced that it will not tolerate late filings and failings to file. In cases of acquisition of sole control, the buyer would be solely responsible for the filing, and for payment of the fine. In cases of joint control, both acquirers of joint control would be responsible for the filing and payment of the fines.

Furthermore, the Commission may de-merge an already implemented concentration (de-concentration), which can be effected by way of a split-off, sale of shares, cancellation of the agreement or performance of any other action that would lead to the restitution of the status prior to implementation of the concentration. The Commission has not implemented any de-concentrations to date. The Commission may also impose both behavioural and structural measures on merging entities to alleviate antitrust concerns. In practice, the Commission has used both behavioural and structural measures. Furthermore, special sanctions, such as additional fines or non-registration, might be applicable in certain particular sectors (i.e., banking or telecommunications).

The Serbian Criminal Code contains a wide provision that could be used to interpret a concentration resulting in the creation or strengthening of dominant position as an ‘abuse of monopolistic position’. In this case, the person responsible for intentional implementation of a prohibited concentration could be criminally prosecuted. The maximum sanction is five years’ imprisonment; however, this provision has never been used in practice.

**Judicial review**

Resolutions of the Competition Commission are final administrative proceedings. A party to the proceedings or a third party with a legal interest may challenge the decision before the Administrative Court of Serbia by initiating an administrative dispute through filing a claim within 30 days of receipt of the decision, or within 60 days if the appellant did not receive the decision. The appeal does not preclude the enforcement of the decision. However, the Competition Commission can in certain cases postpone enforcement until the Court ruling upon the request of the appellant.

The Administrative Court may confirm the decision, annul the decision and return it to the Competition Commission for revision, or decide the case itself. The Administrative Court must decide the administrative dispute within two months of receiving the claim. However, in practice the administrative dispute before the Administrative Court takes much longer than two months, and can last even a couple of years.

The Supreme Court of Cassation decides on extraordinary legal remedies against the rulings of the Administrative Court. Such request may only be filed if the
Administrative Court has violated the law or procedural rules where this could have affected the outcome of the proceedings.

iv Substantive assessment

When deliberating on the permissibility of a concentration, the Competition Commission particularly considers the following:

a. the structure of the relevant market;

b. actual and potential competitors;

c. the market position of the parties and their economic and financial power;

d. the possibility to choose suppliers and customers;

e. legal and other barriers to entry in the relevant market;

f. the level of competitiveness of parties;

g. supply and demand trends for relevant goods or services;

h. technical and economic development trends; and

i. the interests of consumers.

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

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

IV OTHER STRATEGIC CONSIDERATIONS

i Voluntary notification

Exceptionally, the Competition Commission has the authority to institute an *ex officio* merger control procedure if an un-notified concentration results in the merged undertakings having a market share above 40 per cent. The 40 per cent market share threshold is not a mandatory jurisdictional threshold (i.e., the parties are not obliged to file a notification with the Competition Commission if their combined market share in any relevant market exceeds 40 per cent).

However, to avoid a situation of an *ex post* analysis, it may be advisable to notify the Competition Commission of the intended merger if the parties’ market shares do exceed this threshold (in Serbia). However, since the enactment of the Competition Law, to our knowledge the Competition Commission has not initiated any *ex officio* merger control procedure where a concentration that has not been notified might have resulted in the parties’ market share exceeding 40 per cent.

ii Acquisition of minority shareholdings

Similarly to the EU regime, an acquisition of a minority shareholding may trigger the filing requirement provided that the minority shareholder would be able to exercise certain controlling rights that fall outside the scope of ordinary rights attributed to a
minority shareholder. However, while the European Commission would normally rely on its own guidelines (the Consolidated Jurisdictional Notice), the Serbian Competition Commission has enacted no such guidelines. Parties normally refer to the Consolidated Jurisdictional Notice, although it is evident that in certain cases the Competition Commission will use a wider interpretation of control than that found in the European Commission’s Notice.

iii Takeovers by public tender offer
Regardless of whether the turnover thresholds have been met, all transactions occurring as a result of a public tender offer must be notified to the Competition Commission. The only exception is where the public tender offer would result in an internal restructuring within a holding.

V OUTLOOK AND CONCLUSIONS
The merger control regime in Serbia functions relatively well. The Competition Commission has increased its capacity, and handles cases in an efficient and fairly consistent manner. Some of its activities have to a certain extent been motivated by public pressure and consumer expectations, but its standard of review is transparent and to a large extent predictable.

The regime is for the most part aligned with the EU regime, and there are no immediate areas of concern. In its annual report for 2014, the Competition Commission expressed its plans for 2015 and announced the adoption of a set of new regulations aimed at providing a more efficient application of the Competition Law. As far as the merger control regime is concerned, the Competition Commission has announced that a new abbreviated merger notification form (i.e., Short Form) will be introduced to further align the merger regime with the EU rules. The Competition Commission has also pointed out how fundamentally important continuous research of particular markets is to prevent distortion of competition.
I INTRODUCTION

The Competition Act, 89 of 1998 (Competition Act) requires mergers (defined as the acquisition or establishment of control by one or more firms over the whole or part of the business of another firm) that meet the prescribed monetary thresholds to be notified to and approved by the South African competition authorities prior to implementation.

In reaching a decision as to whether a notified merger may be implemented in South Africa, the competition authorities will assess the impact of a proposed transaction on both classic competition issues, as well as public interest issues, an approach that is likewise being adopted by a number of other countries across Africa.

Briefly, merger reviews under the Competition Act require the assessment of:

a whether the merger is likely to lead to a substantial prevention or lessening of competition;

b if so, whether there are technological, efficiency or pro-competitive gains directly from the implementation of the proposed merger that would outweigh its anti-competitive effects; and

c irrespective of the above-mentioned analysis, whether the merger can or cannot be justified on public interest grounds, which requires a consideration of the impact of a proposed merger on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.

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1 Lee Mendelsohn is a director and Lebogang Phaladi is an associate at ENSafrica (Edward Nathan Sonnenbergs).
In assessing whether a transaction is likely to lead to a substantial prevention or lessening of competition as contemplated in (b) above, the Competition Commission (Commission) will assess the strength of competition in the relevant markets as defined, and the probability that the firms in the market will behave competitively or cooperatively following the proposed transaction, taking into account any factor that is relevant to competition in that market. Section 12A(2) of the Competition Act proposes a non-exhaustive list of factors that can be considered in such analysis:

a. the actual and potential level of import competition in the market;
b. the ease of entry into the market, including tariff and regulatory barriers;
c. the level and trends of concentration, and history of collusion, in the market;
d. the degree of countervailing power in the market;
e. the dynamic characteristics of the market, including growth, innovation and product differentiation;
f. the nature and extent of vertical integration in the market;
g. whether the business or part of the business of a party to the proposed transaction has failed or is likely to fail; and
h. whether the proposed transaction will result in the removal of an effective competitor.

Although the merger control regime and the enforcement thereof in South Africa is still in the development stages relative to counterparts in the United States and European Union, over the past year the South African competition authorities have continued to demonstrate an amenability to the development and implementation of creative, fluid solutions in the context of merger transactions, remaining ever-mindful of commercial imperatives underpinning the process.

II YEAR IN REVIEW

The most recent official figures released by the Commission\(^2\) indicate that, during 2014, approximately 320 mergers were notified: 95 large, 209 intermediate and 16 small mergers.\(^3\) Of the mergers assessed by the Commission during 2014, approximately 302 were unconditionally approved, 22 were conditionally approved and four were prohibited, and the balance of the mergers were withdrawn due to lack of jurisdiction. These figures reveal a slight decrease in terms of the number of transactions notified to the Commission (324 in 2013, compared with 320 notified in 2014).

In the past year, the competition authorities took a firm approach in respect of public interest concerns that arose in mergers. In particular, employee retrenchments were at the forefront of the Commission’s considerations when assessing mergers before it. This was highlighted by the publishing of the draft Guidelines on the Assessment of Public Interest Provisions in Merger Regulation Under the Competition Act (Public

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\(^2\) Information extracted from the Commission’s Annual Report for the 2013/2014 financial year.

\(^3\) During the year of review, the Commission finalised 327 merger transactions.
Interest Guidelines), which seek to provide a means for stakeholders involved in merger proceedings to understand the balancing act that the Commission undertakes when weighing public interest against classic competition considerations.

Once again, we saw the competition authorities’ fluid approach to merger control, demonstrated in a number of mergers assessed during the year in review where the competition authorities adjusted their approach to timelines and public interest considerations in an attempt to develop practical solutions. In addition, the robustness of the appellate system came to the fore, as we saw that the Commission, the Competition Tribunal (Tribunal) and the CAC do not always speak with one voice. We discuss a few of these cases in more detail below.

**i Oceana Group Limited (Oceana)/Foodcorp Proprietary Limited (Foodcorp)**

This CAC decision involves an appeal of an intermediate merger between Oceana and Foodcorp. The merging parties are vertically integrated companies involved in catching (in line with the allocated fishing quota), processing and marketing canned pilchards. This merger concerned two iconic South African pilchard fish brands, Lucky Star and Glenryck, which are owned by Oceana and Foodcorp respectively. In its initial investigation, the Commission found that the merging parties’ brands were close competitors in the market for the sale of canned pilchards, having a combined market share of 80 per cent, with the next closest competitor sitting at 10 per cent. The Commission found the market to have high barriers to entry due to regulatory hurdles, high capital inputs, brand loyalty and input scarcity. Further, the Commission was of the view that the merger would result in the removal of an effective competitor at each level of the value chain, which would result in a substantial reduction in competition. The Commission ultimately approved the transaction subject to Foodcorp selling off the Glenryck brand and its small pelagic fish allocation to an independent entity prior to implementing the proposed transaction.

The merging parties subsequently lodged a request for consideration of the merger with the Tribunal, and during these proceedings, Bidvest Namibia Fishery Proprietary Limited (Bidfish) concluded a binding agreement with Foodcorp to purchase the Glenryck brand without Oceana's fishing quota. The merging parties maintained that by selling the Glenryck Brand to Bidfish, the concerns raised by the Commission would be sufficiently addressed. The merging parties argued that access to quota was not required to sustain a viable canned pilchards brand in the market. Evidence showed that Oceana's own quota equates to less than one-third of its total pilchard requirements for Lucky Star, with the remainder being contracted from other local quota holders and more than 60 per cent of its requirements being sourced from imported pilchards. The acquisition of Foodcorp's quota would therefore only marginally reduce Oceana's reliance on imports. However, the Tribunal found, *inter alia*, that:

- once the Glenryck brand is divorced from its supporting quota it would result in the removal of an effective competitor from the canned pilchards market;

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the owner of the Glenryck brand would have to source pilchards from a variety of third parties at much higher cost than would have applied pre-merger; and

Lucky Star would gain additional advantages through access to local quota and would increase its dominance downstream.

The Tribunal approved the merger subject to the divestiture of the Glenryck brand and Foodcorp’s small pelagic fishing quota.

The merging parties appealed the Tribunal’s decision to the CAC. The CAC found that, in view of the evidence presented by the merging parties (which was not refuted by the Commission’s evidence), the Tribunal had drawn inferences that ultimately led to conclusions that were not based on the facts. The CAC stated that for the Tribunal to reach a proper conclusion, there must be sufficient evidence to justify a conclusion that there would be a prevention or lessening of competition. This cannot be done by simply applying a balance of probabilities test to an untested theory. In light of this, the CAC approved the merger subject to a condition that Foodcorp retain and continue to operate the Glenryck brand in accordance with good business practice and, in the event of the subsequent sale of Glenryck, that Foodcorp notify the Glenryck sale to the Commission if required to do so.

ii Bytes People Solutions (Bytes)/Inter-Active Technologies Proprietary Limited (IAT)\(^5\)

In the large merger between Bytes and IAT, the Tribunal was required to consider whether the prior retrenchment of 43 employees by IAT was merger-specific or whether the retrenchments resulted from operational requirements unrelated to the merger. In its assessment, the Tribunal found that the merger did not raise any anti-competitive effects. As regards public interest concerns, former employees of IAT alleged that the retrenchment of 43 employees (which occurred in close proximity to but before IAT’s negotiations with Bytes) were merger-specific. Believing the retrenchment to be irrelevant to the merger proceedings, IAT had not even informed the Commission thereof in its merger filing. The merging parties did, however, disclose the potential maximum prospective retrenchments that could arise as a result of the merger in accordance with the statutory obligation. To determine this issue, the Tribunal had to consider all of the factual circumstances leading up to the retrenchments.

The Tribunal found that IAT had been in financial distress from at least the end of its financial year (being February 2014), and that, during that year, it had considered various merger proposals, including one from Bytes. IAT’s shareholder was optimistic of surviving the financially testing times on its own; however, during October 2014, IAT’s funding facility was unexpectedly withdrawn. As a result of this, IAT could no longer meet its financial obligations, and subsequently its shareholder accepted an offer from Bytes for its buy out. Bytes also agreed to provide a funding facility to keep IAT operational pending its acquisition.

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\(^5\) Bytes Peoples Solutions a division of Bytes Technology Group South Africa Proprietary Limited and Interactive Technologies Proprietary Limited Case No: 020123.
After hearing oral submissions from former employees of IAT and the merging parties, the Tribunal accepted that there was insufficient evidence to link the prior retrenchments to the merger, and thus found that the retrenchments were not merger-specific. Notwithstanding the foregoing, the Tribunal held that the merging parties should have disclosed information pertaining to the retrenchments to the Commission, given that the retrenchments were effected after the date that IAT contemplated a transaction with Bytes.

iii BB Investment Company Proprietary Limited (BB)/Adcock Ingram Holdings Limited (Adcock)⁶

This case concerns a prospective merger between BB, a subsidiary of The Bidvest Group (Bidvest) of companies (which is involved in a diverse range of activities spanning trading, logistics and distribution) and Adcock, a pharmaceutical and hospital products manufacturer. In December 2013, Bidvest, acting on behalf of a consortium, made an offer to acquire approximately 34.5 per cent of Adcock’s issued share capital, and the offer was accepted. The merging parties submitted that the 34.5 per cent stake comprised a non-controlling shareholding in Adcock for the purposes of competition law. Bidvest, thereafter, notified its strategic intention to acquire sole control of Adcock to the competition authorities.

The proposed transaction did not raise any anti-competitive concerns. However, it did raise public interest issues, which came about as a result of Adcock embarking on a restructuring exercise whereby it ultimately identified 51 employee positions as redundant. Bidvest advised that, upon completion of the proposed transaction, it intended to continue with the turnaround strategy initiated by Adcock. According to Bidvest, the turnaround process required fluidity, and Bidvest advised that there further retrenchments might be required to initially stabilise and thereafter grow the business.

The Commission was satisfied that Adcock followed a rational and fair process in identifying the 51 redundant positions. However, it felt that it needed to safeguard any further negative effects on employment that may be introduced by Bidvest post-merger. Therefore, the Commission recommended that the Tribunal approve the merger subject to a condition limiting the number of retrenchments at Adcock to the 51 identified positions for a period of three years. This condition was opposed by the merging parties on the grounds that the retrenchments were not merger-specific.

At the Tribunal hearing, the Commission argued that, although Bidvest claimed that the 34.5 per cent shareholding acquired was initially a non-controlling stake, Bidvest may have implemented the acquisition before obtaining approval in contravention of the Competition Act. The Commission argued that the merging parties had in all likelihood already implemented the merger and, as Mr Kevin Wakeford, the new chief executive officer, was a Bidvest appointee doing its bidding, any contemplated retrenchments arising from Mr Wakeford’s turnaround strategy were merger-specific. The merging

⁶ BB Investment Company Proprietary Limited and Adcock Ingram Holdings Limited Case No: 018713.
parties argued that the retrenchment proposals could not be attributed to the agency of Bidvest, as Bidvest was not yet a controlling shareholder.

The Tribunal held that, on a balance of probabilities, Bidvest had already acquired material influence over Adcock, and that Bidvest’s influence extended to the removal of Dr Jonathan Louw, the previous Chief Executive Officer of Adcock, and the appointment of Mr Wakeford as the person likely to carry out Bidvest’s strategy for turning around Adcock’s fortunes.

The Tribunal further held that ‘merger-specific’ means conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller. If available, pre-merger management plans already in operation or already proposed may be useful to compare against the plans the firm has post-merger. If the differences are stark, and particularly if the change in plans takes place within a short period of time, then it is reasonable to infer that the post-merger plans of the acquirer reflect a different set of incentives to those of the pre-merger management, and hence can be considered to be merger-specific.

In this regard, the Tribunal found that Mr Wakeford’s retrenchment plan was reflective of the material influence of Bidvest, and that it was starkly different from the pre-merger plan. Therefore, the planned retrenchments were, on a balance of probabilities, merger-specific. In light of this, the merger was approved subject to the condition that Adcock not retrench any employees in South Africa for a period of one year from date of approval of the transaction.

The Tribunal’s approach in the Bytes People Solutions/Inter-Active Technologies and BB Investment Company/Adcock Ingram mergers seems to follow that set out in the Public Interest Guidelines, which provide that merging parties are required to disclose any contemplated retrenchments, regardless of whether such retrenchments are merger-specific. This approach is likely to place a heavy burden on merging parties, as parties must now delve into non-merger related retrenchments and justify them as non-merger specific in addition to all of the other requirements involved in preparing merger filing submissions.

iv Lewis Stores Proprietary Limited (Lewis)/Beares stores (Beares)7

Following the financial difficulties of one of South Africa’s large commercial banks, African Bank Limited (ABIL), a series of urgent transactions ensued in order to ensure the survival of some of its businesses as well as to curb the employment losses as a number of its wholly-owned subsidiaries went into business rescue. One such transaction involved the large merger between Lewis and Ellerine Furnishers Proprietary Limited (Ellerine), in respect of the 63 Beares stores (Beares) owned by Ellerine. Lewis and Bears are furniture retailers focused on the lower to middle income market. The merger was notified to the Commission on 29 October 2014, and was approved by the Tribunal on 12 November 2014 on an urgent basis because, without the merger, Beares would have exited the market, and therefore would no longer serve as a competitive constraint

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7 Lewis Stores Proprietary Limited and Ellerine Furnishers, in Business Rescue as represented by the Business Rescue Partners in respect of the 63 Bears Stores.
on Lewis in certain identified areas. Further, if Beares were to be liquidated, its entire workforce would be retrenched. The Commission was of the view that the merger would result in fewer retrenchments than would otherwise have been the case under liquidation, and that the merger offered an opportunity to save 393 jobs. The merging parties agreed to various undertakings to ameliorate the impact caused by the financial difficulties of the ABIL group of companies.

Transactions such as this demonstrate the willingness on the part of the competition authorities to act swiftly to ensure that the competitive and public interests for which provision is made are safeguarded to the greatest extent possible.

III THE MERGER CONTROL REGIME

To determine whether a transaction is notifiable to the competition authorities in South Africa, it must be established whether:

a the competition authorities have jurisdiction over the proposed transaction;

b the proposed transaction comprises a ‘merger’ as defined in Section 12 of the Competition Act; and

c the proposed transaction meets the merger thresholds, as contemplated in the Competition Act and the regulations promulgated thereunder (Government Notice 216 of 2009).

i Jurisdiction

The point of departure when assessing the impact of South African competition law on a particular transaction is to establish whether the transaction in question falls within the jurisdiction of the South African competition authorities. In terms of Section 3(1) of the Competition Act, the provisions thereof apply to all economic activity ‘within, or having an effect within’ the Republic of South Africa.

ii The definition of a merger

The Competition Act defines a ‘merger’ as the direct or indirect acquisition or establishment of direct or indirect control, by one or more firms, over the whole or part of the business of another firm.

iii Merger thresholds

In the event that the South African competition authorities enjoy jurisdiction and the transaction satisfies the definition of a ‘merger’ as set out in Section 12 of the Competition Act, one must then establish whether the transaction in question constitutes a small, intermediate or large merger; only the latter two statutorily require mandatory notification and approval from the competition authorities prior to their implementation.

Intermediate mergers are defined as those mergers where the combined annual turnover or assets (whichever is greater) in, into or from South Africa of the acquiring firms and the target firms is valued at or above 560 million rand, and the annual turnover or assets (whichever is greater) in, into, or from South Africa of the target firm is valued at or above 80 million rand. If the annual turnover or asset value of the parties to the
merger falls below either of these monetary thresholds, the transaction will be a small merger.

Large mergers are defined as mergers where the combined turnover or assets (whichever is greater) in, into, or from South Africa of the acquiring firms and the target firms is valued at or above 6.6 billion rand, and the annual turnover or assets (whichever is greater) in, into, or from South Africa of the target firm is valued at or above 190 million rand.

Intermediate and large mergers must be notified to and approved by the competition authorities before they are implemented. Small mergers need not be notified to the Commission as a matter of course. In two circumstances, small mergers will require certain action to be taken. The first is where a party to a small merger, or any entity within the group of companies to which a party to a small merger belongs, is under investigation or being prosecuted by the competition authorities for a prohibited practice. In such case, the merging parties must inform the Commission of their merger. They need not file a merger notification unless called upon to do so by the Commission, and unless and until they are so required, the parties may proceed to implement their merger. The second circumstance is where the Commission itself calls for a notification of a small merger (which it may do within six months of the implementation of the small merger if it is of the view that the merger substantially lessens or prevents competition, or cannot be justified on public interest grounds). In such event, the merging parties must cease any further implementation of their merger, and must notify the Commission in the standard form and obtain approval before implementation resumes.

iv Penalties
In terms of Section 59(1)(d)(iv) of the Competition Act, if the parties to a merger have proceeded to implement either an intermediate or large merger without the approval of the competition authorities, the Tribunal may impose an administrative penalty not exceeding 10 per cent of a firm's annual turnover in South Africa and its exports from South Africa in the preceding financial year.

In addition to the foregoing, if a merger is implemented contrary to the Competition Act, the Tribunal may:

a order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or

b declare void any provision of an agreement to which the merger was subject.

v Process and decision-makers
Small and intermediate mergers are investigated and decided by the Commission. In the case of large mergers, the Commission investigates the likely effect of the merger on competitive conditions and the public interest and makes a recommendation to the Tribunal. The Tribunal then convenes a public hearing, hears oral evidence and legal arguments where necessary and makes a decision. Decisions of the Commission may be referred to the Tribunal for reconsideration. Tribunal rulings may be appealed or reviewed by the CAC. With leave of that Court, a further appeal lies to the Constitutional Court in circumstances where constitutional issues or matters of national importance arise.
vi  Time periods
No time periods in which the filing of a merger notice with the Commission must be made are prescribed by the Competition Act or the Rules for the Conduct of Proceedings in the Commission.

However, as stated above, parties to an intermediate or large merger may not implement such a merger without the prior approval of the competition authorities.

In terms of Sections 14 and 14A of the Competition Act, in the case of a large merger, there is no statutory maximum number of days for the competition authorities to finalise the process:

- the Commission has 40 business days to consider and refer such large merger to the Tribunal. The Tribunal may extend this period for an unlimited number of times by no more than 15 business days at a time. In other words, in complex mergers, the Commission may seek to extend its 40-business-day period for as long as may be required by it to complete its analysis of the merger. This initial period for analysis by the Commission (i.e., before its recommendation is made to the Tribunal) can run to in excess of eight months in complex cases;
- within 10 business days of the referral to it of a large merger, the Tribunal must schedule a pre-hearing meeting or hearing. This period may be extended; and
- within 10 business days of the hearing, the Tribunal must approve or prohibit the merger and, within 20 business days thereafter, must issue the reasons for its decision.

The hearing process may also be long, particularly where there are interventions or where oral evidence is required to be led.

In the case of an intermediate merger, the Commission has an initial period of 40 business days to consider the merger and make a decision whether to approve (with or without conditions) or prohibit it. The Commission may unilaterally extend the above period by a further 20 business days.

vii  Submission of a merger filing to the competition authorities

**Merger procedures and formalities**

A copy of the merger notification (with all confidential information removed) must be provided to:

- any registered trade union that represents a substantial number of employees; or
- the employees concerned or representatives of the employees concerned, if there is no such registered trade union.

A merger filing is not complete (and the relevant time periods do not begin to run) until the relevant trade union or employee representatives have been served with a non-confidential version of the merger notification.

In terms of Section 44 of the Competition Act, a person, when submitting information to the Commission, may identify any information that is confidential. Any such claim must be supported by a written statement explaining why the information is confidential. Confidential information means any trade, business or industrial
information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.

The merger filing fee (payable to the Commission) in the case of a large merger is 350,000 rand and, in the case of an intermediate merger, 100,000 rand. No filing fee is payable in the case of a small merger that is required to be notified.

Composition of a merger filing
The merger notification to be submitted to the competition authorities is composed of the following documents.

**Statutory forms**
These forms detail, *inter alia*:

- the identity of the acquirer and the target and their holding, subsidiary and associated companies;
- the identity of trade unions or employee representatives of the acquirer and the target;
- a description of the transaction;
- financial information pertaining to the acquirer and the target;
- the nature of the business activities of the acquirer and the target, their market shares and the market shares of their competitors;
- the identities of the customers of the acquirer and the target; and
- any pre-existing business relationships between the acquirer and the target.

**Statutory documents**
Various documents must be submitted to the Commission as a part of every merger filing. These include:

- the agreement upon which the transaction is premised (either in final form or the most recent draft);
- the most recent audited annual financial statements of the acquirer and the target;
- any minutes, documents, resolutions, presentations or summaries prepared for the board of directors of each of the acquirer and the target in respect of the proposed transaction;
- the most recent budget, business plan or forecast of each of the acquirer and the target; and
- the most recent report submitted by each of the acquirer and the target to the Takeover Regulation Panel (where applicable).

Great care must be exercised in the preparation of all correspondence, memoranda, and – most importantly – presentations to the boards and various committees of the merging parties for the purposes of assessing the transaction. Far greater weight is given by the competition authorities to these contemporaneous registering of intent and expected effect than is given to the carefully constructed arguments made in the competitiveness report prepared for the purposes of encouraging approval of the transaction.
**Competitiveness report**

In most matters, the merging parties must prepare a competitiveness report, which is an analysis of the impact of competition in the relevant market or markets.

A comprehensive competitiveness report will contain, at least, a detailed assessment and application of the factors set out in Section 12A(2) of the Competition Act (discussed above) to the merger under scrutiny.

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**IV OTHER STRATEGIC CONSIDERATIONS**

**i Oversight of competition authorities**

Oversight responsibility of the competition authorities is now vested in the EDD. Under the direction of the Minister of Economic Development, Ebrahim Patel, the EDD has been more interventionist than the Department of Trade and Industry had previously been.

**ii Heightened focus on public interest issues**

Public interest focus remains an important consideration in the South African merger control process. This increased focus has manifested itself in increased involvement in mergers by trade unions and government, and also in the attitude of the competition authorities themselves, which have given ever greater time and attention to these matters than was previously the case, as reflected in the sample of merger transactions discussed above. In addition, the Commission’s Annual Performance Plan 2015/2016 (Annual Performance Plan) recognises that competition policy is one of the microeconomic policy drivers identified as a tool to support an inclusive economy. The Annual Performance Plan recognises that the areas of alignment between the New Growth Path (NGP) and competition policy are, *inter alia*, job creation and job saving.

**iii Merger review process**

A large merger hearing or reconsideration of a decision by the Commission in an intermediate merger before the Tribunal is a quasi-trial, the extent and duration of which is directly linked to the complexity of the matter; the competition law or public interest concerns raised, or both; and the degree of opposition to the merger (whether from the Commission or third parties).

A hearing in relation to a relatively benign merger, for instance, can be over in a matter of minutes, and the merging parties will receive their clearance certificate in respect of the approval of the transaction usually within a day or two of the hearing.

The hearing of a particularly challenging transaction in South Africa has been known to last for several months, with a number of short periods of evidence and argument during that time. The Tribunal has, however, successfully significantly curtailed the time taken and amount of evidence led even in complex mergers, and hearings are now conducted in a far more streamlined, disciplined manner. During the hearing period, counsel are called upon to submit legal arguments, factual and expert evidence is led, witnesses are cross-examined, etc. The hearing of a complex merger will also likely be preceded by a discovery process and various interlocutory proceedings (including challenges to claims of confidentiality by the merging parties).
The merger hearing is an open process that attracts much interest from the press. The inner workings of the merging parties are scrutinised through an analysis of e-mails, memoranda, presentations, etc. It is a time-consuming, costly and invasive process. Importantly, the merging firms are effectively sterilised from other corporate activity (other than ordinary business, which can continue as usual) from the date of filing until the date on which the merger proceedings are finalised.

Any person can, in terms of Section 13B of the Competition Act, file any relevant information with the Commission in respect of a merger. Should a person raise concerns regarding the outcome of a merger or implore the Commission to prohibit a merger or approve a merger with conditions, the Commission will investigate and analyse the nature and validity of claims made and consider such in the overall examination of the merger.

The right to participate in Tribunal merger hearings is automatically conferred upon the parties to the merger, the Commission, trade unions or employee representatives that have indicated their intention to participate, and the Minister if he or she has indicated an intention to participate formally. In addition, any person that has a material interest in the merger may apply to intervene. In effect, a contested hearing will occur where interveners participate or the Commission or one or more unions oppose the merger.

Although third parties wishing to participate need to apply to be admitted as interveners, the Tribunal will allow wide scope for intervention, except where the merging parties can definitively demonstrate that the third party’s intentions are dishonourable (that the aim is not the furtherance of competition but some other personal gain or interest of the third party).

Extensive discovery proceedings (akin to those that occur in civil trials) are not only allowed but are, in fact, encouraged by the Tribunal, which sees such processes as a unique opportunity to expose the true rationale for the merger and the likely future conduct of the merged entity, if the merger is allowed. After lengthy and invasive discovery, witness statements (factual and expert, including from economists) are filed. Thereafter, a hearing involving examination and cross-examination of witnesses is scheduled.

A lengthy, invasive and time-consuming process – usually involving senior management – will ensue in all contested scenarios.

The South African merger regime has been criticised for the fact that it is open to abuse by parties wishing to employ dilatory tactics with the aim of delivering commercial blows to competitively innocuous transactions. In a large merger, interveners are able to substantially delay finalisation of the South African merger process by raising alleged anti-competitive and contrary-to-public-interest outcomes that are likely to result from an implementation of the merger. While these allegations, if unfounded, are ultimately

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8 ‘Minister’ is defined as the Minister of Trade and Industry in Section 1 of the Competition Act. However, the competition authorities have recently been moved from the Minister of Trade and Industry’s portfolio to the Minister of Economic Development’s portfolio. As such, while this has not been amended in the Competition Act, it is now the Minister of Economic Development that will participate in merger hearings.
likely to be exposed for what they are, an intervenner in a large merger is likely able to delay a transaction, albeit for far shorter periods than was previously the case in South Africa.

V OUTLOOK AND CONCLUSIONS

As envisaged in the previous edition of this book, this year in review revealed how public interest considerations (particularly employment) continued to attract scrutiny from the competition authorities, with most transactions being approved subject to a moratorium on merger-specific retrenchments for a period of two years post-implementation. We are of the view that this trend will continue, as the creation and saving of jobs have been recognised as areas of alignment between South Africa's competition policy and the NGP.

Of course, given the trend in merger review over the past year, it is also likely that the competition authorities will continue to encourage free debate between the Commission, the merging parties and other industry bodies or third parties that may be affected by the implementation of a merger so as to ensure that solutions are developed and implemented that address merger-specific competitive and public interest concerns, while remaining cognisant of the commerciality underpinning such transactions.
Chapter 35

SPAIN

Juan Jiménez-Laiglesia, Alfonso Ois, Jorge Masía, Joaquín Hervada and Emilio Carrandi

I INTRODUCTION

i Regulations

The merger control provisions in Spain are set out in the Spanish Competition Act and its Implementing Regulation. These provide the legal framework governing the merger control procedure and cover areas such as the concept of a merger, the relevant filing thresholds, applicable deadlines and the assessment criteria.

