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Merger Control 2022

Contributing Editors
Jean-François Bellis and Porter Elliott
Van Bael & Bellis

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Chambers Global Practice Guides

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Published by
Chambers and Partners
165 Fleet Street
London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

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INTRODUCTION

Contributed by: *Jean-François Bellis and Porter Elliott,* ***Van Bael & Bellis***

Merger Control Boom Continues

Well into year three of the COVID-19 pandemic, the business world has (mostly) returned to normal. Customs that were introduced, or at least accelerated, by the pandemic – such as more flexible working and having video calls in place of what used to be in-person meetings – seem likely to remain. But otherwise, business as we've known it is back.

M&A activity remains strong, and with it we have seen continued growth in the volume of deals subject to merger control scrutiny. In the EU alone, the number of transactions notified to the European Commission reached 405 in 2021, the second-highest number ever. After the first four months of 2022, the Commission is on pace to receive over 450 merger notifications, which would be a record. Other jurisdictions are also seeing large increases in merger control activity.

This is not to suggest that this trend will last, as Russia's invasion of Ukraine, supply chain disruptions, inflation and rising interest rates have some experts predicting a looming recession. But for now, at least, M&A activity is booming. This means that obtaining regulatory approval remains a top priority for companies doing deals that fall within the thresholds of one or more of the increasing number of jurisdictions worldwide that have merger control laws. Even Luxembourg, one of the few western countries not to have merger control law, is now considering joining the party.

As a result, the challenges that both in-house and external counsel face on how to obtain merger control approvals as quickly and efficiently as possible have never been more relevant. This is especially true considering that competition regulators around the world continue to get tougher on mergers, and the road to deal approval is only getting longer and even more replete with pitfalls. This makes having a clear guide such as this one all the more essential. Indeed, the Chambers Merger Control 2022 guide provides answers to all of the most pressing questions companies and their lawyers face with every notifiable transaction.

Filing location

For starters, where does the deal need to be filed? This is a crucial question, as there are potentially serious consequences for failing to make a required merger control filing, including the imposition of heavy fines. Unfortunately, it can be tricky to determine where filings are required in a given case. Although an ever-increasing number of countries have some form of merger control law, there remains very little standardisation, with each merger control regime continuing to have its own test to determine which transactions amount to a notifiable event. Some jurisdictions catch only changes in control, while others also cover certain acquisitions of non-controlling minority stakes. Moreover, every jurisdiction has its own set of filing thresholds based on various factors such as the parties' turnover, asset value, market share and the size of the transaction.

Given this, determining where to file requires a careful country-by-country analysis.

As from 1 January 2021, this can mean having to notify a transaction not only to the US Federal Trade Commission and the Japan Fair Trade Commission, for example, but also to both the European Commission and the UK Competition and Markets Authority (CMA), a scenario that did not arise when the UK was still part of the EU. In fact, the CMA has demonstrated such an appetite for active merger control enforcement that it is fair to ask whether the UK merger control regime is in fact "voluntary" in name only.

Other leading merger control authorities include those in Australia, Brazil, Canada, China, Mexico and South Korea, to name but a few. Sorting out where filings are required can be a very significant task.

Substantive reviews

Once it has been determined where merger filings need to be made, the next question is what the regulatory reviews will entail and what needs to be done in order to obtain approval in each jurisdiction. Again, each merger control regime has its own test for determining whether a given transaction will be approved, and while the approach may be broadly similar across jurisdictions, there are nuances in each that are important to understand.

For example, is the legal test for assessing mergers based on maintaining effective competition, avoiding the creation or strengthening of a dominant position, or some other standard? Are vertical mergers (which are starting to garner more attention in the USA, in particular) subject to the same level of scrutiny as horizontal mergers? How are efficiencies considered by the regulator in its assessment? Is the agency's analysis based purely on competition law principles or are there other (eg, public interest) considerations at play? What kinds of arguments are most likely to be persuasive to each authority, and how does one ensure a consistent approach across jurisdictions at a time when international co-operation between regulators is more common than ever?

Timing

Of course, another key issue will be how the regulatory process affects timing. After all, there is no such thing as a deal that is not time-sensitive. In every transaction, there is a sense of urgency and a desire to close as soon as possible, ideally the day before yesterday.

This urgency needs to be reconciled with the fact that, with some notable exceptions, most merger control jurisdictions require closing to be suspended until regulatory approval has been granted. Taking into account the time needed to prepare the filing(s), which in challenging cases can easily be hundreds of pages long (excluding annexes) in certain jurisdictions, the time spent in "pre-notification consultations" with the relevant authorities before formal filing occurs (an increasingly common practice), and the time it takes for the review process(es) to play out, closing can easily be delayed, for a couple of months in simple cases to well over a year in more challenging ones.

Reasonable timelines need to be set for the parties, and expectations must be carefully managed. Once again, every jurisdiction has its own procedural rules and deadlines, so co-ordinating the reviews across the world can be a significant challenge. This is even more the case where remedies are required in order to obtain approval in one or more jurisdictions.

Conclusion

For the above reasons – and many more – navigating a global merger control filing and approval process is a complex business, and it is only getting more complex every year. Merger Control 2022 aims to cut through some of that complexity by providing the reader with a practical guide that covers several of the world's leading merger control jurisdictions in a user-friendly format.

INTRODUCTION

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The sections in this guide cover the key rules relevant for a merger control filing assessment, including:

- what kinds of transactions have to be notified;
- what the filing thresholds are;
- the procedure and timeline for notification and approval;
- the substantive considerations for the authorities; and
- what kind of enforcement record the authorities have.

However, the chapters also go beyond the letter of the law and provide useful information on how these rules are applied in practice. For instance, the sections on applicable fines for failure to file not only cover whether such penalties exist and what their legal maximum is, but, more importantly, whether these penalties are applied in practice and what penalties have been imposed recently.

Although by no means a substitute for seeking advice from experienced merger control counsel, this guide provides clear and practical answers to most of the fundamental questions faced by any company involved in a transaction that requires merger control filings. The reader will find this guide to be a very useful tool for finding their way through the increasingly complex labyrinth of global merger control.

As with any work of this nature, compiling this guide has been a team effort. With this in mind, we would like to thank all the authors for their contributions, as well as the Chambers team for their diligence and professionalism.

INTRODUCTION

Contributed by: *Jean-François Bellis and Porter Elliott,* ***Van Bael & Bellis***

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, Van Bael & Bellis' competition team has assisted clients in cases at both EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

CONTRIBUTING EDITORS

Jean-François Bellis is the co-founder and current chairman of Van Bael & Bellis. He has extensive experience assisting clients in a broad range of antitrust issues, including cartels, dominant market positions, mergers and state aid. Jean-François has written extensively on competition law and has spoken on this subject at numerous international conferences. He is also a professor of EU competition law at the Institute of European Studies of the University of Brussels.

Porter Elliott is the co-head of competition law at Van Bael & Bellis and a leading expert on EU merger control law. For the past 25 years, he has successfully guided dozens of complex and high-profile transactions through the regulatory process, both in Europe and elsewhere. He has also represented third parties in successfully challenging proposed mergers and preventing their approval. Porter regularly teaches, writes and speaks on issues of competition and merger control law and has conducted training for merger control authorities.

Van Bael & Bellis

Glaverbel Building
Chaussée de la Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Tel: +32 2 647 73 50
Fax: +32 2 640 64 99
Email: brussels@vbb.com
Web: www.vbb.com

VBB

AUSTRALIA

Law and Practice

Contributed by:
Elizabeth Avery, Haidee Leung and Marina Yang,
***Gilbert + Tobin** see p.35*

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant merger control legislation in Australia is found in the Competition and Consumer Act 2010 (Cth) (CCA). Section 50 of the CCA prohibits the acquisition of shares or assets that would have the effect, or likely effect, of substantially lessening competition in a market in Australia.

The Australian Competition and Consumer Commission (ACCC), the independent government agency responsible for enforcing the CCA in Australia, has published a range of guidance materials relevant to Australia's merger control regime, which includes:

- ACCC Merger Guidelines 2008 (Merger Guidelines);
- ACCC Informal Merger Review Process Guidelines 2013 (Informal Review Guidelines);
- ACCC Merger Authorisation Guidelines 2017;
- ACCC Media Merger Guidelines 2017; and
- ACCC Use of Section 155 Powers.

1.2 Legislation Relating to Particular Sectors

The relevant legislation for foreign transactions and investments are the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), the Foreign Acquisitions and Takeovers Regulation 2015 (FATR) and the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations (foreign investment rules).

These laws govern the review of foreign investment proposals, including requiring certain foreign investments that meet the relevant criteria to seek approval from the Australian Treasurer. The Treasurer may block proposals that are contrary to the national interest (or national security, as applicable), or apply conditions to ensure a proposal is not contrary to the national interest (or national security, as applicable). The Treasurer's power to approve foreign investments is administered through the Foreign Investment Review Board (FIRB).

There are additional approval requirements for acquisitions in the banking and financial services sector. Special rules in the Broadcasting Services Act 1992 (Cth) governing acquisitions in the media sector were abolished in 2017. Accordingly, acquisitions in the media sector are subject to the foreign investment rules and section 50 of the CCA. The ACCC Media Merger Guidelines 2017 supplement the ACCC's Merger Guidelines by drawing out key areas of focus for the ACCC when assessing mergers in the media sector.

In February 2022, the ACCC raised the possibility of a digital-specific merger control regime as part of its five-year Digital Platform Services Inquiry (DPSI). However, it is unclear if this concept will progress further, including because the concepts overlap with the ACCC's proposal for broader economy-wide merger reforms in August 2021 (see **9.1 Recent Changes or Impending Legislation**).

1.3 Enforcement Authorities

Enforcement by the ACCC

The ACCC is the regulator that enforces and administers Australia's merger control regime under the CCA. The ACCC has sole standing to enforce section 50.

In Australia, it is not mandatory to notify transactions to the ACCC. However, parties regularly notify transactions that fall within the thresholds set by the ACCC in its Merger Process Guidelines on a voluntary basis, including to obtain comfort that the ACCC will not intervene to seek an injunction to block the transaction. The ACCC is also free to review any transaction it wishes, including transactions that are not notified.

If the ACCC opposes a transaction because it considers that the transaction would be likely to have the effect of substantially lessening competition in contravention of section 50, the decision is not binding. However, the ACCC may enforce the decision by applying to the Federal Court of Australia (FCA) for a range of remedies. These include:

- injunctions preventing companies from completing transactions;
- forced divestiture following a merger, or orders to unwind the transaction;
- compensation for customers or competitors; and
- penalties of up to AUD10 million per contravention for companies, and AUD500,000 for individuals.

The ACCC has no independent powers to seek to prevent mergers without a court order.

In practice, if the ACCC opposes a transaction, it will generally request an undertaking that the parties will not complete. If the parties refuse to give such an undertaking, the ACCC may seek an injunction to prevent the transaction proceeding.

The ACCC is also the body that has the power to authorise a transaction, which gives the transaction statutory immunity from action under section 50.

Enforcement by FIRB

FIRB enforces the foreign investment rules. The impact on competition is a relevant factor when FIRB is considering the impact that a foreign investment proposal would have on the national interest. As a matter of practice, FIRB consults with the ACCC on the competition impacts of the foreign investment proposal and FIRB will not grant approval until the ACCC confirms it has no competition concerns.

2. JURISDICTION

2.1 Notification

Voluntary Notification Regime

Australia has a voluntary merger notification regime. However, in practice, parties regularly notify the ACCC of transactions in Australia.

Guidance thresholds

The ACCC's Informal Review Guidelines encourages notification of a merger where:

- the products of the merger parties are either substitutes or complements; and
- the merged firm will have a post-merger market share of more than 20% in the relevant market(s).

Section 50(6) of the CCA defines a market as a market for goods or services in Australia, a State or Territory of Australia, or a region of Australia.

Although parties may proceed with a transaction without notifying the ACCC, in practice the ACCC expects to be notified of transactions that meet the above thresholds. Further, if the transaction requires FIRB approval under the foreign investment rules, ACCC notification is pseudo-mandatory and suspensory because FIRB will not approve the transaction until the ACCC has confirmed it has no competition concerns. The ACCC can also review any transactions it wishes to, even if not notified by the parties.

Industries of interest

The ACCC also encourages parties to notify or transactions within certain industries. For example, the ACCC may identify specific industries of interest in its compliance and enforcement priorities for the upcoming year, and in the course of inquiries it conducts on the direction of the Australian government.

In 2022, the ACCC's priorities are competition and consumer issues arising in relation to:

- essential services (especially in energy and telecommunications);
- financial services, especially payment services;
- energy; and
- digital platforms.

In recent years, the ACCC has also shown particular interest in mergers in the health industry, financial services, telecommunications and digital platforms (including acquisitions by large digital platform services). See **9.3 Current Competition Concerns** for further detail.

Informal Merger Clearance

Parties may seek informal merger clearance from the ACCC for a proposed transaction. Informal clearance does not provide statutory immunity. However, parties who receive clearance will obtain a letter of comfort from the ACCC that it will not take further action in relation to the transaction, provided no material facts later come to light of which the ACCC was not aware. Sections **3.5 Information Included in a Filing** and **3.8 Review Process** provide further explanation of the informal merger clearance processes. The vast majority of mergers in Australia are assessed under the informal merger clearance process, which remains the most flexible, convenient and relatively effective process for obtaining ACCC approval in Australia.

Merger Authorisations

It is also possible for parties to seek merger authorisation from the ACCC. This provides the parties with statutory immunity from any court action taken under section 50 of the CCA. **3 Procedure: Notification to Clearance** provides further explanation on the merger authorisation process.

2.2 Failure to Notify

Penalties for Failing to Notify the ACCC

As it is not mandatory to notify the ACCC of transactions, there are no penalties for not notifying. However, even if parties do not notify a transaction to the ACCC, the ACCC can (and does) investigate transactions that it becomes aware of through other avenues (eg, complaints from market participants, FIRB, other Australian or international regulators, or the media). In these circumstances, the ACCC may take an aggressive approach to investigating the transaction, including issuing statutory notices. If it has serious preliminary concerns about the transaction, it may approach the court for an injunction to prevent completion.

Penalties for Failing to Notify FIRB

There are civil and criminal penalties for failing to notify FIRB if a transaction is caught by thresholds under the foreign investment rules. A foreign person who takes a notifiable action without having first notified FIRB or takes a "significant action" prior to obtaining the Treasurer's approval can be subject to the following.

Criminal penalties

For individuals, up to ten years' imprisonment or a fine of up to 15,000 penalty units (AUD3.3 million). For corporations, up to 150,000 penalty units (AUD33 million).

Civil penalties

The lesser of:

- 2,500,000 penalty units (AUD555 million); or
- the greater of the following: 5,000 penalty units (AUD1.1 million) for individuals or 50,000

penalty units (AUD11.1 million) if the person is a corporation; or an amount determined by reference to the value for the action.

2.3 Types of Transactions

Section 50 of the CCA applies to all direct and indirect acquisitions within Australia of shares and/or assets, including:

- purchases of legal or equitable interests in assets, membership interests, and trust units;
- acquisitions by way of purchase, exchange, lease, hire or hire purchase; and
- joint acquisitions.

The ACCC Merger Guidelines state that section 50 does not apply to asset acquisitions by way of a charge or in the ordinary course of business. A mere internal restructuring will not give rise to a need to file if the acquisitions of shares are all between related bodies corporate as there would be no lessening of competition.

2.4 Definition of “Control”

There is no statutory threshold based on “control”. However, any acquisition of shares and/or assets that raises competition concerns may be investigated by the ACCC.

In practice, the ACCC is most interested in acquisitions that result in a change in control. The ACCC’s Merger Guidelines indicate that the ACCC treats the acquisition of a controlling interest in a company in the same way as the acquisition of all the company’s shares. In most cases, a majority shareholding would deliver control of a company, but minority shareholdings with or without other interests may also be sufficient. Relevant factors include the ownership distribution of the remaining shares and distribution of voting rights.

2.5 Jurisdictional Thresholds

There are no jurisdictional thresholds for the ACCC reviewing a transaction and it is not mandatory to notify, but the ACCC encourages parties to notify transactions that meet its guidance thresholds (see **2.1 Notification**).

Under section 50, the ACCC must find that there is a substantial lessening of competition in a market in Australia, which may include a global market that includes Australia.

Under section 50A, the CCA applies to foreign-to-foreign acquisitions of a controlling interest in a body corporate where that body corporate has a controlling interest in a corporation. If the transaction would not otherwise fall within section 50, the ACCC may approach the Australian Competition Tribunal to declare that the transaction has the effect or is likely to have the effect of substantially lessening competition in a market. To date, section 50A has not been invoked by the ACCC.

2.6 Calculations of Jurisdictional Thresholds

There are no jurisdictional thresholds because it is not mandatory to notify the ACCC. However, the ACCC encourages notification where a potential transaction meets certain thresholds, which is based on the merger parties’ combined shares in the relevant market(s) (see **2.9 Market Share Jurisdictional Threshold**).

Generally, the ACCC considers shares based on the merger parties’ revenues and/or sales volumes in at least three recent years, but it can also consider other measures of shares as appropriate.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

When assessing whether a transaction falls within the ACCC's guidance thresholds, both the acquirer's and the target's shares (including any shares of their related bodies corporate) should be included in the share calculation.

A related body corporate is defined in section 50 of the Corporations Act 2001 (Cth) to mean that where a body corporate is a holding company of another body corporate, a subsidiary of another body corporate, or a subsidiary of a holding company of another body corporate, the first-mentioned body and the other body are related to each other.

The ACCC requires information regarding the parties and their related bodies corporate to undertake the informal merger review and merger authorisation processes. To the extent there are any changes to the acquirer's or the target's businesses that may impact on share calculations after the ACCC has been notified of the transaction, it would be prudent to update the ACCC with this information.

2.8 Foreign-to-Foreign Transactions

As explained in **2.5 Jurisdictional Thresholds**, the merger control regime under the CCA applies to foreign-to-foreign acquisitions where the parties' activities include Australia, such that there could be an anticompetitive effect in Australia (eg, if there are Australian customers or businesses that could be affected).

2.9 Market Share Jurisdictional Threshold

As explained in **2.1 Notification**, while it is not mandatory to notify the ACCC, the ACCC expects to be notified of a merger where:

- the products of the merger parties are either substitutes or complements; and
- the merged firm will have a post-merger market share of more than 20% in the relevant market(s). Consequently, it is possible for transactions that do not include any overlaps (ie, parties do not supply substitutable products) to be captured (eg, because the parties supply complementary products and one party has 20% or more share in their product).

2.10 Joint Ventures

Section 50 of the CCA applies to joint ventures if they involve the acquisition of shares and/or assets (see **2.3 Types of Transactions**).

Joint ventures may also be subject to other provisions of the CCA that relate to restrictive trade practices, such as the provisions regulating cartel conduct (which can attract civil and criminal penalties) or contracts, arrangements or understandings that have the purpose or likely effect of substantially lessening competition (which can attract civil penalties). Exemptions to these provisions may apply if a joint venture meets certain criteria. Alternatively, parties may apply to the ACCC for authorisation of a joint venture for statutory immunity against breaching these provisions.

2.11 Power of Authorities to Investigate a Transaction

The ACCC can investigate any transaction involving the acquisition of shares and/or assets. It may do so by:

- requesting information or documents to be provided on a voluntary basis; and/or
- exercising powers under section 155 of the CCA to obtain information, documents and evidence on a mandatory basis (see **3.10 Requests for Information During the Review Process**).

The ACCC can also apply to the FCA for an injunction preventing completion of the transaction or a remedy more broadly (see **1.3 Enforcement Authorities**).

2.12 Requirement for Clearance Before Implementation

As notification is voluntary, transactions are not required to be suspended until ACCC clearance is granted. However, the ACCC may in some circumstances ask parties to provide an undertaking not to complete a transaction until the ACCC has finished its review (eg, in circumstances where the transaction is not conditional on ACCC clearance and the ACCC has preliminary concerns). In addition, the ACCC may apply to the FCA for an interim injunction to prevent completion.

However, if FIRB approval is required, then the merger parties cannot complete until FIRB approval is obtained, which means that the ACCC clearance process is pseudo-suspensory (see **2.1 Notification**).

Further, merger parties seeking merger authorisation must give an undertaking under section 87B of the CCA not to complete the transaction while the ACCC is considering the authorisation application.

2.13 Penalties for the Implementation of a Transaction Before Clearance

There are no statutory penalties for completing a transaction without ACCC clearance. However:

- If the parties have given the ACCC a court-enforceable undertaking not to complete the transaction until the ACCC has completed its review, then completion may result in a court order directing compliance, penalties amounting to the financial benefit that can be reasonably attributed to the breach, or compensation.
- The ACCC can also apply to the FCA for an injunction to prevent completion of the transaction.

The ACCC may apply to the FCA for a range of remedies post-completion if it considers that the transaction contravenes section 50, including penalties and orders to unwind the transaction (see **1.3 Enforcement Authorities**).

There are also civil and criminal penalties for implementing a transaction without FIRB approval if a transaction is caught by the foreign investment rules (see **2.2 Failure to Notify**).

2.14 Exceptions to Suspensive Effect

As noted in **2.12 Requirement for Clearance Before Implementation**, the ACCC has no power to suspend completion of a transaction.

However, if parties have given an undertaking not to complete until the ACCC has completed its review, then the parties will need to seek ACCC consent to withdraw or vary the undertaking.

In limited circumstances, it may be possible for the parties to negotiate with the ACCC to allow completion to occur subject to a hold separate undertaking, while the ACCC completes its review.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As the Australian merger control regime is non-suspensory (see **2.12 Requirement for Clearance Before Implementation**), merger parties are not prohibited from completing a transaction before it is cleared by the ACCC. However:

- As explained in **2.14 Exceptions to Suspensive Effect**, if parties have given a court enforceable undertaking not to complete until the ACCC has completed its

review, then it must seek permission from the ACCC to vary the undertaking before the transaction can complete before clearance or authorisation.
- Though rare, there is a risk that the ACCC would apply to the FCA to seek an injunction to prevent completion (see section **1.3 Enforcement Authorities**). In 2021 the ACCC successfully obtained its first interlocutory injunction from the FCA, preventing completion of the acquisition of Adora Fertility by Virtus Health pending a final determination on the merits, in circumstances where the ACCC review was ongoing.

If the parties have yet to receive ACCC clearance or authorisation, but wish to close the transaction, it may be possible for the parties to negotiate with the ACCC to allow completion to occur subject to a hold separate undertaking, while the ACCC completes its review. For example, while the ACCC reviewed its acquisition of Atwood Investment Holdings, Dometic Group provided an undertaking to hold a subsidiary of the target company separate until the ACCC completed its review in 2015 so that the rest of the global transaction could close in the interim.

There is no prohibition against completion before the ACCC completes its review unless the parties have given an undertaking not to complete the transaction until that time. In the merger authorisation context, the acquirer must give an undertaking to not complete the proposed acquisition while it is under review.

If the parties complete, merger authorisation is no longer an option as the ACCC cannot authorise completed acquisitions.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

As notification is voluntary, there is no deadline or applicable penalties.

However, if parties have a condition precedent requiring ACCC clearance and a global timetable for completion, they should be mindful of filing early enough to provide the ACCC sufficient time to review. In May 2022, ACCC Chair Gina Cass-Gottlieb commented that merger parties often notify the ACCC later than other jurisdictions due to the absence of a mandatory notification requirement in Australia, which may slow down the global merger clearance process given the need to independently review the transaction.

3.2 Type of Agreement Required Prior to Notification

There is no requirement in the informal clearance process to seek clearance on the basis of a binding agreement. Indeed, in some cases, bidders in an auction process will be required to obtain clearance before the seller will accept an offer. However, the ACCC will not consider a hypothetical transaction.

3.3 Filing Fees

There are no filing fees under the informal merger clearance process.

A merger authorisation application requires a AUD25,000 filing fee. There is also a AUD25,000 fee for lodging an application for revocation and substitution of a merger authorisation. However, no fee applies for applications for minor variation or applications to revoke an existing authorisation.

3.4 Parties Responsible for Filing

As primary liability for a breach of section 50 falls on the acquirer, the acquirer is typically responsible for filing in Australia. However, the seller will bear ancillary liability so will be closely involved in the process.

However, in the course of assessing a transaction, the ACCC can seek information from any party. In particular, the ACCC may seek information or exercise statutory powers to compel the production of information or documents, or to give evidence (see **2.11 Power of Authorities to Investigate a Transaction**).

3.5 Information Included in a Filing

Information Required for Informal Clearance Filing

There is no form for filing through the informal clearance process. However, the ACCC Informal Review Guidelines indicate that the ACCC requires initial information including:

- information about the parties, including their Australian business operations, interests and assets;
- details of the transaction; and
- information regarding market shares, imports, and new entry and expansion in relevant markets.

For mergers which the ACCC considers require a public review, the ACCC will typically ask for a list of key customers and/or supplier contact details.

Information Required for Merger Authorisation Application

To apply for merger authorisation, parties need to provide the ACCC with:

- a public version of their application;
- a signed declaration that the information in the application is true, correct and complete;
- a section 87B undertaking not to complete the transaction while the ACCC is considering the application; and
- the AUD25,000 lodgement fee.

The merger authorisation application requires information including:

- information about the parties;
- details of the transaction;
- transaction documents, including the sale and purchase agreement;
- documents relating to the applicant's decision to acquire the target firm;
- information on the relevant markets;
- the effect of the transaction on competition; and
- public benefits and detriments likely to result from the transaction.

3.6 Penalties/Consequences of Incomplete Notification

Invalid Notification Under the Informal Clearance Process

There are no penalties for an invalid notification under the informal clearance process. However, failure to provide relevant information upfront could cause delays to the clearance process, and if material facts later come to light that would have been relevant to the ACCC's review, it may decide to reopen the investigation.

Invalid Notification Under the Merger Authorisation Process

The ACCC must assess the validity of a merger authorisation application within five business days of receipt.

If it considers that an application is invalid, no penalties apply. However, the ACCC will notify the applicant within the five-business day period and, in most cases, will provide the applicant with an opportunity to rectify and re-submit the application (with no additional fee, provided the AUD25,000 lodgement fee was paid initially).

If the ACCC becomes aware that the merger authorisation application was invalid after the initial five-business day period, it will raise this with the applicant.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Knowingly giving false or misleading information to the ACCC is a serious criminal offence under section 137 of the Criminal Code (Cth).

In the context of a merger authorisation application, it is an offence under section 92 of the CCA for a person to give information to the ACCC in connection with a merger authorisation application if the person knows, or is reckless or otherwise negligent, as to whether the information given is false or misleading. Pecuniary penalties apply for breaches of section 92.

Penalties also apply for refusal or failure to comply with a section 155 notice (such as giving evidence which is false or misleading) in the course of the ACCC carrying out its assessment of the transaction.

The ACCC's clearance letter will state that it does not intend to take further action in relation to the transaction. The letter will contain a standard form caveat that if the ACCC becomes aware of new information or that information it received during the review process is incorrect or incomplete, it may reconsider its decision.

3.8 Review Process

Informal Clearance Timeline

The informal clearance process may involve the following processes:

- Pre-assessment – when parties notify the ACCC of a transaction (or the ACCC otherwise becomes aware of it, eg, through FIRB consultation), the ACCC conducts a "pre-assessment" of the transaction. This is done confidentially and relying on information provided by the parties or otherwise publicly available, rather than conducting public market inquiries. In some cases, if the transaction is not confidential, the ACCC may conduct targeted inquiries (eg, with a selected number of customers and/or suppliers, without publishing the matter more broadly on its website). At the end of the pre-assessment process, the ACCC may decide to clear the transaction or go to public review (or a confidential review, if the transaction is not yet announced). The ACCC's Informal Merger Guidelines indicate that it typically takes two weeks for pre-assessment. However, in practice, a substantive pre-assessment may take around six to eight weeks.
- Public review – if the matter goes to public review, the ACCC will publish a market inquiries letter on its website and seek submissions from interested parties. The letter will contain a brief description of the transaction and a set of questions for submissions to address. The ACCC will also publish an indicative timeline, which will include a "provisional decision date" for the end of its first phase of review. The ACCC's indicative timing for public review is six to 12 weeks from concluding the pre-assessment phase. On the provisional decision date, the ACCC may decide to either clear the transaction or publish a "Statement of Issues" (ie, move to a second phase review).
- Statement of Issues (SOI) – if the ACCC has preliminary competition concerns following market feedback and this has not been resolved during phase one, it will publish an SOI, which sets out the issues that the ACCC are "likely" to be of concern ("red lights") and issues that "may" be of concern ("amber lights"). The ACCC will also establish a sec-

ondary timeline. Parties may need to address the matters raised in the SOI with additional submissions and information. The ACCC's indicative timing for this stage is six to 12 weeksafter publication of the SOI.

The duration of the above stages of informal merger clearance varies from case to case, depending on the complexity of the issues and/or the degree of complaints received from market participants. The ACCC may also suspend its published timeline (ie, "stop the clock") if parties do not meet the ACCC's timeframes for responding to voluntary or statutory information/document requests. The ACCC may also "stop the clock" if parties offer a remedy during the review process and the ACCC requires additional time to consider the proposal, including to test the proposal with relevant market participants.

The overall time period for a highly complex merger is typically in the vicinity of six to eight months (accounting for clock stoppages).

Merger Authorisation Timeline

Under the merger authorisation process, the ACCC is subject to statutory timeframes. The timing certainty afforded by the merger authorisation process is considered to be one of the benefits of the process over informal clearance.

The ACCC has 90 calendar days to make a decision regarding a merger authorisation, starting from the day the ACCC receives a valid application.

If the ACCC does not make a decision within this time, it is deemed to have refused the application. However, the 90-day time limit can be extended with the consent of the merger parties in writing prior to the expiration of the 90 days. The ACCC has extended the timeline in each of the three merger authorisation reviews it has completed since 2017 to the date of this publication, with the longest being 171 days for the proposed amalgamation of BPAY, eftpos and NPPA.

There is the theoretical risk that the ACCC can repeatedly extend its review time and applicants will be left with no choice but to agree to those extensions or else risk a negative decision.

Further, in the context of other authorisation process (ie, authorisation of contracts, arrangements or understandings that may be cartel conduct or may have the purpose, effect or likely effect of substantially lessening competition), the ACCC has generally been diligent in complying with statutory timeframes. Practically, merger authorisation gives the parties more certainty as to timing and potentially a shorter timeframe, compared with informal merger clearance processes, which may involve protracted timeframes for complex transactions. On average in the last three years, informal merger clearance took around 105 calendar days.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions with the ACCC before initiating the informal clearance or merger authorisation processes.

Discussion With the ACCC Before Initiating an Informal Clearance Process

Parties may wish to approach the ACCC for a briefing and/or discussions prior to initiating the informal clearance process. Whether this is appropriate will vary from case to case (eg, if the transaction is significant and/or concerns a sector the ACCC is unlikely to be familiar with, it may be helpful to arrange a "briefing in" session). However, the ACCC is unlikely to give any indication of whether the transaction raises any concerns prior to reviewing the filing, although the ACCC may ask questions and give the parties a better indication of the type of information that the ACCC would consider helpful in its assessment. For more straightforward cases, there is unlikely to be any utility in seeking pre-notification discussions with the ACCC.

Discussion With the ACCC Before a Merger Authorisation Application

The ACCC strongly encourages potential merger authorisation applicants to contact the ACCC for an informal discussion before lodging their application. During such discussions:

- the applicant will have the opportunity to discuss their application and ensure that it is valid and contains adequate information; and
- the ACCC can indicate the issues that the applicant should address in their application, though the ACCC cannot provide its views on the likely outcome.

The ACCC also recommends that the applicant provide a draft application to the ACCC prior to the discussion, which will be kept confidential and will not be placed on the public register.

3.10 Requests for Information During the Review Process

Types of Information Requests

For both the informal clearance and merger authorisation processes, the ACCC may:

- issue voluntary information and/or document requests to the merger parties or third parties before or during its review; and/or
- use its statutory information-gathering powers under section 155 of the CCA (section 155 notice) to compel the furnishing of information, production of documents and/or summon officers to provide oral evidence.

The nature of the voluntary requests and/or section 155 notices depends on many factors, including the extent of overlaps, whether an affected market or sector is one that the ACCC is focused on, and whether the ACCC is aware of complaints from market participants about the transaction.

For section 155 notices, the ACCC may provide a draft notice for the parties to comment on prior to serving the notice.

In June 2022, the ACCC announced that if documents are withheld from a response to a section 155(1)(b) notice on the basis of legal professional privilege, reasons must be provided for each privilege claim. This aligns the section 155 notice process more closely with the subpoena process and the approach taken by other corporate regulators in Australia such as the Australian Securities and Investments Commission.

Impact on Review Timeframe

For both the informal clearance and merger authorisation processes, the clock generally does not stop if the parties respond within the requested timeframes. However, if the parties delay in providing information, the ACCC may delay its review timeline.

A merger authorisation process may also be delayed if the ACCC needs to obtain or review extensive material (eg, a large volume of documents). As noted in **3.8 Review Process**, the ACCC needs the parties' consent to extend the timeline.

3.11 Accelerated Procedure

Under the ACCC's informal clearance process, it is possible for parties to obtain clearance under the pre-assessment phase. This is usually possible for transactions that are not complex and/or where there are clearly no substantial competition concerns (eg, because there are very minimal overlaps). The ACCC's guidance indicates that pre-assessment could take around two weeks (although in practice, a substantive pre-assessment may take six to eight weeks).

To avoid delays in the informal clearance or merger authorisation processes, parties should engage proactively with the ACCC on competition issues (especially if they are raised by overseas regulators), as this can reduce or prevent information requests, and respond to information requests on time.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test under section 50 of the CCA is whether the transaction would have the effect or likely effect of substantially lessening competition.

Section 50(3) contains a non-exhaustive list of "merger factors" that the courts have to take into account (and which the ACCC will also take into account) when reviewing a transaction. The courts and the ACCC may also consider any other relevant factors.

- Import competition: the degree of actual or potential direct competition from imported goods or services, including whether the supply of imports can respond to competitive signals in a timely and sufficient manner.
- Barriers to entry: the likelihood of timely and sufficient entry and expansion in relevant markets post-transaction. The ACCC will more likely have competition concerns where significant barriers exist. However, a transaction need not increase barriers to entry for it to be considered anti-competitive by the ACCC.
- Concentration and market shares: the extent to which the transaction will increase market concentration, including through considering the market shares of the merging parties and their competitors, and whether current market shares are likely to reflect future market share patterns.
- Countervailing power: the degree to which customers have countervailing power, which can weigh against the merged entity's market power. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass the merged firm (eg, through vertical integration and/or sponsoring new entry).
- Ability to increase prices for profit margins: the extent to which the transaction will give the merged entity a greater ability to significantly and sustainably increase prices or profit margins, as this may also indicate that the transaction is likely to give rise to a substantial lessening of competition or result in public detriments that outweigh public benefits. However, the ACCC recognises that increased profitability is not in itself a conclusive indicator of a substantial lessening of competition.
- Substitutes: whether substitutes are available and the degree to which they impose sufficient constraint on the merged entity, having regard to how close the merger parties compete with each other and other market participants, and the ability of rivals to expand. This assessment is related to identifying the relevant product market(s) (see **4.2 Markets Affected by a Transaction**).
- Dynamic characteristics of the market: the degree and extent of any change to the nature of the market in the future. Dynamic changes may result from a range of factors including market growth, innovation, product differentiation and technological changes.
- Removal of a vigorous and effective competitor: vigorous and effective competitors can drive significant aspects of competition, such as pricing, innovation or

product development, even though their own market share may be modest. Therefore, if a transaction involves acquiring a vigorous and effective competitor or a 'maverick', the ACCC will be more likely to consider that the transaction raises competition concerns.
- Vertical integration: if a merger involves both horizontal and vertical competition issues (for example, because one or more of the merger parties operate at more than one level of the supply chain or each of them operates at a different level), the ACCC will assess the merger based on the combined potential horizontal and vertical impacts on competition.

4.2 Markets Affected by a Transaction

Section 50(6) of the CCA defines "market" as a market for goods or services in Australia, a State or Territory of Australia, or a region of Australia.

The ACCC defines markets based on the products and geographic areas that are supplied, or potentially supplied, by the merger parties. It typically focuses on the overlaps between the merger parties in the products and areas supplied, and on their close substitutes.

In relation to substitution, the ACCC is concerned with:

- demand-side substitution, which involves consideration of the likely customer switching behaviour in response to an increase in price, or a decrease in service or quality; and
- supply-side substitution, which involves consideration of behaviour in response.

The ACCC may request and take into account the following information to identify a close product substitute:

- the function, end use, and characteristics of the product;
- cost of switching, and evidence of switching; and
- changes in the product price compared to that of potential substitutes.

In identifying close substitutes of the relevant geographic area, the ACCC may consider:

- the portability of the product (which may depend on its perishability or weight);
- transportation costs;
- the ease, cost or difficulties associated with obtaining the product from alternative regions; and
- changes in price between different geographic sources of supply.

4.3 Reliance on Case Law

While the ACCC in practice will have regard to Australian and overseas case law and/or its previous decisions or decisions by other regulators, it is not bound by them.

However, if the ACCC brings court proceedings, then the court will have regard to, and be bound (as appropriate) by Australian case law.

4.4 Competition Concerns

As discussed in **4.1 Substantive Test**, the ACCC will have regard to the merger factors set out in section 50(3) of the CCA, in addition to other factors it considers relevant to the assessment of whether a transaction will have the effect or likely effect of substantially lessening competition.

The potential theories of harm to competition that the ACCC will assess are set out in the ACCC's Merger Review Guidelines.

Unilateral Effects

The ACCC will consider whether the transaction will give rise to or increase the likelihood of unilateral effects, which is when competitive constraints are weakened or removed such that the merged firm's unilateral market power increases post-merger. A merged firm's unilateral market power may increase if it has the ability and incentive to raise prices, reduce output or otherwise exercise market power it has gained.

Coordinated Effects

The ACCC will also consider whether a transaction will give rise to or increase the likelihood of co-ordinated effects when they assist firms in the market to coordinate their pricing, output or related commercial decisions.

This may occur if a merger:

- reduces the number of firms among which to coordinate;
- removes or weakens competitive constraints; or
- alters the market conditions that make co-ordination more likely.

Vertical Effects

The ACCC will consider the effect on competition of a merger between firms at different levels of a vertical supply chain where the upstream firm supplies an input to the downstream firm's production process. It will consider whether the vertically integrated merged firm would have the ability and incentive to foreclose rivals, for example by:

- charging downstream rivals higher prices for an important input;
- limiting or denying downstream rivals from accessing an important input;
- limiting or denying upstream rivals from accessing customers; and/or
- charging upstream rivals higher prices for accessing customers.

Conglomerate or Portfolio Effects

The ACCC will consider whether conglomerate mergers between firms that interact across related product markets will enable the merged firm to foreclose rivals and reduce competition by bundling or tying products across a portfolio. Typically, a conglomerate firm would be able to do if it has sufficient market power in at least one functional level of the vertical supply chain, or in one of the related markets.

4.5 Economic Efficiencies

Informal Merger Clearance

In the informal merger clearance process, the ACCC does not consider economic efficiencies as part of the substantive test under section 50 of the CCA of whether the transaction would have the effect or likely effect of substantially lessening competition, unless the parties are able to demonstrate the efficiency gain is likely to have an impact on competition by being passed on to consumers in terms of lower pricing, for example.

Merger Authorisation

However, one of the advantages of the merger authorisation process is that the ACCC can grant authorisation if it is satisfied that the transaction:

- would not be likely to have the effect of substantially lessening competition; or
- is likely to result in a net public benefit (ie, the likely public benefit resulting from the transaction outweighs the likely resulting public detriment).