The rules applicable to merger control in Spain have undergone some modifications in 2013, although these are not related to the jurisdictional or material assessment, but only to the setting up of a new authority. In addition, two papers were published by the Spanish competition authority in 2014 and at the beginning of 2015 that have been consistently applied throughout 2015: the strategic plan and the action plan for 2015.

ii Merger control authority

On 4 June 2013, Parliament adopted Act 3/2013 creating a new authority in charge of both competition and regulatory matters. As a result, the current authority in charge of the merger control procedure in Spain is the National Markets and Competition Commission (NMCC). On 7 October 2013, the NMCC became fully operational, following the publication of the relevant Ministerial Order of the Ministry of Economy. The NMCC merges the former competition authority, the National Competition Commission with several sectoral regulators: the National Energy Commission, the Telecommunications Market Commission, the Railway Regulation Committee, the

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National Postal Commission, the Airport Economic Regulation Commission and the State Council of Audiovisual Media.

The NMCC comprises a Council and four directorates: the Competition Directorate; the Telecommunications and Audiovisual Directorate; the Energy Directorate; and the Transports and Postal Services Directorate.

The Council is a collective decision-making body composed of two chambers: the Competition Chamber, devoted solely to competition enforcement, and the Sectoral Supervisory Chamber, devoted to regulatory matters. Each chamber is composed of four Council members who will serve on a rotating basis, with the two chambers keeping each other informed about their activities. The Council can sit in plenary, attended by the members of both the Competition Chamber and the Regulatory Chamber, to decide on NMCC organisational issues and when there is a divergence between the Chambers. Likewise, when a given number of members of the Council so decide, a matter may be subject to plenary approval. Members of the Council are proposed by the Ministry of Economy and Competitiveness and appointed by the government.

The Competition Directorate is in charge of overall competition enforcement in all sectors, while the three regulatory directorates have investigative powers in their respective sectors. The structure and functioning of the directorates is decided by government regulation through the NMCC Statute.\(^3\)

As required by the Spanish Constitution, the NMCC structure guarantees the functional separation between the competition enforcement and regulatory activities of the four directorates and the decision-making body, the Council.

Additionally, the Spanish Council of Ministers may intervene in certain exceptional circumstances. Such intervention is limited to those cases where the NMCC decides to prohibit a merger or to clear it subject to conditions. The intervention must be based on certain public interest criteria other than the protection of free competition; therefore, government intervention is limited to exceptional situations.

### iii Transactions that require approval

As the Spanish Competition Act indicates, a merger shall be deemed to exist where a stable change in control takes place over the whole or part of one or more undertakings. This definition is modelled on the EU concept of merger and typically arises from:

\(a\)

the merger of two or more previously independent undertakings;

\(b\)

the acquisition by an undertaking of control of the whole or part of one or more undertakings; or

\(c\)

the creation of a joint venture and, in general, the acquisition of joint control of one or more undertakings, when they perform on a long-term basis the functions of an autonomous economic entity.

Control is defined as the possibility of exercising a decisive influence on an undertaking. Therefore, control may be based on contractual arrangements, on the acquisition of rights over shares or on any other means that, having regard to the considerations of fact or law

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3 Royal Decree 657/2013, 30 August, which approves the by-laws of the NMCC.
involved, confer the possibility of exercising a decisive influence on an undertaking. In particular, the concept of control catches ownership as well as the right to use all or part of the assets of an undertaking, and also any means of controlling the composition or decisions of the relevant corporate bodies.

**Jurisdictional thresholds**
The obligation to file a merger with the NMCC arises when one or both of the following conditions are met:

- the acquisition of a market share equal to or higher than 30 per cent in a specific product or service in the national market or in a defined geographic market within it. Pursuant to a *de minimis* rule, this threshold is increased to 50 per cent if the acquired company’s turnover was below €10 million in the last financial year; or

- the combined aggregate turnover in Spain of all the undertakings involved in the transaction exceeded €240 million in the last financial year, provided that at least two of the undertakings concerned achieve an individual turnover in Spain of at least €60 million.

If one of these alternative thresholds is met, filing is mandatory and the transaction may not be implemented until clearance has been obtained. A waiver of this suspension obligation is possible in theory, but unlikely in practice.

The filing must be made:

- jointly by the parties participating in a merger, in the creation of a joint venture or in the acquisition of joint control over the whole or part of one or more undertakings; or

- individually by the party that acquires exclusive control of the whole or part of one or more undertakings.

**Consequences of lack of notification**
The execution of a concentration before clearance is obtained (except when the suspension obligation has been waived by the authority) is a serious infringement of the Competition Act. The NMCC monitors the market to detect any infringements of the duty to notify mergers. The breaching of this duty may result in fines of up to 5 per cent of the total turnover achieved in the business year immediately preceding that of the imposition of the fine.

Failure to notify a transaction when required *ex officio* by the NMCC is considered a minor infringement. Fines in this case can be as high as 1 per cent of the total turnover of the infringer in the business year immediately preceding the year of the imposition of the fine.

**Filing fees**
A filing fee must be satisfied before the authority starts the analysis of the merger. The amount of the fee is updated annually, and in 2015 is 1 per cent higher than it was in 2014:

- €5,557.17 when the aggregate turnover in Spain of all participants does not exceed €240 million;
Spain

b €11,114.35 when the aggregate turnover in Spain of all participants exceeds €240 million but not €480 million;

c €22,228.08 when the aggregate turnover in Spain of all participants exceeds €480 million but not €3 billion;

d a fixed amount of €44,383 when the relevant turnover exceeds €3 billion and an additional €11,114.35 for each €3 billion in excess of that amount. The maximum payable fee is capped at €110,958.60; and

e a reduced fee of €1,545.45 for those mergers that qualify for the short-form filing procedure.

The filing will not be considered complete until the filing fee is satisfied, which implies that the applicable review periods will not start running.

II YEAR IN REVIEW

i Relevant cases

Telefónica/DTS

In April 2015, the NMCC authorised the most relevant merger in the first half of 2015, the acquisition by Telefónica of sole control over the first pay-TV operator in Spain, Distribuidora de Televisión Digital (DTS). The clearance was conditioned on three sets of commitments: one applicable to the pay-TV market, one related to a wholesale offer of individual audiovisual content and TV channels (including the obligation for the merged entity to offer at least 50 per cent of its premium content and channels to its competitors), and one regulating access to the Telefónica internet network by other telecommunications operators. The commitments have an effective term of five years, extendable for three additional years. The merged entity will be able to request a change of the offered commitments in the event of a relevant structural modification or if a change in the regulations applicable to the affected markets occurs during the effective time frame.

Findus/Nestlé-Assets and OpCapita/La Sirena

In February 2015 and November 2014, the NMCC cleared in Phase I without commitments the acquisition by the frozen and chilled food producer and distributor Findus of certain property assets of Nestlé related to its frozen and chilled products activity, and the acquisition by the private equity fund OpCapita of sole control over the Spanish frozen food retail distributor La Sirena.

According to the NMCC, the strong presence of private labels suggests that customers are not very loyal to brands. This reality, together with the fact that price is the essential element in the purchasing decision, confers great market power upon distributors that is, ultimately, the reason why these mergers between manufacturers are not likely to raise competition concerns.
Acquisitions by IDCSalud in the Spanish private health-care sector

In October 2014, the NMCC approved the acquisition of Grupo Hospitalario Quiron by IDCSalud. IDCSalud is controlled by the private equity company CVC Capital Partners and, like Grupo Hospitalario Quiron, is active in the provision of private health care and management of public health care. The European Commission had referred the transaction to the Spanish Competition Authority because it entails the integration of the two most important private health groups in Spain, creating the third-largest operator in Europe.

The transaction was cleared in Phase I without commitments despite concerns raised by some, particularly in Barcelona.

Additionally, in February and March 2015, the NMCC authorised the acquisition by IDCSalud of Policlinica Guipuzcoa and Grupo Ruber, one of the most significant groups within the private health sector in Madrid. Both transactions were cleared in Phase I without commitments.

Urbaser/Tirme

In December 2014, the NMCC cleared in Phase I without commitments the acquisition by the nationwide waste management company Urbaser of sole control over Tirme, a waste management company operating in Mallorca.

According to the NMCC, this transaction did not give rise to competition concerns since the companies’ combined share in the market for non-hazardous waste management at a national level did not reach 20 per cent. The NMCC considered that in narrower geographical markets (i.e., limited to the island of Mallorca), the parties’ activities did not overlap given that Tirme is the only operator who has been awarded with the required administrative concessions.

DIA/Grupo El Arbol

In October 2014, the NMCC authorised with commitments the acquisition of sole control over El Arbol by DIA. Both companies are active in the market for the retail distribution of daily consumer goods. The European Commission referred the transaction to the Spanish authority.

The NMCC concluded that the transaction created competition concerns in certain geographical areas where the parties’ activities overlapped and combined market shares were high. In seven of 37 local markets, the parties combined market shares was over 50 per cent (and even over 60 per cent in six of them), and in those areas where the parties were the main operators, they both were the owners of the largest establishments and there were no other relevant competitors.

The NMCC cleared the proposed transaction conditioned on divestiture of stores in those seven local markets, as proposed by the acquirer.

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6 Cases C/640/15, C/0626/14 and C/616/14.
7 Case C/0623/14.
8 Case C/0600/14.
Again within this sector, in November 2014, the NMCC also authorised the acquisition by Auchan and APF of joint control over La Zenia, which managed a shopping mall in Alicante.

**Banking sector 2014**

In 2014 and the beginning of 2015 there have been new steps in the Spanish banking restructuring process. Most of these transactions involve the acquisition of sole control over other entities, such as the purchase of Catalunya Bank by BBVA; CXG by Nova Caixa Galicia Bank; Barclays assets in Spain by Caixabank; Citibank assets in Spain by Banco Popular; and the acquisition Caja Badajoz by Ibercaja.

These transactions were cleared by the NMCC in Phase I decisions without commitments given there would be little impact on competition in the markets and the absence of any obstacles to the maintenance of effective competition in the relevant markets. Low barriers to entry due to the liberalisation of the Spanish financial system following the European harmonisation have also fostered these transactions and advocate for unconditional clearances.

**Springwater Capital LLC/Establecimientos Miró**

In November 2014, the Council of the NMCC authorised the acquisition by the private equity company Springwater (a very active investor in Spain in the past couple of years through acquisitions previously reviewed by the NMCC, including Springwater/Gowaii/Pulmantur, Springwater/Sarennet and Springwater/Grupo Daorje) of certain assets belonging to Establecimientos Miró, a retail distributor of household appliances. Such assets included 66 retail locations, the Miró online store, 100 per cent of the stock belonging to Miró at the time of the acquisition, intellectual property rights, employment contracts of 452 Miró employees, licences, furniture, software and computer applications.

The NMCC concluded that this concentration did not give rise to any concerns since there was no overlap between the activities of the two parties; therefore, the operation was cleared in Phase I without commitments.

**Schibsted/Milanuncios**

In November 2014, the NMCC cleared in Phase II the acquisition by Schibsted Classified Media Spain of sole control of online classified advertisement company Milanuncios. The clearance was conditioned on a specific commitment: signing a licence agreement with a third competitor to grant exclusive exploitation of classified online ads published by professional advertisers on the motor section of milanuncios.com. Such licence has an effective term of two years, and stipulates that both the licence agreement and the licensee shall be subject to prior approval by the NMCC before the effective implementation of the concentration.

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9 Cases C/0615/14, C/0611/14, C/0603/14, C/0587/14 and C/0582/14.
10 Case C/0608/14.
11 Case C/0573/14.
**Photobox/Hofmann**\(^{12}\)
In November 2014, the NMCC issued a Phase I clearance decision authorising the acquisition by Photobox, an online supplier of photographic products, of sole control over Hofmann, a company which offers custom-made photographic products through the retail and online channels. In principle, this concentration involved a merger between the main operator in the online channel in Spain and one of the biggest suppliers of custom-made photographic products in the market; thus, the merged entity would become the leading player in several segments within the photographic products market. Nevertheless, the NMCC ultimately decided that the transaction would not decrease competition due to the presence of a significant number of competitors in all the segments analysed and the existence of limiting factors on the operators exercising power market, such as the homogeneity of products, low entry barriers and the ease with which clients can switch supplier.

**JCDecaux/Cemusa**\(^{13}\)
In October 2014, the authority also authorised the acquisition of sole control over Cemusa by JCDecaux. The acquirer is dedicated to the worldwide marketing of outdoor advertising spaces and acts in Spain through various subsidiaries. Cemusa is engaged in the design, manufacture and installation of advertising supports, including furniture, urban equipment and other material carriers of information and publicity. Cemusa also provides other related outdoor advertising services.

The merger involved the two main suppliers of outdoor advertising in Spain and resulted in the merged entity holding a market share well above the rest of its competitors, especially in large cities like Madrid and Barcelona.

The transaction was cleared in a Phase II decision without commitments because, after an exhaustive analysis, the authority determined that the merged entity would not become an essential supplier of outdoor advertising campaigns in Spain and that there would remain sufficient alternative competitors to JCDecaux. Among other reasons, this is due to both the large number of Spanish advertisers are available and the fact that outdoor advertising is a secondary advertising channel to most companies.

**KKR/GAG**\(^{14}\)
In June 2014, the NMCC authorised the acquisition by private equity fund KKR of sole control over the cement and paper (mainly newsprint) businesses of Grupo Alfonso Gallardo. This operation was carried out within the framework of the restructuring of Alfonso Gallardo, which sold those two businesses to retain their main activity (manufacturing of iron and steel products).

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12 Case C/0613/14.
13 Case C/0577/14.
14 Case C/0580/14.
ii NMCC statistics
The number of concentrations notified to the NMCC increased during 2014, mainly because of the improvement seen in Spain’s economic situation. From a qualitative standpoint, most transactions continue to be cleared in Phase I, and only a small number are subject to commitments.

III THE MERGER CONTROL REGIME

i Merger control procedure
Filing a notification has a suspensory effect, which means that the parties cannot implement the merger before clearance is obtained, either through a positive decision from the NMCC or by administrative silence when the relevant periods have expired.\(^{15}\) A waiver of this obligation is possible in theory, and requires the NMCC to balance the specific circumstances of the case at hand and the potential consequences of waiving the suspension obligation. Furthermore, the derogation can be made subject to certain obligations and conditions to guarantee the effectiveness of the final decision that the NMCC may issue. In practice, however, the NMCC has not made use of this possibility, and there are no indications that this trend may change.

The merger control procedure in Spain is divided into two phases, plus an optional (albeit recommended) pre-notification phase. The second phase is reserved for those mergers that pose an identified risk to competition in the relevant markets and involves an in-depth investigation, as explained below. Finally, a consultation procedure is available to approach the authority before notification and establish whether a specific transaction qualifies as a notifiable concentration.

Pre-notification
The NMCC may be informally approached to clarify formal or substantive issues of a specific transaction, and to discuss jurisdictional and other legal issues. These contacts serve to address issues such as the scope of the information to be submitted, and to prepare for the upcoming investigation by identifying key issues and possible competition concerns at an early stage.

Although not mandatory, the Spanish authority strongly encourages these pre-notification contacts, which, depending on the transaction, typically last between two and four weeks. For these contacts to be fruitful, all the relevant information should

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\(^{15}\) Public takeover bids are an exception to this suspension obligation in the sense that bids for shares launched in a stock market authorised by the National Securities Commission can be executed provided that the transaction is filed with the NMCC within five days of the presentation of the application for authorisation of the bid to the National Securities Commission (if this has not been previously done) and, additionally, the acquirer refrains from exercising the voting rights attached to the securities acquired or only does so to maintain the full value of its investment and on the basis of a derogation granted by the NMCC.
be provided to the authority, typically including the submission of a draft filing form. These contacts are kept secret by the authority until a formal filing is made.

**Phase I**

Once a complete notification is received, the NMCC formalises the proceedings and prepares a report for the Council to issue a decision on the transaction. This phase lasts up to one month, although extensions may take place if commitments are offered (10 additional days) or if the authority issues requests for information to clarify or further investigate specific issues (the review period is suspended until a full reply is provided).

This first phase ends with a decision from the Council of the NMCC:

- **a** authorising the concentration;
- **b** subordinating clearance to the fulfilment of certain commitments proposed by the notifying party;
- **c** initiating the second phase of the procedure;
- **d** referring the merger to the European Commission when it is better positioned to assess the transaction; or
- **e** shelving the proceedings (e.g., if the notification thresholds are not met or if the parties abandon the transaction).

The transaction will be tacitly approved if the NMCC does not issue and notify its decision to the notifying party within the stipulated time frame (one month plus any extensions that may have occurred).

**Phase II**

This second phase is reserved for mergers that pose an identified risk to competition in the sense that effective competition could be impeded in one or more relevant markets in Spain. By its very nature, this second phase involves an in-depth investigation during which market tests are conducted.

Once this phase is initiated, the NMCC issues a report detailing the identified competition risks and specifically describing the possible restrictions to competition (theory of harm). Third parties may access the file and submit their views on the transaction.

The possible outcomes of this phase are authorisation of the concentration, with or without commitments proposed by the parties or conditions imposed by the authority; prohibition of the concentration; or shelving of the proceedings in the cases set out in the Competition Act.

The basic duration of this second-phase review is two months, extendible if commitments are offered (15 additional days) or if the authority issues information requests to clarify or further investigate specific issues (the review period is suspended until a full reply is provided).

Under the public interest criteria, the Spanish Council of Ministers has the option to intervene in mergers provided that the NMCC has prohibited the transaction or has imposed commitments or conditions. The Ministry of Economy may decide (within 15 days) to ask the government to intervene. Should the government intervene, it will have one additional month to decide on the transaction. This is informally known as the third phase of the merger control procedure. The government’s review may confirm
the NMCC’s decision, or authorise the transaction with or without commitments or conditions.

ii Filing forms

The annexes to the Implementing Regulation set out the requirements of both the ordinary and short-filing forms. These filing forms are similar to the EU Form CO and Short Form CO.\(^{16}\) In both cases, the notifying party is required to produce copies of the relevant agreements, annual reports and internal documents prepared for the purposes of analysing the transaction.

The ordinary filing form requires detailed information on the parties (contact details, turnover, areas of activity, etc.), on the transaction (type of merger, structure of control, economic rationale, etc.), on the market (market shares, barriers to entry, market structure and distribution networks, information on research and development activities and expenditure, etc.), as well as other elements such as ancillary restraints, and the existence of cooperative and vertical aspects or efficiencies.

The abbreviated or short-filing form reduces the amount of information required mainly in respect of the relevant markets.\(^{17}\) The short-filing form is reserved for those cases that are less likely to pose competition concerns. In particular, one of the following requirements must be met:

1. the parties are not active in the same geographical and product markets or in upstream or downstream markets (no horizontal or vertical overlaps);
2. the transaction is not capable of significantly affecting competition (measured in terms of market shares and overlaps);
3. a party acquires sole control over one or more undertakings over which it already had joint control; or
4. acquisitions of joint control where the company does not carry out nor plans to carry out activities in Spain, or those activities are only marginal.

Although time periods are not modified, the simplified analysis to be performed by the NMCC allows the parties to produce less information mainly concerning the relevant markets (competitors’ market shares, barriers to entry or, more generally, the market structure (offer and demand) are not discussed in this filing form). The filing fee is reduced to €1,545.45 and, in practice, pre-notification contacts and the duration of Phase I tend to be shorter.

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17 At the end of 2011, the Spanish competition authority issued a guidance paper on short-form filings. These guidelines explain which mergers qualify for the short-form notification procedure and also identify certain transactions that, despite meeting the short-form criteria, must always be notified using the ordinary full-form notification. This is the case for transactions where the notifying party has requested the NMCC to lift the suspension obligation.
iii Ancillary restraints
Ancillary restraints that are directly linked to and essential for implementing the merger are covered by the clearance decision issued by the NMCC. Contrary to the approach followed by the European Commission, Spanish merger control decisions expressly deal with ancillary restraints, and the filing forms (both the ordinary and short form) include a section on ancillary restraints.

iv Third-party access to the file and rights to challenge mergers
There are no specific rules regarding the intervention of third parties in merger control proceedings. However, in accordance with general Spanish procedural rules, any natural or legal person who may be affected by the transaction may apply to be considered as an interested party in the merger control procedure. It is possible to claim a role as an interested party as soon as the second phase of the procedure is opened, but not before.

Within 10 days of receiving the request, the NMCC will evaluate if there is a legitimate right or interest and will make its decision on accepting or rejecting the request. Interested parties may access the file and submit their views and allegations on the transaction.

While formal merger control processes can only be initiated by the notifying party, the NMCC may request filing in those cases it identifies as transactions that meet the relevant notification threshold. Similarly, any third party may file a complaint with the NMCC informing the authority of a specific transaction for the authority to investigate if a filing was indeed required.

v Appeals and judicial review
The NMCC’s decisions in merger procedures are administrative decisions subject to judicial appeal. These can be filed before the Spanish National Court within two months from the date on which the decision was notified. Rulings by this Court are subject to appeal before the Spanish Supreme Court. However, a decision by the government confirming or dismissing a previous decision by the NMCC, when applicable, may be directly appealed to the Supreme Court.

IV OTHER STRATEGIC CONSIDERATIONS
In May 2014, the NMCC published its strategic plan, which identifies three main goals:

a to obtain the highest level of efficiency, the NMCC will apply its tool portfolio rigorously to the markets and regulated sectors;
b the NMCC will act in a transparent and independent manner, giving its actions the maximum predictability, and will focus on the general interest regarding the best functioning of the markets; and
c the NMCC will take advantage of the synergies deriving from its integrated structure, providing global solutions to market constraints so that legal certainty is guaranteed.
The NMCC also stated in the strategic plan its intention to enhance cooperation with the Portuguese Competition Authority in law enforcement matters, including regarding both antitrust and merger control processes.

V OUTLOOK AND CONCLUSIONS

The establishment of effective merger control procedures has become a major economic policy concern, as some mergers can significantly alter the structure of the markets in a manner that is contrary to the maintenance of effective competition in Spain.

In January 2015, the NMCC published its action plan for 2015 in which it underpins the main goals established in the strategic plan. The NMCC will promote corporate social responsibility, placing an emphasis on checking people’s merits and capabilities when it is selecting personnel, better training and the creation of multidisciplinary teams. At the same time, the NMCC will intensify its dialogue and cooperation with other government and public bodies in order to advocate the principles of efficient economic regulation, prevent market distortions and have an effective impact on markets.

Finally, the authority will contribute to the continuous improvement of the international regulatory and competitive environment by participating in various EU and other international bodies and fora, such as its participation in working groups of the European Competition Network, and providing technical assistance to the authorities of Latin American countries.
Chapter 36

SWITZERLAND

Pascal G Favre and Patrick Sommer

I INTRODUCTION

Merger control in Switzerland is governed by the Federal Act on Cartels and Other Restrictions of Competition (ACart) and the Merger Control Ordinance (MCO). These competition regulations came into force on 1 July 1996 and were first revised in 2003.

Concentrations are assessed by the Competition Commission, an independent federal authority based in Bern that consists of up to 15 members. There are currently 12 members who were nominated by the federal government, the majority of which are independent experts (i.e., law and economics professors). Deputies of business associations and consumer organisations take the other seats. Cases are prepared and processed by the Secretariat of the Competition Commission (with a staff of 85 employees at the end of 2013, mostly lawyers and economists), divided into four departments: product markets, services, infrastructure and construction.

The types of transactions that are subject to merger control are mergers of previously independent undertakings; and direct or indirect acquisitions of control by one or more undertakings over one or more previously independent undertakings, or parts thereof. Joint ventures are also subject to merger control if the joint venture company exercises all the functions of an independent business entity on a lasting basis; if a joint venture company is newly established, it is subject to merger control if, in addition to the above criteria, the business activities of at least one of the controlling shareholders are transferred to it.

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Pursuant to Article 9 ACart, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year prior to the concentration:

\(a\) the undertakings concerned must have reported a worldwide aggregate turnover of at least 2 billion Swiss francs or a Swiss aggregate turnover of at least 500 million Swiss francs; and

\(b\) at least two of the undertakings concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

These thresholds are considered to be relatively high in comparison with international standards. Alternatively, a particularity of the Swiss regime is that if the Competition Commission has previously issued a legally binding decision stating that an undertaking holds a dominant position in a particular market, such undertaking will have to notify all its concentrations, regardless of the turnover thresholds, provided that the concentration concerns that particular market or an upstream, downstream or neighbouring market. According to Article 4(2) ACart, an undertaking is considered to hold a dominant position if it is ‘able, as regards supply and demand, to behave in a substantially independent manner with regard to the other participants in the market (competitors, suppliers, buyers)’.

If the thresholds are met, or in the case of a dominant undertaking as explained above, the concentration must be notified to the Competition Commission prior to its completion. If a transaction is implemented without notification or before clearance by the Competition Commission (or if the remedies imposed are not fulfilled), the companies involved may be fined up to 1 million Swiss francs. Members of the management may also be fined up to 20,000 Swiss francs. So far, the Competition Commission has imposed several fines on companies for failure to notify, but there has been no criminal sanction of members of management. Furthermore, the Competition Commission may order the parties to reinstate effective competition by, for instance, unwinding the transaction.

The ACart does not stipulate any exemptions to the notification requirements. However, if the Competition Commission has prohibited a concentration, the parties may in exceptional cases seek approval from the federal government if it can be demonstrated that the concentration is necessary for compelling public interest reasons. Such approval has, however, not been granted so far.

Specific rules apply to certain sectors. Thus, a concentration in the banking sector may be subject to a review by the Swiss Financial Market Supervisory Authority, which may take over a case involving banking institutions subject to the Federal Law on Banks and Saving Banks, and authorise or refuse a concentration for reasons of creditor protection, irrespective of the competition issues. If the parties involved in a concentration hold special concessions (e.g., radio, television, telecommunications, rail, air transport), a special authorisation by the sector-specific regulator may be required. Moreover, under the Federal Law on the Acquisition of Real Estate by Foreign Persons, for any concentration involving a foreign undertaking and a Swiss real estate company holding a portfolio of residential properties in Switzerland, the approval of the competent cantonal or local authorities may also be necessary.
The Swiss merger control regime features a very high standard of assessment compared with other jurisdictions, which is sometimes called the ‘dominance-plus test’. Pursuant to Article 10 ACart, the Competition Commission must prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

- 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 (Schweitz) AG, the Swiss Supreme Court had to determine whether a concentration could be prohibited if there was a mere creation or strengthening of a dominant position or whether conditions (a) and (b) (i.e., creation or strengthening of a dominant position and elimination of effective competition) were cumulative. This question has significant practical consequences, because if the two conditions are cumulative, then a concentration may be authorised even if a dominant position is created or strengthened if it cannot be established that the concentration will eliminate effective competition. In the Swissgrid case, seven Swiss electricity companies wanted to integrate their electricity-carrying network under a common company. The Swiss Supreme Court held that conditions (a) and (b) were cumulative. The reasoning followed by the Supreme Court was that merger control is part of the control of market structure. Therefore, to justify an administrative intervention, the concentration must result in a concrete negative change in the market structure and the competition must be altered. In this case, the Court found that competition did not exist prior to the concentration. Accordingly, the concentration would not change the market conditions and the administrative intervention was not justified. In more recent cases (notably the Tamedia/PPSR (Edipresse) case), the Competition Commission examined whether the concentration could eliminate effective competition, but in a way that might indicate that it is in fact reluctant to give an autonomous scope to that criterion. In practice, the efficiency gains provided in condition (c) have so far played no role.

II YEAR IN REVIEW

In 2014, the numbers of merger notifications remained stable, with 30 notifications of concentrations being filed to the Competition Commission (there were 32 notifications of concentrations in the previous year). Thirty-five cases (including a notification received in December 2013 but not declared unobjectionable until the start of 2014) were cleared after a preliminary investigation. One decision was rendered after an in-depth investigation (Phase II).

In the telecommunications sector, the Competition Commission assessed the merger between Swisscom Directories AG and Search.ch AG. In this case, Swisscom and Tamedia, following the takeover of Publigroupe SA, planned to merge its subsidiaries local.ch and search.ch into a joint subsidiary undertaking. The Competition Commission’s preliminary investigation at the end of November 2014 revealed that the
merger might establish or increase a dominant position in relation to address directories. Accordingly, and under Article 10 of the Cartel Act, the planned merger was the subject of an investigation that was completed in March 2015. Although the Competition Commission arrived at the conclusion that this merger would result in the creation of a dominant position on the directories market, it found that such dominant position was not capable of eliminating effective competition.

The Competition Commission was also called on to assess several company mergers in the media sector. In the merger planned between Tamedia AG and the B2C division of Ticketportal AG, Tamedia reported its intention to take over the B2C division of Ticketportal via its subsidiary Starticket AG. In the case of Aurelius/Publicitas, Aurelius AG planned to take over the activities of Publigroupe in the field of media sales. In the case of Ringier/Le Temps, Ringier AG planned to acquire sole control of HE Publishing SA; this would result in Ringier having the sole control of Le Temps SA. In the case of Thomas Kirschner/Valora Mediaservices AG, Thomas Kirschner announced its intention to acquire indirect control of the Swiss press wholesaler Valora Mediaservices AG via its subsidiary Brillant Media Services GmbH. Subsequently, Thomas Kirschner/A and B XY/Valora Mediaservices AG reported their acquisition of joint control of Valora Mediaservices AG by Thomas Kirschner and the spouses XY – the latter via ATLAS Beteiligungen GmbH & Co KG. In the case of Swisscom (Switzerland) AG/Publigroupe SA, Swisscom announced its intention, as part of a public takeover bid, to gain the sole control of the Publigroupe group of companies. In the case of Tamedia/home.ch, Tamedia planned to take over sole control of the home.ch division. In relation to all these cases, the Competition Commission approved the mergers following a provisional assessment.

Following on from the merger proceedings in the case of Ringier/Le Temps, in a ruling dated 8 September 2014 the Competition Commission also lifted the conditions imposed by its decision of 20 October 2003 in the case of Edipresse/Ringier – Le Temps. The conditions were imposed due to the joint control of Ringier and Tamedia over HE Publishing (and thus the newspaper Le Temps) in order to guarantee the independence of Le Temps and to be able to control the effects of the cooperation in other media markets. With Ringier taking over sole control of Le Temps, the conditions were no longer required and thus had to be lifted.

In addition, on 3 September 2014, the conditions that the Competition Commission imposed in 2007 in the Migros/Denner merger proceedings all expired, with one exception. The exception relates to the permanent requirement that Migros is basically not permitted to enter into exclusive agreements with its suppliers. The conditions were ordered on the one hand with the aim of ensuring that other operators in the market could take over Denner’s previous role as Migros’ most significant fringe competitor. On the other, the conditions were supposed to prevent it becoming more difficult for suppliers to gain access to sales markets. In the Competition Commission’s view, the conditions have served their purpose; the conditions were enforced without any significant irregularities.
III THE MERGER CONTROL REGIME

If the turnover thresholds are reached by the undertakings concerned or if the concentration involves a company holding an established dominant position (see Section I, supra), the filing of a merger notification is mandatory prior to the completion of the transaction. Under Swiss law, there are no deadlines for filing. A transaction can be notified prior to the signing of the final agreements. However, the parties must demonstrate a good faith intention to enter into a binding agreement and to complete the transaction (in practice, the standard is similar to that of the European Commission). The Secretariat of the Competition Commission can be contacted on an informal basis before the notification. This can speed up the notification procedure (for example, the Secretariat can agree to waive some legal requirements in relation to the content of the notification).

In the case of mergers, the notification must be made jointly by the merging undertakings. If the transaction is an acquisition of control, the undertaking acquiring control is responsible for the filing. The filing fee for a Phase I investigation is a lump sum of 5,000 Swiss francs. In Phase II investigations, the Secretariat of the Competition Commission charges an hourly rate of 100 to 400 Swiss francs.