Accordingly, the ACCC may consider economic efficiencies in the course of the merger authorisation process. Merger parties may wish to consider merger authorisation (rather than informal merger clearance) in circumstances where the transaction may be perceived to raise competition issues but would also give rise to material public benefit.

Court Action

Economic efficiencies are not relevant if the ACCC brings court action in relation to a transaction that it considers has contravened section 50 of the CCA.

4.6 Non-competition Issues

The ACCC does not consider non-competition issues as part of the informal merger clearance process.

However, in the merger authorisation process the ACCC will assess whether the transaction is likely to result in a net public benefit, which can include consideration of non-competition public benefits.

4.7 Special Consideration for Joint Ventures

The ACCC considers joint ventures caught by section 50 the same way that it does other acquisitions.

The ACCC's Merger Guidelines note that joint acquisitions of assets by rivals may have coordinated effects (see **4.4 Competition Concerns**). For example, two competitors in a market may participate in a joint venture in another market, which may result in coordinated effects in the first market.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The ACCC does not itself have independent powers to suspend or prevent parties from completing a transaction. However, as explained in **1.3 Enforcement Authorities**, if the ACCC has serious competition concerns with a transaction, and the parties choose to proceed with the transaction without ACCC approval (or notwithstanding ACCC issuing an oppose decision), the ACCC may apply to the FCA for remedies, which include seeking an injunction to prevent completion and/or or an order to divest or unwind following completion.

As explained in **2.1 Notification**, if the transaction requires FIRB approval, notification to the ACCC is pseudo-mandatory and suspensory, because FIRB consults with the ACCC regarding any competition concerns and will not approve the proposed foreign investment until it has received confirmation there are no such concerns from the ACCC.

5.2 Parties' Ability to Negotiate Remedies

Section 87B Undertakings

The ACCC has the power to accept court enforceable undertakings under section 87B of the CCA as a means of remedying competition concerns that may arise from mergers. While it is possible to offer both behavioural and structural undertakings (or a combination of both), the ACCC has expressed that it considers behavioural undertakings are unlikely to sufficiently remedy any competition concerns it may have with a transaction (see **5.4 Typical Remedies**).

Commitments to the FCA

Outside of the ACCC process, it is also possible for parties to offer commitments directly to the FCA during court proceedings; if such undertakings are accepted by the FCA, the ACCC may also accept an 87B undertaking to assist in the monitoring and enforcement of the undertakings accepted by the FCA.

5.3 Legal Standard

Parties may offer any remedies, and there is no legal standard that remedies must be met. However, the ACCC has discretion over whether to accept a remedy. Its Merger Review Guidelines indicate it has a strong preference for structural undertakings (ie, divestitures) over behavioural undertakings, as it considers structural remedies tend to be more straightforward to administer, monitor and enforce.

Further, the ACCC typically prefers remedies to be offered in its standard section 87B undertaking form, which is provided in its Section 87B Undertakings Guidelines.

5.4 Typical Remedies

As the ACCC prefers structural undertakings over behavioural undertakings, it accepts the former more frequently. Between 2021 and May 2022, the ACCC:

- conducted informal clearance reviews of 31 mergers and accepted undertakings in only two, Culligan/Waterlogic and Veolia/Suez, both of which were structural; and
- completed merger authorisation reviews of three transactions and accepted undertakings in two, AP Eagers/Automotive Holdings and the amalgamation of National Payments Platform Australia, BPAY and eftpos, the latter of which was behavioural.

Structural Undertakings

The ACCC Merger Guidelines indicate that generally, a structural undertaking requires all of the following in order to be acceptable to the ACCC:

- a divestiture remedy that is proportionate to the competition concerns and effective in restoring or maintain competition;
- sale of the assets to a viable, effective and long-term competitor;
- procedures for the purchaser to be approved by the ACCC;
- preservation of the value and integrity of the divestiture package, pending divestiture;
- appropriate provisions which would apply if the firms fail in their core obligations;
- appropriate provisions to enable ACCC monitoring, investigation and enforcement (if necessary) to ensure compliance with the undertakings; and
- implementation within a timely manner.

Behavioural Undertakings

The ACCC Merger Guidelines indicate that behavioural undertakings are generally only appropriate if they foster the development or maintenance of effective competitive constraints in the short-term. Permanent or long-term behavioural undertakings are rare.

Recent behavioural remedies accepted by the ACCC include:

- The 2021 behavioural undertaking from Australian Payments Plus in connection with its acquisition of shares in BPAY, eftpos and New Payments Platform Australia. The undertaking includes obligations on Australian Payments Plus to ensure the parties will supply prescribed services, explore and make available certain services, and to agree an industry-wide standard.
- The 2019 undertaking relating to ANZ Terminals' acquisition of GrainCorp Liquid Terminals Australia, which had both structural and behavioural elements. This undertaking required the parties to divest a terminal and ANZ Terminals to not lease further land in a specified area without ACCC consent.
- The 2018 undertakings relating to the acquisition of the majority interest in the WestConnex project by Sydney Transport Partners (a consortium led by Transurban). This undertaking includes obligations on Transurban require Transurban to publish important traffic data to ensure that the transaction would not lessen competition for future toll roads.

The ACCC also recently rejected the long-term behavioural undertaking offered by Google in relation to its proposed acquisition of Fitbit (which it completed in 2021 without ACCC approval). Under the undertaking, Google offered to behave in certain ways towards rival wearable manufacturers, not use health data for advertising and, in some circumstances, and allow competing businesses access to health and fitness data. Though the European Commission accepted a similar undertaking from Google, the ACCC was not satisfied that such a long-term behavioural undertaking could be effectively monitored and enforced in Australia.

In 2020, the ACCC considered a behavioural undertaking offered by Woolworths in relation to its acquisition of a 65% shareholding of PFD Food Services. Though the ACCC received feedback from public consultations that the undertaking would not be effective, it ultimately considered that it was unnecessary as the acquisition was unlikely to substantially lessen competition.

5.5 Negotiating Remedies With Authorities

When to Offer a Section 87B Undertaking

Merger parties can propose an 87B undertaking at any stage of the informal clearance or formal merger authorisation processes.

Although undertakings may be offered upfront, they are more frequently offered after the ACCC has expressed its preliminary concerns to address those concerns. The ACCC will usually conduct public consultation with interested parties on the effectiveness of proposed section 87B undertakings, which may delay its review.

How to Offer a Section 87B Undertaking

The merger party (usually the acquirer) must offer an 87B undertaking based on the ACCC's standard form. The ACCC does not accept changes to the majority of the operational provisions and any amendments must be explained in a submission.

After receiving the offer, the ACCC typically conducts public market inquiries (which can be targeted) with interested parties to test whether the proposed remedy is adequate to address competition concerns raised by the potential transaction, and the level of composition, purchaser and asset deterioration risk associated with the proposed divestiture package. The ACCC will then raise the market feedback with the merger parties and may suggest amendments to the proposed 87B Undertaking to address any issues. The ACCC typically allows for two to three weeks to conduct these inquiries.

5.6 Conditions and Timing for Divestitures

Generally, the ACCC prefers upfront buyers. However, if there is no upfront buyer, the merger parties will generally need to persuade the ACCC that there will likely be sufficient parties interested in purchasing the divested business, and that asset deterioration is unlikely.

In May 2022, the ACCC accepted a divestment remedy without an upfront buyer from Culligan's parent company (Osmosis), in relation its acquisition of Waterlogic. The undertaking requires Osmosis to propose a purchaser for approval by the ACCC.

5.7 Issuance of Decisions

Informal Clearance Decisions

If a transaction is cleared and does not raise significant issues, the ACCC will publish a brief outline of its decision on the ACCC website. This will typically involve a short summary of its reasons and a media release.

The ACCC will publish a public competition assessment (PCA) that outlines the basis for reaching its final conclusion if:

- a merger is cleared and raises important issues that the ACCC considers should be made public;
- a merger is rejected;
- a merger is subject to enforceable undertakings; or
- the merger parties seek such disclosure.

The ACCC aims to publish PCAs within 30 business days of making a decision, but this may be longer in complex matters. It will also provide a letter to the parties stating it does not intend to take further action regarding the transaction.

Merger Authorisation Decisions

The ACCC may grant merger authorisation without conditions, grant authorisation subject to conditions (usually this will take the form of a condition to give and comply with a section 87B undertaking), or deny authorisation.

The ACCC must provide its decision and reasons to the applicant in writing. It will also publish the decision on its public register.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As explained in **1.3 Enforcement Authorities**, the ACCC does not have power to require a remedy or prohibit a transaction, but may clear a transaction if the parties offer a remedy that addresses the ACCC's concerns.

However, between 2018 and May 2022 the ACCC completed informal merger review of 87 transactions, taking the following actions.

- It accepted section 87B undertakings to resolve competition concerns it had with 14 transactions.
- It opposed three transactions. B&J City Kitchen/Jewel Fine Foods was withdrawn, but the remaining two were ultimately completed and led to court proceedings. After the ACCC opposed the TPG/Vodafone acquisition, the parties challenged its decision in the FCA, which declared that the transaction was not contrary to section 50 of the CCA. In Pacific National/Aurizon, the ACCC commenced enforcement proceedings against the parties alleging that they had reached an understanding that would contravene section 50. The Full Federal Court found in favour of the parties, and the ACCC was denied special leave to appeal the decision to the High Court in 2020.
- It did not take enforcement action against two transactions that were completed before the ACCC completed its review (Google/Fitbit and Qube/Newcastle), though it investigated both. Its investigation of Google/Fitbit is ongoing as of the date of this publication, but it announced in March 2022 that it would not pursue enforcement action against Qube.
- It successfully obtained an injunction from the FCA to restrain the Virtus/Adora transaction from completing, its first such injunction since 1994.

See **9.2 Recent Enforcement Record** for further detail on the ACCC's enforcement and investigation activities.

It is not uncommon for the ACCC to clear foreign-to-foreign transactions subject to remedies. For example, it recently cleared the acquisition of Waterlogic by Culligan, both of which are based overseas, subject to a structural undertaking.

The ACCC has not recently opposed any foreign-to-foreign mergers, but the Trade Practices Commission (which was merged with the Prices Surveillance authority to establish the ACCC in 1995) has done so in the past. For example, the Commission brought action against Gillette/Wilkinson Sword in 1992 and the FCA found that, notwithstanding that the transaction was entered into overseas, section 50 was applicable and there was evidence that it had been breached.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

A clearance decision will cover related arrangements that are legitimately part of the transaction, as the ACCC will assess whether the acquisition, including the arrangements substantially lessens competition, compared to the world without the acquisition and arrangements.

Any arrangement which is not legitimately related to the transaction will not be covered by the ACCC's review and the parties may need to seek separate authorisation if the arrangement would otherwise breach other CCA provisions, such as the prohibitions on cartel conduct or other contracts, arrangements and understandings that have the purpose, or likely to have the effect, of substantially lessening competition.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The ACCC may reach out to third parties such as customers and competitors of the merger parties as part of its assessment of a transaction in both the informal clearance and merger authorisation processes (see **7.2 Contacting Third Parties**).

Any party may contact the ACCC to voice concerns about a transaction, including in response to a market inquiries letter or to make a complaint even if the transaction has not been notified. Third parties may make submissions and provide information and/or other supporting evidence.

For merger authorisations, third parties can make submissions to the ACCC, which are published on its register.

While the ACCC is the only entity able to obtain an injunction for a potential breach of section 50 of the CCA, other parties may seek other remedies, including declarations and damages, and the ACCC may request third parties to give evidence in any proceedings.

7.2 Contacting Third Parties

In the pre-assessment stage of an informal clearance process, the ACCC may conduct limited targeted inquiries if the transaction is not confidential. It will typically ask parties to provide contact details (eg, of a selection of customers) and the ACCC will reach out to them individually for telephone calls.

In the course of a public review in the informal clearance process (if the transaction is not pre-assessed), and in the merger authorisation process, the ACCC will typically undertake more rigorous inquiries of third parties by:

- conducting targeted inquiries by contacting customers and/or competitors; and/or
- conducting public market inquiries by publishing a market inquiries letter on its public register to ask interested parties to make submissions. The ACCC will also typically reach out directly to the merger parties' key customers.

The ACCC may seek the views of third parties on not only the transaction but also to test any remedies offered by the merger parties.

7.3 Confidentiality

Confidentiality Under the Informal Clearance Process

During the pre-assessment stage of the informal clearance process, the ACCC does not publish information regarding the transaction. However, if it decides to commence public review, it will place non-confidential information regarding the transaction on the public register. The ACCC provides merger parties with an opportunity to make confidentiality claims over information published on the register (such as the market inquiries letter).

The ACCC does not publish submissions it receives in the course of the informal clearance process. However, the ACCC will provide the merger parties with an anonymised summary of the feedback it receives during market inquiries.

Confidentiality Under the Merger Authorisation Process

The ACCC publishes merger authorisation applications on its public register. However, the merger parties can claim confidentiality over material in the application and provide the ACCC with a redacted version of the application for publication.

Confidentiality Generally

Under both the informal clearance and merger authorisation processes, the parties may claim confidentiality over information and documents provided to the ACCC. The ACCC considers requests for confidentiality on a case-by-case basis, and accepts confidentiality information on its usual terms (which relate to the ACCC's use of the information and disclosure to external advisers, consultants and third parties) (see section 2.43 of the ACCC Informal Merger Guidelines and section 5.9 of the ACCC Merger Authorisation Guidelinesfor details).

7.4 Co-operation With Other Jurisdictions

The ACCC, being party to a number of co-operation agreements with international competition and consumer agencies and governments, co-operates closely with regulators in a number of jurisdictions. These include:

- the United Kingdom's Competition and Markets Authority;
- the United States Federal Trade Commission and Department of Justice;
- the New Zealand Competition Commission;
- the European Commission;
- the Canadian Competition Bureau;
- the Ministry of Commerce of the People's Republic of China;
- the Competition Commission of India; and
- the Fair Trade Commission of the Republic of Korea.

The ACCC may consult with other regulators regarding a transaction. Where discussions do not involve protected information (such as commercially sensitive or confidential information), the ACCC may do so without seeking permission from the merger parties.

However, where the ACCC wishes to share or seek confidential information, then it must seek confidentiality waivers from the parties (ie, permission to handle the information). The ACCC will typically ask parties to sign its standard form waiver for most transactions that are being considered by overseas competition regulators.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Appealing Informal Clearance Decisions

There is no right of appeal the ACCC's decision not to grant informal clearance. However, merger authorisation may be sought at any time during the informal clearance process or after the ACCC announces its decision to oppose the transaction.

Further, if the parties object to the ACCC's opposition to the transaction, they can seek a declaration from the FCA that the transaction does not breach section 50. For example, after the ACCC opposed the merger of TPG Telecommunication and Vodafone Hutchison Australia, the FCA declared in 2020 that the merger would not substantially lessen competition.

Prior to the 2017 reforms to Australia's competition laws following the 2015 Competition Policy Review (the Harper Reforms), merger parties could seek authorisation from the Australian Competition Tribunal if the ACCC did not clear the transaction (or if the parties believed that the ACCC was likely not to clear the transaction). For example, in 2016 the Australian Competition Tribunal granted Sea Swift authorisation to acquire asserts of Toll Marine Logistics (subject to conditions) despite the ACCC's opposition to the transaction.

For informal review, even if the ACCC decides to oppose a transaction, the parties are not prohibited from completing the transaction. However, such a decision is a strong signal that the ACCC will initiate court action to prevent completion.

Appealing Merger Authorisation Decisions

Merger authorisation decisions of the ACCC are subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines (90 days to make its decision, extended to 120 days if new information is admitted).

The Tribunal will make its decision based upon the materials that were before the ACCC, but it has the discretion to allow or request further evidence that was not available at the time of the ACCC's decision or to address new circumstances.

8.2 Typical Timeline for Appeals

As mentioned in **8.1 Access to Appeal and Judicial Review**, the appeal of a merger authorisation decision is governed by a strict timeline of 90 days that may be extended to 120 days.

Since the Harper Reforms, no merger authorisation decisions have been appealed to date.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have a right to seek an injunction for a breach of section 50 but may seek other remedies, as noted above.

Third parties may apply to the Australian Competition Tribunal for a review of an ACCC merger authorisation decision. However, they must explain their interest in the decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

Merger Authorisation

The ACCC's power to grant merger authorisation was the result of the 2017 Harper Reforms. Merger authorisation was previously the responsibility of the Australian Competition Tribunal. Under the current laws, merger parties cannot seek authorisation in the Tribunal in the first instance, but they may seek a review by the Tribunal of an ACCC decision to refuse authorisation.

ACCC's Merger Reform Proposals

In August 2021, the ACCC announced its economy-wide merger reform proposals, outlined below. It is also worth noting that the ACCC has raised the possibility of a creating merger control regime specific to digital platforms, which would have the elements similar to what is being proposed economy-wide (but applying only to the digital sector).

However, the ACCC's proposals are preliminary and at a conceptual stage, and any such changes would require a change to legislation. As at the date of this publication, no draft legislation has been proposed. Further, the proposals were announced under the previous ACCC Chair and it remains to be seen whether or the extent to which these reforms will be progressed under the new Chair Ms Gina Cass-Gottlieb, who commenced in March 2022.

New merger review processes

The ACCC has called for a new merger review process to replace the existing voluntary regime and its options for clearance (including informal merger review and merger authorisation) with a mandatory and suspensory regime. Under the proposed system:

- all acquisitions above specified thresholds would be required to be notified the ACCC;
- completion of the notified acquisition would be prohibited until clearance is granted; and
- the ACCC would have a "call-in" power to formally review acquisitions that fall below the thresholds.

Changes to the substantive merger test

The ACCC has also proposed four main reforms to the merger test:

- Updating the merger factors to focus on structural conditions for competition that are changed by the acquisition to the detriment of competition, as well as the inclusion of new factors that address whether the acquisition may result in the loss of potential competitive rivalry and/or increase access to, or control of, data, technology and other significant assets.
- Defining the term "likely" in section 50 of the CCA to mean "a possibility that is not remote," which would mean that establishing contravention of section 50 would not require a finding on the balance of probabilities that there is a real commercial likelihood of an SLC.
- Inclusion of a deeming provision that acquisitions involving substantial market power will substantially lessen competition. The deeming provision would apply where one merger party has substantial market power, and as a result of the acquisition, that position is likely to either be entrenched, materially increased or materially extended.
- Consideration of other agreements between merger parties as part of the SLC assessment to prevent parties from taking steps to change the counterfactual or take advantage of the anti-overlap provisions in section 45 of the CCA.

9.2 Recent Enforcement Record

Recent ACCC Review Record

Although the ACCC conducted public reviews of 31 mergers between 2021 and May 2022, it did not oppose any and:

- four mergers were withdrawn: Virtus/Adora, Aon/Willis Tower Wilson, Cargotec/Konecranes, and OneFortyOne Plantations/World Timberfund Australia Trust;
- one merger was given “no decision” by the ACCC: after Google completed its acquisition of Fitbit without ACCC approval in January 2021, the ACCC closed its review without a decision and commenced an investigation into the transaction; and
- one merger was cleared subject to an undertaking (Culligan/Waterlogic).

Recent ACCC Enforcement and Investigative Action

Noting that there are no fines or penalties for failing to notify, the ACCC has historically had limited success in taking action in the courts in relation to mergers. As mentioned in **5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**, the ACCC was unsuccessful in the high-profile enforcement proceedings that it brought against the merger parties in Pacific National/Aurizon for alleged breaches of section 50 of the CCA.

The ACCC does not always commence enforcement action where parties complete a reviewed transaction without ACCC approval. For example, the ACCC has not announced any enforcement action against Google for completing the acquisition of Fitbit in January 2021 without ACCC approval. It also investigated Qube/Newcastle Agri Terminal after the parties completed the transaction before the ACCC had completed its review, but announced in March 2022 that it would not pursue enforcement action against Qube.

However, the ACCC has been able to use the informal clearance process to prevent mergers that it considers raises competition issues, either because the parties withdraw or provide remedies to address the concern (primarily via divestiture). Notably, in 2021, the ACCC successfully obtained an interlocutory injunction to restrain the Virtus/Adora merger.

9.3 Current Competition Concerns

As discussed in **2.1 Notification**, the ACCC identifies competition concerns in its compliance and enforcement priorities and in its inquiries. In his speech on the ACCC’s 2022-2023 compliance and enforcement priorities, the then-Chair Rod Sims observed the high levels of merger and acquisition activity in Australia and expressed concerns around the adequacy of the current merger control regime in Australia (see **9.1 Recent Changes or Impending Legislation** regarding the ACCC’s proposed reforms). The ACCC’s current priorities include competition and consumer issues arising in relation to:

- essential services (especially in energy and telecommunications);
- financial services, especially payment services;
- energy; and
- digital platforms.

The ACCC has expressed it is particularly focussed on acquisitions by large digital platforms with market power, in particular acquisitions that protect or extend the market power of large digital platforms, such as acquisitions that enable platforms to expand into related markets. The ACCC is exploring the impact of these acquisitions on competition in its ongoing DPSI.

In recent years, the ACCC has also shown particular interest in mergers in the health sector (for example, it obtained an interlocutory injunction in 2021 to prevent the acquisition of

Adora Fertility by Virtus Health), financial services and in transactions in the digital and data space (such as MYOB/GreatSoft, Dye & Dun/Global X, Salesforce/Slack, and Google/Fitbit).

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AUTHORS

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Gilbert + Tobin

Level 35, Tower Two, International Towers
Sydney, 200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
Email: info@gtlaw.com.au
Web: www.gtlaw.com.au

Trends and Developments

Contributed by:
Elizabeth Avery, Haidee Leung and Marina Yang
Gilbert + Tobin see p.42

Review and Clearance Trends

Informal merger clearance reviews

There have been high levels of merger and acquisition activity in Australia in recent years, with record numbers of mergers being notified to the ACCC. According to the ACCC, 472 mergers were notified in 2021, up 41% compared to 2020. It considered 63% more mergers in 2021 than the average over the last five years.

Consistent with previous years, the vast majority of these mergers were considered in pre-assessment. The ACCC conducted public reviews of 31 mergers between 2021 and May 2022:

- No mergers were opposed by the ACCC. However, the ACCC successfully sought an interlocutory injunction in the Federal Court of Australia to prevent the acquisition of Adora Fertility by Virtus Health in 2021.
- Four mergers were withdrawn by the parties: Virtus/Adora, Aon/Willis Tower Wilson, Cargotec/Konecranes, and OneFortyOne Plantations/World Timberfund Australia Trust.
- Five mergers were cleared following the ACCC publishing an SOI, without remedies. While a behavioural undertaking was offered by Woolworths in relation to its acquisition of a 65% shareholding of PFD Food Services, the ACCC ultimately considered it was unnecessary as the acquisition was unlikely to substantially lessen competition.
- One merger was given “no decision” by the ACCC: Google completed its acquisition of Fitbit without ACCC approval in January 2021, resulting in the ACCC closing the review without a decision. Though the ACCC has commenced an investigation into the transaction, it has not announced any enforcement action.

Merger authorisation

The ACCC’s power to grant merger authorisation remains relatively new, having resulted from the 2017 Harper Reforms. Merger authorisation was previously the responsibility of the Australian Competition Tribunal, and parties could seek authorisation regardless of whether the ACCC had reviewed the transaction (or whether the ACCC had cleared the transaction). For example, in 2016 the Australian Competition Tribunal granted Sea Swift authorisation to acquire asserts of Toll Marine Logistics (subject to conditions) despite the ACCC’s opposition to the transaction.

Under the current laws, merger parties can no longer bypass the ACCC and seek authorisation in the Tribunal in the first instance. However, parties may seek a review by the Tribunal of an ACCC decision to refuse authorisation.

Since 2017, the ACCC has completed merger authorisation reviews of three transactions (Gumtree/Cox, AP Eagers/Automotive Holdings and the amalgamation of National Payments Platform Australia, BPAY and eftpos). It is currently considering an authorisation application from Telstra and TPG regarding spectrum usage and network services.

Undertakings

The ACCC has long preferred structural undertakings over behavioural undertakings and has continued to do so in recent years. Between 2021 and May 2022, the ACCC:

- conducted informal clearance reviews of 31 mergers and accepted undertakings in only two, Culligan/Waterlogic and Veolia/Suez, both of which are structural; and
- completed merger authorisation reviews of three transactions and accepted undertakings in two, AP Eagers/Automotive Holdings and the amalgamation of National Payments Platform Australia, BPAY and eftpos. The latter was a rare undertaking that was purely behavioural in nature.

Timing of notification

While Australia has a voluntary merger control regime and there are no deadlines for notification, the ACCC has indicated that it expects parties to engage with it early and to provide it with sufficient information to allow it to make its assessment (including as to any proposed remedies). This reflects the ACCC's views that merger parties are taking a strategic approach to seeking clearances in multiple jurisdictions by focusing efforts on a key jurisdiction while "marking time" in others until clearance is granted in the key jurisdiction.

In a keynote address at the Pre-International Competition Network Forum in Berlin, the ACCC Chair Ms Cass-Gottlieb expressed views that the ACCC was often approached "comparatively late" in relation to multi-jurisdictional transactions, due to the absence of a mandatory notification requirement in Australia. While she acknowledged that "in some cases there may be legitimate reasons for this approach", she stated that "in others there may not be… this approach in most cases simply slows the entire process down". Ms Cass-Gottlieb noted that "agencies make independent decisions and so can reach different conclusions even if they have engaged constructively with each other during their processes".

Enforcement and investigation

The ACCC has historically had limited success in taking action in the courts in relation to mergers. In Pacific National/Aurizon, the ACCC commenced enforcement proceedings against the parties alleging that they had reached an understanding that would contravene section 50. The Full Federal Court found in favour of the parties, and the ACCC was denied special leave to appeal the decision to the High Court in 2020.

The ACCC does not always commence enforcement action where parties complete a reviewed transaction without ACCC approval. In 2021, the ACCC launched two post-merger enforcement investigations into the Fitbit/Google and Qube/Newcastle Agri Terminal transactions, both of which were completed before the ACCC had completed its review. In the latter, the ACCC stated that it had "not provided sufficient time or information to assess the competitive impact of the transaction" (a sentiment it would later repeat in relation to the Virtus/Adora acquisition that it successfully restrained). In March 2022, the ACCC announced that it would not pursue enforcement action against Qube, but would continue to monitor developments in the bulk grain export industry that the parties are involved in.

Since August 2020 the ACCC no longer publishes information regarding its investigations into completed mergers on its merger registers as a matter of course. This means that the commencement and progress of such investigations is now opaque unless the ACCC publishes this information in media releases.

Despite its limited success with enforcement action in the courts, the ACCC has been able to use the informal clearance process to prevent mergers that it considers raises competition issues. As mentioned above, the ACCC successfully obtained an interlocutory injunction to restrain the Virtus/Adora merger in 2021. This was the first time the ACCC had obtained such an injunction since 1994. Noting that Virtus had provided "very limited information" in its notification, the ACCC sought and was granted an interim injunction. After the FCA granted an interlocutory injunction to prevent completion before the proceedings brought by the ACCC were finalised, the parties withdrew their transaction.

The then Chair pointed to these proceedings as an indication of the need for reform to the informal merger clearance proceedings, noting that "being forced to take urgent court proceedings added significant timing pressure, additional cost and complexity to this matter".

The ACCC's approach to these recent transactions reflects a growing sensitivity about the notification process and providing it with what it considers to be sufficient time to conduct a public review. Both timing and comprehensive engagement with the regulator are of key strategic importance for any transactions involving material competitive overlaps, especially in light of the ACCC's broader push for reforms to Australia's merger control regime (which are discussed below).

Areas of interest

The ACCC identifies competition concerns in its compliance and enforcement priorities and in its inquiries. In his speech on the ACCC's 2022-2023 compliance and enforcement priorities, the then Chair Rod Sims observed the high levels of merger and acquisition activity in Australia and expressed concerns around the adequacy of the current merger control regime in Australia. The ACCC's current priorities include competition and consumer issues arising in relation to:

- Competition and consumer issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications.
- Promoting competition and investigating allegations of anti-competitive conduct in the financial services sector, with a sharpened focus in 2022-23 on payment services.
- Competition, consumer and fair trading issues relating to the digital economy.
- Acquisitions by large digital platforms. The ACCC is particularly focussed on acquisitions by large digital platforms with market power, in particular acquisitions that protect or extend the market power of large digital platform, such as acquisitions that enable platforms to expand into related markets. The ACCC is exploring the impact of these acquisitions on competition in its ongoing five-year Digital Platform Services Inquiry (DPSI), in which it has raised the possibility of a digital-specific merger control regime (as discussed below).

In addition to acquisitions by large digital platforms, the ACCC has also demonstrated interest in transactions in the digital and data space more broadly, such as MYOB/GreatSoft, Dye & Dun/Global X, Salesforce/Slack, Google/Fitbit, and its current review of Microsoft/Activision Blizzard. The ACCC has shown particular interest in theories of harm relating to access to data, which it raised in Google/Fitbit and is continuing to explore in its DPSI.

In recent years, the ACCC has also shown particular interest in mergers in the health sector. These included Virtus/Adora and Liverpool Partners/Genea, which involved fertility clinics, and Wesfarmers/Australian Pharmaceutical Industries, Mylan/Upjohn, iNova/Juno, GlaxoSmithKline/Pfizer and Arrow Pharmaceuticals/Apotex Pharmaceuticals in the pharmaceuticals space.

ACCC's merger reform proposals

The ACCC has indicated a broad agenda to widen its regulatory powers, reform competition and consumer law, and increase sector-specific regulation to address its concerns with digital platforms (including acquisitions by large digital platforms).

New merger review processes

In August 2021, the ACCC called for a new merger review process to replace the existing voluntary regime and its options for clearance (including informal merger review and merger authorisation) with a mandatory and suspensory regime. Under the proposed system:

- all acquisitions above specified thresholds would be required to be notified the ACCC;
- completion of the notified acquisition would be prohibited until clearance is granted; and
- the ACCC would have a "call-in" power to formally review acquisitions that fall below the thresholds.

Changes to the substantive merger test

The ACCC has also proposed four main reforms to the merger test:

- Updating the merger factors to focus on structural conditions for competition that are changed by the acquisition to the detriment of competition, as well as the inclusion of new factors that address whether the acquisition may result in the loss of potential competitive rivalry and/or increase access to, or control of, data, technology and other significant assets.
- Defining the term "likely" in section 50 of the CCA to mean "a possibility that is not remote", which would mean that establishing contravention of section 50 would not require a finding on the balance of probabilities that there is a real commercial likelihood of an SLC.
- Inclusion of a deeming provision that acquisitions involving substantial market power will substantially lessen competition. The deeming provision would apply where one merger party has substantial market power, and as a result of the acquisition, that position is likely to either be entrenched, materially increased or materially extended.
- Consideration of other agreements between merger parties as part of the SLC assessment to prevent parties from taking steps to change the counterfactual or take advantage of the anti-overlap provisions in section 45 of the CCA.

The ACCC has also proposed that there should be a separate mergers test for acquisitions by certain digital platforms (which the ACCC would specify). This is being considered, along with other reforms targeting large digital platforms, as part of the ACCC's DPSI (see below).

However, these proposals are preliminary and at a conceptual stage, and any such changes would require a change to legislation. As at the date of this publication, no draft legislation has been proposed. Further, the proposals were announced under the previous ACCC Chair. It remains to be seen whether or the extent to which these reforms will be progressed under current ACCC Chair Ms Gina Cass-Gottlieb, who commenced in March 2022. Ms Cass-Gottlieb has stated that the ACCC is continuing to consider the proposed reforms but that it is ultimately a question for government to progress them.

In our view, the ACCC will continue its work in developing potential alternatives to the current merger review process and closely consider the evidence, but it is likely to re-examine some of its assumptions or conclusions and may not advocate for the same positions as the previous ACCC Chair.

As for government, the then Treasurer Josh Frydenberg responded to the ACCC's announcement with reservations, stating: "I do not want to put more regulatory barriers in front of business". However, the new Labor Federal Government came into power in May 2022 and its position on merger law reforms can be expected to be announced in the coming months. It has already indicated a focus on protecting consumers and small businesses, announcing increased penalties for anti-competitive conduct and a new "Super Complaints" ACCC function that would enable consumer groups to refer serious complaints to the ACCC.

Reforms targeting large digital platforms

As noted above, the ACCC has raised the possibility of a creating merger control regime specific to digital platforms, which would have the elements similar to the proposed economy-wide suite of reforms discussed above (but applying only to the digital sector). However, it is unclear if the digital platform-specific proposals will progress further, including because the concepts overlap with the ACCC's proposal for broader economy-wide merger reforms.

The ACCC is exploring these reforms in a context where it considers there is growing momentum from regulators and governments around the world to address the perceived competition and consumer harms arising in digital platforms markets, including anti-competitive effects arising from acquisitions by large players.

Speaking to the Pre-International Competition Network Forum in Berlin, the ACCC Chair Ms Cass-Gottlieb expressed the view that the ACCC may need additional tools to address its concerns with digital platforms, stating that "the ACCC is increasingly concerned that enforcement action alone cannot address the systemic competition and consumer concerns identified in digital platform markets". Ms Cass-Gottlieb emphasised that the ACCC was observing and taking inspiration from reforms being proposed and implemented overseas in the EU, UK, Germany, Japan, and the USA.

The ACCC is particularly concerned with acquisitions by certain large digital platforms, such as Apple, Meta (formerly known as Facebook Inc), Google, Microsoft and Amazon. It has found that they are "serial acquirers" that have grown rapidly through acquisitions in addition to organic expansion, having made 296 acquisitions between January 2016 and December 2020. The ACCC's concern arises from its views that these platforms enjoy market power and positions as gatekeepers, which means that they can potentially vertically integrate and cause anti-competitive effects in the market, unilaterally "set the rules of the game", or impose unfair terms of use and access.

The ACCC published these views and options for reform in its February 2022 DPSI Discussion Paper. It has invited stakeholder feedback on the various reforms it is considering, which include not only reforms addressing concerns regarding acquisitions by digital platforms, but also anti-competitive conduct leading to consumer and competition harm such as online tracking, use of dark patterns, and unfair trading. With respect to mergers, it is seeking comments on its proposed economy-wide reform package mentioned above and the test to determine which platforms would be caught by the new merger regime (if it is introduced).

The ACCC will present its views and recommendations in its next interim report, which is due to be provided to the Treasurer in September 2022.

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Gilbert + Tobin

Level 35, Tower Two, International Towers
Sydney, 200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
Email: info@gtlaw.com.au
Web: www.gtlaw.com.au

AUSTRIA

Law and Practice

Contributed by:
Gerhard Fussenegger and Florian Neumayr
bpv Hügel Rechtsanwälte GmbH see p.67

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Austrian Cartel Act of 2005 (as amended) (*Kartellgesetz*, the "Cartel Act") contains the main provisions of Austrian merger control, eg:

- the definition of a notifiable "merger" or "acquisition" (Section 7 of the Cartel Act);
- the turnover thresholds (Section 9 of the Cartel Act); and
- the substantive test for mergers (Section 12 of the Cartel Act).

Additionally, the Austrian Competition Act 2002 (as amended) (*Wettbewerbsgesetz*, the "Competition Act") also refers to merger control matters.

In 2021, the Cartel and Competition Law Amendment Act came into force (the "2021 Amendment"). With regard to merger control, inter alia, a new second national threshold was introduced; ie, at least two undertakings concerned must now achieve a turnover in Austria of EUR1 million respectively, while in total the combined turnover in Austria must still trigger the EUR30 million threshold. Furthermore, a new additional substantive test was introduced. Following the concept of the EU merger control regime, not only the "creation or strengthening of a dominant position" (as hitherto) but also a "significant impediment of effective competition" (the "SIEC-test") impedes clearance of a notified transaction (see **4.1 Substantive Test**).

The Federal Competition Authority (*Bundeswettbewerbsbehörde* or FCA) provides guidance on its website (also provided in English) concerning basic aspects of merger control practice in Austria, including, eg, defining a merger, threshold values, notification requirements, pre-notification, etc.

The FCA, in co-operation with the German *Bundeskartellamt* (Federal Cartel Office or FCO), also published guidance on its transaction value-based notification threshold, as introduced in 2017 (including an English version).

1.2 Legislation Relating to Particular Sectors

Following the Austrian Investment Control Act (*Investitionskontrollgesetz* 2020 or the ICA 2020), which entered into force on 25 July 2020 and which is based on EU Regulation (EU) 2019/452, the acquisition of (parts of) undertakings, shares, substantial influence or even assets of undertakings is notifiable.

The FDI-screening proceedings must be applied if the acquirer is based outside the EU, EEA or Switzerland and if the target is (inter alia) an Austrian undertaking (or assets thereof). If the target is active in a highly sensitive sector (as conclusive listed in the ICA, eg, defence equipment and technologies, critical energy infrastructure, water) a "10% or more" acquisition of shares is notifiable; if the target is active in other sensible sectors (as non-conclusively listed in the ICA, eg, energy, information technology, traffic and transport, health, food, etc), any "25% or more" acquisition is notifiable.

Responsible authority for FDI-screening is the Austrian Ministry for Digital and Economic Affairs. Following the 2021 Amendment, the FCA must forward each merger control notification to the ministry to enable the latter to check whether the FDI-screening applies.

For specific sectors, particular authorities also have to be notified of transactions. For example, with regard to the bank and insurance sector, the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde* or FMA), which acts pursuant to the Austrian Financial Market

Authority Act (*Finanzmarktaufsichtsbehördengesetz* or FMABG), must also be notified.

1.3 Enforcement Authorities

Filings have to be made with the Official Parties (*Amtsparteien*): the FCA and the Federal Cartel Prosecutor (*Bundeskartellanwalt* or FCP). The FCA is an independent body, whereas the FCP is subordinate to the Federal Minister of Justice.

The FCA and/or the FCP are responsible for applying to the Cartel Court (*Kartellgericht*, a special division within the Vienna Court of Appeals, *Oberlandesgericht Wien*) for an in-depth (Phase II) investigation of a notified transaction. The Cartel Court is the only competent authority that is legally entitled to substantively rule on the legality of a notified transaction, eg, by prohibiting it or by granting clearance. Decisions and orders of the Cartel Court can be appealed to the Supreme Cartel Court (*Kartellobergericht*), a special division within the Supreme Court (*Oberster Gerichtshof*).

During the initial (Phase I) investigation of a notified transaction, the Austrian Competition Commission (*Wettbewerbskommission*) is entitled to submit a recommendation to the FCA. During an in-depth (Phase II) proceeding, a number of entities – including the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*), the Federal Chamber of Labour (*Bundeskammer für Arbeiter und Angestellte*), the President's Conference of the Austrian Chambers of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*), as well as certain regulators – are entitled to submit observations to the Cartel Court.

2. JURISDICTION

2.1 Notification

If the preconditions for filing are fulfilled (with regard to turnover thresholds, the type of transaction and an effect in Austria), notification prior to closing of the deal is compulsory in Austria, with no exceptions.

2.2 Failure to Notify

Failure to notify a transaction is considered to be an infringement of the prohibition on implementation before clearance. In addition to nullifying the underlying transactional agreements, the Cartel Court, upon request of the FCA and/or the FCP, may impose fines on the undertakings concerned of up to 10% of their consolidated worldwide turnover.

The Supreme Cartel Court has ruled that the failure to notify is generally considered a serious infringement of competition law. In fact, failure to notify has been in the focus of the FCA's practice in recent years. Recent fines, on average, have ranged from EUR30,000 to EUR100,000. As an outlier upwards, in August 2021, the Cartel Court imposed a fine in the amount of EUR9.6 million on Facebook/Meta for not filing its acquisition of US-based GIPHY in 2020. The acquisition itself received clearance with remedies by the Cartel Court (Phase II). In May 2022, the FCA appealed against the clearance decision to the Supreme Cartel Court (currently pending).