Once the notification form has been filed, if the Competition Commission considers that the filing was complete on the date of the filing, it will conduct a preliminary investigation and will have to decide within one month whether there is a need to open an in-depth investigation. If the Competition Commission decides to launch an in-depth investigation, it will have to complete it within four months.

As a rule, the closing of a transaction should not take place prior to the competition authorities’ clearance. However, in specific cases, the authorities may allow a closing prior to clearance, for important reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid. Contrary to the European merger control rules (Article 7, paragraph 2 of Council Regulation (EC) No. 139/2004), no exception for public bids is provided under Swiss law. Therefore, each case will be assessed individually. In the Schaeffler/Continental case (where Schaeffler and Continental eventually agreed on the conditions of a public takeover), the Competition Commission decided that a request for an early implementation of a concentration can be granted before the notification is submitted if three conditions are fulfilled:

- the Competition Commission must be informed adequately about the concentration;
- specific reasons must be given on why the notification cannot be submitted yet; and
- whether the transaction can be unwound must be assessed in the event that the concentration is not allowed by the Competition Commission after its review.

In that case, these conditions were fulfilled. However, the Competition Commission imposed two additional conditions: the obligation not to exercise the voting rights except to conserve the full value of the investment, and the obligation to submit a full notification within a relatively short period of time.

In practice, the one-month period for the Phase I investigation can be shortened in less complex filings, especially if a draft filing was submitted to the Competition Commission for review prior to the formal notification.
If the Competition Commission decides to launch a Phase II investigation, it will publish this decision. It will then send questionnaires to the parties, as well as their competitors, suppliers and clients. Usually, a Phase II hearing with the parties takes place. If the parties propose remedies, close contact is established between the Secretariat and the undertakings involved to determine the scope. Ultimately, however, the authority to impose remedies lies with the Competition Commission, which enjoys a wide power of discretion (subject to compliance with the principle of proportionality).

Third parties have no formal procedural rights at any point in the procedure. If the Competition Commission opens a Phase II procedure, it will publish basic information about the concentration and allow third parties to state their position in writing within a certain deadline. The Competition Commission is not bound by third-party opinions, or by answers to questionnaires. Third parties have no access to documents and no right to be heard. Moreover, the Swiss Supreme Court has held that third parties are not entitled to any remedy against a decision of the Competition Commission to permit or prohibit a concentration.

A decision of the competition authority may be appealed within 30 days to the Federal Administrative Tribunal and ultimately to the Swiss Supreme Court. The duration of an appeal procedure varies, but may well exceed one year at each stage.

In September 2014, the Competition Commission published an updated version of its communication dated 25 March 2009 regarding merger control (Merger Control Communication).

The Merger Control Communication first clarifies the concept of ‘effect’ in the Swiss market in the case of a joint venture. Article 2 of the ACart provides that the Act ‘applies to practices that have an effect in Switzerland’. Until the Merger Control Communication, the Competition Commission and the Swiss courts held that if the turnover thresholds of Article 9 ACart were reached, it should always be considered that there was an effect in the Swiss market. Thus, in the case of the creation of a joint venture with no activity in Switzerland but where the turnover thresholds were met by the parent companies, a notification was required (see, e.g., the Merial decision of the Swiss Supreme Court of 24 April 2001). However, in the Merger Control Communication, the Competition Commission takes a different approach: if the joint venture is not active in Switzerland (no activity or turnover in Switzerland – in particular no deliveries in Switzerland) and does not plan to be active in Switzerland in the future, then the creation of this joint venture does not have any effect in Switzerland and accordingly no notification is required, even if the turnover thresholds are met by the parent companies.

In the Axel Springer/Ringier case (dated May 2010), Ringier AG and Axel Springer AG formed a joint venture in Switzerland, in which they concentrated all the printed and electronic media activities they had in eastern European countries. In the light of the criteria set out in the Merger Control Communication, the Competition Commission took the view that the joint venture was subject to Swiss merger control, since some of the entities concentrated in it had achieved a turnover in Switzerland in the year preceding the concentration, while others had made deliveries in Switzerland.

The second jurisdictional issue dealt with by the Merger Control Communication generalises the position taken by the Competition Commission in its Tamedial/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
Switzerland

Tamedia over that period. The Competition Commission decided that the deal could be regarded as a single concentration only if the three following conditions were met:

1. constitution of a joint control during a transition period;
2. a shift from joint control to sole control concluded in a binding agreement; and
3. 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.

The Merger Control Communication also addresses the subject of the geographic allocation of turnovers. In general, the test for the geographic allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where the competition with other alternative suppliers takes place respectively. The billing address is not relevant. Special rules apply to the calculation of turnovers based on the provision of services.

The Merger Control Communication also clarifies the examination criteria and the notification requirements for markets affected by concentrations in which only one of the participants operates with a market share of 30 per cent or more. The issue is the extent to which the other companies involved in the concentration may be categorised as potential competitors. According to the Competition Commission’s practice, a planned takeover leads to the exclusion of potential competitors if an undertaking involved plans to enter the problematic market or if it has pursued this objective in the past two years (e.g., the development of competing medicines that has entered an advanced phase may be interpreted as the intention to enter a new market). An exclusion of potential competitors is also possible if an undertaking involved holds important intellectual property rights in this market, even where it is not active in the market concerned. Special attention must be given to cases in which another undertaking involved is already active in an upstream or downstream product market or in a neighbouring market closely linked with the product market in which the relevant undertaking holds a market share of at least 30 per cent.

IV OTHER STRATEGIC CONSIDERATIONS

The Competition Commission maintains close links with the European Commission. It accepts that, in cases where a notification has also been filed with the European Commission, the parties provide the Form CO filing, annexed to the Swiss notification for reference. This reduces the workload for the drafting of the Swiss notification, as the parties therefore only have to add specific data regarding the Swiss market. That said, while annexes to the Swiss notification may be provided in English, the main part of the notification must be drafted in one of the Swiss official languages (French, German or Italian).

The Competition Commission aims to give decisions coherent with that of the European Commission if a case has been notified both in Brussels and in Bern. To ensure
compatible decision-making, it is advisable for the parties to provide a waiver that allows
the Competition Commission to liaise directly with the European Commission.

More generally, the report of the Taskforce Cartel Act presented in January 2009
(see Section V, *infra*) states that in the context of growing globalisation, it would be
appropriate for Switzerland to conclude cooperation agreements with its main trading
partners to make possible the exchange of confidential information between competition
authorities. On 17 May 2013, the government signed an agreement between the Swiss
Confederation and the European Union concerning cooperation on the application of
their competition laws (Agreement). In essence, the Agreement regulates cooperation
between the Swiss and European competition authorities. It is a purely procedural
agreement and does not provide for any substantive harmonisation of competition
laws. The two competition authorities shall notify each other in writing of enforcement
activities that could affect the important interests of the other contracting party. A list
is given of examples of cases in which notification must be given, and the time for
notifications in relation to mergers and other cases is also set out (Article 3, paragraphs
3 and 4). Furthermore, the Agreement creates the legal basis for the competition
authorities to be able to coordinate their enforcement activities with regard to related
matters. The Agreement entered into force on 1 December 2014.

The Competition Act does not contain any specific rules regarding public
takeover bids. The Competition Commission should be contacted in advance so that
it can coordinate its course of action with the Swiss Takeover Board. This is particularly
important for hostile bids. Past practice has shown that in most cases the Competition
Commission substantially follows the rules of the EU Merger Control Regulation
on public takeover bids. In addition, it is possible to request provisional completion
specifically in public takeover bids.

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
ACart. Article 59a of the ACart requires the federal government to evaluate the efficiency
and conformity of any proposed measure under the Act before submitting a report and
recommendation to Parliament in relation to such measure. As regards concentrations,
the Taskforce Cartel Act takes the view that, compared with other countries, the Swiss
system, which only prohibits concentrations that can eliminate effective competition,
is deficient and provides a relatively weak arsenal to enhance competition effectively.
According to the experts, a risk exists that concentrations adversely impacting
competition might be approved. They recommend a harmonisation of the Swiss merger
control system with the EU merger control system to eliminate that risk and to reduce
the administrative workload with respect to transnational concentrations, as well as the
implementation of modern instruments to control the criteria governing intervention
in the case of concentrations (the SIEC test, efficiency defence and dynamic consumer
welfare standard).
On 30 June 2010, the federal government published a set of draft amendments to the ACart for public consultation. The government proposed, *inter alia*, to replace the currently applied ‘dominance-plus test’ either with a simple dominance test (whereby the criterion of a possible elimination of competition would be dropped) or with an SIEC test analogous to EU law. As regards notification obligations, the government proposed maintaining the existing turnover thresholds, but suggested a new exception to eliminate duplicate proceedings where every relevant market geographically extends over Switzerland plus at least the European Economic Area and the concentration is being appraised by the European Commission.

Based on the results of the consultation procedure, on 22 February 2012 the federal government released a dispatch to Parliament on the revision of the ACart together with a set of draft amendments. Regarding merger control, the draft amendments confirmed the willingness of the federal government to change the assessment criteria for the merger control procedure (introduction of the SIEC test) combined with a relaxation of regulations on undertakings in the case of concentrations with defined international markets and in relation to deadlines (harmonisation with conditions in the EU). Additional changes in the merger regime included more flexible review periods. The present review periods in Switzerland are one month for Phase I and an additional four months for Phase II (see Section III, *infra*). The reform would have introduced the possibility to extend the review period in Phase I by 21 days and in Phase II by two months. Such extension would have to be agreed between the authorities and the undertakings concerned. Finally, the reform would have included a waiver of the notification obligation in the case of a concentration where all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration is assessed by the European Commission. In such cases, the filing of a copy of Form CE with the Swiss authorities for information purposes but without review would be have been sufficient.

In the parliamentary debate, the Council of States approved the Federal Council draft for the revision of the Cartel Act at its first reading in March 2013, subject to various amendments. However, the National Council at its first reading in March 2014 decided not to consider the revision. After the Council of States adhered to its decision in June 2014, but the National Council again decided not to consider the revision in its second reading in September 2014, the final outcome is that the Cartel Act will not be revised.

According to the Competition Commission, rejection of the revised Cartel Act without even considering it is a missed opportunity to meet the need for reform highlighted in the evaluation. It also means that several changes proposed by the Council of States, including changes to the merger control procedure, are no longer on the table.
Chapter 37

TAIWAN

Victor I Chang, Margaret Huang and Deven Lu

I INTRODUCTION

Taiwan established comprehensive regulation of antitrust and unfair competition activities when the Fair Trade Act was enacted in 1991 and made effective in 1992. The Fair Trade Act was most recently amended in January 2015, which for the most part became effective as of February 2015 (2015 amendment). Under the 2015 amendment, several changes have been made to the requirements of merger applications: inter alia, what constitutes a ‘merger’ and the calculation of the ‘sales revenue threshold’ under the Fair Trade Act have been changed.

There are many sub-rules that explain and add details to the Fair Trade Act, and that are amended and updated more frequently. For instance, in response to the 2015 amendment, in March 2015 the TFTC announced a rule to amend the turnover for financial enterprises and non-financial enterprises that are subject to pre-merger applications.

Taiwan plays an active role in the international community with respect to competition policy and law, and in particular with respect to merger control. Since 1997, the TFTC has created and maintained the APEC Competition Policy and Law Database on behalf of the 21 member economies that comprise the Asia-Pacific Economic Cooperation Forum (APEC). The Database allows APEC’s member economies to share experiences and exchange views on complex issues of competition policy and law. Additionally, the TFTC is a member of the International Competition Network (ICN), which was created in 2001 to provide competition authorities with an informal, specialised venue for maintaining regular contact with competition authorities in other jurisdictions and addressing practical competition concerns. As a member of the ICN,

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the TFTC hosted the annual ICN Merger Workshop in 2009, which was attended by members from around the world. Taiwan also regularly participates as an observer in discussions on competition law in the OECD as well as regional forums, where it shares information and receives input from other jurisdictions.

II YEAR IN REVIEW

i Recent TFTC review of extraterritorial mergers

Microsoft and Nokia
In September 2013, Microsoft Corporation proposed acquiring Nokia Corporation’s devices & services (D&S) business for €5.4 billion. The D&S business mainly produces and sells smartphones and feature phones, and the target includes the business units and design team, operations including production facilities, sales activities and patents. The market share of Microsoft’s Windows operating system met the filing threshold, as did the revenue of both parties in Taiwan of the previous fiscal year. In this vertical merger, the relevant market was defined as the worldwide market of smart mobile operating systems, smart mobile devices and patent licensing relevant to these products. The TFTC determined the risk of Microsoft ceasing the licensing of its Windows Phone operating system to be very low, since its worldwide market share was only 3.4 per cent, compared with the Android system, which has a nearly 80 per cent market share. Since the effect on the Taiwan market would not be significant, the TFTC approved the business combination with the following conditions in February 2014: Microsoft shall not unreasonably set prices or discriminate when licensing patents related to smart mobile devices; and for standard essential patents, Nokia shall continue to abide by the fair, reasonable and non-discriminatory (FRAND) principle. Should Nokia transfer such standard essential patents to another business, it shall guarantee that the assignee shall abide by the FRAND principle.

ASML and Cymer
In October 2012, ASML Holding NV (ASML) proposed acquiring all shares of Cymer Inc (Cymer). Because ASML’s global market share in lithography systems exceeds 70 per cent, Cymer’s global market share in lithography light sources exceeds 60 per cent, and both companies’ sales in Taiwan for the preceding fiscal year were higher than the TFTC’s threshold, ASML and Cymer filed a pre-merger notification with the TFTC. In this vertical merger, the relevant geographic markets are the worldwide lithography systems market and the worldwide lithography light sources market since there are no domestic lithography systems or lithography light sources producers. Globally, there are only three producers of lithography systems and two producers of lithography light sources. However, the TFTC decided that the proposed merger’s pro-competitive effects would be greater than its anti-competitive effects due to the following reasons:

a the EUV lithography technology is still under development; thus, there is no conceivable market barrier;

b technology is a more important factor than price; thus, the merging parties cannot be said to have a price advantage;
Taiwan

c. transaction counterparties are sophisticated international semiconductor foundries with much bargaining power; thus, it is unlikely that ASML would abuse its market power; and

d. Cymer’s business will continue to be operated as an independent business segment and maintain existing relationships with Nikon and Canon; thus, market foreclosure is unlikely.

The TFTC approved the proposed merger in March 2013 with conditions.

One-Red, LLC
LG Electronics, Inc, Pioneer Corporation, Koninklijke Philips Electronics NV and Sony Corporation proposed the creation of a patent alliance through a joint venture company, One-Red, LLC (One-Red), in which each would hold a quarter of the total shares. One-Red would serve as a one-stop-shop for licensing DVD-related patents from the four companies. The TFTC decided that the proposed joint venture’s pro-competitive effects would be greater than its anti-competitive effects, and allowed the business combination to go through in January 2013 with conditions based on the following agreements between the joint venture parties:

a. the patent pool would only include necessary patents and complementary patents (excluding interchangeable patents) for DVDs, and an independent committee of patent experts would determine which licensed patents it constitutes as necessary;

b. when a court or a patent expert deems that a patent is invalid or expired, that patent must be removed from the patent pool; and

c. all parties participating in this patent alliance must not discriminate against licensees seeking licences to individual patents.

ii Recent proposed mergers prohibited by the TFTC

From the time the Fair Trade Act was promulgated in 1992 until April 2015, 6,751 applications were submitted for merger approval (for filings made prior to the amendments to the Fair Trade Act in February 2002) or merger notifications (for filings made starting in February 2002 subsequent to the amendments to the Fair Trade Act). Of those filings, only 10 of the proposed transactions have been refused or prohibited by the TFTC, representing much less than 0.01 per cent of all applications. No statistics are, however, provided with respect to those mergers that are approved or cleared subject to specific conditions. Such conditions are not uncommon, particularly in cases requiring more complex analysis and a detailed balancing between overall economic benefits with restraints on competitiveness. Some conditions may be very cumbersome on the parties, and in effect prohibit the completion of the deal.

In 2013 and 2014, 50 and 66 merger notifications were filed with the TFTC respectively; none was prohibited. In 2015, 24 merger notifications were filed, and none had been prohibited as of April 2015 according to the most updated statistics dated 13 May 2015. In 2010, only one out of the 44 merger notifications filed with the TFTC was prohibited. The prohibited transaction was the proposed acquisition by Uni-President Enterprise Co Ltd (Uni-President) for more than half of the shares of Wei-Li Food Industry Co Ltd (Wei-Li Food). In 2009, only two out of the 57 merger notifications filed with the TFTC were prohibited, both of which were proposed mergers
between domestic companies. The prohibited transactions were the proposed mergers between Holiday Co Ltd (Holiday) and Cashbox Co Ltd (Cashbox) and between Yieh United Steel Corp (Yieh Steel) and Tang Eng Iron Works Co Ltd (Tang Iron).

**Uni-President and Wei-Li Food – instant noodles**

This prohibited transaction concerned a share acquisition between two entities that are the top two market share leaders manufacturing instant noodles in Taiwan. The published decision primarily discussed whether the product market was limited to instant noodles or whether a larger definition was permissible.

The relevant market takes into consideration the product’s capabilities, uses, special characteristics, pricing, high demands and whether the product is replaceable. The applicant, Uni-President, had proposed that the relevant market include each of the following:

- **a** cookies and desserts (including cookies, bread, potato chips, rice crackers and chocolate);
- **b** perishable food products (including sandwiches sold at 7-Eleven stores, supermarket bento boxes, Taiwanese cuisine marinated in soy sauce, deep-fried chicken, tempura, fried dumplings and rice balls);
- **c** entrée noodle dishes (including noodles, instant noodles, mung bean noodles and rice, flavoured by consumers using separately purchased sauces); and
- **d** sauces (satay sauce, XO sauce and others) and frozen foods (including cooked lamb, spaghetti, risotto, dumplings and fried rice).

Uni-President suggested that these are all replaceable products and should therefore comprise one product market in the view of the TFTC. Under Uni-President’s proposed product market, its combined market share with Wei-Li Food would only be about 9.04 per cent.

The TFTC did not accept Uni-President’s proposed product market definition. The TFTC noted that instant noodles could be used as a main entrée and stored for long periods without spoiling at room temperature (for about six months). Cookies and desserts were snacks, and were not generally used as main entrées. Perishable foods would need to be consumed on the date of purchase and could not be stored for more than a few days. Frozen foods were of a price much higher than instant noodles, and required the use of a microwave and a freezer. Non-instant noodles and sauces required significant preparation time, unlike instant noodles. Furthermore, upon interviews with other manufacturers of instant noodles and consumers, the TFTC determined that instant noodles are not replaceable with the other types of food products as suggested by Uni-President, as the pricing strategy and the demands of the consumer were very unique to instant noodles. Therefore, the TFTC determined the relevant market to be instant noodles, beverages, and the manufacture and sale of cooking oil, and determined that the parties’ market share in instant noodles was in excess of 70 per cent. Under the more limited definition of the relevant market determined by the TFTC, the parties’ proposed combination was prohibited, as harms to the economy were not outweighed by the benefits. Uni-President appealed to the administrative courts, and the Supreme Administrative Court ruled against Uni-President on 15 August 2013. This decision cannot be appealed.
In February 2009, the TFTC sanctioned Uni-President for indirectly controlling Wei-Li’s board of directors and supervisors, and also for failure to report its acquisition of a stake in Wei-Li. Uni-President challenged the TFTC’s decision in court. The Supreme Court ruled in favour of Uni-President on 28 March 2013, confirming the lower court’s finding that the TFTC had not provided sufficient proof of control.

**Holiday and Cashbox**
The planned merger between Holiday and Cashbox has a long and drawn-out history. The parties had negotiated a merger in 2003, when the TFTC had cleared the merger subject to various post-combination restrictions, including certain broad, general prohibitions on preferential treatment to affiliated entities, but the parties ultimately did not complete the transaction at that time. However, in 2007 and again in 2008, the parties again notified the TFTC of the intended merger; in both cases, the TFTC determined that the damage to competition was likely to outweigh any benefits to the overall economy. Primarily, the TFTC focused on the fact that a merger between the two parties would eliminate competition in this market in Taipei City and Taipei County, leading to decreased incentives for market participants to innovate and improve the quality of their service and inflated prices for consumers. Additionally, upstream karaoke video distributors would only be able to negotiate with one major purchaser after the proposed merger, and this would give the merged parties the ability to extort pricing concessions or completely shut out one distributor in favour of another. Because of these reasons, the TFTC determined that the parties’ proposed merger was prohibited under Article 12(1) of the Fair Trade Act. The parties were able to appeal the TFTC’s decision in 2008, but when they again notified the TFTC of a proposed merger in 2009, the merger was yet again prohibited for the same reasons. The TFTC also noted that while the parties were granted conditional approval in 2003, the parties did not complete the proposed merger within the time limits prescribed at that time and the market was no longer the same in 2009 as it had been in 2003.

In March 2010, Holiday and Cashbox again drew the attention of the TFTC when the TFTC determined that Cashbox and Holiday were jointly operating their businesses, and that Cashbox controlled Holiday’s board of directors and supervisors, which are both situations constituting a merger under the Fair Trade Act and requiring a filing with the TFTC. The TFTC ruled that the parties were in violation of the law for failure to make the required filing, and that the way that they were operating their businesses violated repeated prior rulings from the TFTC. Furthermore, the parties were required, within a specified period of time, to disengage their joint business activities and remove directors and officers simultaneously serving both entities, and to pay a significant fine. Cashbox challenged the TFTC’s decision in court. Cashbox lost the case in the court of first instance on 19 January 2012.

**Yieh Steel and Tang Iron**
In May 2009, the proposed merger in which Yieh Steel intended to acquire 34 per cent of the shares of Tang Iron on the Taiwan Stock Exchange was prohibited. Both parties were in the business of manufacturing sheets of stainless steel, which are generally manufactured using either a hot-rolling or process a cold-rolling process. Tang Iron did not manufacture sheets of stainless steel using the hot-rolling process, but instead offered
such sheets for sale using goods obtained from a subcontractor. After the merger, the TFTC determined that the parties’ combined gross revenue would represent 57.25 per cent of the market, which is greater than 50 per cent of the market. The TFTC also considered that there are high barriers to enter the market for manufacturing sheets of stainless steel and a significant preparation period is required before another enterprise could begin to manufacture sheets of stainless steel. As such, this proposed merger would lead to decreased competition and a decrease in the quality of services for downstream purchasers of stainless steel, and the TFTC determined that the proposed merger was prohibited under Article 12(1) of the Fair Trade Act. Yieh Steel challenged the TFTC’s decision in court, and the case was remanded to the lower court for further review by the Supreme Administrative Court on 12 December 2013. The lower court, upon further review, entered a judgment in favour of the TFTC on 25 December 2014.

### III  THE MERGER CONTROL REGIME

When two or more enterprises merge or combine their businesses, greater efficiency is often achieved in their operations. Along with such efficiency, however, a concentration in the market share will often occur as well. The objective of the TFTC in regulating mergers is to prevent enterprises from raising the concentration of a market to the extent that it weakens or impedes free competition in Taiwan through a proposed merger. To avoid these undesirable results, the Fair Trade Act requires parties intending to ‘merge’ as defined by the statute to notify the TFTC when certain market thresholds are attained. The TFTC is then given an opportunity to review and, if necessary, prohibit or impose conditions on the proposed merger.

#### i  Covered transactions

Any transaction that is considered a ‘merger’ under Article 10 of the Fair Trade Act is subject to pre-merger notification under Taiwan law. The following transactions are covered:

- **a** two enterprises merge into one;
- **b** an enterprise acquires the voting shares of, or makes capital contributions to, another enterprise equal to more than one-third of the total voting shares or capital of the other enterprise;

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2 Note that the transactions covered under the definition of ‘merger’ are more expansive than the generally accepted legal meaning afforded to that term in many jurisdictions where a merger is generally understood to mean a legal mechanism by which one entity is absorbed into another with only one surviving entity. Under Taiwan law, and as may be seen in the English translations of the pre-merger notification forms, the concept of ‘merger’ also includes the concept of business combinations or the acquisition of control using varying methods as described under the statutory definition. After a proposed transaction is determined to be a statutory merger as defined by the Fair Trade Act, the filing requirement then turns on whether certain market share or turnover thresholds are met.
an enterprise obtains an assignment of or a lease of all or substantially all of the business or assets of another enterprise;

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

an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

Under the 2015 amendment, when determining whether the one-third of voting shares and capital contributions threshold specified in Article 10(b) is met, all shares and capital contributions of the subordinate companies controlled by the same company (or companies) as the merger participant must be included in the calculation.

ii Filing thresholds: market share and turnover

Under Article 11 of the Fair Trade Act, two types of thresholds have been set forth to determine whether a merger notification should be filed with the TFTC. The first is based on market share and the second is based on the amount of turnover generated in the preceding fiscal year by the parties to the proposed merger.

In determining market share, the TFTC will take into account the production, sales, inventory and data relating to import and export value and volume for the applicable enterprise and the particular market in which it operates. The ‘market share threshold’ requires that the applicable party or parties file a merger notification with the TFTC under two circumstances:

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

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 new 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. Other than the above sales revenue threshold amount set forth for financial and non-financial enterprises, the 2015 amendment 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, under the 2015 amendment, 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.

As for the market share threshold, although the Executive Yuan of Taiwan has proposed removing such threshold from the legislation in order to reduce uncertainty in filings, the Legislative Yuan did not approve the proposed amendment. As a result, the market share threshold remains intact after the 2015 amendment.

In 2015, the first amendments were also made to Article 12 of the Fair Trade Act since its last substantive change in 2002 regarding those mergers that are not subject to the notification requirements described above. Under the 2015 amendment, filings are not required for a merger between two entities where one enterprise or its wholly-owned (100 per cent held) subsidiary holds 50 per cent or more of the voting shares, or has made 50 per cent or more of the capital contributions into the other enterprise. Additionally, an enterprise that establishes a subsidiary and holds 100 per cent of the shares or capital contribution of the newly established subsidiary is also not subject to these notification requirements.

iii Standard for review: overall economic benefits in excess of competition restraints

The standard under which the TFTC must review any merger notifications is fairly expansive. Under Article 13 of the Fair Trade Act, the TFTC may not prohibit any filed merger if the overall economic benefits of the merger outweigh the disadvantages resulting from the competition restraints that it would cause. Therefore, the standard does not require an absolute bar on mergers causing competition restraints. Rather, the TFTC will balance the restraints on competition with the overall benefit to the economy prior to determining whether such a merger should be prohibited. Under regulations set forth by the TFTC, a non-exclusive list of factors to be considered are consumer interests, whether the parties to be merged had weaker positions in the market prior to the proposed merger, whether one of the merging parties is a failing enterprise and how closely related the concrete results of the proposed merger may be to the stated economic benefits.

At times, the overall economic benefits to Taiwan as a whole relative to the global market have been a factor in the TFTC’s decisions. In 2000, a merger involving three of Taiwan’s semiconductor foundries was proposed for review. In this transaction, Taiwan-Acer Manufacturing Corp and Worldwide Semiconductor Manufacturing Corp would both merge into and be survived by Taiwan Semiconductor Manufacturing Corp (TSMC). After the combination, TSMC’s share of the domestic foundry market would rise from 53 per cent to over 60 per cent, which would give TSMC, along with only one other remaining market participant, nearly 100 per cent of the domestic market. The TFTC recognised that competition in Taiwan’s domestic foundry market would be
restricted or hindered, but that it was more important to ‘the overall economic interests of the nation’ for the combination to take place, as it would ‘solidify Taiwan’s leadership role in the foundry market, bring increased economies of scale to Taiwan’s IC market, and give Taiwan a greater leadership role in the global IC market’. Additionally, the TFTC noted that upstream and downstream participants would also benefit from enhancement of the merged entity’s global competitiveness.

iv  Waiting periods and time frames
Under the Fair Trade Act, enterprises must not proceed to merge within 30 days from the date that the TFTC accepts the filing materials as complete. Should the TFTC in its discretion determine that the filing materials are incomplete and request that supplemental information be provided, the 30-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 days under the 2015 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. With respect to hostile takeovers or tender offers, no special provisions are made.

v  Third-party challenge 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. Should parties be dissatisfied with the TFTC’s decision, under the 2015 amendment, 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. Such letters are often drafted and submitted by counsel on behalf of the parties to the proposed transaction and are maintained on a confidential basis by the TFTC.

ii Confidentiality

Unless qualified for expedited notification as described above, the TFTC will post basic information on its website to gather public comments on the proposed transaction. Such basic information will include the names of the merging parties and their relevant markets, the type of merger to be conducted as set forth in the Fair Trade Act, the period during which comments are accepted and the forum by which comments may be made to the TFTC. Furthermore, the TFTC has entered into agreements with certain foreign authorities, which will require the exchange of information in circumstances where the notification would affect the jurisdictions with which the agreements are entered. However, in a merger case, the TFTC will maintain the confidentiality of the filing if it determines that a filing is not necessary due to a lack of jurisdiction or a failure to meet filing thresholds.

Parties to a proposed transaction still being negotiated may enquire whether a filing is necessary by submitting anonymous queries to the TFTC. However, at some point, if the parties intend to proceed with a transaction and if a filing is required, identifying details will need to be disclosed to the TFTC.

Parties will not have access to the TFTC's files during the review process. However, in more complex cases and in the event that the parties have special requirements with respect to the review of their transactions, we have often been able to successfully request special meetings with the TFTC to discuss the review and any relevant facts that are to be specially communicated. Additionally, parties may request that the TFTC maintain certain portions of its information in absolute confidentiality if such portions are clearly denoted.

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.

The 2015 amendment changes over 70 per cent of the provisions in the original Fair Trade Act, making it one of the most significant amendments to the Act since its first enactment in 1991. Several changes have been made to the requirements for merger applications, although the proposal to remove the market share threshold was not adopted. The impact of the 2015 amendment and relevant rules on merger application practice will be worth monitoring in 2015.
I INTRODUCTION

The Trade Competition Act 1999 (TCA) is the legislation governing pre-merger filings in Thailand. The TCA established the Thai Trade Competition Commission (Commission) and its secretariat within the Department of Internal Trade, Ministry of Commerce. The TCA prohibits mergers of businesses that may result in a monopoly or unfair business competition, unless permission is obtained from the Commission.

The Commission has the authority to issue notifications prescribing the criteria and process under which a merger will be examined, and to set a minimum threshold of market share, sales volume, amount of capital, number of shares or amount of assets that will be subject to a pre-merger filing. However, as the details of the enabling notifications still remain under consideration, the merger control regime has not yet been implemented in Thailand.

Once the enabling notifications have been set by the Commission and published in the Government Gazette, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market.

It is unclear when the enabling notifications will be issued; however, the 10 Member States of the Association of Southeast Asian Nations (ASEAN), including Thailand, have agreed to introduce national competition policies and laws by the end of 2015. The establishment of competition law regimes is one of the goals noted in the ASEAN Economic Blueprint, with the intention of fostering a culture of fair business competition in the region.

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II YEAR IN REVIEW

As noted above, in practice, merger controls have not yet been implemented in Thailand; as such, we cannot comment on any recent merger cases or legislative changes. The jurisdictional thresholds are currently being drafted by the Commission.

III THE MERGER CONTROL REGIME

i Commission

Before the enactment of the TCA, competition law was proscribed by the Price Fixing and Antimonopoly Act of 1979 (1979 Act). The purpose of the 1979 Act was to prevent product supply shortages and to protect consumers from abusive pricing of products, but it did not address competition or market power issues. In 1999, the 1979 Act was repealed and replaced by two separate and distinct acts: the TCA, and the Act Concerning the Price of Goods and Services. One of the mandates of the Commission is to examine proposed mergers to prevent harmful effects on competition; however, the implementation regulations remain under consideration.