The Cartel Court is required by law to publish its final decisions in the so-called *Ediktsdatei*, which is a website run by the Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice.

Furthermore, the FCA (also based on a legal obligation) publishes on its website short press releases concerning the Cartel Court's rulings in proceedings involving the Official Parties.

2.3 Types of Transactions

Under Section 7 of the Cartel Act, the following types of transactions are caught by Austrian merger control:

- the acquisition of an undertaking or 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 indirect or direct acquisition of 25% or more, or 50% or more, of the shares or voting rights in an undertaking (independent of the acquisition of control);
- the establishment of cross-directorships, ie, acts that ensure that at least half of the members of the executive board or the supervisory board in two or more undertakings are the same;
- the achievement of a direct or indirect controlling influence over another undertaking; and
- the creation of a joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity.

Some of the above-listed transactions (bullet points two, four and potentially also five) by definition cover operations that do not involve the transfer of shares or assets. A controlling influence without a transfer of shares or assets might be achieved, for example, by:

- attaching special rights to preferential shares (eg, the minority shareholders' right to appoint more than half of the members of the supervisory board);
- a de facto controlling influence by minority shareholder who are highly likely to achieve a majority at the shareholders' meetings due to the percentage of shareholders in attendance; or
- minority shareholders acting together in exercising their voting rights.

2.4 Definition of "Control"

"Control" is not defined in Austrian competition law.

The Austrian Supreme Cartel Court (Case No 16 Ok 7/07) has confirmed that a controlling influence under the Cartel Act, Section 7 is identical to exercising "decisive influence" within the meaning of Article 3 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EUMR). In the same decision, the Supreme Cartel Court also defined "sole" and "joint" control as follows.

Joint Control

Joint control exists where the controlling shareholders all have the "possibility to influence strategic decisions", eg, where such decisions cannot be taken without the participation of other shareholders. In defining the term "strategic decisions", the Supreme Cartel Court referred to the Commission's Consolidated Jurisdictional Notice No 139/2004 and listed the "budget, the business plan, major investments or the appointment of senior management" as rights that typically confer joint control.

Sole Control

Sole control is achieved if the acquirer is able to influence the strategic competitive behaviour of the target independently. The Supreme Cartel Court again follows the Commission's Jurisdictional Notice (including for cases of negative sole control).

Acquisition of Shares

As discussed in **2.3 Types of Transactions**, the direct or indirect acquisition of 25% or more (or 50% or more) of the shares or voting rights of an undertaking is caught by Austrian merger control, independent of whether control is acquired or not. In addition, under Austrian case law, the acquisition of even less than 25% of the shares or voting rights in an undertaking is caught by Austrian merger control if the acquirer gets rights that are comparable to minority rights typically attributed to a 25% or more shareholder.

2.5 Jurisdictional Thresholds

According to the "classic threshold" of Section 9(1) of the Cartel Act, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following turnover figures in the previous business year:

- a combined global turnover of more than EUR300 million;
- a combined turnover of more than EUR30 million in Austria, of which at least two companies each more than EUR1 million; and
- at least two of the relevant undertakings each had a global turnover of more than EUR5 million.

Furthermore, if only one of the undertakings concerned had a turnover of more than EUR5 million in Austria, the global turnover of the other undertaking involved must exceed EUR30 million in order to require merger notification (Cartel Act, Section 9(2)).

With the 2017 Amendment, a new notification threshold was implemented, which supplements the "classic" turnover thresholds described above.

According to this so-called "transaction-value-based" notification threshold (Cartel Act, Section 9(4)), a concentration has to be notified to the FCA if:

- the combined worldwide turnover of the undertakings concerned exceeds EUR300 million;
- the combined Austrian turnover of the undertakings exceeds EUR15 million;
- the value of the consideration for the transaction exceeds EUR200 million; and
- the target is active in Austria to a significant extent.

For mergers that occur in the media sector, a special turnover calculation has to be applied. Depending on the status of the undertakings concerned (eg, newspaper, publisher, etc) the respective turnover must be multiplied by a factor of 200 or 20.

2.6 Calculations of Jurisdictional Thresholds

Classic Threshold

The thresholds of Section 9(1) of the Cartel Act (see **2.5 Jurisdictional Thresholds**) refer to the last business year, are based on turnover (ie, asset value does not factor in) and calculated on the basis of net turnover achieved by ordinary or regular business activity. Foreign turnover must be converted on the basis of official currency exchange rates, eg, the European Central Bank's ("ECB's") official exchange rates for the last business year.

Concerning credit institutions, the turnover calculation is based on:

- interest income and similar income;
- income from shares, other equity and non-fixed income securities, income from equity investments and income from investments in affiliates;
- commission income;
- net income from financial transactions; and
- other company income. With regard to insurance companies, turnover is based on premium income (Section 22(2) of the Cartel Act).

Value-of-Transaction Threshold

The transaction value-based notification threshold (Section 9(4) of the Cartel Act) refers to three criteria:

- turnover thresholds;
- the value of the transaction; and
- significant activity by the target in Austria ("domestic activity").

The turnover thresholds are, as with the classic threshold, calculated on the basis of net turnover achieved by ordinary or regular business activity.

The value of the transaction (in euros) is based on "consideration". While the term "consideration" is not legally defined, reference can be made to the explanatory notes to the law. Furthermore, as detailed in **1.1 Merger Control Legislation**, the FCA has published guidance on how to determine the value of a transaction (an English version is available on the FCA's homepage). According to the explanatory notes to the law and the FCA's guidance, "consideration" comprises any value (which means any monetary benefits) that the seller receives from the acquirer in connection with the transaction.

If a new joint venture creating a previously non-existing company is established by several parties that each transfers consideration into the new entity, the sum of those considerations must be used in calculating the value of the transaction.

Satisfying the "domestic activity" requirement

In determining whether the transaction value-based threshold's requirement of "domestic activity" by the target is satisfied, the focus is on current market-related activity. In contrast to Section 9(1) of the Cartel Act (see **2.8 Foreign-to-Foreign Transactions**), domestic activity is measured on the basis of domestic turnover only if this turnover adequately reflects the market position and the competitive potential of the target company (usually in mature markets). In this case, the FCA will routinely find that there is no domestic activity if the turnover of domestic target companies is below EUR500,000. However, domestic turnover over EUR500,000 does not necessarily establish significant domestic activity, and the whole of the circumstances will be taken into consideration by the authority. Besides the mentioned EUR500,000 threshold, the above-discussed joint guidance of the FCA and German Bundeskartellamt identifies various criteria to measure activities which may be applied to different sectors and activities.

The measurement should be carried out in line with objective industry standards. For example, in the digital sector, the explanatory notes in Austria refer to user numbers ("monthly active users") or the access frequency of a website ("unique visitors") as examples of possible indicators. For example, concerning Facebook's planned acquisition of GIPHY, the FCA, in examining if GIPHY business activity, concluded that GIPHY has significant domestic activities in Austria. The FCA hereby focused on the user numbers and considered not only the direct use via GIPHY's own website and app, but also the users of other services, websites and apps of third parties that integrate GIPHY via programming interfaces (eg, Facebook, Signal, Snapchat).

Furthermore, in Austria, the location of the target company is also relevant to determining whether it has significant domestic activity in accordance with Section 9(4) of the Cartel Act. Domestic activity must be presumed where the target has a physical presence (eg, subsidiary office) in Austria. However, this must also take account of the extent to which the activities at this site have domestic market orientation.

Market orientation in cases where the user of the service does not pay for it could include:

- non-monetary remuneration by the user (eg, the user provides their data);
- future or alternative monetisation of the use (eg, the user must view revenue-generating advertising or pay to access additional features); or
- research and development of future marketable products or services.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The relevant turnover is the turnover of the buyer and the target. However, if the seller keeps 25% or more of the shares (and/or direct control) in the target, the seller's turnover must also be included in the target's turnover.

The respective turnover of each undertaking concerned is calculated on a group-wide basis. Austrian law provides for a somewhat extraordinary definition of what constitutes the relevant "group", which deviates from the rules of the EUMR. Under Austrian law, the turnover of all undertakings linked to the parties concerned by direct or indirect control, or by an upstream or downstream shareholding of at least 25%, must be included in full (ie, not on a pro rata basis).

Changes in the business (such as acquisitions or divestments) after closing of the preceding financial year but before implementation of the planned transaction must be reflected in the analysis of whether the relevant thresholds are met.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Austria; a local presence is not required. If the target does not achieve any turnover in Austria, but the thresholds are nevertheless still triggered, a filing is required unless the "effects doctrine" applies.

The "effects doctrine" can be invoked in special circumstances to avoid notification in Austria. Besides the precondition that the target does not achieve any turnover in Austria, it must be shown that the planned transaction will have no effect on the Austrian market. Effects resulting in an obligation to file could exist, for example, on the basis that the target will be active in Austria in the near future, or that the target, though not active in Austria, is active in a broader geographic market that encompasses Austria (eg, an EU-wide market).

In general, a notification will be required if the market position of the acquirer(s) in Austria is "noticeably" and "directly" strengthened by taking over the target. The FCA has published a guidance paper on the application of the effects doctrine (available on its website).

With the introduction of the second national threshold (see **2.5 Jurisdictional Thresholds**), the "effects doctrine" can only apply if the target (without any turnover in Austria) will have, post-transaction, two parental undertakings, which both hold at least 25% in the target and which both trigger the national thresholds (ie, combined Austrian turnover of EUR30 million and EUR1 million each).

2.9 Market Share Jurisdictional Threshold

There is no market share threshold in Austrian merger control.

2.10 Joint Ventures

Under Section 7(2) of the Cartel Act, Austrian merger control follows Article 3(4) of the EUMR, according to which "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration". Therefore, a joint venture must be newly created, must have sufficient resources to operate independently in a market and must be involved in activities beyond one specific function for the parent companies. Furthermore, the sale/purchase relationship between the joint venture and its parent companies must be limited and the joint venture must be intended to operate on a lasting basis.

However, contrary to the EUMR (which, as made clear in Austria Asphalt GmbH & Co OG v Bundeskartellanwalt, ECLI:EU:C:2017:643, C-248/16, treats as concentrations only full-function joint ventures, whether newly created or converted from an existing undertaking), the creation of a non-full-function joint venture might also trigger an obligation to file in Austria. This is the case if one of the parent companies transfers a "substantial part of an undertaking" into the joint venture. A "substantial part" may include production facilities, customer lists, patents, etc. In specifying the term "substantial part", the Supreme Cartel Court refers to whether a (potential) market position is, or will be, transferred with the transaction (Case No 16 Ok 8/01).

2.11 Power of Authorities to Investigate a Transaction

If the thresholds of Austrian merger control are not met, the Austrian competition authorities can investigate a transaction based on antitrust criteria according to both Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the Cartel Act. Although precedents are not entirely clear about this, there is also the possibility (though very rare in practice) that a merger which does not meet the turnover thresholds may still qualify as an abuse of dominance under Article 102 of the TFEU and Section 5 of the Cartel Act.

As the legal consequence of not notifying a notifiable transaction is nullification of the underlying agreements, there is no statute of limitations on the authorities' ability to investigate a transaction.

2.12 Requirement for Clearance Before Implementation

Completion of a transaction must be suspended until clearance.

As discussed in **2.2 Failure to Notify**, closing a transaction before clearance is subject to penalties of up to 10% of the consolidated turnover of the parties.

The Supreme Cartel Court ruled that a transaction had been implemented upon its registration in the company register, and acceptance of a takeover bid (16 Ok 2/17f (7 December 2017)). The Court also held that a transaction is deemed "implemented" once the acquirer obtains the "opportunity to exercise economic influence", regardless of whether, or when, it actually exercises that influence.

2.13 Penalties for the Implementation of a Transaction Before Clearance

As outlined in **2.2 Failure to Notify**, failure to notify and, therefore, implementation prior to receiving clearance, has been the focus of the FCA's practice in recent years, and has led to fines in several cases.

2.14 Exceptions to Suspensive Effect

Austrian merger control, in contrast to EU law (see Article 7(2) EUMR), does not provide any exceptions to the suspensive effect. In general, no such exception applies to failing firms, either.

However, under Section 19 of the Cartel Act, notification is not required for certain types of transactions that are not considered to be an "acquisition" under the meaning of Section 7 of the Cartel Act, such as:

- credit institutions may acquire shares (but not assets) in undertakings, without providing notification of the transaction, if the shares are acquired only for the purpose of resale;
- certain private equity undertakings may acquire shares (but not assets), without providing notification of the transaction, if the accompanying voting rights are exercised only to maintain the full value of those investments and not to determine, directly or indirectly, the competitive conduct of those undertakings; and
- while the first two exceptions are in line with EU law (see Article 3(5)(a) and (c) of the EUMR), the Cartel Act goes further by additionally exempting acquisitions by credit institutions which are made to restructure a financially suffering target or to secure claims towards the target (Section 19(1)(2) of the Cartel Act).

As discussed, the Supreme Cartel Court ruled that acceptance of a takeover bid is considered to be an implementation of a transaction (which requires immediate notification). Therefore, the authorities' former practice with regard to public bids of accepting the completion of acquisition of shares prior to clearance as long as the acquirer did not actually exercise influence in the target no longer seems applicable.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Austrian authorities do not have the statutory authority to grant derogations from the bar on closing a transaction prior to clearance. Moreover, the debate in legal writing as to whether under Austrian law the parties may close the transaction prior to clearance, as long as the acquired control is not exercised, is not valid anymore due to the discussed judgment of the Supreme Cartel Court, which held that the mere acquisition of the possibility to exercise control is to be considered as an act of implementation.

In special cases, it is possible to implement transactions outside of Austria while the transaction in Austria (eg, concerning an Austrian subsidiary) is suspended pending clearance (ie, so-called "hold separate" agreements). However, carve-outs of the Austrian branch of a business might be difficult to be applied in practice, as the target's Austrian operations typically are considered not sufficiently autonomous as a standalone business so as to be carved out.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There are no deadlines for notification in Austria. As outlined, completion before clearance is not allowed. With regard to fines for failure to notify, see **2.2 Failure to Notify** and **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A written binding agreement or letter of intent is not necessary for notification. Instead, it is sufficient that the parties intend to implement the transaction; eg, the parties agree (in writing or orally) on the core elements of the transaction and the envisaged timetable.

3.3 Filing Fees

With the 2021 Amendment, the filing fee in Austria has been increased to EUR6,000, which is a fixed rate, regardless of the size of the transaction (or the turnover of the parties to the concentration). The filing fee must be irrevocably transferred to the FCA account before the filing is transmitted (if payment is not made before filing, the review period will start running only once the filing fee has been received by the FCA).

3.4 Parties Responsible for Filing

According to the Cartel Act, "the parties to the concentration" are entitled to file. The Cartel Act does not define this term; however, it seems to be accepted that "parties to the concentration" covers the acquirer and the target company, but not the seller (unless it keeps a "25% plus" share and/or (joint) control in the target).

3.5 Information Included in a Filing

Based on the standard form published by the FCA, the following core information is requested for purposes of Austrian merger control:

- accurate and exhaustive information on the circumstances that may create or may strengthen a dominant position or otherwise significantly impede effective competition;
- a description of the notification; eg, whether the transaction is a transfer of shares or assets, or whether it is an acquisition of sole or joint control;
- information on the undertakings concerned; eg, register numbers and contact persons;
- information on the ownership structure and the shareholdings, as well as the turnover figures (worldwide, EU and Austria); and
- information on the relevant market; eg, the relevant product/service market(s) where the target is active and/or all markets where there is a horizontal or vertical relationship; data for the last business year must be provided with regard to the total size of the relevant market, as well as the market shares of the parties concerned and a list of main competitors.

Additional Information

If there is an "affected market" (see **3.11 Accelerated Procedure**), more detailed information is requested, including the following:

- a list of all the shareholdings acquired by the undertakings concerned in the affected markets;
- a description of prior business relationships between the undertakings concerned;
- market data for the last three years (compared to only the last business year in a short-form notification);
- information concerning the relevant supply markets, including the five largest independent suppliers; and
- information on the five major independent customers.

If a presumption of dominance pursuant to Section 4(2) or (2a) of the Cartel Act is fulfilled (eg, combined market share of at least 30%), information on possible countervailing factors such as buyer power, market entries, efficiencies, existence of a restructuring merger must be provided.

Documents submitted should include the organisation charts of the undertakings concerned, annual reports, and the basis and sources (eg, economic statistics) for the calculation of the market data provided (listed above). Transaction documents are not required (but may be requested). If the transaction results in an affected market, business plans are additionally required.

The Cartel Court has ruled that the filing and attachments must be submitted in German. In practice, English attachments are often accepted (eg, with regard to annual reports).

A written power of attorney is not required for filing a transaction in Austria.

3.6 Penalties/Consequences of Incomplete Notification

The FCA and the FCP do not have the power to declare the notification incomplete. Only in an application to the Cartel Court for a Phase II proceeding can they request an order that the notification be completed. If the parties concerned do not adhere to such an order (which must be issued within one month of the Official Parties' respective request), the notification will be rejected by the Cartel Court. Only recently (March 2022), the Cartel Court rejected the notification in ARAplus/Saubermacher/digi-Cycle. The parties did not answer the Cartel Court's order to complete the notification in time.

Also in this case and generally in practice, the Official Parties try to obtain missing information during Phase I (which runs for four weeks and for six weeks if requested by the parties). In complex cases, it might be useful to initiate pre-notification talks (see **3.9 Pre-notification Discussions With Authorities**) with the Official Parties to gather feedback concerning the completeness of a notification upfront.

Under the Cartel Act, no fines can be imposed for submission of an incomplete notification as long as the incompleteness does not result in inaccurate or misleading information being provided to the authorities (see **3.7 Penalties/ Consequences of Inaccurate or Misleading Information**). If the non-prohibition of the concentration or the waiver of a request for a Phase II proceeding was based on incorrect or incomplete information from the parties, the Cartel Court may impose both, a fine and/or ex-post measures on the undertakings concerned.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notifying party supplied inaccurate or misleading information in the filing, the Cartel Court, upon request of the FCA and/or the FCP, can impose fines on the undertakings concerned of up to 1% of their consolidated worldwide turnover.

Fines that have been applied in practice include the following.

In 2016, a fine of EUR50,000 was imposed on Grosso Holding GmBH, as it was not disclosed in the filing that two out of the three CEOs of Grosso Holding GmbH (as acquirer in the filed transaction) were also CEOs of an important competitor.

In 2018, a fine of EUR212,000 was imposed on REWE International AG. When acquiring supermarkets from the insolvent Zielpunkt GmbH, REWE International AG agreed with the FCA in the respective merger control proceeding to close a Billa branch, which was near one of the supermarkets acquired from Zielpunkt GmbH. However, REWE did not inform the authorities that it had specific plans to open a new Billa supermarket close by.

3.8 Review Process

The total duration of formal merger control proceedings (Phase I and Phase II) may amount to up to seven-and-a-half months.

Phase I takes four weeks, calculated from the date of submission. On request of the notifying party, Phase I can be extended to a total of six weeks.

Phase II takes up to five months, calculated from the date when the application of the FCA and/or the FCP for an in-depth examination is received by the Cartel Court. On request of the notifying party, Phase II can be extended to a total of six months.

In addition, decisions of the Cartel Court may be appealed to the Supreme Cartel Court, which must decide the appeal within two months, calculated from the date when the court file is received by the Supreme Cartel Court. Since under Austrian law the standstill obligation ceases to apply only once clearance has become final, a challenge by the FCA or the FCP to a clearance decision by the Cartel Court can thus lead to an additional delay.

3.9 Pre-notification Discussions With Authorities

The FCA and the FCP do not expect to be consulted prior to each and every merger filing. Pre-notification talks, however, are recommended if there are doubts as to whether filing is necessary, if the merger is very complex, or if the merger could result in high market shares. Initiation of pre-notification talks is not published on the FCA's website.

3.10 Requests for Information During the Review Process

It is quite common that, during a Phase I investigation of a transaction that involves meaningful competitive overlaps, the FCA and/or the FCP will send requests for information to the parties concerned. For example, concerning the acquisition of Gmundner Molkerei by Salzburger Alpenmilch Genossenschaft in March 2022, the Official Parties had several extensive requests for information to the notifying party (as there were concerns with regard to a deterioration in conditions for agricultural milk suppliers due to a reduction in competition). The Official Parties also might initiate market investigations and thereby include third parties in the process. For example, concerning METRO's acquisition of AGM wholesale grocery markets in 2022, the FCA carried out an extensive market survey in Phase I. In the first request for information, 65 questions were put to ten competitors of METRO and AGM. Most of the competitors expressed strong concerns. The second request for information with up to 87 questions was sent to about 1,200 large and small customers on basis of an online survey.

Information Requests and the Review Period

Information requests do not suspend the review period, nor do the Austrian authorities have the power to order an extension ("stop the clock") unilaterally. Extension of Phase I (for additionally two weeks) is only possible on request of the parties concerned, although receiving requests for information might cause the parties to apply for an extension of Phase I in the hopes of avoiding a Phase II proceeding.

The extent of the requests for information very much depends on the peculiarities of the given case. In general, in Phase I, information requests do not tend to be overly data-heavy, as the review deadline is too short for the authorities to perform a sophisticated economic analysis. However, in Phase II, the parties may be required to provide a significant volume of data to the Cartel Court.

If the Official Parties do not receive sufficient information in Phase I, they might initiate a Phase II proceeding before the Cartel Court.

3.11 Accelerated Procedure

A short-form notification is available if there are no affected markets; eg, if after implementation of the transaction the combined horizontal market shares do not reach 15%, if one of the undertakings concerned does not have a market share of 25% or more in vertically overlapping markets or if a presumption of dominance pursuant to Section 4(2) or (2a) of the Cartel Act is not fulfilled (eg, combined market share of at least 30%). Clearance in Phase I may be expedited by obtaining waivers from both the FCA and the FCP of their right to initiate Phase II proceedings.

Waivers are not issued automatically, but only upon request by the notifying party. The authorities have wide discretion as to whether to grant a waiver and they will typically only do so if the case does not give rise to competition concerns.

Furthermore, the notifying party has to demonstrate that there is an urgent need for the transaction to be cleared early.

In 2021, the Official Parties granted a waiver concerning their right to initiate a Phase II proceeding in only 2.3% of all notifications or, in concrete figures, in 15 out of 647 filings. The Official Parties are strict in granting such waivers. The request must be therefore well-reasoned, eg, threat of insolvency is usually accepted as a reason for urgency.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Austrian merger control uses the dominance test: a transaction will be prohibited if it creates or strengthens a dominant position. With the 2021 amendment, an additional substantive test was introduced. A transaction will be also prohibited if it results in "significant impediment of effective competition" (the "SIEC-test"). The Austrian legislator hereby incorporated two equal substantive tests in the Cartel Act ("or"), while the Commission, in its ECMR, refers to "a concentration which would significantly impede effective competition… in particular as a result of the creation or strengthening of a dominant position".

Nevertheless, even if these substantive tests are triggered, the Cartel Court must clear the transaction if it gives rise to improvements in the competitive conditions that outweigh its detrimental effects, or if it is indispensable to the international competitiveness of the parties and justifiable in the interest of the national economy. With the 2021 amendment, additionally, the notified transaction has to be cleared if the national economic advantages significantly outweigh the disadvantages of the merger. The legislator's explanatory notes to the 2021 amendment hereby refer, eg, to growth, innovation and full employment, the increase of prosperity, income growth, etc. It remains to be seen if this rather vague defined exception will be applied in future.

Concerning the dominance test, Austrian law provides for very low statutory thresholds at which the existence of a dominant position will be presumed (rebuttably). In particular, an undertaking will be presumed to hold a dominant position if its market share is 30% or more. Similarly, low thresholds exist for the existence of collective dominance.

While the Austrian authorities are required to investigate the case ex officio and may not simply prohibit a case based on the statutory thresholds, these presumptions do have an impact on which cases are referred to Phase II.

4.2 Markets Affected by a Transaction

The Austrian authorities will look at the market in which the target is active. Of special interest are markets in which both parties to the transaction are active (horizontal overlaps). Markets that are vertically linked (where, for example, one party is a supplier and the other party is a customer, irrespective of an actual supply relationship between the parties) also have to be identified in the recommended notification form.

There is no de minimis rule, but competitive concerns are unlikely where the use of the short-form notification is possible; ie, where there is no affected market (as outlined in **3.11 Accelerated Procedure**, an affected market exists if the combined horizontal market share reaches 15% or more, or if one of the parties concerned has a market share of at least 25% in a vertically overlapping market).

4.3 Reliance on Case Law

The Austrian authorities also refer to the decisional practice of other competition authorities, in particular with regard to market definition. The most important points of reference for the Austrian authorities are the European Commission and the German Federal Cartel Office.

4.4 Competition Concerns

The dominance test and the now additional SIEC-test apply to all types of mergers; eg, horizontal, vertical and conglomerate transactions. In investigating these transactions, the authorities may rely on both unilateral and coordinated effects. In practice, the focus has mostly been on horizontal cases that have given rise to high market shares, and on vertical and conglomerate foreclosure issues. Recent decisions also reveal an increasing emphasis on closeness of competition.

4.5 Economic Efficiencies

To date, efficiencies have not featured prominently in Austrian practice. However, the Cartel Act explicitly provides for efficiencies to be taken into account. Given the increased attention granted to efficiencies in recent practice at an EU level, efficiencies may also become more important in Austria in the future.

4.6 Non-competition Issues

As mentioned, the Austrian Cartel Act provides for a non-competitiveness defence if the national economic advantages significantly outweigh the disadvantages of the merger. So far, in spite of this explicit statutory provision, non-competition considerations such as industrial or employment policy do not play a factual role in Austrian merger control proceedings.

In the case of a media merger, Austrian merger control also protects media diversity.

4.7 Special Consideration for Joint Ventures

In Austria, contrary to the EUMR, the creation of a non-full function joint venture may qualify as a notifiable transaction if one or both parents transfers assets into the joint venture such that the formation of the joint venture qualifies as an "acquisition of an undertaking or part of an undertaking" (which is a reportable transaction under Austrian merger control rules, see **2.3 Types of Transactions**).

In substance, like all other reportable transactions, joint ventures are subject to the dominance test and the additional SIEC-test. In addition to the concentrative effects of the merger, any co-ordination between the parent companies that is directly related and necessary to the implementation of the merger is to be assessed in the course of the merger proceedings. Any co-ordination between the parent companies that is not directly related and necessary to the implementation of the merger is deemed beyond the coordinative effects resulting from the structural change brought about by the merger and therefore is assessed under the antitrust rules (and not the merger control rules).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

In Phase I, the Official Parties cannot prohibit a transaction. In Phase II, only the Cartel Court may prohibit a transaction if it creates or strengthens a dominant position or if it results in a significant impediment of effective competition (see **4.1 Substantive Test**). However, prohibition decisions in Austria are very rare (see **5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**).

In addition, the Cartel Court may clear transactions subject to conditions or obligations; eg, asset divestitures.

Appointing an Economic Expert Witness

In practice, the Cartel Court appoints an economic expert witness in the early stages of Phase II. The economic analysis is then largely carried out by the expert witness, whose report is of considerable importance to the outcome of the proceedings. If the expert concludes that the transaction would give rise to the creation or strengthening of a dominant position (or in future also significantly impedes effective competition), the parties may offer remedies to the Cartel Court to obtain clearance.

However, in practice, it is much more common for remedies to be offered to the FCA and the FCP (on the basis of which they refrain from requesting an in-depth review of the transaction by the Cartel Court or, if Phase II has already been opened, withdraw their request(s)).

5.2 Parties' Ability to Negotiate Remedies

The parties may offer remedies to the FCA and the FCP to convince them in Phase I, not to refer a case to Phase II or to withdraw their Phase II request(s), or in Phase II, in order to withdraw their Phase II request(s). In addition, Phase II remedies may be offered directly to the Cartel Court to obtain conditional clearance; however, in practice, negotiations with the FCA and the FCP are much more common.

While only remedies accepted by the Cartel Court result in a formal (conditional) clearance decision, "informal" remedies entered into with the FCA and the FCP to avoid Phase II or to obtain withdrawal of a Phase II request also have a binding effect. An undertaking that fails to comply with such remedies is deemed to have violated the standstill obligation, which may result in substantial fines.

5.3 Legal Standard

There is no specific legal standard that remedies must meet. Similarly to the European Commission, the Austrian authorities will assess whether the remedies proposed are suitable to address the specific competition concern(s) at issue.

Precedents, in very general terms, define remedies as an order requiring the merging companies to act, tolerate or refrain from doing something. Remedies must ensure that the merger meets the substantive tests. If this requirement is achieved by remedies, the merger cannot be prohibited.

In accepting remedies, the authorities do, however, have wide discretion.

Modifying Remedies

As demonstrated in a 2019 decision regarding a 2015 merger of two brewers (Brau Union/VKB), the Cartel Court may modify a remedy that was previously put in place to clear a merger if necessary to account for later developments in the market. In that case, certain obligations imposed on the merging brewers to run their operations independently had not had the expected pro-competitive effect on the market, and so the Cartel Court terminated the obligations at an earlier point in time than it had previously ordered as a condition for clearing the merger.

Also remedies exclusively agreed on with the FCA and the FCP can be modified based on changes of the competitive circumstances (see the merger of Axel Springer/Media Impact).

5.4 Typical Remedies

Structural and Behavioural Remedies

Compared to authorities such as the European Commission, the Austrian authorities are more willing to consider not only structural, but also behavioural remedies. For example, in the acquisition of joint control of Fresenius Medical Care (FMC) over D.Med Consulting (DMC) in 2019, FMC offered remedies to prevent, on the one hand, ongoing projects by DMC for FMC's competitors from being slowed down or hampered and, on the other hand, that in DMC's future projects FMC would gain an undue competitive advantage from sensitive competitive information. By creating respective organisational "Chinese walls", FMC committed to take reasonable measures to ensure that the FMC members of the DMC Management Board neither directly nor indirectly will receive sensitive competitive information.

A similar "Chinese Wall" remedy was agreed on in FUJIFILM/Hitachi (2021); Fujifilm committed itself to an ongoing and long-term supply to a manufacturer and to implement mechanisms to ensure that the trade secrets of this competitor are kept confidential and not disclosed to the respective acquired business from Hitachi.

Concerning Recticel's acquisition of FoamPartner in 2021, the merging parties were closest competitors with regard to technical foam. As a change of supplier in the area of technical foams is associated with a longer preparation time. remedies were imposed to ensure the continued supply of Austrian customers by the notifying parties. The remedies were agreed on for a period of three years in order to give customers and competitors sufficient time to make any necessary adjustments to the sources of supply or to initiate any necessary product developments.

In Salzburger Alpenmilch/Gmundner Molkerei (2022), the Official Parties had concerns that the acquisition of dairy Gmundner Molkerei might have negative effects on the market for the collection of raw milk due to the reduction in mutual competitive pressure between acquirer and target. In order to eliminate the competition concerns, the parties committed themselves to remedies for six years, which include, inter alia, a purchase guarantee, farmer's freedom to sell also in direct sales or milk supply contracts with reasonable termination rights. In addition, access remedies are relatively frequent. Concerning the acquisition of assets of DHL Austria by Austrian Post, remedies included, inter alia, access remedies whereby Austrian Post agreed for a period of ten years to offer to conclude a contract with every logistics company with parcels for delivery to Austrian recipients. Concerning Meta's (Facebook's) acquisition of GIPHY, the Cartel Court imposed remedies on Meta, including, inter alia, a non-discriminatory access to GIPHY's GIF library for competing social media (for a period of five years), and access for alternative GIF libraries to GIPHY's GIF library under certain conditions, thereby enabling the establishment of an additional GIF provider alongside GIPHY (Meta) and Tenor (Google) for a period of seven years.

Usually, concerning access remedies imposed, a monitoring trustee will be established to conduct ongoing review.

"Hold Separate" Remedies

Austrian merger practice also utilises "hold separate" remedies that are not tied to divestitures. Such remedies typically involve the purchaser agreeing not to integrate parts of the acquired business with its own activities for a number of years. Similarly, purchasers sometimes commit to continue to supply certain products in Austria, eg, in 2019 caterer Transgourmet took over its competitor Gastro Profi and agreed on remedies for a period of three years. The remedies obliged the companies:

- continue operating the target's site;

- maintain the separate marketing presence and distributions of Transgourmet and Gastro Profi, including a separate pricing and promotion policy; and
- ensure that Transgourmet's own brands were not sold through Gastro Profi.

However, structural remedies are also used. In Brau Union/Fohrenburger (2020), Brau Union agreed not to buy or lease any new restaurants in Vorarlberg and breweries based in Austria for the next five years. In eBay/Adevinta (2021) the parties agreed, inter alia, to reduce its acquired 100% share of Adevinta into a (maximum) 33% share within 18 months after closing. In Metro/AGM (2022), Metro agreed to sell two out of nine acquired wholesale grocery markets of AGM. The FCA, in this regard, stated in general that structural restraints have a direct effect on the market structure after the merger by means of a one-time – usually stronger – intervention and are therefore usually more effective than behavioural restraints.

Media Diversity

Austrian merger control also protects media diversity. Therefore, remedies might be required in order to guarantee media diversity (eg, by requiring that editorial teams or marketing teams of merging newspapers have to work independently for a certain period after the merger).

5.5 Negotiating Remedies With Authorities

There is no procedural regime for discussing remedies with the Official Parties, nor are there any strict deadlines. However, if the parties want to consider offering remedies in Phase I, these should be offered relatively early in the process, given the short time available to the authorities (a maximum of six weeks). For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post AG) by Austrian Post, detailed remedies were negotiated and agreed on within an extended pre-notification period and by extending Phase I to six weeks. Also in Salzburger Alpenmilch/Gmundner Molkerei, several extensive requests for information were sent out and answered and various commitments agreed on in (an extended six-week) Phase I.

In Phase II, more time is available for discussing remedies.

Negotiating and Proposing Remedies

There is no standard approach for discussing remedies with the Official Parties. In practice, parties often try to negotiate remedies in the early stage of Phase II to prevent significant delays to the closing of the transaction.

The authorities can, in theory, also propose remedies. The Cartel Court has complete and final discretion in which remedies to impose, and in the absence of an agreement between the parties, it may impose whatever remedies it deems appropriate. The Cartel Court can even clear a transaction subject to "conditions and obligations", meaning that remedies can effectively be imposed on the parties.

In practice, however, remedies are usually based on a proposal by the parties.

5.6 Conditions and Timing for Divestitures

The Austrian authorities typically do not make completion of the transaction conditional on compliance with the remedies. However, nothing prevents the Official Parties from requiring an upfront buyer or fix-it-first solution if the circumstances of the case warrant such action. See, eg, VTG Rail Assets' indirect acquisition of Nacco SAS, whereby VTG Rail Assets agreed to sell upfront approximately 30% of the Nacco business to third parties.

Failure to comply fully with remedies is subject to fines of up to 10% of consolidated turnover. This applies irrespective of whether the remedies were imposed by means of a formal conditional clearance decision adopted by the Cartel Court, or entered into informally with the FCA and the FCP. In addition, failure to comply with obligations imposed by a formal conditional clearance decision may result in the imposition of appropriate remedial measures by the Cartel Court.

5.7 Issuance of Decisions

Formal decisions are very much the exception under Austrian law. Phase I cases are cleared by expiry of the statutory deadline or waivers issued by the FCA and the FCP. In merger notifications of special interest (eg, including remedies), the Official Parties publish a summary of the case and, eg, the remedies concerned.

Phase II cases are usually resolved by withdrawal of the FCA's and/or the FCP's Phase II request(s). Such withdrawals are often based on remedies agreed on between the parties and the FCA or FCP. The FCA publishes short summaries of remedies cases, as well as the text of the remedies, on its website.

Only cases going through a full Phase II examination (or the very unlikely case in which the Cartel Court, on its own initiative, clears a transaction subject to "conditions and obligations") are subject to a formal decision by the Cartel Court. Such decisions are published in an online database.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Given that merger cases are ultimately decided by the Cartel Court (unless there is an appeal to the Supreme Cartel Court), the authorities challenging a merger (the FCA and/or the FCP) have an incentive to resolve cases with remedies, as this gives them some control over the outcome of the proceedings. This results in a very low number of prohibition decisions in Austria, while remedies are fairly common. Failing an agreement on remedies, transactions are typically abandoned by the parties.

For example, in 2021, one single notified transaction has been prohibited by the Cartel Court (ARA/Saubermacher, see **3.6 Penalties/Consequences of Incomplete Notification**).

Foreign-to-foreign mergers do not receive any different legal treatment. The authorities do not hesitate to investigate fully foreign-to-foreign transactions that may have a significant impact on Austrian consumers and have also required remedies in foreign-to-foreign transactions; eg, in the above-mentioned foreign-to-foreign acquisitions, VTG Rail Assets/CIT Rail Holdings (see **5.6 Conditions and Timing for Divestitures**) and GIPHY/Facebook (see **2.6 Calculations of Jurisdictional Thresholds**).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Merger control clearances also cover ancillary restraints to the extent that they are directly related to, and necessary for, the implementation of the transaction. No separate notification is required (or indeed possible) for such arrangements. As experience in Austria is scarce, the European Commission's Ancillary Restraints Notice provides some guidance on what types of restraints may be considered ancillary and thus covered by the clearance.

For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post) by Austrian Post, the FCA explicitly stated that merger control clearance did not constitute a decision on the permissibility of a cooperation arrangement between ÖPAG and Deutsche Post in connection with the notified acquisition.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are entitled to submit their observations to the authorities, both in Phase I and in Phase II, but they do not have any further procedural rights and do not receive party status. In particular, third parties are not granted access to the file. Also the seller is considered to be a third party (unless they keep 25% or more of the shares or voting rights of the target).

In Phase II of merger proceedings (as in any proceedings before the Cartel Court), access to the file is subject to the parties' consent. In the context of damage claims following on from a cartel infringement, this rule has been found to be in violation of EU law by the ECJ in the Donau Chemie case. However, the Amendment 2021 did not change the basic rule that access to the Cartel Court's file is subject to the parties' consent and only introduced new rights for damage claimants to request the disclosure of documents in damage proceedings.

7.2 Contacting Third Parties

In more complex cases, it is quite common for the authorities to contact third parties such as competitors, customers and suppliers. Usually, they do this on the basis of written questionnaires in which they "test" the information provided in the notification (in particular, regarding market definition and the market position of the parties and competitors). It is also common that remedies offered by the parties are "market tested" in this way.

In AGM/Metro, ten competitors of METRO and AGM and about 1,200 large and small customers received requests for information on basis of an online survey (see **3.10 Requests for Information During the Review Process**).

7.3 Confidentiality

The fact of the notification is published on the FCA's website. While third parties are not granted access to the file, it is common for the notifying parties to submit a non-confidential version of the notification. This version is not published, but may be used by the FCA; eg, for the purpose of information requests addressed to third parties.

7.4 Co-operation With Other Jurisdictions

Austria is a member of the EU and, as such, the FCA co-operates routinely with its counterparts in other EU and European Economic Area member states. These authorities share with each other basic information on notifications received and may co-operate more closely on a case-by-case basis. In 2019, the FCA (in accordance with other NCAs) submitted one request for referral to the European Commission pursuant to Article 22 of the EC Merger Regulation (Synthes/Medos International/Topaz Investment AS).

In practice, the FCA co-operates most often with the German Bundeskartellamt.