Specialised committees of the Commission

The Commission must appoint one or more specialised subcommittees of persons qualified and having experience in specialised fields, including a representative of the Department of Internal Trade, to provide opinions on:

a matters concerning conduct indicative of market domination; i.e., a merger of businesses or other reduction or restriction of competition stipulated in the TCA:
   • Section 25: abuse of market power in a dominant position;
   • Section 26: mergers and acquisitions that may amount to a monopoly;
   • Section 27: agreements and collusive practices that adversely affect competition;
   • Section 28: exclusive distribution of imported products that impairs the opportunity of consumers to purchase such goods or services directly from business operators outside the kingdom; and
   • Section 29: acts that are not free and fair competition, and that would have the effect of excluding or restricting other business operators from conducting business or causing cessation of business;

b the consideration of applications for permission to merge businesses or initiate the reduction or restriction of competition; and

c other matters to be considered at the request of the Commission and other acts to be performed as entrusted by the Commission.

ii Merger control provisions

The merger control provisions will apply to private sector business operators. The TCA exempts state enterprises, agricultural and other cooperatives, central and regional government agencies, and businesses covered by ministerial regulations.

A business operator is defined as a distributor; a producer of goods for distribution; an orderer or importer into Thailand of goods for distribution; a purchaser of goods for production or redistribution; or a service provider in the ordinary course of business.
Once the merger control regulations are implemented, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market. The TCA does not specify the types of mergers that will be included in the merger controls, but they are likely to apply to both horizontal mergers and vertical mergers. Certain transactions are specifically targeted in the TCA:

- the merger of a manufacturer with another manufacturer, a distributor with another distributor, a manufacturer with a distributor, or a service provider with another service provider, where such merger will result in one business being maintained while the other is extinguished or a new business is formed;
- the purchase of all or part of the assets of another business for the purpose of controlling that business’s administration policy, administration or management; and
- the purchase of all or part of the shares of another business for the purpose of controlling that business’s administration policy, administration or management.

On 6 June 2013, the Commission approved the following pre-merger notification criteria:

- the merger of businesses that have an aggregate market share in any market for any goods or services prior to or after the merger of 30 per cent or more, and a total sales (turnover) or income in the preceding year of 2 billion baht or more; and
- the acquisition of shares with voting rights for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, where the acquisition results in the business of a company or both companies having an aggregate market share of 30 per cent or more in any market of any goods or services before or after the acquisition, and a total sales volume (turnover) or income in the previous year of at least 2 billion baht.

Unfortunately, the above criteria have not yet been enacted by the Commission.

iii Control test
Section 26 of the TCA applies to mergers that result in a monopoly or unfair competition as prescribed by a notification, and it is unclear whether the concepts of ‘decisive influence’ or ‘material influence’, or another level of control over the target, will be adopted.

iv Joint ventures
Joint ventures are not prescribed in the TCA. However, if the nature of the joint venture, once implemented, involves business operations that fall within the scope of characteristics that may result in a monopoly or unfair competition as prescribed in Section 26, the merger control provisions may apply.

v Application process
To obtain permission to carry out a transaction that falls within the scope of the merger control regime, a business operator will be required to submit an application
in accordance with the Commission’s form, rules, procedures and conditions to be prescribed and published in the Government Gazette.

Although the details of the process have not been determined, the TCA stipulates that an application for approval must specify adequate reasons and the necessity of the proposed merger; the method of achieving the proposed merger; and the duration of the proposed merger.

The substantive test for clearance is that the merger:

- is reasonably necessary to the business;
- is beneficial;
- has no serious harm on the economy; and
- has no material effect on the due interest of consumers in general.

The Commission must complete its consideration of an application for a merger within 90 days. When a decision cannot reasonably be made within 90 days, the Commission may extend such time frame for up to 15 days.

If the Commission is of the opinion that a merger meets the criteria, conditions and the substantive test, it may issue an order granting permission for the merger. In any case, the Commission must specify reasons for an order granting or rejecting permission, both on questions of fact and questions of law. The Commission may fix the time or any condition for compliance by the business operator, and if the economic situation, facts or conduct relied on by the Commission in its consideration have changed, the Commission may amend, make addition to, or revoke such time or conditions at any time.

The TCA provides for three types of general enforcement measures: administrative orders, criminal lawsuits and actions for damages.

In the criminal context, the Office of the Commission receives complaints alleging violations of the TCA. After receiving a complaint from the Secretariat, the Commission will either conduct an investigation or refer the investigation to an ad hoc subcommittee. If it is found that a business operator is in violation of the TCA, the Commission may issue an order or send an opinion advocating criminal prosecution to the Attorney General, who may assign a public prosecutor to proceed with a criminal action.

vi Penalties

Penalties for violations of substantive provisions

If a business operator is required to obtain permission from the Commission before consummating a merger, but fails to do so, the business operator will be subject to imprisonment not exceeding three years or a fine not exceeding 6 million baht, or both. If the offence is repeated, the penalty will be doubled.

Penalties for violations of procedural provisions

The Commission may also order a business operator to suspend, cease, rectify or vary a merger considered to be in violation of the TCA. Any person who fails to comply with an order will be liable to imprisonment for a term of one to three years, a fine of 2 million to 6 million baht, or both, as well as a daily fine not exceeding 50,000 baht throughout the period of the violation.
vii Civil actions by consumers
The TCA will entitle any person who sustains damages arising from a violation of Section 26 to bring suit for compensation in a civil court of proper jurisdiction. The Consumer Protection Commission or an association established under the law on consumer protection may also bring a lawsuit for damages against the offending business operator on behalf of consumers or members of the association. In an action by consumers, the injured party may recover only actual damages, plus attorneys’ fees and costs. The burden of proof is on the injured party to prove the business operator’s actions caused damages to the business of the injured party.

IV OUTLOOK AND CONCLUSIONS
During 2014 and 2015, pre-merger filing controls have not been at the forefront of the government agenda. Other political issues are pending, and a new government will soon be elected; therefore, there has been no movement in this particular area. Given the lack of subsidiary legislation to implement merger controls, the TCA remains a paper tiger.

However, as previously mentioned, the 10 ASEAN Member States have agreed to introduce nationwide competition policies and laws in fulfilment of the goals of the ASEAN Economic Blueprint. To date, several Member States have enacted national competition legislation that includes prohibitions against anti-competitive mergers.

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2 Indonesia, Philippines, Singapore, Thailand and Vietnam.
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, Presidency and Service Departments. 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 leniency unit, one decisions unit, one information management unit, one external relations unit and one strategy development unit. There is a ‘sectoral’ job definition for each technical unit.

The relevant legislation on merger control is Law No. 4,054 on Protection of Competition and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. The Competition Board has also issued many guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules. The Guideline on Market Definition was issued in 2008, and is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C372/03). The Competition Board recently 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 (Remedy Guideline). The Remedy Guideline is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004. The third and fourth are the Guidelines on Horizontal Mergers and Acquisitions (Horizontal Guidelines) and the Guidelines on Non-horizontal Mergers and Acquisitions (Non-horizontal Guidelines). These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments. Finally, the Competition Board released the Guidelines on Merger and Acquisition Transactions and the Concept of Control, also closely modelled on the respective EC guidelines.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control 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 Turkish Competition Authority recently enacted a substantial amendment to the merger control thresholds in Communiqué No. 2010/4. The new turnover thresholds are as follows:

\[ \text{the total turnover of the parties to a concentration in Turkey exceeds 100 million liras and the respective Turkish turnover of at least two of the parties individually exceed 30 million liras; or} \]

\[ \text{the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 30 million liras, or the Turkish turnover of any of the parties in mergers exceeds 30 million liras; and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million liras.} \]

The above thresholds are reviewed by the Competition Board once every two years. The Competition Board will next confirm or revise these thresholds at the beginning of 2017.

In addition to the changes in turnover thresholds, Communiqué No. 2010/4 no longer seeks the existence of an ‘affected market’ in assessing whether a transaction triggers a notification requirement. Prior to the amendment, transactions that did not affect a market did not trigger a pre-merger notification or approval requirement, even if they exceeded the turnover thresholds. Joint venture transactions were the exception to this rule, and they required pre-merger notification and approval if they exceeded the thresholds, regardless of whether they resulted in an affected market. Now, the existence of an affected market is not a condition to triggering a merger control filing requirement.

The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions has also been recently 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 recent 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:

- Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;
- mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;
- intra-corporate transactions are not notifiable;
- acquisitions by inheritance are not subject to merger control;
- acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour;
- multiple transactions between the same undertakings realised over a period of two years are deemed a single transaction for turnover calculation purposes. 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; and
- transactions that are closely connected in that they are linked by conditions or take the form of a series of transactions in securities taking place within a reasonably short period of time are treated as a single concentration (interrelated transactions theory).

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents, insurance companies and pension companies. The Turkish merger control regime does not, however, recognise any de minimis exceptions.

Failing to file or closing the transaction before the Competition Board’s approval can result in a turnover-based monetary fine. The fine is calculated according to the annual local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquiring party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, not be less than 16,765 liras. 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 Competition Authority may ex officio launch an investigation into the transaction; order structural and behavioural remedies to restore the
situation as before the closing (\textit{restitutio in integrum}); and impose a turnover-based fine of up to 10 per cent of the parties’ annual turnover. Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carveout or hold-separate arrangements proposed by merging undertakings.\textsuperscript{2} 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 of the new regulation allows some room to speculate that carveout or hold-separate arrangements are now allowed, it remains to be seen if the Competition Authority will interpret this provision in such a way. As noted above, this has so far been consistently rejected by the Competition Board, which argues that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

\section*{II YEAR IN REVIEW}

With the introduction of new turnover thresholds and the removal of the affected market requirement, the Competition Board has finally been able to shift its focus from merger control cases to the fight against cartels and cases of abuse of dominance. The new merger control thresholds are solid measures to decrease the number of merger notifications and to lower the number of notifications. The previous merger control thresholds – and the alternative global turnover threshold in particular – proved too low, and the definition of affected market proved too broad to result in the appropriate level of resources being deployed in merger review. The Competition Authority publicly announced a significant increase in the number of merger control filings before the introduction of the new regime. This was the signal that the Competition Board was inclined to modify the thresholds. Consequently, the new thresholds entered into force in 2013, and have resulted in a significant decrease in the number of merger cases.

The Competition Board reviewed a total of 215 merger cases in 2014. These merger cases included 169 cases that received unconditional clearance, three cases that were cleared with conditions and 43 cases that were found to be not notifiable (i.e., a decision that the notified concentration does not exceed the applicable jurisdictional thresholds) or that fell outside the merger control regime (i.e., a decision that the notified transaction falls outside the scope of applicability of the merger control rules for not bringing about a change of control). Out of these 215 transactions, four were found to be outwith the merger control regime, while 18 were privatisations. Fifty-three transactions were Turkish-to-Turkish, whereas 76 were foreign-to-foreign.

The Competition Board’s most important merger control decisions in 2014 were as follows:

In *THY OPET/Mobil Oil*, the Competition Board granted conditional approval of the acquisition of 25 per cent of Mobil Oil’s assets by THY OPET subject to the Aviation Operation Agreement for Refuelling and Storage at the Airports in Turkey. The Competition Board initially decided that the commitments proposed by THY OPET were not sufficient, and subjected the transaction to a Phase II review. The Competition Board took into consideration THY OPET’s market share, which had been above 60 per cent for two years, and THY OPET’s partnerships with Tüpraş and Turkish Airlines and their high level of concentration. Arguing that there were no other powerful players in the market, and that there were legal, administrative and physical entry barriers, the Competition Board initially took a rather dismissive approach to the transaction. However, after extensive negotiations and follow-up, the Competition Board cleared the transaction with conditions.

In *Kraton/LCY Chemical*, the parties to the transaction had a high market share in the relevant product market for the manufacture of styrenic block copolymers through their import sales in Turkey, although they did not have a subsidiary or affiliate in Turkey. The Competition Board raised concerns about the risk of creating or strengthening dominance in the relevant market. However, the Competition Board cleared the transaction in Phase I by taking into consideration that the relevant market is completely based on imports. The lack of legal or physical entry barriers, low transportation costs and a large number of global players also played a role in the Competition Board’s conclusion.

In *Ersoy/Sesli*, the Competition Board discussed the independent economic undertaking notion in detail and clarified that, even in cases where the undertakings do not generate turnover and have a market share in the relevant product market, they are accepted as independent economic undertakings. The Competition Board imposed an administrative fine on the parties for gun jumping.

In *SASA/Indorama*, the Competition Board unconditionally cleared a transaction for the acquisition of 51 per cent of the shares in Sasa Polyester Sanayi AŞ (SASA), a prominent domestic producer of polyester chips, polyester staple fibre, polyester filament yarn and polymer and intermediate products in Turkey. The acquirer was Indorama Netherlands BV (Indorama), a global fibres and petrochemicals producer. The transaction became a hot topic in the Turkish textile sector owing to SASA’s strategic importance as the sole domestic producer of polyester products. The Turkish Competition Authority decided to conduct a Phase II review due to numerous complaints against the takeover. However, the Turkish Competition Board decided that the transaction would not significantly impede effective competition in the market, and cleared the transaction without conditions or commitments. Sabancı Holding AŞ announced shortly after the

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4 14-20/381-165, 29 May 2014.
6 15-02/24-10, 8 January 2015.
Competition Board’s clearance decision that it had cancelled the sell-off to Indorama, and had decided to sell the shares to Erdemoğlu Holding AŞ.

In *General Electric Company/ALSTOM*, the Competition Board cleared the transaction for the acquisition of sole control of the thermal power, renewable power and grid businesses of the parent companies of the Alstom Group, ALSTOM (*société anonyme*) and Alstom Holdings by General Electric Company. The transaction was a cross-border deal between two main players in the power generation equipment, solutions, services and grid sectors, and involved the French government. The transaction was subject to merger control filing in over 20 jurisdictions.

In *Rolls-Royce*, the Competition Board cleared the acquisition of sole control by Rolls-Royce Holdings over Rolls-Royce Power Systems Holding GmbH plc, which was a joint venture company controlled by Daimler and Rolls-Royce Holding plc.

In *AFM/Mars*, another significant recent decision, the transaction parties requested authorisation for the merger of AFM and Mars, which are the two largest movie theatre operators in Turkey. AFM operates in nine of Turkey’s provinces and owns 182 movie theatres, while Mars operates in 14 of Turkey’s provinces and owns 239 movie theatres. In defining the relevant geographical market, the Competition Board divided the overlapping provinces in which both undertakings operate. It concluded that consumers would prefer movie theatres within a 20-minute driving distance. Given that AFM and Mars have a significant combined market share in the relevant markets, the transaction would have a significant impact on effective competition. The transaction parties proposed several remedies to the Competition Board, including divestitures concerning 12 movie theatres. The Competition Board granted conditional clearance, reserving that clearance would be revoked in the event of a failure to transfer the 12 movie theatres to third parties. The Competition Board requested the parties to regularly supply information on annual average ticket prices and changes thereto for the next five years. The Competition Board confirmed that the conditions were duly fulfilled, and the process was completed by a decision of 22 November 2012. The decision was challenged and submitted for judicial review before the competent court. The High State Court accepted the request for the suspension of the execution of the decision. The Court’s decision relied on the following grounds:

- **a** there were high barriers to entry in the relevant market;
- **b** post-merger figures did not indicate or justify a competitive market structure;
- **c** there were no competitors capable of putting sufficient competitive pressure on the merged entity;
- **d** the transaction would create an unbalanced buying power against upstream and downstream market players;

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7 15-03/30-15, 15 January 2015.
8 14-26/521-230, 7 August 2014.
commitments comprised relatively small theatres, and even in the event that the
biggest rival acquired them all, its size would amount to a quarter of the merged
entity; and
commitments would lower the market share relatively, but would not be able to
frustrate the alleged dominant position created by the acquisition.

The case was still being reviewed on appeal at the time of writing.

The Competition Authority also recently enacted substantial revisions in
the ‘privatisation communiqué’. Communiqué No. 2013/2 replaced Communiqué
No. 1998/4 on the procedures and principles to be pursued in pre-notifications and
authorisations to be filed with the Competition Authority in order for acquisitions via
privatisation to become legally valid.

Communiqué No. 2013/2 brought about several changes in terms of both
procedure and substance. Most importantly, it eliminated the market share threshold
altogether and increased the turnover threshold. A new feature of Communiqué No.
2013/2 is that the Competition Board’s opinions on privatisation deals are valid for a
period of three years.

The approach of the Competition Board to market shares and concentration levels
is similar to that of the European Commission, and in line with the approach spelled
out in the Guidelines on the Assessment of Horizontal Mergers under the Council
Regulation on the Control of Concentrations between Undertakings (2004/C 31/03).
The first factor discussed under the Horizontal Guidelines is that market shares above
50 per cent can be considered an indication of a dominant position, while the market
share of the combined entity remaining below 20 per cent would not require further
inquiry into the likelihood of harmful effects emanating from the combined entity.
Although a brief mention of the Competition Board’s approach to market shares and
the Herfindahl-Hirschman Index (HHI) levels is provided, the Horizontal Guidelines’
emphasis on an effects-based analysis (coordinated and non-coordinated effects) without
further discussion of the criteria to be used in evaluating the presence of a dominant
position indicates that the dominant position analysis still remains subject to Article
7 of Law No. 4054 on the Protection of Competition. Other than market share and
concentration level considerations, the Horizontal Guidelines cover the following main
topics:
a the anti-competitive effects that a merger would have in the relevant markets;
b the buyer power as a countervailing factor to anti-competitive effects resulting
from the merger;
c the role of entry in maintaining effective competition in the relevant markets;
d efficiencies as a factor counteracting the harmful effects on competition that
might otherwise result from the merger; and
e conditions of a failing company defence.

The Horizontal Guidelines also discuss coordinated effects that might arise from a merger
of competitors. They confirm that coordinated effects may increase the concentration
levels and may even lead to collective dominance. As regards efficiencies, the Horizontal
Guidelines indicate that efficiencies should be verifiable and that the passing-on effect
should be evident.
The Non-horizontal Guidelines confirm that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 25 per cent and the post-merger HHI is below 2,500 (except where special circumstances are present) are unlikely to raise competition law concerns, similarly to the Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board’s approach to market shares and concentration levels, the other two factors covered in the Non-horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-horizontal Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

The ongoing legislative activity signals that modernisation of the Turkish merger control regime will remain one of the priorities of the Turkish Competition Authority in 2015. The amendment to the notifiability thresholds under Communiqué No. 2010/4 and the fact that the Horizontal and Non-horizontal Guidelines were issued are clear indications that the Competition Authority’s 2015 agenda will contain similar merger control-related items. This trend is also supported by the recent issuing of the Guidelines on Mergers and Acquisitions and the Concept of Control. With this secondary legislation, the Turkish merger control regime now has more concrete grounds, with the welcome result that undertakings will be able to act more freely (although carefully) when considering a merger or an acquisition. 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 is the change in the competent body for appeals against the Competition Board’s decisions. Previously, the court of first instance was the High State Court, which is the highest administrative court in Turkey. The court of first instance for appeals against Competition Board decisions is now Ankara Administrative Court. Decisions of Ankara Administrative Court can still be challenged and submitted to judicial review before the High State Court.

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 four years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.12

In line with this trend, the Competition Authority issued the Remedy Guideline. The Remedy Guideline aims to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may otherwise

be deemed as problematic under the dominance test. The Remedy Guideline sets out the
general principles applicable to the remedies acceptable to the Competition Board, the
main types of commitments that may be accepted by the Competition Board, the specific
requirements that commitment proposals need to fulfil and the main mechanisms for the
implementation of such commitments.

III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey. There is, however,
a suspension requirement (i.e., a mandatory waiting period): a notifiable transaction
(whether or not it is problematic under the applicable dominance test) is invalid, with all the ensuing legal consequences, unless and until the Turkish Competition Authority approves it.

The notification is deemed filed when the Competition Authority receives it in its complete form. If the information provided to the Competition Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final, executed or current version of the transaction agreement.

The Competition Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. While the wording of the law implies that the Competition Board should decide within 15 calendar days whether to proceed with Phase II, the Competition Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information. In practice, the 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 45 to 50 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 40 to 45 days after the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the tenders and notifications of the three highest bidders are submitted to the Competition Board following the Privatisation Authority's public privatisation tender. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.
There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and if there is a genuine inability to provide information due to the one-sided nature of the transaction, the Competition Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

The Competition Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Competition Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition, may request a hearing from the Competition Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Competition Board’s decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

The Competition Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation and right of access. As noted above, the number of conditional clearances has increased significantly in recent years.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before Ankara Administrative Court. 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 deadline to appeal the Competition Board’s final decisions to Ankara Administrative Court is 60 days starting from receipt of the reasoned decision. 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 carveout or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. As noted above, the Competition Board is
Turkey

currently rather dismissive of carveout and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carveout or hold-separate arrangements are now allowed. Because the position the Competition Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early-closing mechanisms recognised by the Competition Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 also will require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Competition Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions. Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Turkish Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures.

V OUTLOOK AND CONCLUSIONS

The two most recent developments in Turkish competition law enforcement are the Draft Proposal for the Amendment of the Competition Law (Draft Law) and the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation on Monetary Fines).

After a long wait on the sidelines, the Draft Law was submitted to the Grand National Assembly of the Turkish Republic on 23 January 2014. The Draft Law introduces a de minimis rule that enables the Competition Board to ignore certain cases that do not exceed a certain market share or turnover threshold (or both), and brings the EU’s SIEC (significant impediment of effective competition) test to the Turkish control regime in place of the current dominance test.

The Draft Law proposal became a hot topic when the Parliament announced that the Draft Law, containing these amendments, had officially been added to the current drafts and proposals list. Subsequent to the enactment of the amendments, the Competition Board is expected to put important implementing regulations in place. The details of these regulations are not yet entirely clear.

Public comment was sought for the Draft Regulation on Monetary Fines. Briefly, the Draft Regulation refers to the new calculation method for administrative monetary fines, which would result in the explicit recognition of the parental liability principle. The upper limit of the administrative monetary fines is 10 per cent of the overall turnover as determined by the Competition Board and generated by the undertaking in the financial year preceding the decision. The Draft Regulation also brings new aggravating and mitigating factors. The content of the Draft Regulation seems to be heavily inspired by the European Commission’s guidelines on the method of setting fines imposed under Article 23(2)(a) of Regulation (EC) 1/2003 on the implementation of the rules on

13 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.
competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty).

The Competition Board recently published the 16th Annual Activity Report (Report). Along with its mission, vision, objectives, priorities and a description of its duties and powers, the Competition Board made a general assessment of its activities between 1 January and 31 December 2014. In the Report, the Competition Board provides information and statistics concerning the cases concluded in 2014, and assesses that there is an easily detectable decrease in the number of cases concluded compared with recent years.
Chapter 40

UKRAINE

Dmitry Taranyk and Maksym Nazarenko

I  INTRODUCTION

The Antimonopoly Committee of Ukraine (AMC) is the authority exclusively responsible for dealing with mergers.

i  Notion of concentration

Merger approvals are required whenever a concentration is consummated, provided that the parties thereto meet or exceed the relevant financial thresholds. In particular, for the purposes of the Ukrainian merger control rules, a concentration is deemed to occur, inter alia, in cases of:

a  mergers between undertakings (i.e., when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities);

b  absorption of one undertaking by another (with one retaining its legal identity and the other ceasing to exist as a legal entity);

c  acquisition of control directly or through other persons or entities by one or more undertakings over one or more undertakings, including by the way of:

•  direct or indirect acquisition (gaining control over or acquiring a lease) of assets that amount to a going concern or a structural subdivision of an undertaking;

•  appointment to the post of a chair or deputy chair in the supervisory council, the executive (management) board or any other supervising or executive body of an individual who already occupies one or more such positions in another undertaking; or

1 Dmitry Taranyk is a counsel and Maksym Nazarenko is a senior associate at Sayenko Kharenko.
• composition of the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking, in such a manner so as to enable the same individuals to represent more than 50 per cent of the members of such bodies in two or more undertakings;

\( d \) establishment by two or more undertakings of a joint venture, which in turn is intended to perform on a continuing basis all the functions of an autonomous economic entity; and

\( e \) direct or indirect acquisition of assets or participation interests (including shares) in an undertaking that allows the acquirer to reach or exceed 25 or 50 per cent of votes in the target undertaking's highest management body.

\[ \textbf{ii Definition of control} \]

Ukrainian competition laws contain a very broad definition of control that is largely based on the EU example, but in practice is even wider in scope. Control is broadly defined in the Law of Ukraine ‘On Protection of Economic Competition’ as follows:

\[\ldots\text{decisive influence by one or more related legal entities and/or individuals} \text{ over the business activity of an undertaking or its part, which is exercised directly or through other persons, in particular due to: the right of ownership or use of all assets or a major portion of them; a right that ensures a decisive influence over the formation, voting results or decisions of the managing bodies of the company; conclusion of agreements or contracts which allow the determination of the conditions of business activity, the giving of mandatory instructions or the performing of the functions of a managing body of the company; or the occupation of the position of chairman or deputy chairman in the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking by a person who already occupies one or more of the listed positions in another business entity. Related undertakings are those legal entities and/or individuals that perform business activity jointly or in coordination, including if they jointly or in coordination exercise influence over the business activity of an undertaking. In particular, spouses, parents, children, brothers and sisters are considered to be related.}\]

The local competition regulation provides a number of criteria based on which the undertaking is deemed to have or be subject to a ‘decisive influence’, including the following:

\[\text{a} \] undertakings in which the acquirer or the target undertaking directly or indirectly:

• owns more than 50 per cent of the authorised capital;
• holds more than 50 per cent of the votes of the managing bodies;
• has the right to appoint the director, vice-director, chief accountant or more than 50 per cent of the members of the supervisory council, the managing body (e.g., the board of directors) or the audit committee; or
• has the right to receive not less than 50 per cent of the net profits;

\[\text{b} \] undertakings that have the rights and powers mentioned in (a) above in relation to the acquirer or the target undertaking;

\[\text{c} \] undertakings that:

• are managed by the acquirer or the target undertaking pursuant to a trust agreement, joint cooperation agreement, lease agreement or other agreement; or
• have the same persons holding the positions of director, vice-director or chief accountant, or not less than 50 per cent of the members of the supervisory council, the managing body or the audit committee; and

d undertakings that provide financial assistance that is used to achieve the concentration, if this may result in a decisive influence of one undertaking over another.

In addition, related entities of the party concerned may include any affiliates that might have an ability to influence the respective party, or to be so influenced, as follows:

a undertakings in which the acquirer or the target undertaking and their related entities, as defined above, directly or indirectly:
• own more than 25 per cent of the authorised capital;
• hold more than 25 per cent of the votes of the managing bodies;
• have the right to appoint the director, vice-director, chief accountant or more than 25 per cent of the members of the supervisory council, the board (or other management body) or the audit committee; or
• have the right to receive not less than 25 per cent of the net profits; and

b undertakings that have the rights and powers mentioned in (a) above with respect either to the target undertaking or the acquirer or any of their respective related entities.

It therefore follows that, under Ukrainian merger control rules and local practice, the ability to exercise de jure or de facto control (including negative control) is the prerequisite for establishing a control relation between undertakings. Namely, if an undertaking can, on the basis of rights, contracts (shareholders’ agreement, etc.), historic pattern of attendance at annual general meetings or other means, obtain any form of control (including the possibility to exercise the right of veto over strategic commercial decisions such as the budget, business plan, appointment or removal of senior management, major investments) over undertakings, it necessarily follows that a control relation between such undertakings is established.

It should be noted that the list above is not exhaustive, leaving the AMC with full discretion to find other cases where a control relationship may arise.

iii Financial thresholds

Wherever a transaction gives rise to a concentration as described above, the Ukrainian filing requirement would be triggered if the parties meet all of the following financial thresholds for the last financial year preceding the transaction:

a the aggregate worldwide value of assets or sales for all parties to the concentration, including related entities, exceeds €12 million;

b the aggregate worldwide value of assets or sales for each of at least two of the parties to the concentration, including related entities, exceeds €1 million; and

c the value of assets or sales in Ukraine of at least one party to the concentration, including related entities, exceeds €1 million.
iv Market shares threshold

In addition to the above financial thresholds, the Ukrainian merger control rules also establish a market share threshold that, if met, also triggers the Ukrainian merger filing requirement. Thus, irrespective of whether the financial thresholds are exceeded by the parties to the concentration, a requirement to seek a merger approval in Ukraine would arise if the market share of any party or the combined market share of all parties to the concentration on any product market in Ukraine exceeds 35 per cent, and the concentration takes place on the same or a neighbouring product market.

v Block exemptions

It should also be mentioned that the Ukrainian competition laws provide for certain specific exceptions from the notion of a concentration. They are intended to provide clarity and legal certainty, outlining which sorts of transactions do not amount to concentrations and therefore do not trigger the Ukrainian filing requirement, which include, in particular, the following:

a establishment of a joint venture undertaking by two or more undertakings that, in turn, results in the coordination of activities among the founders or between the founders and the new undertaking (such actions are instead treated as concerted practices and may also require a separate approval from the AMC);

b acquisition of shares or other equity interest in an undertaking by a person or entity whose main activities are financial or securities transactions, for the purpose of reselling such shares or other equity interest within one year, provided that the acquirer does not participate in the undertaking’s managing bodies;

c actions otherwise constituting a concentration that occur between undertakings connected by control relations, provided that the latter were established in compliance with the Ukrainian merger control rules; and

d acquisition of control over an undertaking by an insolvency administrator or a state official.

The Ukrainian merger control rules also provide for a pre-notification procedure. Unlike in some jurisdictions, there is no requirement to make a pre-notification filing in Ukraine provided certain conditions are met. Instead, the procedure is generally used by the parties to ascertain whether a particular transaction requires a merger filing in Ukraine. In other words, the parties can seek a comfort letter (in Ukraine, ‘preliminary conclusions’) from the AMC to confirm whether a merger filing is required under particular circumstances.

No statutes, regulations or guidelines relating to merger control issues were issued during 2014. However, important legal developments are still in the pipeline that may have far-reaching consequences regarding when the Ukrainian merger filing requirement is triggered. These are considered in Section V, infra.
II YEAR IN REVIEW

The level of market consolidation in 2014 showed a decrease compared with 2013. In 2014, 781 merger filings were made to the AMC, which is an approximately 19 per cent decrease over 2013. In turn, out of the 781 filings submitted to the AMC in 2014, 280 were returned by the authority for being incomplete, and were therefore not reviewed. There was a slight decline in the number of filings returned in 2014 (183 in 2014, compared with 194 in 2013). Further, out of 501 reviewed merger filings, 476 did not contain any threats to Ukrainian economic competition and were approved within a Phase I review, while the remaining 25 required greater scrutiny under a Phase II review. The AMC conducted almost the same number of investigations for clearing transactions in 2014 as it had in 2013.

In 2014, the AMC issued several merger approvals that contained behavioural remedies concerning prices, sales tariffs, conditions of sale, the methodology behind price setting as well as conditions of market entry of other undertakings.

Following the anticipated increase of financial thresholds discussed further in Section V, infra, we expect the number of Phase II reviews to grow substantially, as the AMC will look into concentrations having real impact on Ukraine more thoroughly. Deals posing no threat to competition could be left outside the regulator’s oversight.

A trend observed in 2013 of a majority of applicants being foreign companies has continued in 2014. In fact, due to the political situation in Ukraine, the number of domestic deals requiring clearance has decreased significantly; out of the 781 applications received by the AMC, 631 were filed by foreign applicants. The number of foreign applicants in 2014 increased by approximately 80.8 per cent compared with 2013. This trend can be linked to the AMC’s active monitoring of M&A transactions, as reported by mass media, and the numerous times when multinational companies have been contacted with a reminder about the merger filing requirement immediately after an M&A transaction has been announced and prosecuted for failure to seek merger clearance. This trend will most likely continue until the relevant law is amended by the Ukrainian Parliament to increase the merger notification thresholds, which amendment is expected to eliminate the current obligation to notify transactions that have minimal nexus to Ukraine.