Authorities of EU member states must seek a waiver from the parties to share confidential information. In its adapted form (introduced in 2020), the FCA now explicitly ask for the parties' waiver allowing the official parties to exchange confidential information with other relevant competition authorities, in particular if affected markets are involved.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Final decisions by the Cartel Court may be appealed to the Supreme Cartel Court (a division of the Austrian Supreme Court) by the parties to the transaction, and by the FCA and/or the FCP. In GIPHY/Facebook, the FCA currently (May 2022) appeals the Cartel Court's clearance decision (with remedies).

8.2 Typical Timeline for Appeals

Appeals against final decisions by the Cartel Court must be brought within four weeks of the decision. The other parties to the proceedings may then file a response to the appeal within four weeks. The Supreme Cartel Court then has two months from receipt of the file in which to decide the appeal.

Note that an appeal by the FCA and/or the FCP against a clearance decision extends the standstill obligation beyond the deadlines discussed above, as the parties may close the transaction only once the clearance has become final.

Appeal rests on points of law only (and only "serious doubts" as to the correctness of the decisive facts on which the decision of the Cartel Court is based), which makes it difficult to challenge the Cartel Court's decisions, as merger cases usually turn on the facts. In GIPHY/Facebook, the FCA, inter alia, based its appeal on procedural deficiency, the Cartel Court's alleged incomplete review of the full effectiveness of the conditions (eg, with regard to the exclusion of possibilities for Facebook to circumvent the conditions) and an alleged incomplete sufficient consideration of the Cartel Court of the development on the market without the transaction and thus the question of which comparative scenario is to be applied in the legal review.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Only the parties to the transaction as well as the FCA and the FCP have the right to appeal the Cartel Court's decisions (note that the FCA and FCP have party status automatically even if they are not the applicant).

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The 2021 Amendment foresees three essential changes with regard to merger control.

Additional National Threshold

According to the updated "classic threshold" of Section 9(1) of the Cartel Act, a second national threshold has been introduced, ie, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following turnover figures in the previous business year:

- a combined global turnover of more than EUR300 million;
- a combined turnover of more than EUR30 million in Austria, of which at least two companies more than EUR1 million each; and
- at least two of the relevant undertakings each had a global turnover of more than EUR5 million.

Additional Tests of Substance

The most significant change refers to an additional test in substance. A concentration is prohibited, if it is to be expected that:

- the concentration creates or strengthens a dominant position; or
- effective competition will otherwise be significantly impeded.

The 2021 Amendment has been criticised for not taking over the exact wording of the EUMR (see **4.1 Substantive Test**). In order to rely on case law of the EU Commission and the EU Courts, such exact "copy and paste" would have been useful.

Competitiveness Defences

The second change re merger control concerns an additional competitiveness defence in case a transaction gives rise to dominance or a significant impediment of competition. Defences can be applied concerning transactions where it is to be expected that it will also improve conditions of competition that outweigh the disadvantages of market dominance, or if the transaction is necessary to maintain or improve the international competitiveness of the undertakings concerned and is economically justified (see **4.6 Non-competition Issues**). With the 2021 Amendment, such defence can be additionally applied if (generally) the economic advantages significantly outweigh the disadvantages of the merger.

9.2 Recent Enforcement Record

In 2021, a record total of 647 mergers were notified with the FCA and FPA. Compared to 2020 (when there were 428 notifications), the number of notified mergers in Austria increased by more than 50%. With the 2021 amendment, the FCA estimates a decrease in notifications by approximately 44%. Extrapolating the number of notifications to the end of April 2022 to the whole year 2022 would result in only 351 notifications, which would even correspond to a 54% reduction in the number of notifications.

Concerning these 647 merger notifications, only in two cases a Phase II proceeding was initiated (Facebook/GIPHY; Metro/AGM). One merger notification was referred to the European Commission (Facebook/Customer), one was prohibited (ARAplus/Saubermacher/digi-Cycle) and eight notifications were withdrawn, ie, 635 mergers or more than 98% of all mergers notified received clearance within Phase I.

9.3 Current Competition Concerns

As mentioned, following the 2021 Amendment, the FCA must forward each merger control notification to the ministry to enable the latter to check whether the FDI-screening applies. Based on changes in the Austrian Investment Control Act (see **1.2 Legislation Relating to Particular Sectors**) and a strict approach of the ministry to examine to examine a broad range of transactions, the number of FDI filings increased substantially in the last year.

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AUTHORS

Gerhard Fussenegger is a partner based in Vienna and Brussels who specialises in EU and Austrian antitrust law, merger control law (EU, multi-jurisdictional and Austrian merger filings), distribution law and foreign direct investment screening (Investment Control Act). Gerhard holds an LLM degree from King's College London.

Florian Neumayr is a partner based in Vienna. He is managing partner, heads the dispute resolution practice and co-chairs the firm's competition law department. Florian advises on all aspects of Austrian and EU competition law (cartels, abuse of market dominance, merger control and procurement). A special focus of his is dispute resolution (litigation, arbitration, mediation) and, in particular, private enforcement.

bpv Hügel Rechtsanwälte GmbH

Donau-City-Straße 11
1220 Wien
Austria

Tel: +43 1 26050 205
Fax: +43 1 26050 133
Email: Gerhard.Fussenegger@bpv-huegel.com;
Florian.Neumayr@bpv-huegel.com
Web: www.bpv-huegel.com

BRAZIL

Law and Practice

Contributed by:
Luis Nagalli, Julia Haddad Niemeyer, Camila Lisboa Martins and Carolina Furlani Adriano
Madrona Advogados see p.89

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Brazilian merger control is governed by Law No 12,529/2011 (the "Brazilian Competition Law") and administrative regulations issued by the Administrative Council for Economic Defence (CADE or the "Brazilian Competition Authority") that provide further guidance concerning Brazilian competition legislation, including:

- CADE's by-laws, which set forth the main extensive set of procedural rules for merger control;
- CADE's Rule No 33/2022, which defines the economic group for the purpose of:
  - (a) assessing jurisdictional thresholds;
  - (b) thresholds for fast-track procedure and minority equity acquisitions;
  - (c) filing procedures; and
  - (d) the Brazilian fast-track/non-fast track transaction filing forms;
- CADE's Rule No 24/2019, which governs the investigation of gun-jumping violations and sets out guidance for fines calculation; and
- CADE's Rule No 17/2016, which defines the types of "associative agreements" that are subject to merger control.

CADE has issued several non-binding guidelines on key merger control topics, such as remedies, horizontal mergers and gun-jumping violations, since the adoption of the ex ante regime. Its Department of Economic Studies has also continuously published studies consolidating precedents in specific industries (eg, fuel, steel, healthcare, agriculture and digital platforms).

1.2 Legislation Relating to Particular Sectors

There is no specific legislation in Brazil for merger controls involving foreign transactions or investments. However, precedents indicate the type of foreign-to-foreign transaction that is subject to Brazilian merger control (see **2.8 Foreign-to-Foreign Transactions**).

Conversely, transactions involving regulated sectors (eg, healthcare, telecommunications, transportation and energy) might require approval from regulatory agencies. Parties can generally submit independent filings to CADE and the relevant regulatory agency simultaneously in order to expedite the approval process. Timing for approval can differ significantly between one agency and another, however.

CADE has executed co-operation agreements with a few regulatory agencies after foreseeing that the exchange of information, along with technical and broad collaboration, between authorities enables a more accurate assessment of mergers in regulated sectors.

A case in point is the banking sector, where CADE and the Brazilian Central Bank (BCB) have issued Joint Normative Ruling No 1/2018 to ensure that transactions satisfying jurisdictional thresholds are ordinarily reviewed by both authorities (CADE and the BCB).

1.3 Enforcement Authorities

CADE is responsible for enforcing the merger control system throughout the Brazilian territory and has powers to review, approve, impose remedies on or block a transaction.

CADE has four main bodies, each with distinct roles in the merger control analysis.

- General Superintendence – responsible for reviewing all fast-track and non-fast-track transactions, with legal powers to clear any transaction without restrictions, issue non-binding opinions and challenge transactions before the Tribunal.

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- CADE's Tribunal – the final decision-making body charged with reviewing transactions challenged by the General Superintendence. It also reviews the General Superintendent's clearance decisions when requested by one of its Commissioners or challenged by a third party. CADE's Tribunal is responsible for issuing the final decision, approving, imposing remedies or blocking transactions.
- Department of Economic Studies – responsible for preparing economic studies and opinions either ex officio or upon request, mainly in non-fast-track cases.
- CADE's Attorney General's Office – essentially responsible for monitoring remedies imposed by CADE's Tribunal.

Parties can still file for a judicial review of CADE's final decision, even though this only happens on rare occasions (see **8.1 Access to Appeal and Judicial Review**).

2. JURISDICTION

2.1 Notification

Transactions require mandatory notification in the following circumstances.

- The transaction is considered a concentration act under the Brazilian Competition Law (including merger, incorporation, consortium, joint venture, share or asset acquisition and associative agreement; see **2.3 Types of Transactions**).
- The jurisdictional thresholds are met (see **2.5 Jurisdictional Thresholds**).
- The transaction has an impact in Brazil (see **2.8 Foreign-to-Foreign Transactions**).
- The transaction does not fall within one of the exceptions outlined by the Brazilian Competition Law.

Transactions that do not require mandatory notification include:

- joint ventures, associative agreements and consortia undertaken with the specific purpose of participating in public auctions or bids; and
- minority equity acquisitions that either (i) do not reach a specific threshold set out by CADE's rules or (ii) are made by the sole controlling shareholder (see **2.4 Definition of "Control"**).

2.2 Failure to Notify

Undertakings that fail to notify CADE of a transaction, or any that implement a transaction before CADE's clearance decision is final, are subject to sanctions under the Brazilian Competition Law.

These types of infringements are also known as gun-jumping violations, as in other ex ante regimes. An administrative procedure may be launched against the parties specifically to investigate such violations.

Penalties that may be imposed by CADE as a result of such procedures include:

- fines ranging from BRL60,000 to BRL60 million; and
- the declaration of the transaction as null and void.

Sanctioned parties must still submit the transaction for CADE's review, in addition to facing the penalties mentioned above.

Gun-Jumping Fine Calculation

According to CADE's Rule No 24, fines imposed in gun-jumping violations begin at a minimum of BRL60,000.

This amount may be increased by:

- 0.01% of the value of the transaction per day for the duration of the time by which notification is delayed;
- up to 4% of the value of the transaction depending on the severity of the violation; and
- up to 0.4% of the economic groups' average turnover in the year preceding the transaction, depending on the parties' intent and good faith.

The fine calculation also considers the timing of the notification, meaning that the spontaneous submission of a transaction to CADE can lead to fines being reduced by up to 50%.

Precedents

CADE takes a very strict approach towards gun-jumping violations – all penalties mentioned above are applied by CADE in practice and made public upon conclusion of the investigation.

One recent example is CADE's May 2022 decision on Procedure No 08700.005713/2020-36, which fined Veolia Environnement SA and Engie SA the highest amount ever imposed (the maximum BRL60 million) for failing to notify the transfer of 29.9% of the shares of a third company, Suez SA, in October 2020 from Engie SA to Veolia Environnement SA.

Also, in November 2021, CADE issued a decision on Procedure No 08700.002914/2020-81, penalising the companies FD do Brasil Soluções de Pagamento Ltda and Software Express Informática Ltda for failing to notify the acquisition of the latter by the former. The parties settled with CADE and agreed to pay a fine of BRL6.7 million.

Other fines imposed by CADE for gun-jumping violations so far amount to:

- BRL57 million – imposed in December 2019 in Merger Review No 08700.001908/2019-73 (IBM and Red Hat Inc); and
- BRL30 million – imposed in January 2016 in Merger Review No 08700.009018/2015-86 (Technicolor SA and Cisco Systems Inc).

2.3 Types of Transactions

The types of transaction subject to mandatory notification, provided that they meet the jurisdictional thresholds (see **2.5 Jurisdictional Thresholds**), include:

- merger or incorporation of previous independent companies;
- acquisition of sole or shared control of another entity;
- acquisition of a minority stake in another company;
- acquisition of bonds or securities convertible or exchangeable into stocks or assets;
- acquisition of assets;
- joint venture;
- consortium; and
- associative agreements executed between competitors foreseeing the exploitation of a joint commercial activity for at least two years, in which risks and results are shared.

Jurisdictional thresholds require that the transaction should involve at least two different corporate groups (defined by CADE as "economic groups" – see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**) before notification becomes mandatory. Meeting the double turnover threshold criteria, restructurings, reorganisations or other intra-group transactions do not therefore require mandatory notification.

Transactions not involving the transfer of shares or assets could still be subject to merger control if there is any change in control (eg, via

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shareholders' agreements or changes to articles of association) – see **2.4 Definition of "Control"**.

2.4 Definition of "Control"

Change of Control

One event that can trigger mandatory notification is change of control, as mentioned in **2.1 Notifications** and **2.3 Types of Transactions**. The Brazilian competition legislation, however, does not provide a clear definition of "control".

CADE uses a case-by-case analysis to identify whether a particular shareholder has sole or shared control (internal control) or, rather, a third party is interfering in the activities of a company (external control).

CADE's precedents indicate that relevant evidence of control includes:

- the power to manage or direct the business;
- the power to elect most members of the management bodies; and
- voting/political rights that directly – or even through shareholders' agreement – enable an autonomous decision on competitively sensitive issues (eg, production, sales, commercial policy and pricing).

Minority Interest Acquisition

The Brazilian merger control system covers minority interest acquisitions in the following circumstances.

- Any amount of interest acquired grants the acquirer sole or shared control.
- The direct or indirect acquisition results in at least 5% of the total or voting capital stock of a company that competes or is active in vertically related markets to the acquirer economic group.
- The direct or indirect acquisition made by an acquiring economic group, which already owns at least 5% of a company, resulting in the ownership of at least another 5% of the same company where it competes or is active in vertically related markets to the acquirer economic group (whether via a single acquisition or the sum of past acquisitions).
- An economic group's direct or indirect acquisition of at least 20% of the total or voting capital stock of a company that is neither a competitor nor active in any vertically related market.

A shareholder, who owns at least 20% of the total or voting capital stock of a company that is neither a competitor nor acts in any vertically integrated market, either directly or indirectly acquires an additional 20% or more of the total or voting capital stock of the same company.

2.5 Jurisdictional Thresholds

The following turnover criteria (or "jurisdictional thresholds") must be cumulatively met for notification of a concentration act (see **2.3 Types of Transactions**) to be mandatory, according to the Brazilian Competition Law, as amended by the Interministerial Ordinance No 994/2012.

- At least one economic group involved in the transaction had a gross turnover or business volume in Brazil (including exports) equal to or greater than BRL750 million in the year before the transaction.
- At least another business or corporate group involved in the transaction had a gross turnover or business volume in Brazil (including exports) equal to or greater than BRL75 million in the year before the transaction.

The Brazilian jurisdictional thresholds are not updated annually but the Ministry of Defence and Ministry of Finance can make a joint decision to adjust them.

2.6 Calculations of Jurisdictional Thresholds

Brazilian jurisdictional thresholds are based on a double turnover system that counts the gross turnover or business volume in Brazil of the economic groups involved in the transaction (see **2.5 Jurisdictional Thresholds**).

Asset value and size of transaction do not feature in the calculation of jurisdictional thresholds (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**).

CADE's by-laws state that, for the purpose of calculating jurisdictional thresholds, all foreign currency must be converted to Brazilian currency based on the exchange rate as it was on the last business day of the previous year.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Economic Group Definition

All businesses/corporate entities that meet the following criteria at the time of transaction must be considered part of the same business or economic group when calculating jurisdictional thresholds, according to Brazilian competition case law.

For companies

- All companies under common control (internal or external).
- All companies in which the company involved in the transaction or any of those that satisfy the above criteria hold, directly or indirectly, an interest equal to or greater than 20% in the total or voting capital stock.

For investment funds

- The economic group of all quotaholders that, individually or through any type of quotaholder agreement, directly or indirectly hold 50% or more of the fund's quotas.
- All companies in which the investment fund involved in the transaction holds, directly or indirectly, control or in which the fund holds, directly or indirectly, an interest equal to or greater than 20% in the total or voting share capital.

CADE's precedents indicate that economic group definitions should be assessed at the point the transaction takes place. Past turnovers of recently acquired companies should be fully considered as part of the economic group turnover calculation.

Moreover, state-owned companies could be considered part of separate or autonomous business/corporate groups for the purpose of calculating jurisdictional thresholds. Thus, transactions between two state-owned companies can be subject to the Brazilian merger control system as though they were fully independent.

2.8 Foreign-to-Foreign Transactions

Foreign-to foreign transactions can be subject to Brazilian merger control if the double turnover criteria is met and the transaction has concrete or potential effects in Brazil.

The local effects test is conducted by CADE on a case-by-case basis, and in the past has considered:

- whether the target company has a direct presence in Brazil through subsidiaries or assets located in the country;
- revenues originating in Brazil through exports, regardless of their amount;
- plans to expand activities or enter the Brazilian market; and

- the geographic nature of relevant markets affected by the transaction (ie, global, national, regional, etc).

2.9 Market Share Jurisdictional Threshold

The current Brazilian Competition Law does not establish a market share threshold.

2.10 Joint Ventures

All types of joint ventures are subject to the Brazilian merger control system if they meet the double turnover criteria and produce effects in Brazil.

Joint ventures with the specific purpose of participating in public auctions or bids and acquisitions of shares through public offering are exempt from compulsory notification in the Brazilian Competition Law, as mentioned in **2.1 Notification**.

Additionally, under the Brazilian merger control system, "contractual joint ventures" are treated as associative agreements and compulsory notification depends not only on the fulfilment of the jurisdictional thresholds but also on specific conditions of the arrangement (see **2.3 Types of Transactions**).

2.11 Power of Authorities to Investigate a Transaction

The Brazilian Competition Law allows CADE one year to investigate any transaction that does not meet the jurisdictional threshold. Such investigation may be instigated by a complaint from third parties – which can be submitted anonymously – or may occur on a discretionary basis whenever CADE understands that a transaction potentially causes competition concerns.

Merger Review No 08700.006853/2021–11 (Odontoprev SA, Mogidonto Planos Odontológicos Ltda and Boutique Dental Ltda) was recently notified at the request of the General Superintendence, even though the parties did not meet the jurisdictional thresholds. The General Superintendence requested notification in order to investigate whether the transaction could lessen competition and increase prices in the affected markets.

Similarly, Merger Review No 08700.001227/2020-49 (Prosegur Brasil SA Transportadora de Valores e Segurança and SACEL Serviços de Vigilância e Transporte de Valores-Eireli) was submitted to CADE at the request of CADE's Tribunal while in the process of analysing another merger from Prosegur.

2.12 Requirement for Clearance Before Implementation

Brazil adopted the pre-merger (ex ante) review system after the new Brazilian Competition Law entered into force in 2012. Any implementation of a transaction subject to the Brazilian merger control system, therefore, must be suspended until CADE's final clearance – ie, a final decision issued by CADE's Tribunal or when clearance is granted by CADE's General Superintendence following a 15-day waiting period.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Any act of implementation carried out before obtaining CADE's final clearance may result in gun-jumping violations and the parties could be subject to the penalties mentioned in **2.2 Failure to Notify** (ie, fines of up to BRL60 million and the transaction declared null and void).

The penalties imposed by CADE are publicly disclosed – for example, as in May 2022 when CADE imposed the maximum fine of BRL60 million on Engie SA and Veolia Environnement SA for implementing a transaction before filing it to CADE (see **2.2 Failure to Notify**).

2.14 Exceptions to Suspensive Effect

Joint ventures, associative agreements, and consortia undertaken with the specific purpose of participating in public auctions or bids are not subject to the Brazilian merger control system, as mentioned in **2.1 Notification**. Furthermore, acquisitions of shares through public offering before CADE's clearance are allowed, provided that clearance is obtained before parties can exercise political or decision-making rights.