As previously mentioned, during 2014 the AMC focused its efforts on discovering past violations consisting of completing a qualifying concentration without the prior approval of the AMC. As a result, the AMC discovered 35 cases of such violations and prosecuted the violators by imposing the fines. Consequent to its review of such past concentrations, the AMC has granted its approvals post factum.

The high-sounding declarations of the AMC made in 2012 regarding a significant increase in the level of fines for unauthorised mergers to a statutory maximum (i.e., up to 5 per cent of gross global group-wide annual turnover) did not come to fruition. Similarly to 2013, in 2014 the AMC imposed relatively low fines for this type of violation. The average level of fine for failure to notify a qualifying merger (also explained in part by

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2 Statistics presented in this chapter are based on the 2014 Annual Report of the Antimonopoly Committee of Ukraine.
the substantial devaluation of the national currency during the past year) amounted to several thousand euros.

These observations apply equally to domestic and foreign-to-foreign transactions, irrespective of the actual presence of the parties in Ukraine.

### III THE MERGER CONTROL REGIME

#### i Waiting periods and time frames

Similarly to the European Merger Control Regulation, the merger review process is split into two stages: Phase I and Phase II reviews. Each denotes a different time frame, and a different level of scrutiny of a particular concentration and the parties’ activities in Ukraine.

The Phase I review is supposed to be completed by the AMC within 45 days from the date of submission. During the first 15 days, the AMC will conduct an initial review (‘formal examination’), and it may return the filing without considering it if it determines that it is incomplete. During the subsequent 30-day period, the AMC analyses the submitted information *per se* and decides whether to grant or deny the approval.

On the other hand, the Phase II review may last up to three months, and this period can be suspended until the AMC receives any subsequently requested information. The authority generally tends to open this second review stage if it discovers any grounds based on which the concentration can be prohibited or needs to engage in complicated research (i.e., if the AMC comes to the conclusion that the relevant market is an important one, or that the concentration involves parties with very high market shares). Thus, the possibility of a Phase II review largely depends on how wide the relevant product market is, as well as the relevant market shares of the parties to the concentration. If the parties’ combined market share is close to 35 per cent of the relevant product market, denoting dominance (monopoly), it will be highly likely that the AMC will initiate a Phase II review. In addition, if the authority comes to the view that the relevant concentration may lead to the creation or strengthening of a dominant (monopoly) position, or to the significant restriction of competition on any market, or a part thereof, in Ukraine, it will not issue an approving decision.

#### ii Accelerated review procedures, tender offers and hostile transactions

The Ukrainian competition laws provide no special clearance procedure for tender offers or hostile transactions. Equally, there is no explicit possibility to accelerate the review procedure. This is primarily because the AMC has historically been suspicious of undertakings attempting to accelerate the merger review process; the prevalent view within the authority is that such intentions represent covert attempts to obscure the merger review process and distract the AMC’s attention from some important facts, or even anti-competitive effects, of the merger. In practice, however, a possibility exists to obtain a clearance decision on an expedited basis.

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The success of efforts to accelerate the merger review procedure exclusively depends on the strength of the arguments put forward by the applicants. Successful arguments include the concept of ‘failing firm’ and the necessity to complete a tender offer to avoid bankruptcy, insolvency, etc. In other words, in order to obtain a clearance decision on an expedited basis, applicants must make the AMC’s involvement as easy as possible. In relation to the frequency of expedited reviews, there are periods where approximately half of all the AMC’s clearances are obtained on an accelerated basis.

### Third-party access to files and rights to challenge mergers
The Ukrainian competition laws do not allow third parties to, on their own initiative, become involved in the merger review process. However, this does not prevent third parties from filing a complaint or providing information for the AMC to take into account when making a decision on whether to approve a concentration. Indeed, the AMC itself may, during the Phase II review, contact any third parties, including customers and competitors, with the aim of collecting any information it requires to conduct the review.

### Appeals and judicial review
Parties to concentrations (including third parties, if they can prove that their rights have been violated) can appeal against AMC decisions to the appropriate economic and administrative courts within a two-month period after the respective decision has been issued.

AMC decisions can also be appealed by the parties to the Cabinet of Ministers within a 30-day period of receiving the authority’s decision. If an AMC decision is appealed to the Cabinet of Ministers, the latter creates a special commission, which includes a number of independent experts from different industries and authorities as well as the AMC’s senior officers. The commission analyses the positive and negative effects of implementing the concentration using the same substantive test employed by the AMC. The Cabinet of Ministers then prohibits or approves the reviewed concentration.

### Effect of regulatory review
The Ukrainian competition laws provide for a possibility for a merger review being conducted by another body. However, such review is not concurrent with the review carried out by the AMC; as mentioned above, parties to the concentration can address the merger to the Cabinet of Ministers within 30 days of the AMC’s blocking decision, and the Cabinet of Ministers can, in turn, approve the merger. Nevertheless, this procedure is very rarely resorted to, since the AMC very rarely blocks concentrations (i.e., no more than once a year).

Parties must refrain from consummating the concentration until the AMC’s approval is obtained.
IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions
The Ukrainian merger review procedure is very specific, making it particularly difficult to coordinate with other jurisdictions. However, there is the possibility to make the most of the similarities between Ukraine and Russia, both in terms of language and the requirements set by the countries’ respective competition authorities. For instance, applicants can benefit from certain synergies, as the Federal Antimonopoly Service in Russia and the AMC largely require the same information and documents to be submitted for their review. Moreover, when dealing with manifold cross-border merger reviews, parties can usually benefit from reduced costs if translations into Ukrainian are made from Russian rather than other languages.

In addition, when faced with relevant markets that it has not had a chance to scrutinise and review previously, the AMC has shown itself to be flexible enough to consider market definitions used by other regulators, particularly the European Commission. Indeed, the AMC’s efforts to increase coordination with other European regulators are widely apparent, with the authority organising panels and fora that are consistently visited by senior members of competition authorities worldwide.

Due to worsening relations between Ukraine and Russia, the AMC has ceased its cooperation with the Russian Federal Antimonopoly Service almost completely, while cooperation with the competition authorities of the US and the EU, as well as some other regulators from central and eastern Europe and authorities from countries of the Commonwealth of Independent States (CIS) such as Belarus and Kazakhstan, is flourishing. The AMC has also established good rapport with international organisations such as the International Competition Network, the United Nations Conference on Trade and Development and the CIS International Council for Anti-monopoly Policy.

ii Special situations
As mentioned above, when one of the parties to a concentration is under financial distress, facing insolvency or bankruptcy, or is in the middle of tender offer proceedings, the AMC has usually been lenient in its modus operandi, allowing for an expedited review.

In cases of hostile takeovers, where the acquiring party cannot obtain the target’s documents or the necessary information for the Ukrainian merger filing, the AMC can rely on a special procedure and address the target with the necessary requests. However, this would inevitably mean that the parties would need to allocate significantly more time for the Ukrainian merger review process in order to account for potential delays in information and document gathering.

The Ukrainian merger control rules do not provide a special procedure to deal with cases where minority ownership interests are involved.

V OUTLOOK AND CONCLUSIONS
Due to recent political developments in Ukraine, 2015 and future years are highly likely to see changes to the AMC with the aim of transforming it into a modern European competition agency. In particular, lawmakers are planning a number of legislative
changes that will shape competition policy in Ukraine and that will put some restraints on the AMC.

The change that is most expected in the Ukrainian competition laws is the increase of financial thresholds in merger control. Currently, a draft law introduced for Parliamentary review provides a threshold increase of about four times and, more importantly, envisages an improvement of the nexus requirement that will eliminate the need to notify numerous global transactions in which only one party has a presence in Ukraine. While this draft is likely to be revised heavily during its review before the Parliament, its core principles are expected to remain.

Additionally, it is planned that the AMC, by virtue of law, will be obliged to publish all of its decisions in merger clearances, including those made within the context of an in-depth review. The respective draft law, while already having undergone significant changes aimed at enabling it to be adopted, still faces significant opposition because of concerns that some business secrets and other confidential information may be disclosed to the public.

Another recent initiative of the lawmakers is the setting up of a transparent procedure for determining the amount of fines for violations of Ukrainian competition laws, including failure to notify a qualifying concentration in Ukraine. Currently, the AMC determines the amount of the fine in each case based on its internal methodology, which is not available to the public. The adoption of draft Law No. 2431 should allow businesses to estimate fine amounts beforehand, and to devise a strategy for mitigation of such amounts in advance.

All of these changes are part of the Ukrainian commitments under the EU–Ukraine Association Agreement, and have a strong chance of being implemented in the near future, thereby finally fulfilling the expectations of the business community.
Chapter 41

UNITED KINGDOM

Jordan Ellison and Paul Walter¹

I INTRODUCTION

On 1 April 2014, the Competition and Markets Authority (CMA) became the principal competition authority in the UK when it assumed the competition powers and responsibilities of the Office of Fair Trading (OFT) and the Competition Commission (CC). This move formed part of a series of reforms intended to strengthen the UK merger control regime, which included providing the CMA with extended formal information-gathering powers, and increasing its ability to prevent parties from taking pre-emptive steps that may prejudice the outcome of an investigation. The reforms also sought to streamline the merger control process through the use of statutory time limits and capture the efficiencies of having a unitary authority.

Anticipated or completed 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.

Prior to 1 April 2014, the OFT had the power to carry out an initial Phase 1 investigation and had a duty to refer any qualifying transaction to the CC for a detailed Phase 2 investigation where it believed that it was or may be the case that the merger could give rise to a substantial lessening of competition. Under the new regime, a separation between the Phase 1 and Phase 2 review has been retained, with the test for reference to Phase 2 remaining the same. Phase 1 decision-making is now undertaken by the Senior

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Director of Mergers or another senior CMA official, while Phase 2 decision-making is undertaken by an independent panel of experts. In much the same way as CC panels were formed under the old system, these experts are drawn from a pool of senior experts in a variety of fields.

Remedial undertakings in lieu of a Phase 2 reference may be accepted by the CMA. The CMA's in-depth Phase 2 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 continues to be ‘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 integration of the two enterprises pending its review. There is a risk that it may then refer the merger for a Phase 2 investigation, which could ultimately result in an order for divestment.

In certain limited circumstances (where the merger raises a defined public interest consideration), the UK system allows the Secretary of State for Business, Innovation and Skills (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.

The CMA has published detailed non-binding guidelines on jurisdictional issues and its procedures for the review of mergers.\(^2\) It has also adopted other guidance documents, including various pre-existing OFT and CC guidelines such as the guidance on how the substantial lessening of competition test is applied.

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.

## YEAR IN REVIEW

### Workload

The number of merger decisions made by the CMA in the 2014–2015 financial year (82) was up from the 65 decisions taken in the preceding financial year, but still somewhat down from the peak of 210 merger decisions made by the OFT in the 2005–2006 financial year.\(^3\)

Of the 82 cases decided during the year, six were referred for Phase 2 review, which is around 7 per cent of cases, down from 12 per cent in the preceding year. Undertakings in lieu of a reference were accepted in four cases, up from zero in the preceding year.

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3 For the CMA case directory, see www.gov.uk/cma-cases.
At the time of writing, three of the six transactions referred to Phase 2 have been cleared, one has provisionally been found to give rise to a substantial lessening of competition, one is still under review, and one has been abandoned.

A total of three Phase 2 decisions were published by the CMA in the 2014–2015 financial year, down from 12 published by the CC in the previous year. Two were unconditional clearances and one permitted the transactions to proceed subject to divestments.

ii Initial enforcement orders

Under the new regime, the CMA has increased powers to impose interim measures to freeze or unwind integrations and prevent pre-emptive action, including in relation to anticipated mergers at Phase 1 (see Section III. vi, infra). In its first year of operation, the CMA imposed initial enforcement orders in 36 per cent of cases. This represents a slight decrease from the 40 per cent of cases in which initial undertakings and enforcement orders were accepted by the OFT in 2013. At the time of writing, the CMA has not yet used its powers to reverse integration steps taken before issuing an order. Some commentators have raised concerns that the initial enforcement orders place undue restrictions on the parties’ businesses, even in cases where no competition concerns arise, and that the process of negotiating derogations from the standard form can sometimes be unduly onerous.

iii Information requirements

The CMA merger notice requires a large amount of information – much more than previously required by the OFT. The CMA therefore 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 new regime is the existence of a statutory 40 working day timetable. 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. In its Annual Plan 2015/16, published in March 2015, the CMA stated its aim to start the statutory clock within 20 working days (on average across all cases) of a submission of a substantially complete draft merger notice. In February 2015, the CMA noted that it had been meeting this target in around 30 per cent of its cases, with pre-notification taking on average 25 working days.4

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,

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4 UK merger control – a retrospective on the last 10 months at the CMA, presentation to the Law Society, 10 February 2015.
The CMA has extended the statutory timetable fairly frequently in its first year of operation. It noted in February 2015 that it had stopped the clock on 13 occasions (from a total of 66 Phase 1 decisions at that time).  

iv Public interest considerations
One of the most closely watched near-deals of 2014 was Pfizer’s bid for AstraZeneca. The attempt was notable for a number of reasons, but perhaps chiefly for the strong political involvement in the process. Pfizer executives were required to appear before multiple parliamentary hearings, and pressed to make promises in respect of UK jobs and manufacturing facilities. As noted above, the Secretary of State has the power to intervene in mergers on certain public interest grounds by issuing an intervention notice to the CMA. Where such an intervention is appropriate, approval of the deal can be made conditional upon commitments from the acquirer. A public interest intervention could, therefore, have enabled the Secretary of State to obtain direct undertakings from Pfizer that would have been binding over the long term. However, none of the existing public interest grounds would have accommodated the concerns around the proposed bid. While the Secretary of State could have sought Parliament’s approval to introduce a new public interest consideration, it would have been more challenging to secure confirmation from the European Commission that such a step was consistent with EU law. The European Commission is keen to avoid individual states introducing national measures that undermine the ‘one-stop shop’ nature of EU merger control, especially if those measures could hinder the cross-border economic activity that underpins the single market objective. The government would have therefore had to convince the Commission that its intervention would not have discriminated in favour of the UK over other EU Member States. This would have complicated proposals, for example, to require Pfizer to base its European headquarters in the UK or to ensure that a specified percentage of its research and development workforce is based in the UK.

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. It formed the jurisdictional basis for the investigations by the OFT and the

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5 Ibid.
6 The breadth of the concept can be seen in *JCDecaux/Concourse* where the OFT found that, even in the absence of an equity stake, material influence had been acquired by virtue of
CC in relation to the 29.82 per cent shareholding acquired by Ryanair in Aer Lingus in the context of a takeover bid. The CC ultimately found that the existence of Ryanair’s minority shareholding led or may have been expected to lead to a substantial lessening of competition in the markets concerned and decided that the most effective and proportionate remedy was to compel the airline to reduce its stake in Aer Lingus to 5 per cent. This case illustrates how a would-be acquirer who builds a minority stake in advance of a full takeover bid remains exposed to a CMA investigation and ultimately risks being ordered to divest the stake, even if the takeover bid fails (for further information, see Section III.ix, *infra*).

A merger situation will qualify for review if it meets the turnover test or the share of supply test (see Section I, *supra*). 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 2 investigation.

In general, a merger will no longer qualify for a reference four months after the date of implementation of the merger. Time will not begin to run, however, until the ‘material facts’ of the merger (i.e., the names of the parties, nature of the transaction and completion date) have been made public or are given to the CMA (if neither occurs prior to completion). Time will not run where undertakings in lieu of reference are under negotiation, where the parties are yet to comply with an information request from the CMA, or where a request has been made by the UK for review of the transaction by the European Commission in accordance with Article 22(3) of the 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 2 a ‘balance of probabilities’ threshold applies. As a result, it is relatively common for mergers to be referred to Phase 2 and subsequently cleared unconditionally.

The CMA has adopted the substantive assessment guidelines jointly published by the OFT and CC in September 2010. These guidelines 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

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7 See *OFT v. IBA Health Ltd* [2004] EWCA Civ 142.
8 Merger Assessment Guidelines (September 2010) OFT 1254, CC 2.
customer surveys) to estimate the upward pricing pressure arising from a merger. For these purposes, the CMA has adopted the previous regime’s guidance on the design and presentation of consumer survey evidence in merger inquiries.\textsuperscript{9} The CMA has also adopted the OFT and CC commentary on the assessment of retail mergers,\textsuperscript{10} which details the type of local market analysis that is often employed to assess mergers between bricks and mortar businesses.

\textbf{iii Counterfactuals}

Consistent with the practice of the OFT and CC, the CMA applies different approaches at Phase 1 and Phase 2 to assessing the merger counterfactual. At Phase 1, 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 2, 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 1. The CMA considered the failing firm test in respect of 12 Phase 1 cases in the 2014–2015 financial year. Of these:

\begin{enumerate}
\item five failed to provide sufficient evidence of a probability of market exit by the failing firm;
\item three failed to prove that no less anti-competitive buyer was to be found;
\item two failed on both these counts; and
\item in the two remaining cases, it was considered unnecessary to reach a definitive conclusion.
\end{enumerate}

The CMA was also asked to apply the failing firm scenario in a Phase 2 case, but concluded that the acquiring firm had failed to prove that on exit all or most of the target’s sales would have switched to its business.\textsuperscript{11}

\textbf{iv The notification procedure}

Under the old regime, it was possible to make an informal application for clearance, which did not involve any prescribed form or process. However, the submission of a formal merger notice is now the only means of applying for clearance.

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

\textsuperscript{9} Good practice in the design and presentation of consumer survey evidence in merger inquiries (March 2011) OFT 1230, CC2 com 1.
\textsuperscript{10} Commentary on Retail Mergers (March 2011) OFT 1305, CC 2 com 2.
\textsuperscript{11} See Alliance Medical/IBA Molecular.
interest intervention notice, or where the European Commission is considering whether to accept a request from the UK for the merger to be referred to Brussels under Article 22(3) of the EU Merger Regulation.

As noted in Section II.iii, supra, 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.

It is possible for the parties to request that the CMA ‘fast track’ a merger reference where there is evidence that an in-depth review is likely to be required. The OFT used this procedure on only two occasions: Thomas Cook/Co-operative Group Limited/Midlands Co-operative Society and Global Radio/GMG Radio, while the CMA has granted one ‘fast track’ request so far: BT/EE. This option may be attractive to parties in cases where a reference appears inevitable, as it allows for Phase 1 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 2 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).

The CMA will normally make an interim order where it has reasonable grounds to suspect that two or more enterprises have ceased to be distinct (i.e., in respect of completed mergers). Given that the risk of pre-emptive action is generally much lower in relation to anticipated mergers, the CMA has noted that it would typically engage with parties before making an order in those circumstances.

The CMA has stated that it would generally not expect to impose an order limiting the parties’ ability to complete an anticipated merger unless it had strong reasons to believe that completion will occur prior to the end of Phase 1, and the act of completion itself might amount to pre-emptive action that would be difficult or costly.

12 In Global Radio/GMG Radio, the issuance by the Secretary of State of a public interest intervention notice meant that the fast-track procedure was delayed for several months. It was only once the Secretary of State had concluded that there were no media plurality issues that the decision to refer to the CC could be made by the OFT.
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). Therefore, absent exceptional circumstances, it is expected that parties will still be able to complete transactions prior to CMA clearance.

vii Exceptions of the duty to refer

As explained above, the CMA has a statutory duty to refer a relevant merger situation for a Phase 2 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 adopted the OFT’s guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase 2 investigation.13

The guidance sets out the criteria for accepting undertakings that may be offered by the merging parties in lieu of a reference. To discharge the CMA's duty to refer, any undertakings offered by the parties should restore competitiveness to pre-merger levels and must be proportionate. It is most common for undertakings to relate to the sale of a part of the merged assets; the CMA is generally reluctant to accept behavioural remedies. It is becoming increasingly common for the CMA to require an ‘upfront buyer’, i.e., 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 be acceptable as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might be acceptable, a period of negotiation and third-party consultation follows. The CMA is required to decide whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

The CMA’s duty to refer may also be discharged in other circumstances, namely in respect of small markets (de minimis mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced. In relation to de minimis mergers, the guidance states that, for markets with an aggregate turnover exceeding £10 million, the benefits of an in-depth Phase 2 investigation may be expected to outweigh the costs. However, for markets with an aggregate turnover of less than £3 million, the CMA expects that a reference will be cost-effective only in exceptional circumstances.

viii Phase 2 investigations

Upon the making of a Phase 2 reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the CMA.

13 Exceptions to the Duty to Refer and Undertakings in Lieu of Reference Guidance (December 2010) OFT 1122.
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 2 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 1 in any event).

Unless the CMA releases or replaces an interim order made during Phase 1, it will continue in force for the duration of the Phase 2 inquiry. If an interim order was not made at Phase 1 or if it is necessary to supplement the measures previously put in place at Phase 1, 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). Under the new regime, the CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase 2 review within which to implement any remedies offered by the parties.

ix Appeals

Any party aggrieved by a decision of the CMA (including a decision not to refer a merger for a Phase 2 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. Nevertheless, there has been an upsurge in such challenges in recent years. Developments that have taken place during the past year are detailed below.

In January 2013, AkzoNobel appealed, *inter alia*, the CC’s findings in *AkzoNobel/Metlac* that it could be the subject of a prohibition order on the basis that it had been ‘carrying on a business in the UK’ through its subsidiaries. The CC’s findings were upheld by both the CAT and the Court of Appeal. In December 2014, the Supreme Court refused permission to appeal further.

In September 2013, Ryanair appealed the CC’s decision that its acquisition of a 29.82 per cent shareholding in Aer Lingus had led or may be expected to lead to a substantial lessening of competition. Ryanair argued, *inter alia*, that the CC’s decision to require a divestiture was contrary to the EU duty of sincere cooperation in circumstances where an appeal to the European Courts was still outstanding in respect of European

Commission’s 2013 decision to prohibit a merger between the two Irish carriers. The CAT dismissed Ryanair’s appeal on all grounds.\textsuperscript{16} Ryanair’s subsequent appeal to the Court of Appeal was also dismissed on 12 February 2015.\textsuperscript{17} Ryanair has applied to the Supreme Court for permission to appeal the Court of Appeal’s judgment.

In December 2013, Groupe Eurotunnel and Société Coopérative de Production Sea France (SCOP) appealed the CC’s decision in respect of the former’s acquisition of three ferries and related assets from the liquidated Sea France business. The parties argued, \textit{inter alia}, that the CC had erred in its consideration of whether, in purchasing the Sea France assets, Eurotunnel had acquired an ‘enterprise’ for the purposes of the EA. The CAT agreed with the parties\textsuperscript{18} and remitted the case back to the CC and the CMA for reconsideration. In June 2014, after concluding that there had been no material change of circumstances, the CMA issued a revised decision confirming its view that the Sea France assets did indeed constitute an enterprise and confirming the original prohibition findings of the CC. On further appeal by SCOP, this decision was subsequently upheld by the CAT but overturned by the Court of Appeal in May 2015. On 12 June 2015, the CMA applied to the Supreme Court for permission to appeal this latest judgment.

In April 2014, AC Nielsen appealed the OFT’s decision not to refer the completed acquisition Information Resources Inc of Aztec Group.\textsuperscript{19} Nielsen argued that the OFT’s conclusion that the completed merger did not give rise to a realistic prospect of a substantial lessening of competition was unsustainable. Following the notice of appeal, one of the parties to the merger provided further information to the CMA regarding certain exclusivity arrangements (which had not previously been provided to the OFT). As a result of this new information, the CMA conceded that the OFT’s original decision had contained material errors of fact. The CAT therefore quashed the original decision and remitted the merger to the CMA.\textsuperscript{20} The CMA subsequently issued a decision in October 2014 clearing the merger at Phase 1.\textsuperscript{21}

\section*{IV OTHER STRATEGIC CONSIDERATIONS}

\textbf{i} \hspace{1em} \textbf{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

\textsuperscript{17} \textit{Ryanair v. Competition Commission} [2015] EWCA Civ 83.
\textsuperscript{21} See \textit{Information Resources/Aztec Group}. 

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complaints. The CMA has a dedicated Mergers Intelligence Committee responsible for monitoring non-notified merger activity and liaising with other competition authorities. In April 2015, the CMA noted that the Merger Intelligence Committee had reviewed over 500 transactions in its first year of operation, and that 21 of its 82 Phase 1 decisions during that period were reached as a result of the Committee’s work, two of which resulted in Phase 2 references and one in the consideration of undertakings in lieu of a reference.\(^{22}\)

The fact that a merger has been completed does not prevent the CMA from investigating and referring it for a Phase 2 investigation or accepting undertakings in lieu of a reference. While the substantive assessment of anticipated and completed mergers ought to be identical, the CMA can be expected to impose interim orders while it considers a completed merger. In addition to ordering the parties to stop any integration that might constitute pre-emptive action, the CMA may also require the parties to unwind any integration steps that have already taken place.

An additional risk to bear in mind is that the initial period for a Phase 1 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 1 clearance, without the need for a Phase 2 investigation.

ii UK or EU?

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 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 OFT was willing to request the post-notification referral of transactions when it considered it appropriate to do so: in 2010, it made two Article 9 requests for cases to be referred from the European Commission, and in both 2010 and 2011, it made an Article 22 reference to the Commission. The CMA can be expected to take a similar stance: its 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.

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\(^{22}\) UK Merger Control: Enhancements and efficiencies in the new regime, presentation to the British Institute of International and Comparative Law, 30 April 2015.
iii Cross-border cooperation

Parties should be aware that the CMA is part of the European Competition Network, and as such is informed of mergers notified to the competition authorities of the other 27 EU Member States and the European Commission. It also participates in the International Competition Network, an informal network that seeks to develop best practice among competition agencies around the world.

V OUTLOOK AND CONCLUSIONS

The implementation of the new regime has not resulted in dramatic changes to the substantive assessment of mergers. Although some of the procedural changes have been subject to criticism from some quarters, particularly the negotiation of derogations from initial enforcement orders, the transition to a unitary authority has on the whole been relatively smooth. In its Annual Plan 2015/16, the CMA stated its aim to further increase the pace, quality and effectiveness of its interventions. In particular, it announced two new targets for its assessment of mergers: to start the statutory clock within 20 working days (on average across all cases) of a submission of a substantially complete draft Merger Notice, and to clear at least 60 per cent of merger cases that are less complex within 35 working days.
Chapter 42

UNITED STATES

Ilene Knable Gotts

I INTRODUCTION

In 1976, the United States became the first jurisdiction with a mandatory pre-merger notification requirement when Congress promulgated the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) to enhance enforcement of Section 7 of the Clayton Act. Under the HSR Act, the US Federal Trade Commission (FTC) 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 fiscal year (FY) 2015, 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 $76.3 million. Transactions in which holdings post-acquisition will be valued between $76.3 million and $305.1 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 $152.57 million, and at least one other person must have total assets or annual net sales of $15.3 million. Transactions valued over $305.1 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;

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2 The fiscal year is 1 October–30 September. 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.
(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 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 geared 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 $16,000 for every day the person does not comply with the HSR Act.

The non-reportability of a transaction under the HSR Act does not preclude either the FTC or 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 the Clayton Act. In addition, even in reportable transactions, the states’ attorneys general may review transactions, typically in conjunction with the federal enforcement agency investigating the transaction. Certain industries also require pre-merger approval of federal regulatory agencies. For instance, the Federal Energy Regulatory Commission will review electric utility and interstate pipeline mergers; the Federal Communications Commission will review telecommunications and media mergers; the Board of Governors of the Federal Reserve System will review bank mergers; and the Surface Transportation Board will review railroad mergers.

State public utilities commissions may have separate authority to review telecommunications and utility mergers. Finally, under the Exon-Florio Act, the Committee on Foreign Investment in the United States may review acquisitions by foreign persons that raise national security issues.

II YEAR IN REVIEW

The agencies entered into a number of consents during FY 2014, some of which were negotiated after the agency brought suit to challenge the transaction. The FTC uniquely possesses the ability to seek a preliminary injunction to block completion of a proposed merger in a federal district court and to challenge both proposed and completed mergers in its own administrative proceeding. In addition, the FTC can enter into a binding consent decree with the transaction parties without judicial intervention. In contrast, the DoJ must bring its challenges (and file any consents) in federal district court, with a judge ultimately deciding the case. The duration of the administrative process is

sufficiently long that rarely will a pending transaction survive the appeals process. For instance, the FTC’s administrative challenge of a completed acquisition by Polypore International Inc that commenced in September 2008 resulted in a March 2010 ruling by the administrative law judge that the acquisition violated the law. The transaction parties appealed the ruling to the full Commission, which held an oral argument on 28 July 2010 and unanimously affirmed the decision on 8 November 2010 (over two years after the challenge commenced); the Eleventh Circuit affirmed the Commission’s decision almost two years later (i.e., over four years after the FTC challenged the merger).

The US Supreme Court denied certiorari in 2013.

During FY 2014, the FTC continued to have an impressive track record in its federal court activities. First, the agency scored a major victory before the Sixth Circuit in its challenge of ProMedica Health System’s acquisition of St. Luke’s Hospital in Ohio, when the court issued a decisive 22-page opinion unequivocally affirming the FTC’s decision to challenge the acquisition. Notably, the court rejected the parties’ claim that St. Luke’s was a ‘flailing firm’, pointing to St. Luke’s increase in market share and improved finances. On 22 December 2014, ProMedica filed a writ of certiorari with the US Supreme Court, seeking review on the grounds that the Sixth Circuit had accepted the FTC’s merger analysis, which it asserts was erroneous in three ways: (1) how the product market was defined to focus solely on obstetrics rather than the broader range of general acute care services; (2) allowing the FTC to base its assumption about competitive harm on market share statistics in a unilateral effects case rather than requiring the FTC to show that the parties’ facilities were close substitutes; and (3) the standard used to decide whether the perceived harm of a merger is offset by the benefits of taking over a financially weak target did not adequately recognise that the market share of a firm facing significant financial weakness may overstate its competitive significance.

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8 Polypore Int'l, Inc v. FTC, 688 F3d 1208 (11th Cir 2012).
9 Polypore Int'l, Inc v. FTC, 12-1016, cert denied (24 June 2013).
Second, the FTC won in district court in Idaho in *St. Luke's/Saltzer Medical Group*, 12 a challenge to St. Luke's Health System’s acquisition of Idaho’s largest independent, multi-specialty physician group on 31 December 2012. The case turned in large part on the court’s adoption of a narrow geographic market consisting of Nampa, since the combined entity included 80 per cent of the primary care physicians in Nampa. The court found it highly likely that health-care costs would rise because the combined entity obtained a dominant market position that would enable it to negotiate higher reimbursement rates from health insurance plans, which would increase consumer costs; and would raise rates for ancillary services to the higher hospital-billing rates. On 10 February 2015, the Ninth Circuit upheld the district court’s decision, concluding that the court had not erred in its factual finding that the relevant geographic market for purposes of evaluating the merger’s competitive effects was limited to Nampa. 13 Nor did the district court clearly err in its factual findings that the acquisition was anti-competitive given the extremely high concentration levels and the statements and past actions of the transaction parties, which made it likely that St. Luke's would raise reimbursement rates. The appellate court, however, did not find that the record supported the district court’s determination that St. Luke’s increased leverage for primary care physician services would result in higher fees in ancillary services. Also noteworthy is the circuit court’s discussion of efficiencies, where it remained ‘skeptical about the efficiencies defense in general and about its scope in particular. It is difficult enough in [merger] cases to predict whether a merger will have future anti-competitive effects without also adding to the judicial balance a prediction of future efficiencies.’ 14

In FY 2014, the FTC entered into 13 consents involving proposed mergers. In addition, in two additional reported instances, the transaction parties abandoned the transaction after the FTC expressed antitrust concerns or brought a lawsuit. During the first six months of FY 2015, the FTC brought two preliminary information challenges in federal district court 15 and entered into 13 consents involving proposed mergers. In addition, the parties abandoned a transaction on the grounds that the FTC would seek to block it. Most of the FTC’s challenges and consents during the past few years have involved the pharma and health-care sectors.

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13 *St Alphonsus Medical Center-Nampa Inc et al v. St Luke’s Health System Ltd et al,* No. 14-35173 (9th Cir 10 February 2015).
14 Id. at p. 25.
During FY 2014, the DoJ did not bring any new merger challenges in federal court, but continued to prepare for trial in one case,\(^\text{16}\) won a trial in another case\(^\text{17}\) and settled before trial with a significant divestiture commitment from the parties in a third case.\(^\text{18}\) The DoJ also entered into five consents involving proposed transactions and one consent involving a consummated transaction. In addition, the parties abandoned one proposed transaction due to antitrust concerns. In the first six months of FY 2015, the DoJ settled the litigation pending from FY 2014 under terms favourable to the DoJ, and entered into four consents involving proposed transactions. In addition, the parties abandoned five transactions due to antitrust concerns, including one transaction in which the DoJ had sued the parties in federal district court to enjoin the transaction.\(^\text{19}\)

The recent enforcement actions and agency officials’ speeches suggest the following enforcement focuses during the Obama Administration.

First, the agencies are likely to continue to investigate and challenge transactions post-completion, particularly in deals not subject to HSR Act notification. Second, vertical and conglomerate theories are being investigated more extensively and even challenged at times. Third, in several matters the reviewing agency focused on the loss of a potential entrant or a maverick as the basis for concern. Fourth, the agencies will settle merger challenges even after litigation commences. Fifth, the agencies have sought behavioural remedies, often in addition to structural remedies, to address both horizontal and vertical concerns. Finally, both agencies have increasingly settled enforcement actions with consents that provided for divestiture to a specific, upfront buyer.

III THE MERGER CONTROL REGIME

Parties can 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 opening up 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 HSR Act notification may not be completed until the requisite HSR forms have been filed with the agencies and the applicable waiting period has expired or been terminated early. In most transactions, the acquired and the acquiring parties must file separate HSR forms, and the waiting period will not


commence until both parties make their filings. In tender offers, the waiting period commences with the filing of the HSR form by the acquirer. The initial waiting period is 30 days (15 days in the case of a cash tender offer or bankruptcy filing). If the period expires on a weekend or holiday, then it will be extended until the following business day. At the parties' request, the waiting period can be terminated earlier by the agencies. Technically, the waiting period may not be extended other than by the issuance of a request for additional information and documentary material (second request). In practice, however, the merging parties may withdraw and refile their HSR forms (recommencing the waiting period), agree not to complete the transaction to grant the antitrust enforcement agencies additional time or agree with the enforcement agency out of court that compliance with the HSR Act will not occur until a further submission is made.

The FTC and the DoJ have concurrent jurisdiction over HSR 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 deal. The agencies have adopted policies to facilitate the investigation of transactions during the initial waiting period, aiming at decreasing the number of transactions in which second requests are issued and developing more precise second requests. The ability to engage in meaningful review of a transaction during this initial waiting period, however, depends on the transaction parties being willing to provide certain documents and information quickly and voluntarily.

If, prior to the expiry of the initial waiting period, the reviewing agency issues a second request (typically on the last business day of the waiting period), then the clock stops until the transaction parties comply with the second request. Unless terminated earlier or otherwise agreed to by the parties, the second waiting period ends on the 30th day (or, in the case of a cash tender offer or bankruptcy, the 10th day) following substantial compliance with the second request. Again, if the waiting period expires on a weekend or holiday, it is extended to the next business day. In tender offers, the waiting period is determined according to when the acquiring party substantially complies. It is not unusual for the parties to agree to extend the waiting periods in exchange for a dialogue with the agency of the concerns presented, particularly if the parties are willing to resolve remaining concerns with a consent decree.

In merger investigations, the agencies typically seek information from third parties (competitors, customers, suppliers, etc.) that is relevant to the review of the transaction. The information may be requested or required. Both agencies can also seek interviews or depositions. Generally, the information provided by the merger parties and third parties is not subject to public disclosure. State attorneys general can also review mergers – a process has been in place for about a decade that facilitates their participation in the HSR review. With the consent of the merger parties, the agencies will discuss the information received by them and coordinate their investigations with the state enforcers. Ultimately, if the transaction is challenged, the state attorneys general often, but not always, join with the agency as plaintiffs. In some transactions, the state attorneys general will seek additional relief. State attorneys general sometimes will also require transaction parties to pay 'attorneys' fees' for their review of the transaction as part of the settlement. In addition, US antitrust authorities regularly consult with their foreign counterparts during a merger investigation. Such coordination and dialogue requires 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 in 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 forego the need for a consent decree if the merger parties eliminate the potential anti-competitive 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 it needs relief or the parties fail to implement the remedy or obtain a regulatory order). These pocket consent decrees can also be used to permit a transaction to proceed before the agency completes its investigation, for instance, in a hostile tender offer situation where the target is uncooperative and seeks to use the HSR review as a means of delay or process denial. Both the FTC and the DoJ permit the transaction to close once they provisionally accept the consent decree and publish it for comment. The FTC approves the final consent decree after the public comment period expires and the staff sends its recommendation to the Commission; the DoJ files the proposed judgment with a federal district court and seeks approval and entry of the judgment by the judge following the public comment period provided under the Tunney Act. 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 expiration of the HSR waiting periods. State attorneys general can bring challenges as well, on their own behalf or as parens patriae of citizens. Private parties can bring challenges, although in most jurisdictions, the standing requirements may be difficult to meet.

IV OTHER STRATEGIC CONSIDERATIONS

Although providing the state attorneys general with an active role in the HSR review may complicate the process and potentially delay the resolution of the review at the agency, it is generally advisable that transaction parties consent to such a request. Most states have compulsory process authority and, absent the protocol, can issue subpoenas for information, documents and even testimony. States can also bring challenges. Having the states work with the agency eliminates confusion, an additional burden of compliance with requests and potentially diverging outcomes. In some recent DoJ consents and challenges, for instance, state attorneys general joined in the DoJ’s decisions.

20 Antitrust Procedures and Penalties Act, 15 USC Sections 16(b)-(h), Section 2(b).
Similarly, many transactions meeting the jurisdiction thresholds of the HSR Act will also require notification as well as in a number of other jurisdictions. The trend is for the FTC and the DoJ to cooperate with other jurisdictions in reviewing cross-border mergers. In that regard, the US agencies have entered into several bilateral and multilateral cooperation agreements. The agencies have cooperated extensively with Canada, Mexico and the European Commission on several mergers, and this cooperation is likely to continue, if not increase, over time. 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. For instance, the US and EU appeared to be diverging in their initial analysis of Oracle’s proposed acquisition of Sun Microsystems, with the EU even issuing a statement of objections. Ultimately, the EU did reach the same conclusion as the DoJ. It is more likely that divergence will occur between the established competition authorities (e.g., the US’s and the EU’s) and the newer competition authorities (e.g., India’s and China’s).

V OUTLOOK AND CONCLUSIONS

From the very outset of the Obama Administration, the antitrust leadership of the federal antitrust agencies had a clear objective of influencing antitrust policy and precedent. The FTC and the DoJ issued new horizontal merger guidelines on 19 August 2010. These guidelines marked the first major revision in over 25 years. On 17 June 2011, the DoJ issued an updated policy guide to merger remedies. The merger remedies guide considers not only the components that constitute an effective structural remedy, but also the role of behavioural provisions, particularly in vertical mergers and in transactions involving intellectual property. The second term of the Obama Administration provides the continuity in merger enforcement policy that could lead to a truly long-term impact.

The simultaneous district court and administrative court litigation strategy being used by the FTC raises the question of whether there should be different standards for the FTC and the DoJ in merger cases. Section 13(b) of the FTC Act authorises the FTC in a ‘proper case’ to seek permanent injunctive relief against entities that have violated or threatened to violate any of the laws it administers. The statute provides that an injunction may be granted only ‘upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the

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23 15 USC Section 53(b).
public interest’.24 In contrast, under traditional equitable standards, a plaintiff must show a likelihood of success on the merits. The circuits 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.

Despite changes in the top leadership posts at both agencies, we are unlikely to see any major alterations in the policy of the federal enforcement agencies, particularly given the continuation of President Obama in the White House for the next few years.

24 Id.
Chapter 43

VENEZUELA

Pedro Ignacio Sosa, Vanessa D’Amelio and Rodrigo Moncho Stefani

I INTRODUCTION

In general terms, the designated authority to oversee and control mergers in Venezuela is the Antimonopoly Superintendency. That entity is governed by, *inter alia*, the Antimonopoly Act.

The Antimonopoly Superintendency is also the designated authority to determine whether a merger will restrict what the law considers ‘fair economic competition’ or if it produces a dominant position in the relevant market in which the involved companies operate.

In addition to the Antimonopoly Superintendency, other agencies are involved in the merger control procedures when the activities of companies are controlled by a regulatory framework (i.e., insurance, banking and telecoms). Specific regulations and variations in the merger control procedures depending on the commercial activities of the involved parties are described in subsequent sections.

For companies that are not regulated, it is not mandatory to request prior authorisation or to notify the Antimonopoly Superintendency of a proposed or pending merger. However, the commercial registry must issue a formal authorisation of any merger once the legal requisites are met. The basic rules regarding mergers in Venezuela are established in the Commercial Code.

The authorisation of the commercial registry only refers to the fulfilment of the formal procedure established by the Commercial Code; the commercial registry does not evaluate or judge the transaction itself in the context of the antitrust legislation. When the transaction entails companies that are regulated, one of the requisites for

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the transaction will be in compliance with its specific regulations, as established by the designated competent authority.

The Antimonopoly Act prohibits economic concentrations that may result in restrictive practices or may create a dominant position in the relevant market. The prohibition only affects concentrations that could significantly change the structure of the relevant market and thus restrict fair economic competition. Therefore, it does not affect existing monopolies or economic concentrations that do not result in dominant positions.

Although there is no requirement for prior notification or authorisation of a merger regarding unregulated companies, some unregulated companies decide to notify the Antimonopoly Superintendency for strategic reasons.

To avoid risks during the execution of the merger (e.g., if there is a hostile opposition to the merger), it is possible to request the Antimonopoly Superintendency’s opinion on the transaction.

While the Antimonopoly Superintendency considers its opinion regarding the merger, the transaction may be consummated with the understanding that the opinion issued by the Antimonopoly Superintendency will be binding, and that if it determines that the transaction harms fair economic competition, it will not be allowed.

The Antimonopoly Superintendency may also act *ex officio* when it becomes aware, by any means, of a transaction that could be deemed as contrary to the fair economic competition principles provided for in the Antimonopoly Act.

In addition, the Antimonopoly Superintendency can initiate procedures against a merger within five years following consummation pursuant to formal authorisation of the competent commercial registry.

II  YEAR IN REVIEW

No noteworthy administrative or judicial decisions were made by the Antimonopoly Superintendency, by its predecessor the Superintendency for the Promotion and Protection of Free Competition (Procompetencia) or by the competent courts during 2014 and the first quarter of 2015. This can be attributed to:

a  the fact that there is no obligation for companies entering into merger agreements to notify or to obtain prior approval of the transaction by the Antimonopoly Superintendency; and

b  the lack of transactions with significant impact in the Venezuelan economy due to the harsh economic situation.

The Antimonopoly Superintendency does not have publicly accessible statistics regarding its work, and it only publishes some of its decisions regarding antitrust procedures. However, most of the opinions and decisions that it issued prior to 2013 and that did decide upon merger control procedures referred to transactions between or related to insurance, reinsurance and insurance brokerage companies.

The lack of decisions from the Antimonopoly Superintendency and Procompetencia has also been attributed to an ongoing restructuring procedure within the agency, mainly with regard to its personnel, and the adoption of the Antimonopoly
Act, which was enacted in November 2014 to replace the Promotion and Protection of Free Competition Act (PPFCA).

It is necessary to go back to 2006 to find examples of merger cases in which Procompetencia applied its principles and doctrine in its decisions.

In a more recent case, in 2009, two of the major chocolate companies in Venezuela, Nestlé Venezuela, SA (an affiliate of Nestlé Switzerland) and Chocolates El Rey, CA (a local producer), decided to merge. Given the size of the transaction, and the relevant market shares of both companies, to ensure the success of the merger and to avoid potential sanctions, on 17 February 2009, Nestlé de Venezuela requested Procompetencia to initiate an evaluation procedure prior to the consummation.

The transaction concerned the acquisition by Nestlé de Venezuela of between 70 and 100 per cent of the registered shares of Chocolates El Rey.

Procompetencia decided that, mainly because of the dominant position that Nestlé de Venezuela would end up acquiring, the proposed merger would cause harm to competing companies in the chocolate market.

Among the conclusions of Procompetencia that led to its decision to prohibit the proposed merger, the following stand out:

a. Nestlé is a leading global company in the food sector;

b. In Venezuela, Nestlé had a dominant position of 69 per cent of the products market for end consumers;

c. Although their opinions were not binding, 26 other competitors were consulted, and 58 per cent of them were against the operation;

d. The increase in production capacity of the combined entity could harm smaller competitors; and

e. The combined entity could end up excluding some smaller competitors or preventing access to the relevant market, thus affecting ‘free competition’ according to the PPFCA (which was the equivalent to the ‘fair economic competition’ definition now found in the Antimonopoly Act).

An example of the application of merger procedures for a transaction involving regulated companies operating in especially regulated sectors (in this case, the telecoms sector) occurred in 2006. In such case, authorisation must be requested before the National Telecommunications Commission (Conatel).

The party requesting authorisation (Corporación Digitel, CA) wanted to merge with three other minor competitors in the mobile carriers market (Infonet Redes de Información, CA, Digital Celular GSM and Digicel, CA) to reach the national market. Conatel requested the opinion of Procompetencia on the matter.

Procompetencia considered the proposed operation to be favourable for the relevant markets, free competition and consumers, given the fact that two other competitors in the market had large market shares and no dominant position would be reached by the resulting entity. The proposed merger was authorised with the imposition of several public service obligations on the absorbing entity, given the market gains it stood to gain.
III THE MERGER CONTROL REGIME

As a general rule, merger control is contemplated in Article 10 of the Antimonopoly Act, which prohibits operations of economic concentration when the effects of a merger are to restrict fair economic competition or produce a dominant situation in either a part or the whole of a market.

According to Regulation No. 2 of the PPFCA, still in force regardless of the enactment of the Antimonopoly Act, any merger, joint venture, takeover, acquisition of productive assets or other similar acts are considered to be economic concentrations, and could be subject to the jurisdiction of the Antimonopoly Superintendency.

As previously mentioned, the general rule in Venezuela is that there is no obligation on participants in a merger to notify or request pre-consummation authorisation, unless they are in an especially regulated commercial sector.

Merger parties can, however, voluntarily notify the Antimonopoly Superintendency, and interested third parties can oppose the merger either before the relevant commercial registry or the Antimonopoly Superintendency. In addition, the Antimonopoly Superintendency can initiate a procedure ex officio to verify if the merger complies with the antitrust regulations.

Below is a brief overview of the different procedures that would invoke some type of merger review before the different competent authorities. It should be noted that there is no way to accelerate or fast track any administrative procedures in Venezuela. Therefore, the time frames given below are always referential, and the procedures can take significantly longer in practice.

i Procedures before the Antimonopoly Superintendency

In addition to conducting merger control procedures, the Antimonopoly Superintendency acts as a consultant in merger control procedures that are conducted by other competent authorities in regulated commercial sectors. The Antimonopoly Superintendency’s opinion is binding in such other procedures.

Procedures conducted directly before the Antimonopoly Superintendency

Procedures conducted directly before the Antimonopoly Superintendency can be initiated either by the parties involved in the merger, or by an interested third party or by the Agency itself.

Merger control of economic concentration operations by the Antimonopoly Superintendency is only possible when the turnover of all the companies involved in the transaction combined exceeds an amount equivalent to 120,000 tax units (currently equivalent to 18 million bolivars). The Antimonopoly Superintendency can analyse the transaction before the transaction has taken place or during a five-year period after the formal authorisation by the competent commercial registry has been issued.

2 Published in Official Gazette No. 35.963 dated 21 May 1996.
3 For 2015, the value of the tax unit is 150 bolivars.
Although there are no specific time frames for a merger control procedure before the Antimonopoly Superintendency, according to legislation regarding administrative procedures, in theory it can last a maximum of six months; however, normally it would take longer. (This is the situation in practice in Venezuela.)

Unless an injunction or precautionary measure to hold the operation is issued by the Antimonopoly Superintendency, merger control proceedings do not suspend the operation. An injunction could only be issued if the Antimonopoly Superintendency has sufficient grounds to presume that fair economic competition will be violated by the transaction.

According to Article 31 of the Antimonopoly Act, by decision of the Antimonopoly Superintendency, either ex officio or at the request of one of either party involved in the procedure, all of the information presented would be declared confidential.

To reduce administrative discretion in decision making, and to achieve greater consistency in the evaluation of transactions, the Antimonopoly Superintendency must evaluate the economic concentration operation consistently with the provisions of the Guidelines for the Evaluation of Economic Concentration Operations (Guidelines) as well as with applicable internationally guidelines.

The Guidelines define the types of economic concentration and establish the criteria for determining whether the transaction violates fair economic competition. Specifically, the Guidelines establish technical criteria to define, inter alia, the relevant market, the concentration in the relevant market and the possibility of entry by new participants in the market.

The Antimonopoly Superintendency analyses each transaction on a case-by-case basis. This means that it may approve mergers that potentially have restrictive effects on fair economic competition but that also carry benefits to society that outweigh the negative effects that a restriction would generate (e.g., positive changes in the production techniques, distribution or commercialisation in that specific market).

If the Antimonopoly Superintendency decides that the transaction infringes fair economic competition, the transaction may not take place. If it determines that the merger does not infringe fair economic competition, the transaction cannot subsequently be penalised.

The above information applies both to procedures initiated by the involved parties, or by interested third parties or the Antitrust Authority. However, some of the differences between the two procedures are as follows:

**Procedures initiated by the parties involved**

Since the analysis of a transaction by the Antimonopoly Superintendency is not mandatory, the parties involved may voluntarily notify the pending merger and carry on with the operation without waiting for the decision of the Antimonopoly Superintendency unless an injunction is issued.

Each participating company must separately submit a complete and detailed request that fulfils the requirements set forth in Article 7 of Regulation No. 2, and
also follow the technical considerations provided in the Instructions issued by Procompetencia.4

Procedures initiated by interested third parties or the Antimonopoly Superintendency

If an interested party considers that it will be affected by an economic combination, and demonstrates a personal, direct and legitimate interest to the Antimonopoly Superintendency, the agency will evaluate the request to decide if an investigation is required.

If the procedure is initiated ex officio by the Antimonopoly Superintendency, it must issue a reasoned administrative decision stating the commencement of the procedure. It must also notify the parties involved in the operation that it is initiating a merger control procedure.

If the merger control procedure begins post-consummation and the Antimonopoly Superintendency determines that the transaction violates the antitrust principles, it may initiate a sanctioning procedure to cause the involved companies to break up the resulting entity, and can even impose a fine. Depending on the severity of the case, fines could range between 10 and 20 per cent of the gross income in Venezuela during the previous fiscal year of the merged companies; in the case of recurrence, this could rise to 40 per cent.

The statute of limitations for breaches of the principles established in the Antimonopoly Act is three or five years, depending on the fault. However, because economic concentration operations that are against antitrust principles do not materialise in one sole act or moment, but to the contrary are permanent and continuous, the statute of limitations period only starts after the concentration has stopped, or when its effects stop restricting fair economic competition or generating a dominant position in a part or the whole of the relevant market.

Parties interested in the annulment of an administrative order by the Antimonopoly Superintendency in a merger control proceeding can file an annulment claim before the competent administrative litigation national court within 45 days following the formal notification of such decision. A bond for the amount of the sanction the annulment of which is being requested must be presented along with the annulment claim. This decision may then be appealed before the Political and Administrative Chamber of the Supreme Tribunal of Justice. In theory, trials take no longer than a year; however, in reality, it could take up to five years for the interested party to obtain a first-instance decision, and a similar amount of time to obtain a decision on appeals.

Some markets are heavily regulated due to public interests. Companies operating in these heavily regulated markets are subject to the supervision of other governmental agencies besides the Antimonopoly Superintendency.

Special legislation regulating specific markets establishes merger procedures that such companies must comply with. In some of the procedures described below, the Antimonopoly Superintendency, applying the above-mentioned criteria and regulations, will issue a binding opinion regarding the convenience of an operation.

4 Published in Official Gazette No. 36.209 dated 20 May 1997.
Procedures before the Superintendency of Insurance Activity (Sudeaseg)

Under the provisions of the Insurance Activity Act (IAA), any merger of insurance and reinsurance companies, insurance agents, insurance brokers, as well as any other companies that conduct business related to insurance, must be previously authorised by Sudeaseg.

The IAA defines a merger as the transfer of all the assets of one company to another company. It also states that the merger may be made:

1. by the dissolution of each of the involved companies in order to transfer all the assets and constitute a new company; or
2. by incorporating one or more companies into an existing company that will absorb all the rights and obligations of the dissolved companies.

Articles 88 and 89 of the IAA precisely regulate the written request that the interested parties must file before Sudeaseg to obtain a merger authorisation. Ruling No. 138 of the former Superintendency of Insurance, 5 besides accounting information and the risk management benefits of mergers in the insurance market, also provides for additional information that interested parties must submit when filing for a merger authorisation.

In addition to the request for authorisation, the parties must file the draft merger agreement for approval along with other required documents, such as the financial statements of the involved companies and the shareholding structure of the resulting company.

As in many other regulated markets, companies in this sector must obtain an authorisation to operate in the insurance market (in this case, from Sudeaseg). If a new company will be created as a result of the merger, a request for the authorisation of the operations of the new company must be filed along with the merger authorisation request before Sudeaseg. The regulating authority will then authorise both the merger and the operation of the new company in the same decision.

Given the fact that the parties require an authorisation for the merger to take place, and that even the merger agreement must be authorised, undertaking any transaction without the prior authorisation of Sudeaseg could result in a fine ranging from 5,000 tax units (currently equivalent to approximately 750,000 bolivars) to 10,000 tax units (currently equivalent to approximately 1.5 million bolivars). 6

As in the Antimonopoly Act, the rule regarding public access to documents in an administrative proceeding would apply, although, given the sensitive nature of the financial and internal documents, the parties can request that such documents be kept confidential.

No specific time frame is provided for the authorisation proceeding of a merger before Sudeaseg: the generic six-month term for general administrative proceedings applies. That being said, considering that the Antimonopoly Superintendency must also issue an opinion and that the internal operating procedures of Sudeaseg are usually quite long, this time period is certain to be closer to 12 months.

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5 Published in Extraordinary Official Gazette No. 5.578 dated 14 February 2002.
6 See footnote 3.
If Sudeaseg’s decision opposes the transaction, the parties may file a reconsideration motion before that same authority within 15 business days of the notification of the decision. If the reconsideration recourse is again contrary to the request of the parties, or Sudeaseg does not render a decision within 15 business days following the filing of the recourse, the parties may file a hierarchical recourse before the competent ministry (at this time, the Finance Ministry).

Instead of administrative appeals, the parties may choose to go directly before the courts at any time, as long as there is no pending term for the administrator to decide. Starting from the date of the notification of the decision, or the date in which the decision should have been rendered, the parties have 180 calendar days to file an annulment claim before the competent court.

If a decision (or the lack thereof) being appealed before the courts is a decision of Sudeaseg, the annulment claim must be filed before the competent administrative litigation national court.

If the decision was issued by the competent ministry within 90 business days of the recourse being filed (or the competent ministry failed to issue such decision), the annulment claim must be filed before the Political and Administrative Chamber of the Supreme Tribunal of Justice.

The affected party may also decide to file a claim opposing the opinion given by the Antimonopoly Superintendency.

### Procedures before the Superintendency of Banking Institutions (Sudeban)

As provided for in the Banking Institutions Act (BIA), Sudeban controls and regulates banks’ activities, such as merger operations carried out to protect the rights of bank account holders. In addition, the merger authorisation procedure of banking institutions is regulated by Resolution No. 01-700 of the Financial Regulation Board.\(^7\)

A merger between banking institutions must gain prior authorisation from Sudeban. Pursuant to Article 38 of the BIA, a bank cannot own 5 per cent or more of the capital stock, or even a smaller percentage that gives it voting power at the shareholders’ meeting of another bank, without first filing for a merger authorisation.

According to the BIA, only universal and microfinance banks may file for a merger authorisation. Said authorisation request must be submitted before Sudeban by the merging companies, and must be accompanied by a description of the financial status of the involved companies and a draft of the by-laws of the resulting company, as well as other requirements established in Article 18 of the BIA and in Resolution No. 01-700.

The merger authorisation proceeding for banking institutions is very clearly established in Resolution No. 01-700. In addition to the very specific information that has to be filed, the interested parties must publish an information notice about the merger in several newspapers. In theory, the entire proceeding, from the moment that the request is filed up to the publication of the merger authorisation in the Official Gazette, or the decision denying such authorisation is notified to the interested parties, should last between 52 and 112 business days.

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\(^7\) Published in Extraordinary Official Gazette No. 5.480 dated 18 July 2000.
If, as a result of the merger, a new bank is going to be formed, or if the surviving bank will be carrying out activities for which it was not previously authorised, the organisation and functioning authorisations required for these activities to be carried out by the resulting company must also be requested from Sudeban.

While the BIA excludes the merger of banks from the general rules contained in the Commercial Code, it contemplates those same general rules with some variations. For example, Article 18 of the BIA establishes that mergers must be approved by shareholders’ meetings of the merging companies with the presence of three-quarters of its registered shares, and the approval of at least two-thirds of the registered shares represented at the meeting.

Instead of the formal authorisation granted by the competent commercial registry, the merger of banking institutions will enter into force once the interested party files the following before the competent commercial registry:

- the merger agreement;
- the articles of incorporation of the surviving or new bank; and
- the authorisation granted by Sudeban (after being published on the Official Gazette).

Such filing must take place within 30 calendar days of the publication of the authorisation.

If a bank does not comply with the authorisation procedure for mergers in any manner, it could be sanctioned with a fine that ranges between 1 and 3 per cent of its capital stock.

Regarding the confidentiality of the proceeding, the comments above regarding Sudeaseg also apply to Sudeban.

If the decision of Sudeban is contrary to the interest of the parties, they may file a reconsideration motion before that same authority within 10 business days of the notification of the decision.

If the decision of the reconsideration recourse is again contrary to the request of the parties, or Sudeban does not render a decision within 45 calendar days following the filing of the recourse, the parties may file an annulment claim before the Administrative Litigation National Court of Caracas. They may also file the annulment claim directly against the original decision from Sudeban. In any case, the period to file the annulment claim is also 45 calendar days.

iv Procedures before the National Superintendency of Securities (NSS)

The provisions of the Securities Market Act are mandatory on companies or persons involved, directly or indirectly, in activities related to the processes of issuing, custody, investment and securities brokerage. The operations of government debt securities and credit, issued under the Central Bank of Venezuela Act and the BIA, are expressly excluded.

The NSS is the authority in charge of overseeing the operations of the above-mentioned companies. Merger operations between companies under the control of the NSS must be notified to such agency prior to consummation.
Notifications are entered in the NSS registry of all of the companies involved in the market. The regulation only states that such notification must be made prior to the merger; however, there is no specific time frame in which to do so.

While in this case a possible merger only requires a notification to the competent authority, any decision by the NSS can be appealed either administratively or in the courts in the same manner described above in the case of Sudeaseg decision.

The confidentiality of the documents presented to the NSS is subject to the same regulations as those explained for Sudeaseg.

v Procedures before Conatel

Mergers between telecommunications companies regulated by Conatel are subject to its approval. Further, any change of control transaction of a company holding a concession or administrative authorisation is also subject to authorisation by Conatel.

The Telecommunications Act states that a concession or administrative authorisation to carry out telecommunications services is not transferable by the merger itself. Therefore, in addition to the request to authorise the merger, the interested parties must expressly request authorisation to transfer the concession or administrative authorisation to the new entity or surviving entity if it is different from the one that originally held the concession or administrative authorisation.

A favourable opinion by the Antimonopoly Superintendency is also required to approve the requested merger.

There are no specific time periods specified for the proceeding to authorise mergers by Conatel; therefore, the general term of six months should in theory apply. The confidentiality of the documents submitted in such procedures is subject to the same regulations as those explained for Sudeaseg.

Decisions by Conatel regarding mergers may be appealed before its hierarchical superior, the Ministry Competent in Telecommunications Matters, within 15 business days following the decision; or directly before the Political and Administrative Chamber of the Supreme Tribunal of Justice within 180 days of the decision being notified.

vi Procedure before the competent commercial registry

Regardless of the authorities involved and the merger control procedures that may take place, any merger procedure has to be completed under the formal control of the competent commercial registry.

Except for companies involved in banking activities, the procedure provided in the Commercial Code for the merger of companies starts with the approval by each of the involved companies of the merger operation by a decision of their shareholders.

According to Article 280 of the Commercial Code, unless provided otherwise in the by-laws of the company, a minimum of three-quarters of the registered stocks issued by the company must be represented at the shareholders’ meeting in which the decision is made, and at least half of them should vote in favour of the merger.

A minute of the shareholders’ meeting approving the merger of every company involved in the operation must be filed with the respective competent commercial registries, along with their balance sheets, financial statements and, if applicable, any authorisation or notification that may be required.
After the commercial registries review and authorise the registration of each shareholders’ meeting minute, they are published. The merger will not be considered effective until three months have passed from the day of publication.

During that three-month period, a company’s creditors may file an opposition to the merger. This period may be avoided if the companies involved can prove that all debts have been paid or that all its creditors accept the merger.

In the event that any creditor files an opposition, the completion of the merger is suspended until the opposition is withdrawn or disregarded by a commercial judge.

In the event that no opposition to the merger is filed by any creditor of the companies involved in the operation, the resulting or surviving company acquires all the rights and obligations of the merged companies.

IV OTHER STRATEGIC CONSIDERATIONS

Coordination of merger operations with other jurisdictions depends on the importance of the business of a Venezuelan company that is the object of the transaction or party to it. However, as previously mentioned, unless the companies involved in the transaction are in a specially controlled market, no notification or authorisation is required to take place in Venezuela. This means that a merger could take place globally and no regulatory action would be required in Venezuela, unless it is evident that the merger of the local companies could restrict fair economic competition or produce a dominant situation in a part or the whole of a market.

If the Venezuelan company operates in a controlled market, any corporate change of control upstream must be examined carefully to ensure that it does not trigger a notification or authorisation request obligation in Venezuela.

V OUTLOOK AND CONCLUSIONS

We do not foresee any major developments in the field of merger control in Venezuela, considering the critical economic situation of the country. This, along with the highly restrictive economic regulations imposed by the government on the private sector, has greatly reduced commercial activities in Venezuela.
Appendix 1

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Natalia Almeida’s practice is focused on financial and commercial law. She assists banks and insurance companies in regulatory and compliance matters. She also advises financial and non-financial entities in designing financial products, and structuring and implementing credits, collateral and derivatives. She also participates in merger and acquisition processes.

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Miriam Andreta joined ABNR as an associate in 2007. She graduated in 2006 from the Faculty of Law, University of Gadjah Mada, majoring in civil law.
At ABNR, she has been involved in major transactions relating to financing (including PT Pertamina’s US$1.5 billion, US$2.5 billion and US$5 billion bonds issuances and PT Elnusa Tbk’s bonds issuance), M&A (including representing Bakrie
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Regarding investment projects, Ms Andreta assists various foreign companies in their investment plans for Indonesia, including several Japanese companies, such as Nippon Steel & Sumitomo Metal Corporation, Osaka Steel Corporation, Mitsubishi Corporation, Mitsubishi Heavy Industries, Mitsui Co, Ltd, Kansai Paint Japan, Shimizu Corporation, Toyota Tsusho, Toyota Housing Corporation, Toyota Enterprise Inc, Tokyu Land, Recruit Inc, KDDI, JACCS Corporation, Yazaki Corporation, Mikakuto Co Ltd, Itochu Corporation, Orient Corporation, TIC Inc, Mitsubishi Hitachi Power System Ltd and Gree.

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Peter Armitage is a senior partner in Ashurst Australia’s competition and consumer protection team and has been a partner since 1992. He is recognised as one of Australia’s leading competition law practitioners. He specialises in complex merger clearances in both domestic and international transactions. He also has a long track record of effectively defending clients in investigations and legal actions by the ACCC.

Mr Armitage has advised on competition law issues and obtained merger clearances from the ACCC in numerous acquisitions in the pharmaceutical, hospitals, medical equipment, payments, telecommunications, food ingredients, gas, paper, chemicals, entertainment, sugar, airline catering, metal manufacturing, automotive components, building materials, plastics, explosives, clothing and mining equipment sectors.

Mr Armitage advised Pick n Pay on the merger clearance process for the sale of its Franklins business to Metcash. He is very experienced in working with overseas counsel in the coordination of global merger clearances. For example, he is acting for Office Depot in its acquisition by Staples, and acted for Wyeth in its acquisition by Pfizer, for Google in its acquisitions of DoubleClick and Motorola Mobility, for Adidas in its global acquisition of Reebok, for Boston Scientific in its acquisition of Guidant and for Bucyrus in its acquisition of Terex's earthmoving equipment business.

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Dany Assaf is co-chair of the competition and foreign investment review practice at Torys LLP in Toronto, Canada. He is recognised as a leading expert in competition law, including being named as one of the world’s ‘Top 40 Competition Lawyers Under 40’ by Global Competition Review.

He has extensive domestic and international advisory experience, and has been involved in many of Canada’s highest-profile transactions and investigations in all areas of competition law. He has appeared at all levels of court including the Supreme Court of Canada. He provided testimony on proposed amendments to the Competition Act before the Canadian Senate and on the Investment Canada Act to the Canadian
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Mr Bakker now regularly serves on international commercial arbitration tribunals and is registered with BANI, the Indonesian National Arbitration Board. Mr Bakker graduated from Leiden University in the Netherlands, and is admitted to the Amsterdam Bar. He has published various articles on insolvency and cross-border investment issues, has taught at the Faculty of Law of University of Indonesia and at the Department of Law and Human Rights, and is a regular speaker at conferences on Indonesian legal issues.

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He also provides legal advice in corporate matters and M&A transactions, and advises both local and international financial institutions such as banks, insurance companies and pension funds on issues relating to the legal and regulatory implications of activities in the Israeli financial markets and investments in derivatives and structured products.

He also specialises in Singapore–Israel cross-border transactions and legal activities, and heads GKH’s Singapore practice.

Prior to joining GKH, he worked in a civil law firm dealing with medical malpractice law, and before that served as an officer in the Military Advocate General’s Unit in the legal advice and legislation branch.

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Marta Flores da Silva has been an associate lawyer in the competition department of Cuatrecasas, Gonçalves Pereira, Lisbon, since September 2012, where her main practice focuses on merger control, cartels, state aid and abuse of dominant position. She previously worked as a trainee lawyer in the European law and competition department of Sociedade Rebelo de Sousa & Advogados Associados, Lisbon (2007–2010), and in the antitrust, competition and trade department of Freshfields Bruchkaus Deringer, Brussels (2011–2012).

She holds a law degree from the Faculty of Law of the University of Lisbon (2006), and undertook a postgraduate course in European law at the University Paris I Sorbonne (2007) and a master’s of European law (LLM) from the College of Europe, Bruges (2011).

GERHARD FUSSENEGGER
bpv Hügel Rechtsanwälte OG
Gerhard Fussenegger is a partner at bpv Hügel's Brussels Office. He advises on EU and national antitrust law, merger control law (EU, multi-jurisdictional and national merger filings), distribution law and European law. He represents undertakings in front of national and EU competition law authorities and courts. He graduated from the University of Vienna (1999 Mag iur) and holds a postgraduate degree from King's College London (2001 LLM). Before joining bpv Hügel, Mr Fussenegger worked in the US (Gardner, Carton & Douglas, Chicago) and for the European Commission (DG Competition).
SAMIR R GANDHI
AZB & Partners
Samir R Gandhi is a partner and heads the competition practice at AZB & Partners. He deals with a broad range of competition law and policy issues and represents both multinational and domestic clients before the CCI, the COMPAT and appellate courts in cartel and dominance cases. He has also represented the CCI in all its early litigation, including the first substantive competition case before the Indian Supreme Court. He was part of the advisory team that helped shape the 2011 merger regulations, and routinely advises on domestic as well as multi-jurisdictional filings. The firm has one of the top merger filing practices in India.


He is a graduate of the National Law School of India University, Bangalore, and the London School of Economics and Political Science, where he was a Commonwealth scholar and Mahindra Trust fellow.

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. Effective August 2015, Ms Gotts will serve as a member of the Board of Governors of the American Bar Association, having served as the chair of the ABA Section of Antitrust Law from 2009 to 2010 and in a variety of other leadership positions in the Section, including as the international officer and on the council. Ms Gotts is regularly recognised as one of the world's top antitrust lawyers, including being selected in the 2007 to 2015 editions of The International Who's Who of Business Lawyers, as one of the top 15 global competition lawyers, in the first-tier ranking of Chambers Global Guide and Chambers USA Guide, and as one of the 'leading individuals' in PLC Which lawyer? Yearbook.

Ms Gotts has served as the editor of the ABA's treatise on the antitrust merger review process for the past 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. She serves on the advisory boards of Antitrust and Trade Regulation Report and Antitrust Counselor and Antitrust Report, and as the co-editor of Competition Law International.

Ms Gotts received her bachelor's degree, magna cum laude, from the University of Maryland in 1980, where she was elected to Phi Beta Kappa. Her law degree was
awarded, cum laude, by Georgetown University Law Center in 1984. She currently serves on the Counsel’s Council of Lincoln Center. In 2011, the New York State Bar Association Antitrust Section awarded Ms Gotts the William T Lifland Service Award for her service to the antitrust bar.

**ALEJANDRO GUERRERO**  
*Gibson, Dunn & Crutcher LLP*

Alejandro Guerrero is a Spanish qualified lawyer in the Brussels office of Gibson, Dunn & Crutcher. Mr Guerrero has more than five years of experience in EU competition law, having trained in a merger unit of the European Commission and intervened in complex EU-wide investigations and transactions.

**GÖNENÇ GÜRKAYNAK**  
*ELIG, Attorneys-at-Law*

Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York, and England and Wales (he is currently a non-practising solicitor). He has unparalleled experience in all matters of Turkish competition law counselling with over 18 years’ experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than 10 years ago, Mr Gürkaynak worked as an attorney in the Istanbul, New York, Brussels, and again Istanbul, offices of a global law firm for more than eight years. He also holds a teaching position at the undergraduate and graduate levels at the Bilkent University Law School in the fields of competition law, and law and economics. Mr Gürkaynak heads the competition law and regulatory department of ELIG. ELIG consists of 52 lawyers, 26 of whom are in the competition law and regulatory department. He has had many international and local articles published in English and in Turkish, and a book published by the Turkish Competition Authority.

**SHARON HENRICK**  
*King & Wood Mallesons*

Sharon Henrick is the head of KWM’s Australian competition law and regulatory group, and is working closely with KWM’s Hong Kong-based clients to prepare for the implementation of Hong Kong’s newly enacted Competition Ordinance.

She principally advises clients on large-scale commercial transactions and investigations that have a competition law application in Australia or the Asia-Pacific region.

She assists clients in their dealings with competition agencies in the Asia-Pacific, including the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, the Competition Commission of Singapore and the Korea Fair Trade Commission.

Her recent transactions include obtaining merger clearance from the Australian Competition and Consumer Commission for Nestlé’s acquisition of Pfizer’s infant nutrition business, for which she won ‘Merger Control Matter of the year – Asia-Pacific, Middle East & East Africa’ at the 2013 Global Competition Review Awards.

She also acted for Glencore on its acquisition of Viterra and Citigroup/EMI on the sale of EMI’s recorded music business to Universal Music, and EMI’s music publishing
business to a consortium of investors led by Sony and Mubadala. She acts for British Airways across the Asia-Pacific region. Her other clients include BHP Billiton, Lion (Australia’s largest food and beverages business), Cabcharge, Hanson and the Gladstone Ports Corporation.

Ms Henrick is listed as a leading individual in many directories, including the Asia Pacific Legal 500 (2012), The International Financial Law Review (2012), Global Competition Law Review’s The International Who’s Who of Competition Lawyers and Economists (2013), Chambers Asia Pacific Guide (2013) and DealMakers – 2013 (where she is listed as a ‘Leading Advisor 100’). She is also recognised as a ‘Best Lawyer’ by The Australian Financial Review.

JOAQUÍN HERVADA
DLA Piper
A senior associate specialised in competition law, Joaquín Hervada joined DLA Piper’s litigation and regulatory group in September 2012, having previously worked at Uría Menéndez in Madrid for five years and at Slaughter and May’s London office. He regularly advises clients in merger and infringement procedures, assisting clients during competition on-site investigations as well as with submissions and appeals before Spanish and EU courts and authorities. He is also a professor at the IE University.

CLAUDIA R HIGGINS
Kaye Scholer LLP
An antitrust partner in the firm’s complex commercial litigation department and managing partner of the firm’s Washington, DC office, Claudia Higgins represents Fortune 500 companies in significant antitrust matters, particularly high-profile mergers, acquisitions and joint ventures, as well as private antitrust litigation and civil investigations by the FTC, the US Department of Justice and international regulatory agencies. Her experience in antitrust spans a diverse set of industries, including health-care products and services, consumer goods, defence and aerospace, natural resources and technology.

She joined Kaye Scholer following more than two decades of distinguished service as an antitrust litigator with the Federal Trade Commission (FTC) where she was also assistant director in its Bureau of Competition. During her practice on behalf of the FTC, she was lead counsel in charge of some of the FTC’s most noteworthy merger transactions, particularly those establishing innovation theory in the context of pharmaceutical mergers.

As a member of the antitrust practice, Ms Higgins has been continuously recognised as a leading attorney by Chambers USA. She is also recognised as a ‘Life Science Star’ in Euromoney’s LMG Life Sciences Guide for 2014 as well as Best Lawyers in America 2015 in the area of antitrust law.

SARI HILTUNEN
Castrén & Snellman Attorneys Ltd
Sari Hiltunen has two decades of experience covering a full range of EU and competition law matters. She frequently represents major Finnish and international clients before Finnish and European competition authorities and courts. She is also a frequent lecturer
in competition law seminars and has published a number of articles on competition law as well as a textbook on merger control.

The Legal 500, Chambers Europe, Best Lawyers and PLC Which Lawyer rank Ms Hiltunen among Finland’s leading legal experts. Ms Hiltunen won the International Law Office’s 2015 Client Choice award in the category Competition & Antitrust – Finland.

**MARGARET HUANG**  
*LCS & Partners*

Margaret Huang is a partner at LCS and has extensive experience in antitrust law. She is a member of the Arbitration Association of the Republic of China. She has handled merger notifications and waiver filings with the Fair Trade Commission for all of the firm’s mergers and acquisitions transactions, and has assisted several multinational clients in resolving all of their antitrust law issues in Taiwan. She has also been involved in amendments of Taiwan's Fair Trade Act. Ms Huang has published numerous articles regarding antitrust law issues in professional journals and newspapers.

**MIKKO HUIMALA**  
*Castrén & Snellman Attorneys Ltd*

Mikko Huimala specialises in competition and antitrust law. He regularly advises Finnish and international companies in all aspects of competition law, with a particular focus on matters related to mergers and acquisitions as well as intellectual property.

He has co-authored an in-depth textbook on EU and Finnish competition law (2012), published several articles on competition law and has a postgraduate diploma in competition law economics from King’s College London. He is ranked by Chambers Europe for his work in the field of EU and competition law.

**DANIEL IMADI**  
*Bentsi-Enchill, Letsa & Ankomah*

Daniel Imadi is an associate in the business and industry department at Bentsi-Enchill, Letsa & Ankomah and works closely with Rosa Kudodazi in advising on very high-profile transactions.

**VICTORIA LUXARDO JEFFRIES**  
*Wilson Sonsini Goodrich & Rosati*

Victoria Luxardo Jeffries represents clients from the internet, networking, software, hardware and media industries on a range of competition and consumer protection matters before the Federal Trade Commission, the Department of Justice and the Federal Communications Commission. Her representative clients include Netflix, Google, Seagate, and Limelight Networks. Prior to joining WSGR, she was an attorney in the Federal Trade Commission’s Bureau of Competition in the Mergers II Division.

**JUAN JIMÉNEZ-LAIGLESLA**  
*DLA Piper*

Juan Jiménez-Laiglesia is a partner in the firm’s litigation and regulatory group in the DLA Piper Madrid office. He specialises in EU law, and competition and regulatory law. He has practised in Brussels and Madrid, and has extensive experience in the following areas: joint ventures, strategic alliances, and mergers and acquisitions (on behalf of
both notifying parties and third parties), as well as abuses of dominant position, cartel investigations and state aid matters before the European Commission, the European courts, and the Spanish competition authorities and courts.

Mr Jiménez-Laiglesia is an associate professor of competition at Carlos III University of Madrid and professor of competition law and energy markets at the Instituto de Empresa in Madrid, and also sits on the editorial board of the *Gaceta Jurídica de la Unión Europea y de la Competencia* (EU and competition law gazette). Mr Jiménez-Laiglesia holds a law degree from the Complutense University of Madrid; a degree in European law from the Free University of Brussels; an MBA from the IESE Business School of Barcelona; a degree in political science from the UNED University in Madrid; and a PhD in commercial law from ICADE in Madrid. He is a member at the Madrid Bar Association.

**RICARDO BORDALO JUNQUEIRO**  
*Cuatrecasas, Gonçalves Pereira, RL*

Ricardo Bordalo Junqueiro has been of counsel in Cuatrecasas, Gonçalves Pereira’s competition and EU law department since August 2013.

From 2002 until 2013, he was a lawyer at Vieira de Almeida & Associados, in the competition and EU law department, and from 2005 until 2006, he was in charge of the firm’s Brussels office.

He has wide experience of counselling clients in all areas of competition law, and in particular on behavioural aspects (antitrust), merger control and state aid.

He represents clients in various proceedings before national and European institutions in connection with the abuse of dominant positions, agreements restricting competition, merger control and state aid.

He is a frequent speaker at national and international conferences and seminars on subjects of European and competition law, and on electronic communication sector regulations.

He holds a law degree from the School of Law of the Catholic University (1999) and a master’s (LLM) in community law from the School of Law of the University of Essex (2001), completed an advanced programme on regulation and competition economics at the School of Business and Economics of the Portuguese Catholic University (2004) and also holds a postgraduate degree in community competition law from King’s College London, London University (2005).

**S MURTHY KAMBHAMPATY**  
*Navigant Economics*

Murthy Kambhampaty is a director and principal with Navigant Economics. He specialises in the economic analyses of mergers and antitrust issues, class certification, regulation, commercial damages, patents, infrastructure investment and economic impact analysis. He has testified or provided expert economic analysis in cartel, merger and other antitrust investigations before European and US agencies, in US litigation and arbitration, and on other economic policy issues before US federal and state agencies or legislative bodies.
ELENA KAZAK
_Egorov Puginsky Afanasiev & Partners_

Elena Kazak has vast experience in obtaining clearances from competition authorities with regard to complicated international merger deals. She advises both Russian and international clients on competition law compliance issues, strategic investment law matters and competition law aspects of joint ventures. She also represents clients before competition authorities.

Ms Kazak graduated with honours from the Lomonosov Moscow State University, Faculty of Law. She has a PhD in law, and undertook secondments at Universität Regensburg, Germany, and Universität Salzburg, Austria.

Ms Kazak is a member of the Non-Profit Partnership for Competition Support.

KYOUNG YEON KIM
_Yulchon LLC_

Ms Kyoung Yeon Kim is a partner at Yulchon and practises primarily in the areas of antitrust, mergers and acquisitions, general corporate, and data privacy and security compliance matters. She joined Yulchon as an associate in 2001 and became a partner in 2009.

Ms Kim also worked on secondment at Cleary Gottlieb Steen & Hamilton’s Hong Kong office from 2007 to 2008.

Some of the major projects she participated in are the sale of Hyundai Merchant Marine’s terminal, the sale of Hynix Semiconductor’s display division, Crown Confectionery’s acquisition of Haitai Confectionary & Foods, the joint venture of Samsung Electronics and Samsung SDI for AMOLED business, and the incorporation of Samsung LED, the merger case of KED Korea, the merger case of Lotte Shopping Co, Ltd and GS Retail Co, Ltd, and the merger case of Lotte Shopping Co, Ltd and HiMart Co, Ltd.

KYU HYUN KIM

Yulchon LLC

Mr Kyu Hyun Kim is a partner at Yulchon and practises primarily in regulatory areas, including antitrust and media and communications; he also advises on intellectual property issues. He joined Yulchon as an associate in 2007 and became a partner in 2015. Before joining Yulchon, Mr Kim served as a judge advocate in the Korean Army.

Mr Kim's representative matters include Qualcomm's abuse of dominant market position, Honam Petrochemical's acquisition of Titan, and the global photocopy paper manufacturers' cartel case.

Mr Kim has published many articles, including the Korean chapter of Getting the Deal Through, Telecoms and Media (Law Business Research, 2008–2010, co-authored).

Mr Kim received his LLB from Seoul National University in 2001 and his LLM from University of Michigan Law School in 2012. He is a member of the Korea and New York Bars.

GIEDRIUS KOLESNIKOVAS

Motieka & Audzevičius

Giedrius Kolesnikovas is a partner responsible for the corporate, M&A and tax practice groups at Motieka & Audzevičius. Mr Kolesnikovas’ main focus is legal support in major transactions and investment projects. He is also well known in the market for structuring joint ventures and holding company structures.

The main geographical focus of Mr Kolesnikovas’ work is the Baltic states and CIS markets with his key specialisation industries being the aviation, agriculture, pharmaceuticals, renewable energy, retail and gaming industries. His experience in corporate governance is highly regarded among his clients; thus, he is currently a member of the management boards of Dvarcioniu Keramika (manufacturing) and Nese Group (gaming).

Mr Kolesnikovas holds an LLM from Duke University, School of Law, Fulbright Alumnus; an LLM in international and EU law from Riga Graduate School of Law; a postgraduate diploma in EU law from King’s College, University of London; and a master’s degree in law from Vilnius University.

His working languages are English, Russian and Lithuanian.

ROSA KUDOADZI

Bentsi-Enchill, Letsa & Ankomah

Rosa Kudoadzi is a partner at Bentsi-Enchill, Letsa & Ankomah, a leading law firm in Ghana, and heads the firm’s business and industry department.

Ms Kudoadzi is a corporate lawyer with over 21 years’ experience in legal practice. She specialises in corporate law, mergers and acquisitions, restructuring, structured trade and commodity finance, and corporate finance. She has structured, negotiated and advised on high-profile transactions across a broad range of sectors.

HEINRICH KÜHNERT

bpv Hügel Rechtsanwälte OG

Heinrich Kühnert is a partner at bpv Hügel’s Vienna office. His practice focuses on EU and Austrian antitrust and merger control law, as well as on state aid law. He is
experienced in a broad range of industries, including in particular telecommunications, energy, media, financial services, agriculture and retail trade. Prior to joining bpv Hügel, Mr Kühnert worked as a principal associate in the antitrust, competition and trade group of Freshfields Bruckhaus Deringer. He received his legal education at the Universities of Vienna (Dr iur), Fribourg and Oxford (Mjur).

JAMES A LANGENFELD
Navigant Economics
James Langenfeld is a managing director and principal at Navigant Economics, and is the head of the antitrust and competition practice. He is also an adjunct professor at Loyola University School of Law. As a consultant, he provides economic analyses in the context of litigation, regulation and economic policy that relate to competition and antitrust, intellectual property, class certification, damages and the impact of government actions. In over 25 years as a professional economist, he has done extensive work in many industries, including health care, pharmaceuticals and medical devices, insurance, petroleum, chemicals, motor vehicles, defence and aerospace and tobacco, and on a wide variety of other consumer and industrial products. Dr Langenfeld regularly testifies for private parties and government agencies engaged in litigation and regulatory proceedings at the federal and state levels in the US, as well as in Europe, Canada and other countries. He worked on hundreds of mergers while working at the FTC, and has worked in consulting since leaving the FTC.

MARIUSZ ŁASZCZYK
Linklaters C Wiśniewski i Wspólnicy Spółka Komandytowa
Mariusz Łaszczyk is a managing associate in Linklaters’ Warsaw office. He is a senior lawyer in the competition practice with wide experience in domestic and cross-border competition law work. He advises clients from such sectors as real estate, FMCG, energy, chemicals, banking, pharmaceuticals and postal. He has been involved in various high-profile matters relating to merger control (both domestic and multi-jurisdictional), antitrust (cartels and abuse of dominance) and consumer protection. He has also provided a number of compliance audits as well as compliance training sessions for clients.

Mr Łaszczyk is a graduate of the faculty of law at Adam Mickiewicz University in Poznań and holds a postgraduate diploma in economics for competition law from King’s College London. He is recommended by Chambers Europe as a competition lawyer.

Mr Łaszczyk is a qualified Polish lawyer (radca prawny) and member of the Warsaw Bar.

SEUK JOON LEE
Yulchon LLC
Mr Seuk Joon Lee is a senior foreign counsel and co-vice chair of the antitrust practice group at Yulchon, and primarily practises in the areas of antitrust, medicine and pharmaceutical, and broadcasting and telecommunications. At Yulchon, Mr Lee has handled antitrust matters in all practice areas including cartels, merger reviews, abuses of market dominance and unfair trade practices. For example, Mr Lee has successfully represented many companies in domestic and international cartels involving products and services such as LPG, air cargo, marine hoses, copy paper, beverages, life insurance
and credit rating services. He has also successfully represented many international and domestic companies in merger review cases, including Texas Instrument’s acquisition of National Semiconductor and Lotte Shopping’s acquisition of GS Mart.

As the head of Yulchon’s health-care practice team, Mr Lee has also successfully represented many prominent Korean and international pharmaceutical companies regarding antitrust issues, including unfair trade practices.

Prior to joining Yulchon in 2006, Mr Lee spent over 21 years working for government agencies such as the Korea Fair Trade Commission (KFTC), the Economic Planning Board and the Ministry of Information and Communication. At the KFTC, he held major positions, including as Director of the Investigation Division, the Labelling and Advertising Division, the Business Group Division, the Competition Promotion Division and the Monopoly Regulation Division. He also took a leading role in investigating many historically important antitrust cases in Korea, including abuse of market dominance cases involving Microsoft, Intel and Qualcomm. In addition, Mr Lee took a prominent role in the development of fair trade policies and the revisions of the Monopoly Regulation and Fair Trade Act (MRFTA) and relevant regulations, in particular as they relate to large Korean conglomerates (i.e., chaebols).


Mr Lee received his JD from Syracuse Law School in 1999 and a master’s degree in accounting from Syracuse University Graduate School of Management in 2000. He has been a member of the New York Bar since 2000 and AICPA in New York since 2001.

JEFF LEONG

Jeff Leong, Poon & Wong

Jeff Leong has extensive experience in representing various IPO candidates and public listed companies in capital raisings and other corporate exercises on the Kuala Lumpur Stock Exchange and Singapore Stock Exchange.

He also has experience acting in domestic and cross-border merger and acquisition transactions, joint ventures, venture capital investment and foreign investment transactions in Malaysia, Singapore, Hong Kong, China, Australia, Indonesia, Sri Lanka and Thailand. Mr Leong was instrumental in developing the firm’s highly regarded reputation in corporate securities and investment law in Malaysia, and was involved in establishing industry standards and best practice for due diligence in respect of submissions to the Securities Commission under the Capital Markets and Services Act.
(formerly known as the Securities Commission Act). He is regularly asked to undertake legal due diligence work in mergers and acquisitions, investment and securities offerings by both foreign investors and domestic Malaysian companies. Notably, he has previously acted in the corporate restructuring of one of the largest shipping fleets in the world.

Mr Leong previously assisted the Association of Merchant Bankers in Malaysia to review the due diligence best practices for the Malaysian corporate sector.

He has been ranked by the independent UK-based publication *The Asia-Pacific Legal 500* as a leading individual in the area of corporate and commercial law in Malaysia. In 2011, he was also recommended as an expert in corporate law practice in Malaysia by Global Law Experts.

**FRÉDÉRIC LOUIS**

*Wilmer Cutler Pickering Hale and Dorr LLP*

Frédéric Louis is a partner in WilmerHale’s Brussels office. He has been practising EU competition law for 20 years, including behavioural investigations, litigation in national and EU courts, merger notifications and state aid. He has been involved in some 30 merger filings, including Phase II and complex Phase I EU procedures such as *Alcatel/Lucent*, *LSG Sky Chefs/Gate Gourmet*, *StatoilHydro/ConocoPhillips (JET)* and *Lufthansa/Brussels Airlines*. In 1998, he was voted one of *Global Competition Review*’s ‘40 under 40’.

Mr Louis has represented clients before the European Commission, and the Belgian, Dutch and French competition authorities, and has appeared before domestic courts in Belgium, France and the Netherlands.

**DEVEN LU**

*LCS & Partners*

Deven Lu practises in the areas of intellectual property law and antitrust law. He negotiates and drafts IP-related agreements, compiles and submits applications and notifications related to merger control, and assists clients to resolve antitrust-related issues.

**MANUELA LUPEANU**

*PeliFilip*

Manuela Lupeanu is a senior associate with PeliFilip and specialises in competition and commercial law. Her main areas of expertise include general EU and national antitrust advice on matters including vertical and horizontal agreements, cooperation between competitors in trading associations, assistance before the national competition authority in connection with investigations, national merger control procedures and state aid issues. Industries of particular interest include telecommunications, fast-moving consumer goods, energy, aviation and pharmaceuticals. Highlights of her career have included assisting in relation to competition authority investigations for leading telecommunications operators, a local subsidiary of a European pharmaceutical producer and regional pharmaceutical distributors.

Ms Lupeanu is also involved in offering advice regarding M&A transactions and public procurement.
Paul McGeown is one of the founding partners of WSGR’s Brussels office. With more than 20 years’ experience in private practice and in industry, he advises clients in a wide range of industries on all aspects of European and UK competition law, with a particular focus on complex merger cases and industrial partnerships. Recent representative merger cases include Glencore/Sumitomo/Clermont, Dolby/Doremi, Cypress/Spansion, HP/Aruba and Intel/Altera.

Luis Marín Tobar was admitted to practise in 2007 and is a senior associate at Pérez Bustamante & Ponce (and also a member of the IP & antitrust practice). He obtained his JD at the Universidad San Francisco de Quito, Ecuador, a master’s degree in international legal studies from Georgetown University Law Center and a postgraduate diploma in economics for competition law from Kings College London. Mr Marín Tobar worked as an international associate with the competition disputes team of White & Case LLP in Brussels during 2013.

Jorge Masía holds degrees in law, economics and business administration from Carlos III de Madrid University, and in political science from Complutense University; a master of laws from Northwestern University (Chicago); a master of laws from IE Business School in Madrid; and a master of tax from CEF (Madrid). He is now a senior associate in the litigation and regulatory group at DLA Piper’s Madrid office. Having joined the firm in January 2007, Mr Masia began his professional law career at Ernst & Young, where he rendered professional services between 2006 and 2007 in the areas of corporate and competition law. He is a professor at the IE University.

Lee Mendelsohn is a director at ENSafrica and heads up the firm’s antitrust and competition department. She has 18 years’ experience and specialises in merger control, enforcement and exemptions, compliance and compliance training.

She has acted for the Competition Commission, as well as various major local and international companies across numerous and varied industries.

Ms Mendelsohn’s enforcement practice experience includes cartel and other horizontal practice investigations and prosecutions as well as vertical practice investigations. She also has experience dealing with all manner of investigations, prosecutions, price discrimination matters and abuse of dominance matters. She has taken responsibility for matters under investigation by the Competition Commission, being prosecuted before the Tribunal, and on appeal or review to the Competition Appeal Court and the Supreme Court of Appeal.
In the mergers sphere, she has been involved in complex horizontal and vertical mergers, unsolicited bids, conditions compliance, appeals and reviews before the Commission, Tribunal, Appeal Court and Supreme Court of Appeal.

Ms Mendelsohn has been the lead professional in extensive compliance audits, compliance training programmes, employee amnesty initiatives, dawn raid training, document creation and management techniques and other company policy compliance programmes.

She is the author of numerous articles, and has presented at various domestic and international conferences. She has also lectured at the University of Cape Town's competition law course and is the managing editor of Butterworths Competition Law Reports. She is also a regular contributor to the Business Law and Tax Review and co-authored the South African chapter in the 2010 edition of the Private Competition Enforcement Review.

She is recognised as a leading lawyer by the following reputable rating agencies and their publications: Chambers and Partners Global Guide to the World’s Leading Lawyers 2014, 2013, 2012 – Competition (South Africa); Euromoney Expert Guides – Guide to the World’s Leading Competition and Antitrust Lawyers 2014 – Competition (South Africa); The International Who’s Who of Competition Lawyers & Economists 2014, 2013 – Competition (South Africa); IFLR1000 2014, 2012 – Competition (South Africa); Legal 500’s guide to outstanding lawyers 2014, 2013, 2012 – Competition (South Africa); Best Lawyers 2013, 2012 – Competition (South Africa); Euromoney’s Expert Guides – World’s Leading World’s Leading Women in Business Law 2013 – Competition and Antitrust (South Africa); PLC Euromoney’s Best of the Best 2013 (top 30) – Competition (South Africa); Global Competition Review – Competition; Guide to the World’s Leading Women in Business Law 2012 – Competition (South Africa); Guide to the World’s Leading Competition/Antitrust Lawyers and Economists 2012 – Competition (South Africa); and PLC Which Lawyer? 2012 – Competition (South Africa).

She is a member of the Law Society of the Northern Province’s sub-committee for competition law.

RODRIGO MONCHO STEFANI
Araquereyna
Rodrigo Moncho Stefani has been an associate at Araquereyna since 2010. His areas of practice include administrative law, tax law and administrative litigation. He gained his law degree from the Universidad Central de Venezuela (magna cum laude, 2010). He is a member of the Capital District Bar, and speaks Spanish and English.

SAUL P MORGENSTERN
Kaye Scholer LLP
Saul Morgenstern, chair of the firm’s antitrust practice, litigates complex disputes, class actions and multi-jurisdictional cases before US federal and state courts, international arbitral tribunals, the Federal Trade Commission and the US International Trade Commission, and represents clients in US government, state and foreign investigations. He also advises companies with respect to the antitrust implications of mergers, acquisitions, joint ventures, trade association activities, distribution and pricing programmes, and other aspects of competitor and customer relations. He has represented
clients across a broad spectrum of industries, including the chemical, computer hardware and software, energy, entertainment, insurance, financial, leisure, luxury consumer goods, pharmaceutical, publishing, real estate, telecommunications and toy industries.


REBECCA MOSKOWITZ
Torys LLP
Rebecca Moskowitz’s practice focuses on all aspects of competition law and foreign investment review. She assists clients on matters under the Competition Act, including complex merger reviews, reviewable trade practices and cartel matters, and on foreign investment matters under the Investment Canada Act. Her experience includes both domestic and complex, multi-jurisdictional competition matters. She also advises clients on compliance with the marketing and advertising aspects of the Competition Act, and on developing and maintaining effective compliance programmes.

She has been published in distinguished journals and other well-regarded publications discussing competition law-related matters. She holds a JD from the University of Western Ontario and a BA (with honours) from the University of Toronto.

VASSILI MOUSSIS
Anderson Mōri & Tomotsune
Vassili Moussis is a senior foreign counsel at Anderson Mōri & Tomotsune. He is an English-qualified solicitor and a registered foreign lawyer (Gaikokuho jimu bengoshi) with the Japanese Bar. Prior to joining Anderson Mōri & Tomotsune in Tokyo, he practised EU, UK and international competition law in Brussels and London for close to 10 years at leading UK and US firms, mainly advising on merger control matters and antitrust investigations.

Mr Moussis studied law in Belgium (Licence en droit, 1994) and in the UK, and holds an LLM (1995) as well as a PhD (2003) from University College London on comparative EU and Japanese competition law. He also worked for a year at the European Commission’s Directorate General for Competition as an administrative trainee (1995–1996). At Anderson Mōri & Tomotsune, his practice focuses on EU and international competition law with a particular emphasis on merger control and international cartel matters.

YUSUKE NAKANO
Anderson Mōri & Tomotsune
Yusuke Nakano is a partner at Anderson Mōri & Tomotsune with broad experience in all aspects of antitrust and competition regulation. He has represented a variety of companies with respect to administrative investigations and hearing procedures conducted by the JFTC, as well as in criminal and civil antitrust cases. He has extensive knowledge and
experience in merger control, and was involved in the first foreign-to-foreign merger case against which the JFTC launched an investigation.

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 used to be a lecturer at Hitotsubashi University Law School. He is a co-author of ‘Leniency Regimes’ (European Lawyer Reference, fifth edition, 2015) and the Japanese chapters of various other publications.

MAKSYM NAZARENKO
Sayenko Kharenko
Maksym Nazarenko is a senior associate at the firm focusing on antitrust and competition matters. He also practices corporate law, M&A, foreign investments. The areas of her expertise include all aspects of competition law matters, including merger control, concerted practices, abuse of dominance and unfair competition. He has broad experience in multinational and domestic merger and concerted practice clearance cases, cartel and abuse of dominance investigations, antitrust compliance and unfair competition law issues. Mr Nazarenko regularly represents clients before the Antimonopoly Committee of Ukraine, mainly in cartel investigations and complex mergers and acquisitions. He has been involved in a number of high-profile matters in the following sectors: pharmaceuticals, fast-moving consumer goods, tobacco, transportation, banking and financial, agricultural and chemical industries.

SUSAN NING
King & Wood Mallesons
Susan Ning is a senior partner and the head of the antitrust and competition and international trade groups of King & Wood Mallesons.

In 2003, Ms Ning began advising on antitrust and competition law issues under the Anti-Unfair Competition Law and various competition provisions spread over several pieces of legislation. In 2006, as one of the first practitioners among her peers, she established the antitrust and competition group in King & Wood Mallesons.

Ms Ning’s current practice focuses on three main areas: securing MOFCOM merger clearance for clients, advising on AML compliance issues and antitrust litigation. Since the enactment of the AML on 1 August 2008, she has, together with her strong team of antitrust and competition lawyers, undertaken more than 200 antitrust merger control filings, mostly on behalf of multinational companies.

She has taken a very active role in assisting and advising the government on the AML legislation and its implementing rules, through which she has built and maintained a close working relationship with the antitrust authorities in China.

Both Ms Ning and her antitrust and competition group have received numerous awards and accolades for antitrust and competition work in China. For four consecutive years (2010–2013), she was listed in the International Who’s Who of Competition Lawyers.
ANNA NUMEROVA
Egorov Puginsky Afanasiev & Partners

Anna Numerova has outstanding experience advising on a wide range of antitrust issues, including those related to M&A transactions and the transfer of assets by large local and international companies in Russia and abroad. She also represents clients before the Federal Antimonopoly Service of Russia as well as in arbitration courts, advises on various commercial and corporate law issues, and conducts legal due diligence in sectors such as banking, automotive, telecommunications, FMCG, B2B services and business processes, aircraft and other manufacturing and VoIP services.

Ms Numerova is the chair of the General Council of the Non-Profit Partnership for Competition Support, a member of the Government Commission on Competition and Development of Small and Medium-sized Businesses, and a member of the Advisory Board on Advertising of the Federal Antimonopoly Service of Russia and of the non-profit partnership ‘CIS Competition Support Association’. She also plays an active role in the steering committees of the International Bar Association and the American Bar Association. She is an associate professor at the chair of the Federal Antimonopoly Service at the Higher School of Economics.

She graduated from Moscow Humanitarian University in 2000. She holds a master’s degree in private law from Russia’s School of Private Law (2008) and an LLM in International Business and Economic Law from Georgetown University Law Center (US) (2011).

Ms Numerova is a member of the Moscow Bar Association.

CORMAC O’DALY
Wilmer Cutler Pickering Hale and Dorr LLP

Cormac O’Daly is a special counsel based in WilmerHale’s London and Brussels offices. He has practised for over 10 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 of which have involved remedies, including Cisco/Tandberg.

EDGAR ODIO
Pacheco, Odio & Alfaro

Edgar Odio is a founder partner and the chair of Pacheco, Odio & Alfaro. 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 postgraduates in EU competition law and economics for competition from King’s College, London.

His practice focuses on foreign investment and mergers and acquisitions. He has served as a local consultant for the Competition for Latin America Program (COMPAL) implemented by the United Nations Conference for Trade and Development (UNCTAD) to draft the amendment to the competition law. He served for four years as member of COPROCOM, the local competitions authority. He served as senior adviser in competition for UNCTAD in Geneva, Switzerland, and is a member of the Advisory Group of Experts of COMPAL. In this capacity, he has participated in training and advisory missions to countries including Bolivia and Guatemala. He teaches a competition course at University of La Salle and a postgraduate distance-learning course on competition and intellectual property at UNED, the distance learning university. He is regularly invited to workshops and training sessions by local and multinational companies, and continuously offers advice on competition matters to local and foreign clients.

ALFONSO OIS
DLA Piper

Alfonso Ois joined DLA Piper at the beginning of 2008 as a senior associate in DLA’s EU and competition department. He holds degrees in both economics and business administration from the Pontificia Comillas University of Madrid as well as a law degree from the Universidad Nacional a Distancia. He began his professional career with CMS Albiñana y Suárez de Lezo, where he worked in their London and Madrid offices as a member of the department of public, regulatory and competition law. He is now of counsel in the litigation and regulatory group of the DLA Piper Madrid office. He is also a professor at the Universidad CEU and at the IE University. Mr Ois specialises in antitrust law and merger control. He also has broad experience in government regulation and competition law in the energy and telecommunications sectors.

GERRIT OOSTERHUIS
Houthoff Buruma

Gerrit Oosterhuis is a counsel at the office of Houthoff Buruma in Brussels. 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 North Sea Group/Argos Group, IHC/DEME/Oceanflore and Reggeborgh/Boskalis/VSMC, as well as concentrations in the food and retail sectors such as Euretco/Intres and FrieslandCampina/Zijerveld. 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 Koninklijke Bunge.


PAKDEE PAKNARA
Weerawong, Chinnavat & Peangpanor Ltd

Pakdee Paknara is a partner at Weerawong C&P. He has extensive experience in mergers and acquisitions, power and energy projects, real estate and construction, property funds, international trade, telecommunications, computer technology and software licensing, government bidding and tax-related transactions. He advises local and foreign clients on a wide variety of matters, and specialises in the preparation of documentation for complex commercial transactions, including the reviewing, drafting and negotiation of agreements such as supply, purchase and sale, service, management and employment agreements. Previously, he was a partner at White & Case (Thailand) Limited, prior to which he worked at a respected law firm in Bangkok as head of the commercial and international trade and tax practices. He obtained his LLB degree from Chulalongkorn University and an MSc (taxation) degree from Golden Gate University, US.

MICHAIL PARCHIMOVIČ
Motieka & Audzevičius

Michail Parchimovič is a senior associate in Motieka & Audzevičius’ corporate and M&A practice group. He has experience acting in a wide variety of corporate and capital market transactions, corporate restructurings and joint ventures, with a particular focus on cross-border deals within the EU. However, his key specialisation lies in the management of M&A transactions.

His portfolio includes transactions relating to the acquisition of companies operating in a wide range of industries, including retail, finance, manufacturing, real estate, agriculture, energy and entertainment. His track record includes advising on complex commercial law issues and working hand-in-hand with major local and Scandinavian clients requiring excellent service and an in-depth understanding of their high-value financial transactions. Recent projects he has been involved in include providing legal support to AB Linas Agro, which is involved in the agricultural and food production, processing and marketing chain, in the setting of business sale transactions; advising MCB Finance Group, a multinational group of companies engaged in the consumer credit business, in a bond issuance with a follow-up security arrangement; consulting with Amari Metals Europe Ltd, an international multi-metal distributor with a network of service centres covering the whole of Europe, in the acquisition of 10 stock operators in nine countries from the NASDAQ OMX Helsinki-listed company, Outokumpu, a global leader in stainless steel; and providing legal assistance to AS Alexela Energia, the Estonian energy holding company, on the acquisition of the Veolia waste handling business in Estonia and Lithuania.

Mr Parchimovič obtained his law degrees from Moscow State Industrial University (BA in law summa cum laude, 2002) and Vilnius University (MA in commercial
Simon Peart is a senior associate in Chapman Tripp’s competition and regulatory group. He has extensive experience advising domestic and international clients in relation to the full range of competition and regulatory matters, including regularly acting on complex multi-jurisdictional merger control proceedings.

CARMEN PELI

Carmen Peli is a founding member of PeliFilip. International league tables place Ms Peli as a top-tier competition lawyer in Romania. She has assisted clients in landmark cases in Romania, including the first investigations in the pharmaceutical and the telecommunications industries; the first investigation of an alleged collective dominance; Phase II merger control investigations; state aid issues in the context of privatisations; and vertical integration and unbundling in the energy sectors.

Recent work includes advising a worldwide IT company in an antitrust investigation; advising a leading international mobile communications operator in relation to two investigations; advising a leading pharmaceutical company in relation to investigations by the Competition Council; and advising various clients in relation to structuring of distribution and agency policies, sales, marketing and pricing policies, training, etc.

Ms Peli is a frequent speaker at seminars on Romanian and EU competition law matters, and is the author of numerous articles on Romanian and European antitrust and merger control law.

DIEGO PÉREZ-ORDOÑEZ

Diego Pérez-Ordoñez was admitted to practise in 1996 and holds a doctor of law from the Catholic University of Quito. He completed an undergraduate microeconomics course at the London School of Economics in 1990. Mr Pérez-Ordóñez is a partner with Pérez Bustamante & Ponce (and a member of its M&A antitrust practice). On the academic front, he is a professor of constitutional law (1999–present) at the Universidad San Francisco de Quito.

RASTKO PETAKOVIĆ

Rastko Petaković is a partner at Karanović & Nikolić, and is the head of the regional competition practice group. He focuses on competition, antitrust, trade and telecoms matters, and is rated a highest-ranked competition lawyer by all the principal directories. With a background in economics, he focuses on the most complex antitrust, competition litigation and merger control matters. Mr Petaković is an editor and co-author of the only regional annual publication on competition law (Focus on Competition) and a range...
of other publications (*IFLR*, *Global Competition Review*, *Doing Business in Serbia*, etc.). He teaches competition law at the Belgrade Law Faculty.

**LEBOGANG PHALADI**

*ENSafrica (Edward Nathan Sonnenbergs)*

Lebogang Phaladi is an associate in the competition and antitrust department at ENSafrica. He has acted for various local and international companies in, *inter alia*, the mining, steel, media, retail, forestry, insurance and financial services sectors.

His experience includes advising on the notifiability and compilation of merger transactions to the competition authorities in various jurisdictions, including South Africa, Botswana, Kenya, Malawi, Namibia and Zambia, and to the regional regulatory body COMESA.

His experience further extends to advising on abuse of prohibited practices, dawn raids, compliance training and education programmes in relation to South African competition law. He has conducted compliance audits and due diligence investigations of various corporate entities.

Mr Phaladi co-authored the South African chapter for the fifth edition of *The Merger Control Review*, and has written articles for the *Business Law and Tax Review*. He is also a contributing editor of *Butterworth’s Competition Law Reports*.

**PATTRAPORN POOVASATHIEN**

*Weerawong, Chinnavat & Peangpanor Ltd*

Pattraporn Poovasathien is a senior associate in the corporate and foreign direct investment group of Weerawong C&P. She has extensive experience in a wide variety of corporate and commercial transactions including banking, foreign exchange as well as mergers and acquisitions, particularly in relation to foreign direct investment. Prior to joining the firm, she practised at respected multinational legal and tax consulting and advisory firms providing services in relation to corporate, commercial, investment and securities law. She obtained her LLB and LLM degrees from Thammasat University and a certificate in English legal methods from the University of Cambridge, UK.

**TATJANA POPOVSKI-BULOSKI**

*Polenak Law Firm*

Tatjana Popovski-Buloski is a partner at Polenak Law Firm. She specialises in competition law, corporate law, mergers and acquisitions and litigation. In relation to competition law, she advises and represents clients with regard to the implementation of merger control proceedings at the Macedonian Commission for Protection of Competition that involve domestic or multi-jurisdictional transactions, and proceedings related to abuse of dominant positions. Her experience also involves compliance systems, the contractual aspects of competition and antitrust law, licensing agreements, distribution agreements and cartels in different industries, including telecommunications, energy, construction, pharmaceuticals and aviation.
KAMYA RAJAGOPAL  
AZB & Partners  
Kamya Rajagopal is an associate and member of the competition and antitrust team at AZB & Partners, and is based in New Delhi. She advises on a variety of contentious and non-contentious competition law issues, including compliance mandates. She has been involved in major investigations into cartels and abuse of dominance issues, as well as merger control proceedings before the CCI, the COMPAT, the European Commission, the UK Office of Fair Trading and the UK Court of Appeal. She also has select experience in the financial services sector. She is qualified to practise in India, England and Wales, and is currently awaiting admission to the New York State Bar.

Ms Rajagopal is a graduate of the National Law School of India University, Bangalore, and the University of Pennsylvania Law School, Philadelphia.

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 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 and StatoilHydro/ConocoPhillips (JET). He has handled numerous, sometimes complex, worldwide filings with local counsel, ranging from Brazil and Turkey to Australia and New Zealand. Mr Ratliff has also represented companies before the European courts in competition law cases and works in other EU law areas.

AMADEU RIBEIRO  
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados  
Amadeu Ribeiro is the managing partner of Mattos Filho’s New York office. He has extensive experience representing clients in complex antitrust matters, including merger review cases, government investigations, judicial litigation and general antitrust counselling. He has been recognised as a leading practitioner by numerous publications, including Chambers, Global Competition Review, Legal 500 and PLI. Mr Ribeiro is the only foreign member of the Council of the American Bar Association – Section of Antitrust Law, and a member of the Brazilian Institute for the Study of Competition, Consumer Affairs, and International Trade (IBRAC). He is fluent in English and German.

MICHAEL ROSENTHAL  
Wilson Sonsini Goodrich & Rosati  
Dr Michael Rosenthal is the founder and head of Wilson Sonsini Goodrich & Rosati’s Brussels office. He advises in all areas of EU and German competition law, and regularly represents clients on complex matters before the European Commission as well as the national competition authority and courts in Germany. Dr Rosenthal is listed as a leading competition lawyer in the principal legal directories and is co-author of the book European Merger Control (Rosenthal/Thomas).
JOSE ÁNGEL SANTIAGO ÁBREGO  
*Valdés Abascal Abogados, SC*

José Ángel Santiago Ábrego obtained his law degree from the Instituto Tecnológico Autónomo de México, with special mention.

Prior to joining the firm, he worked in the public sector, where he held offices in the Mexican Federal Competition Commission and in the General Direction of Juridical Affairs of the Executive Secretariat of the Mexican Security System. As part of his work in both entities, he participated in the elaboration and negotiation of constitutional and legal amendments.

He became partner at Valdés Abascal Abogados SC in January 2013. His practice primarily focuses on consultancy, competition and antitrust litigation, regulated industries and *amparo* trials.

Currently, he is an assistant professor of competition law at Universidad Panamericana Law School. He has also acted as an invited professor at the same university, where he held a competition and antitrust seminar, and in the National Institute of Criminal Science.

He collaborated with the University of Houston Law Center on the second edition of *Mexican Law* (Zamora, Cossío, et al., 2004) and is a co-author of the Antitrust volume of the *Encyclopedic Juridical Work*, written as a tribute for the 100 year anniversary of the Escuela Libre de Derecho.

He is a vice-coordinator of the Competition Law Committee of the Corporate Lawyers National Bar Association.

RAHUL SATYAN  
*Azb & Partners*

Rahul Satyan is an associate and member of the competition and antitrust team at AZB & Partner, and is based in Mumbai. He represents clients at the CCI as well as the COMPAT in antitrust investigations. He has been involved in several investigations into cartels and abuse of dominance issues and is also involved in merger control proceedings before the CCI. He has worked on several policy representations to organisations such as the Confederation of Indian Industry and sectoral regulators, as well as to the Ministry of Corporate Affairs, Government of India.

Mr Satyan is a graduate of the Faculty of Law, University of Delhi and the London School of Economics and Political Science.

THEA SUSANNE SKAUG  
*Arntzen de Besche Advokatfirma AS*

Thea Susanne Skaug is a senior lawyer at Arntzen de Besche. She works with the firm’s European and competition law practice group. With a strong background gained from two periods of working for the Norwegian Competition Authority, latterly as legal director, she has gained comprehensive experience within competition law and assists clients from all industries. Ms Skaug represents Norwegian and foreign clients in matters involving domestic and foreign competition authorities.

She has special expertise in all fields of European and Norwegian competition law, including mergers and joint ventures, and anti-competitive practices and abuse of a dominant position. Ms Skaug has represented a number of foreign and domestic...
companies in mergers and acquisitions investigated by the Norwegian Competition Authority, including successful appeals to the Ministry of Trade, Industry and Fisheries and filings to the Commission. In addition, she has considerable experience in compliance audits and in-house competition law training for clients, as well as assisting at Competition Authority dawn raids.

She also works within public procurement law, marketing practices law and particularly within food law.

Ms Skaug acquired international work experience from her work at a law firm in Brussels and the European Commission. She was a member of the State Food Chain Law Committee, which in 2013 proposed a new act to prohibit unfair practices in negotiations in the food supply chain. She was also a leader of the secretariat of the Norwegian Competition Law Reform Commission responsible for drafting the 2004 Norwegian Competition Act.

PIOTR SKURZYŃSKI
*Linklaters C Wiśniewski i Wspólnicy Spółka Komandytowa*

Piotr Skurzyński is a senior associate in Linklaters’ Warsaw office with extensive experience as a competition lawyer. He advises on the full range of both Polish and EU competition law issues, as well as state aid and consumer protection. He has advised in many complex merger control notifications, as well as antitrust proceedings concerning agreements restricting competition or abuse of a dominant position. He has also prepared and delivered a number of competition compliance programmes and trainings. In his work, he focuses on regulated sectors, namely chemicals, energy, telecommunications and transport. He has taken part in a number of projects related to internal audits and antitrust advice for leading global companies from such sectors as telecoms, health care, insurance, FMCG, industrial products and retail.

Mr Skurzyński is a graduate of the faculty of law at Warsaw University and is a qualified Polish lawyer (radca prawny). He is a member of the Warsaw Bar.

He is recommended by *Chambers Europe* as a competition lawyer.

MARCIO DIAS SOARES
*Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados*

Marcio Dias Soares regularly represents domestic and international clients in connection with a wide variety of competition law matters involving many different industries. His practice is focused on both merger filings and anti-competitive conduct investigations. Mr Soares serves as the country representative for Brazil on the International Committee of the Antitrust Law Section of the American Bar Association. He is fluent in English.

PATRICK SOMMER
*CMS von Erlach Poncet Ltd*

Dr Patrick Sommer is head of CMS von Erlach Poncet’s competition & EU practice group. He represents major Swiss and international companies in all aspects of antitrust law, including Swiss and multi-jurisdictional merger control filings, investigations of the Swiss competition authorities and dawn raids. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities. He is a frequent speaker at conferences and regularly publishes on antitrust issues. Mr
Sommer graduated from the University of St. Gallen in 1987 and was admitted to the bar in 1989. He wrote his doctoral thesis on the relationship of Switzerland to the European Union and completed postgraduate studies at the College of Europe in Bruges.

Before joining CMS, he worked for seven years in the legal department of the Swiss multinational group Holcim where he has been promoted to the offices of General Counsel and Secretary of the Board of Directors. Mr Sommer is a member of the international advisory board of the ‘St. Gallen International Competition Law Forum’ and of the ‘Studienvereinigung Kartellrecht’.

Other areas of practice include corporate and commercial law. Mr Sommer is fluent in German, English and French.

PEDRO IGNACIO SOSA
Araquereyna

Mr Sosa is a senior partner at Araquereyna. His areas of practice include corporate law, mergers and acquisitions, international business transactions and litigation.

He gained his law degree at the Andrés Bello Catholic University (1981) and a master’s in comparative law from the National Law Center at George Washington University (1983).

Mr Sosa has been a member on several boards of directors of important companies and business organisations. He has also been an invited professor of corporate governance at the UNIMET and UCAB, and written articles on the subject of corporate governance. Mr Sosa is a member of the Capital District Bar, the International Bar Association, the International Trademark Association and the Inter-American Association of Industrial Property. He speaks Spanish and English.

DMITRY TARANYK
Sayenko Kharenko

Dmitry Taranyk is a counsel at Sayenko Kharenko focusing on antitrust and competition. He practices corporate law and specialises in mergers and acquisitions, foreign investments and privatisation. He regularly advises clients on merger control, concerted practices, abuse of dominance, monopolisation and unfair competition issues. He also counsels on antitrust matters in relation to multinational and domestic acquisitions and joint ventures, including merger clearances by the Antimonopoly Committee of Ukraine. Mr Taranyk is experienced in resolving complex antitrust disputes involving multinational companies, particularly abuse of dominance claims, and is engaged in developing antitrust compliance programmes and policies for many international clients.

TOYIN TELLA-BINUYO
Strachan Partners

Toyin Tella-Binuyo is an associate at Strachan Partners. She works in the Lagos office, and her areas of specialisation include admiralty law, business establishment, intellectual property, dispute resolution, regulatory compliance and general corporate advisory services. She is very familiar with the regulatory requirements for the implementation of merger arrangements and has been involved in due diligence reviews carried out on Nigerian companies in connection with various mergers and acquisitions.
SEBASTIAN TEMPLETON

*Chapman Tripp*

Sebastian Templeton is a solicitor in Chapman Tripp’s competition and regulatory group. His practice covers a broad range of competition and regulatory matters, with particular experience advising clients in relation to merger control and price-fixing issues.

RAFAEL VALDÉS ABASCAL

*Valdés Abascal Abogados, SC*

Rafael Valdés Abascal obtained his law degree from the Universidad Panamericana Law School, where he holds the chair as competition law professor and has been member of its Academic Council.

He began his practice at Santamarina y Steta SC in the corporate law area. He joined the public sector in 1990 where he held office, *inter alia*, as head of the Legal Counselling Office for the Chief of Staff of the President. Later, he served as the executive secretary of the Federal Competition Commission (CFC).

In 1996 he left the public sector to found his own law firm. He has undertaken 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 heads the Competition Law Committee of the Corporate Lawyers National Bar Association, and has been appointed by the CFC as non-governmental adviser for the International Competition Network.

He is ranked as leading lawyer on competition and antitrust in Mexico by, *inter alia*, *Chambers & Partners*, *The Legal 500* and *Who’s Who Legal*.

CARMEN VERDONCK

*Altius*

Carmen Verdonck is a partner in the commercial and competition team at Altius. She advises a wide range of domestic and multinational clients on all aspects of Belgian and EU competition law, including strategic alliances, cartel investigations, the establishment and operation of distribution systems, technology licensing, abuses of dominant positions and state aid. She has also assisted various multinational clients in the design and implementation of compliance programmes and training courses. In merger control cases, Ms Verdonck has assisted various clients in obtaining merger control clearance from the Belgian Competition Authority and the European Commission, and in the coordination of merger filings in numerous other countries. She holds a bachelor’s degree in law 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 President of the Association pour l’Etude du Droit de la Concurrence; a member of the legal committee of the Belgian Franchising Federation; a board member of the International League of Competition Law; and a member of the Women’s Competition Network. Ms Verdonck has been appointed as assessor in the newly formed Belgian Competition Authority. Ms Verdonck is also *maître de conférences* at the University of Liège, and lectures on Belgian competition law in the LLM
 programme in European competition and IP law. She has written numerous articles and other publications on competition law.

**WEIJER VERLOREN VAN THEMAAT**  
*Houthoff Buruma*

Weijer 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 Buruma’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 health-care practice. In 2012, he acted in two out of the three Dutch Phase II hospital mergers and received assignments for litigating merger fines from, *inter alia*, Amlin.


**LUKY I WALALANGI**  
*Ali Budiardjo, Nugroho, Reksodiputro*

Luky I Walalangi joined ABNR in March 2001 and became a partner on 1 January 2009. He graduated from the Faculty of Law, Parahyangan Catholic University, majoring in business law. In 2000, he earned his LLM degree in the Netherlands, majoring in international business law. Prior to joining ABNR, he worked as a foreign trainee with a banking institution in Amsterdam.

Mr Walalangi has been involved in a number of major electricity projects in Indonesia, including the Cirebon Project, Paiton Projects (US$2.5 billion and US$1.6 billion), Sengkang, Tanjung Jati, Central Java Project and Jawa Power, and has extensive regulatory knowledge in these areas. He has also been involved in a number of major financings, including most recently in PT Pertamina’s US$10 billion bonds issuance and US$800 million loan to PT Newmont Nusa Tenggara. His expertise covers antimonopoly issues, corporate restructuring, project and debt financing, land and investment projects as well as oil and gas projects.

Mr Walalangi has been listed by the *Legal 500 Asia Pacific* 2014 as a recommended lawyer in corporate & M&A, banking and finance, and real estate. He is also listed by *Asialaw Profiles* 2014 as a recommended individual.

In investment projects and M&As, Mr Walalangi has been representing various foreign companies in all aspects, including a number of Japanese group companies: Mitsubishi Heavy Industries, Ltd; Toyota Tsusho Corporation; Mitsui Co, Ltd; Itochu Corporation; Nippon Steel Sumitomo Metal Corporation; Osaka Steel Corporation;
PAUL WALTER
Slaughter and May
Paul Walter is a special adviser in the Slaughter and May competition group focusing on marketing and business development. He has represented clients in respect of a broad range of competition cases in front of the UK competition authorities, the European Commission and other competition regulators around the world.

KIYOKO YAGAMI
Anderson Mōri & Tomotsune
Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune working mainly in the fields of antitrust and competition law, foreign direct investment and other corporate legal affairs.

Ms Yagami is a graduate of Chuo University (LLB 2000), Temple University Beasley School of Law (LLM 2001), China University of Political Science and Law (LLM 2002) and Waseda Law School (JD 2007), and is admitted to the Bar in Japan and New York. She worked as a trainee in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of Foreign Affairs of Japan prior to joining Anderson Mōri & Tomotsune in 2008.

K KORHAN YILDIRIM
ELIG, Attorneys-at-Law
K Korhan Yıldırım holds an LLB degree from the Galatasaray University Law School, and he is qualified to practise in Istanbul. Mr Yıldırım is a partner in the competition law and regulatory department of ELIG. He has extensive experience in all areas of competition law, including compliance, vertical agreements, cartel agreements, abuses of dominance, concentrations, joint ventures and compliance programmes. He has represented various multinational and national companies before the Turkish Competition Authority and Turkish courts in investigations, concentration filings and litigations in many sectors. Mr Yıldırım has given numerous legal opinions and training in relation to compliance to competition law rules. He has authored and co-authored many articles and essays in relation to competition law matters. He regularly speaks at conferences and symposia on competition law matters.

Mr Yıldırım was promoted to the firm’s partnership on 1 January 2014.

HAZEL YIN
King & Wood Mallesons
Hazel Yin is a partner in the international trade and antitrust and competition groups of King & Wood Mallesons. Her current practice includes representing clients to obtain antitrust clearance from MOFCOM; advising clients of deal structures from the antitrust perspective; providing antitrust and anti-unfair competition compliance advice on business models, distribution arrangements, pricing policies, etc.; conducting antitrust training and in-house audits; representing clients in antimonopoly administrative
proceedings and anti-unfair competition administrative proceedings; and advising clients in antitrust civil litigations.

She has advised multinationals in a variety of industries, including semiconductor, mining, agriculture, automobile, beverages, high-tech, trading, telecommunications, distribution, aircraft leasing, chemical, pharmaceutical and manufacturing, in both antitrust filings in China to the Ministry of Commerce and on compliance and investigations matters.

Ms Yin also has extensive experience in foreign direct investment matters, and has worked for multinationals on joint ventures, M&A and general corporate matters since 2004.

She received her bachelor of art and master’s of law degrees from Southwest University of Political Science and Law, and her LLM degree from Columbia Law School in New York (Harlan Fiske Stone scholar). She is qualified to practise law in the PRC and the State of New York.

SAI REE YUN
Yulchon LLC

Mr Yun, a founding partner of Yulchon, is the managing partner of the firm. Mr Yun practises primarily in the areas of corporate (with an emphasis on mergers and acquisitions (M&A)), antitrust, tax and governmental relations. Before founding Yulchon, Mr Yun was a prosecutor with the Pusan District Prosecutor's Office, an associate with the law firms of Lee & Ko and Baker & McKenzie (Chicago and New York), and a partner at Yoon & Partners.


Mr Yun has given lectures at both the Judicial Research and Training Institute and Seoul National University Law School. He has served as outside legal adviser to various government agencies such as the Korea Fair Trade Commission (KFTC) and the Ministry of Trade, Industry, and Energy, and was a member of the Competition Policy Advisory Board for the KFTC. In addition, Mr Yun has been on the Legal Advisory Committee of the Korean Broadcasting Commission, and was a technical adviser for the Tax Policy Review Council for the Ministry of Finance and Economy.

In recent years, Mr Yun was selected as one of the world's leading M&A lawyers by the International Financial Law Review, as a practical law company cross-border M&A leading lawyer, as a Chambers Global leading banking and finance/corporate lawyer, as a Global Competition Review leading (competition) lawyer and as one of Asia's leading (competition) lawyers by AsiaLaw. He has been selected by Who's Who Legal as a leading competition lawyer every year since 2004. Additionally, Mr Yun has received a Prime Minister's Award for antitrust administration and a Deputy Prime Minister's Award for tax administration. Mr Yun was also chosen as a leading lawyer of 2009 by the International Financial Law Review 1000.
Mr Yun has successfully represented numerous major corporations, including AMD, Bridgestone Corporation, the Carlyle Group, Citigroup, Daum Communications, GE, Goldman Sachs, Hyundai Capital, Hyundai Merchant Marine, Hyundai Motors, LG Philips LCD, Lotte Shopping, LVMH, RealNetworks, Samsung Electronics, Samsung Life Insurance, SK Corporation and SK Telecom.

ROSS ZAURRINI
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Ross Zaurrini is a partner in the competition and consumer protection team. In addition to experience in advising clients on mergers in a range of industries, he has extensive experience in competition litigation. He also has significant experience in litigating complex competition law issues against the ACCC, conducting civil litigation with respect to consumer protection claims and responding to ACCC investigations.

Mr Zaurrini’s experience includes acting for Australian Cooperative Foods Limited in successfully defending a prosecution by the ACCC for alleged price fixing; acting for a major Australian medical products manufacturer in defending a prosecution by the ACCC for alleged misuse of market power and exclusive dealing; successfully defending two federal court proceedings for alleged third-line forcing in respect of its preferred supplier arrangements and alleged unconscionable conduct against a not-at-fault party; and acting for Samsung in civil litigation with Apple involving complex issues of patent and competition law.
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