The Brazilian Competition Law allow parties to submit a formal request for precarious and preliminary authorisation by CADE to fully or partially implement a transaction, where parties can prove that waiting for CADE's approval would lead to substantial and irreversible financial damages.

Such preliminary authorisation is rarely granted by CADE and involves a lengthy and uncertain negotiation with authorities. The parties must clearly demonstrate (and provide substantial evidence of) not only irreversible and substantial financial damages, but also that the implementation acts are fully reversible and will not cause irrevocable harm to competition in the affected markets.

Any waiver granted by CADE to implement certain parts of the transaction does not imply its automatic clearance. CADE will continue to analyse the impact of the transaction on competition and can ultimately block a transaction in which a waiver has been granted.

One such example was Merger Review No 08700.005700/2021-48 (SAS Shipping Agencies Services SÀRL and MSC Mediterranean Shipping Company Holding SA). CADE granted an authorisation for the exercise of political rights in the target company before final clearance in order to protect the investment to be made within the transaction.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no other circumstances in which CADE authorises the closing of the transaction before final clearance, apart from the exceptions described in **2.14 Exceptions to Suspensive Effect**. Moreover, CADE has been consistently rejecting carve-out to allow global closing before receiving clearance in Brazil.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

The Brazilian Competition Law does not set forth a deadline for notification. Notwithstanding, compulsory notifications cannot be implemented before obtaining CADE's final clearance. Regarding the penalties for implementing a transaction before a formal competition approval, please refer to **2.2 Failure to Notify** and **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

Transactions should be submitted to CADE preferably following the execution of binding documents between the parties. However, CADE usually also accepts filings based on preliminary binding documents that outline the transaction, such as a letter of intent or a memorandum of understanding.

Regardless of the type of agreement, CADE's approval will be limited to the scope of the transaction described in the submitted documents. Any modification concerning the structure of the transaction or ancillary restraints (such as non-compete or exclusivity provisions) may need to be reported and approved by CADE, and could trigger a new filing.

3.3 Filing Fees

A fee of BRL85,000 is required to file a transaction before CADE. Proof of such payment is one of the mandatory documents that must be submitted to CADE.

3.4 Parties Responsible for Filing

Both parties are responsible and liable for filing a compulsory transaction before CADE. The Brazilian Competition Law, however, permits a new transaction to be notified jointly by both parties or unilaterally by just one party. Regardless of the party responsible for submitting to CADE, a single filing is required per transaction.

3.5 Information Included in a Filing

CADE's filing form for both fast-track and non-fast-track procedures requires detailed information, such as the following, from the parties and affected relevant markets.

- Information and documents concerning the involved parties and their businesses and/or economic groups (eg, gross turnovers, latest financial statements, organisational charts, line of business and activities of all companies from a corporate group).
- Information on the transaction (eg, structure, terms and conditions, price and means of payment, non-compete or exclusivity clauses).
- The transaction's main documents (eg, agreement and shareholders' agreement). CADE can require other documents prepared for the purposes of the transaction (eg, presentations to the board or shareholders, company market intelligence, estimates for market trends).
- Competition analysis and information on the affected relevant markets, including market shares, market structure, regulatory framework, information on suppliers, customers and competitors.

Further and even more detailed information is required specifically for non-fast-track procedures (eg, parties' and competitors' historical market shares, demand structure, entry and rivalry conditions, monopsony analysis, co-ordination and counter-factual effects of the transaction).

Additionally, on a discretionary basis, CADE can request the presentation of further information and documents for cases submitted through both the fast-track and non-fast-track procedures.

All documents should be submitted in Portuguese, including the filing form. CADE's rules require all original documents in other languages to be translated, which should be prepared in advance to expedite filing.

3.6 Penalties/Consequences of Incomplete Notification

The parties have a single opportunity to amend the notification if CADE deems it incomplete. However, if the incompleteness persists and CADE is not satisfied with the level of information provided in the amendment, the notification is shelved without a decision on its merits and the parties will have to file the transaction again after paying another filing fee.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

CADE can fine parties that provide inaccurate or misleading information within the scope of a merger filing anything from BRL60,000 to BRL6 million. Additionally, CADE can launch an administrative proceeding against the party and adopt any other appropriate measures.

3.8 Review Process

The merger control process within CADE has two main stages of analysis (as mentioned in **1.3 Enforcement Authorities**).

- Phase I – General Superintendence: all fast-track transactions and non-fast-track transactions are first reviewed by the General Superintendence. It has legal powers to clear any transaction without restrictions or challenge transactions before the Tribunal.
- Phase II – CADE's Tribunal: the final decision-making body is responsible for reviewing transactions challenged by the General Superintendence or interested third parties (see **7.1 Third-Party Rights**) and reviewing the General Superintendence's clearance decisions upon request of one of its commissioners. CADE's Tribunal is responsible and has legal powers for issuing the final decision to impose remedies on, block or approve transactions.

CADE's deadlines for analysis may vary according to the type of procedure.

- Fast-track cases – the overall timeline for clearance shall not last longer than 30 days from filing or amendment of the information (regarding the amendment, see **3.6 Penalties/Consequences of Incomplete Notification**). Should CADE's analysis exceed 30 days, the General Superintendence must justify the delay before CADE's Tribunal and prioritise the case. The average time taken to analyse fast-track cases in 2021 was 20.3 days.
- For non-fast-track cases – the overall timeline for clearance is within 240 days from filing or amendment of the information (regarding the amendment, see **3.6 Penalties/ Consequences of Incomplete Notification**), which can be extended for up to 90 additional days, totalling 330 days of analysis. If CADE's analysis exceeds 330 days without a final decision, the transaction is considered automatically approved. The analysis of non-complex, non-fast-track cases usually takes approximately 90 days, whereas the analysis of complex non-fast-track cases may take 120 days or more, especially when parties need to negotiate remedies. The average timeline for analysis of non-fast-track cases (considering complex and non-complex cases) in 2021 was 113.7 days.

There is also a 15-day waiting period following clearance from CADE's General Superintendence, whether the case was filed under the fast-track review or not.

3.9 Pre-notification Discussions With Authorities

In non-fast-track procedures, parties are encouraged by CADE to engage in pre-notification discussions. The pre-notification entails sharing a draft filing form and engaging in discussions with the authority. The whole process is kept confidential.

CADE's by-laws limit the pre-notification discussions for non-fast track cases, so fast-track cases should be formally submitted before parties start interactions with the authority.

3.10 Requests for Information During the Review Process

CADE can, at any time and discretionarily, request additional information from the parties during the review process and/or test the market by sending requests for information to third parties, including clients, competitors, suppliers and public agencies.

Although the Brazilian Competition Law allows CADE to request information in all types of procedures, this practice is usually adopted in non-fast-track transactions.

Requests for information can require very detailed information, which could impact timing for approval, but they never stop the clock or suspend the review process.

3.11 Accelerated Procedure

The following transactions are considered eligible in Brazilian competition legislation for the fast-track procedure.

- Transactions resulting in horizontal overlaps below 20% of market share in the affected relevant markets.
- Transactions in which the concentration results in a variation of the Herfindahl-Hirschman Index below 200 points, provided they do not result in concentrations over 50% of market share in the affected relevant markets.
- Transactions resulting in vertical integrations lower than 30% of market share in the downstream and upstream affected relevant markets.
- Transactions involving classic or co-operative joint ventures, whose activities are not vertically or horizontally related to the activities of the merging parties.
- Transactions resulting in no horizontal overlaps or vertical relationships between the activities of economic groups involved in the transaction.
- Other cases not encompassed above that CADE's General Superintendence could consider simple enough to not warrant a detailed analysis.

Regardless of the above-mentioned provisions, any fast-track procedure can be ultimately converted to a non-fast-track procedure at CADE's discretion, especially when a more detailed analysis is deemed necessary.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

According to CADE's *Guidelines for Horizontal Mergers*, the Brazilian merger control system aims to focus the substantive test generally on a dominant position and a substantial lessening of competition analysis.

CADE usually analyses the level of concentration and the structural conditions of the affected markets, including:

- ability to exercise market power unilaterally;
- entry barriers; level of rivalry; idle capacity of established competitors; buying power; and
- possible co-ordinated effects arising from the transaction.

There are ancillary methods that may be used by CADE depending on the relevant markets, such as mathematical and econometric simulations, counterfactual analysis, elimination of maverick firms and potential competition.

Regardless of the method employed, the Brazilian Competition Law establishes that efficiency gains in the affected markets must prevail over potential negative effects as a condition for the approval of a transaction.

4.2 Markets Affected by a Transaction

CADE's relevant market definition commonly begins by applying the hypothetical monopolist test to evaluate the boundaries of product and geographic dimensions, frequently relying on its own precedents.

When determining the relevant product market, CADE could consider:

- customer profile;
- market size;

- buying patterns;
- relevance of goods' and/or services' prices;
- quality for customers;
- relevance of brand;
- credit;
- payment conditions; and
- moment of consumption.

The relevant geographic market is defined by the precise location in which companies offer their products, and, more importantly, the area in which customers seek to make a purchase. CADE should consider transportation timing and costs, local prices, customers search radius, among others, in order to investigate the geographic market definition.

4.3 Reliance on Case Law

CADE is willing to consider foreign case law examples as ancillary persuasive arguments or starting points for competition analysis, but the agency seldom relies solely on foreign precedents without actually testing the market and evaluating effects on the Brazilian market. Foreign case law, however, can be even more relevant in markets with an international scope or where national precedents are limited.

4.4 Competition Concerns

CADE's analysis usually focuses on investigations into dominant position and lessening of competition, as mentioned in **4.1 Substantive Test**. The multiple competition analysis tests CADE uses to investigate actual or potential negative competitive effects, particularly in non-fast-track complex cases, include the analysis of:

- unilateral and co-ordinated effects;
- vertical foreclosure;
- barriers to entry;
- network effects;
- elimination of potential competition; and
- conglomerate or portfolio effects.

CADE recently imposed structural remedies in Merger Review No 08700.000149/2021-46 (Localiza Rent a Car SA and Companhia de Locação das Américas) after analysis demonstrated that rivalry levels and entry conditions were not sufficient to avoid the exercise of market power by the parties. It conducted a deep analysis in Luxottica/Essilor (08700.004446/2017-84) of whether portfolio effects would increase the merged-company ability to harm competition. Ultimately the authority didn't find concrete evidence that would support an intervention and the case was cleared.

4.5 Economic Efficiencies

Pursuant to the Brazilian Competition Law, CADE must consider economic efficiencies during a merger review process.

A transaction should be approved whenever economic efficiencies outweigh adverse competition effects arising from the transaction, as mentioned in **4.1 Substantive Test**.

CADE's analysis of economic efficiencies usually considers whether they are:

- measurable and verifiable;
- achievable in less than two years; and
- beneficial to consumer welfare.

It also looks at whether externalities (eg, cost reduction) related to the transaction can be achieved by other means.

4.6 Non-competition Issues

The Brazilian Competition Law grants CADE the power to enforce competition matters, meaning that non-competition issues (such as industrial policy, national security, employment and the environment) are not therefore considered during a merger review process.

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The agency has, nevertheless, in the past suggested improvements for industry policy and regulation for different sectors in order to improve competition. CADE indicated, for example, in Merger Review No 08700.005719/2014-65 (Rumo Logística Operadora Multimodal SA and All-América Latina Logística SA) that the regulation for railways and highways did not set forth enough measures to avoid anti-competitive concerns.

4.7 Special Consideration for Joint Ventures

Spill-over effects, including co-ordination and exchange of competitively sensitive information, can be taken into special consideration during CADE's substantive review of joint ventures. The authority specifically verifies whether the transaction agreements contain appropriate measures to ensure that involved parties will not engage in anti-competitive practices.

One example was Merger Review No 08700.004934/2019-53 (ADM International Sàrl, Bunge SA, Cargill International SA, COFCO Resources SA, Louis Dreyfus Company Suisse SA and Glencore Agriculture BV). CADE thoroughly analysed the purpose and scope of the joint venture ("Covantis JV"), including:

- whether there were compliance rules to guarantee the independence of the parties' businesses;
- the type of information that would be exchanged among the parties;
- safeguards to prevent the exchange of sensitive information; and
- whether the negotiation and contracting process, in which the parties should remain independent, would be involved.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

CADE has broad powers to prohibit or interfere, by means of antitrust merger remedies, with all transactions submitted to the merger review, including those transactions that do not represent compulsory notifications (see **2.11 Power of Authorities to Investigate a Transaction**).

Remedies are adopted by CADE mainly when the actual or potential negative effects of a transaction outweigh its positive effects or efficiencies (see **4.1 Substantive Test**). CADE can impose all necessary structural or behavioural measures to remedy the identified adverse effects, including:

- divestment of assets;
- discontinuing of products or services;
- refraining from limiting capacity; and
- obligations to grant access to inputs or intellectual property rights.

Any intervention in the transaction is carried out during its assessment and does not require a judiciary decision.

5.2 Parties' Ability to Negotiate Remedies

Pursuant to the Brazilian Competition Law, remedies may be both (i) suggested by the parties, upon agreement and negotiations with CADE, or (ii) unilaterally imposed by CADE's Tribunal.

Remedy negotiations are encouraged by the authority and can start from the very beginning of the merger review (see **5.5 Negotiating Remedies With Authorities**).

5.3 Legal Standard

There are no legal standards that remedies must meet to be deemed acceptable. However, CADE's *Guidelines on Antitrust Remedies* suggests the following main principles to consider when assessing their effectiveness.

- Proportionality – remedies must be sufficient to address competition concerns.
- Timeliness – remedies that mitigate concerns faster are preferable.
- Feasibility – remedies will only be effective if:
  - (a) they can be monitored;
  - (b) they do not generate risks; and
  - (c) there is no regulatory impediment.
- Verifiability – the following must be verifiable and/or feasible:
  - (a) means to ascertain obligations;
  - (b) monitoring of actions taken by the parties; and
  - (c) identifying consequences and the type of actions necessary to achieve the agreed or imposed remedies.

5.4 Typical Remedies

CADE prefers to impose structural remedies (such as divestiture or sale of assets), rather than behavioural remedies, because the former are generally more effective at reducing impacts on market structure and monitoring costs are lower. Additionally, the authority understands that structural remedies are less likely to create market distortions. Nonetheless, in practice, CADE has been applying behavioural and/or hybrid remedies more often than standalone structural remedies. It approved six transactions, subject to remedies, in 2021. The following are three examples.

- Merger Review No 08700.003553/2020-91 (Hypera SA and Takeda Pharmaceuticals International AG) – the parties voluntarily offered to divest part of the target's portfolio, including all rights and necessary know-how for the manufacturing of the divested products.
- Merger Review No 08700.002569/2020-86 (Tupy SA and Teksid SpA) – the remedies imposed consisted of a set of behavioural measures and the transferral of supplying agreements to third parties.
- Merger Review No 08700.005598/2020-08 (White Martins Gases Industriais Ltda and Petróleo Brasileiro SA) – the remedies imposed concerned the dissolution of a pre-existent consortium among the parties.

5.5 Negotiating Remedies With Authorities

According to CADE's by-laws, the parties may submit a remedy proposal from the date the transaction is submitted for merger review until 30 days after the case is submitted to CADE's Tribunal.

Although parties can negotiate remedies with CADE's General Superintendence, all proposals are subject to final approval from CADE's Tribunal. Ordinarily, a remedy proposal approved by the Tribunal will set out detailed information on the following matters.

- How parties should conduct divestitures and/or comply with behavioural remedies, including:
  - (a) the specific assets to be divested;
  - (b) buyers eligible to purchase divested assets and whether an upfront buyer would be required;
  - (c) timetable;
  - (d) pricing terms; and
  - (e) deadlines for behavioural commitments.
- How the remedies will be monitored by CADE and whether parties will be required to send recurrent reports on remedies compliance.
- Whether remedies will require the appointment of a monitoring trustee.

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- Sanctions for breaching the remedies agreement.

CADE's Tribunal has powers to unilaterally impose remedies as a condition for clearance, but precedents indicate CADE's preference for the adoption of negotiated remedies.

5.6 Conditions and Timing for Divestitures

Conditions and Timing for Divestitures

All remedies imposed under the Brazilian merger control system must be specific and address the competition concerns caused by the transaction.

CADE may impose behavioural, structural or hybrid remedies, as mentioned in **5.2 Parties' Ability to Negotiate Remedies**. Although it is a non-binding document issued by the agency, CADE's *Guidelines on Antitrust Remedies* recommends prioritising structural remedies and completing any divestiture process within the shortest possible timeframe (certainly no longer than 3–6 months). A timeline for behavioural remedies is established by taking the actual competitive concern that needs addressing into consideration.

Completion of the Transaction

There is no rule under the Brazilian Competition Law regarding completing a transaction before remedies have been implemented; this varies on a case-by-case basis.

Generally, for parties to complete a transaction before remedies are complied with, several measures must be adopted and monitored by CADE (and/or a monitoring trustee) to preserve market conditions. These include maintaining the integrity and commercial viability of the assets and avoiding the exchange of sensitive commercial information.

CADE specifically ruled in Merger Review No 08700.000726/2021-08 (Oi SA, Tim SA, Telefônica Brasil SA and Claro SA) that part of the remedies had to be implemented before closing, otherwise the parties would not have enough incentives to comply with them at a later stage.

Penalties

Parties may be subject to fines, which are established within the scope of the merger control agreement executed for the transaction's conditional approval. The amount may vary according to the relevance of the obligation. Fines for non-compliance with the main obligations (eg, structural or behavioural) tend to be higher than fines for non-compliance with ancillary obligations such as the presentation of documents or reports.

It is worth noting that the parties will have the opportunity to justify any failure to meet deadlines or other commitments. Ultimately, however, CADE may also fully reassess or even block the transaction if obligations are not fulfilled in a timely manner.

5.7 Issuance of Decisions

CADE issues formal decisions on all transactions submitted to merger control. All decisions issued by CADE (by both the General Superintendence and the Tribunal) can have two versions: a confidential (available only to the parties) and a non-confidential version (publicly disclosed). It is only the parties' sensitive information and strategic and structural aspects of the transaction that are generally not disclosed in the non-confidential versions of CADE's decisions.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

CADE has already imposed remedies in several foreign-to-foreign transactions that generated effects in Brazil.

The authority recently imposed both structural (eg, divestiture of business units and related assets) and behavioural remedies (eg, assignment of IP rights) within the scope of Merger Review No 08700.003307/2020-39 (Danfoss SA and Eaton Corporation PLC), which concerned a global transaction in the auto parts sector.

CADE also imposed behavioural remedies related to the licensing of distribution rights and the prohibited exchange of sensitive information in Merger Review No 08700.001390/2017-14 (AT&T and Warner).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Ancillary restraints set forth within the scope of transaction, particularly non-compete and exclusivity provisions, are reviewed by CADE.

The authority's consolidated understanding of such restraints allows for provisions that do not exceed five years' duration and are limited to the product and the geographical scope of the target's activities. Where ancillary restraints do not comply with the criteria described above, CADE can request that these obligations are amended as a condition of the transaction's approval.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

According to the Brazilian Competition Law, "Interested Third Parties" can officially intervene or oppose a transaction during merger review process, subject to CADE's approval. Undertakings must submit a formal request for CADE's approval to be formally considered Interested Third Parties.

The third party must demonstrate its financial interest in the case and how the potential effects of the transaction will negatively impact its business. Interested Third Parties may include trade associations, competitors, suppliers, retailers and consumers.

Requests containing grounded reasons for intervention must be submitted to CADE within 15 consecutive days of the merger review's public notice in *TheBrazilian Official Gazette*.

Interested Third Parties are considered part of the merger review and are allowed to engage actively in the review process by presenting all types of submissions at any time, including technical opinions, reports or even studies to provide alternative market scenarios.

More importantly, as it could impact the time-line, Interested Third Parties are allowed to file an appeal if the transaction is cleared by CADE's General Superintendence.

7.2 Contacting Third Parties

CADE typically contacts third parties via email questionnaire as part of its review process' market test (see **3.10 Requests for Information During the Review Process**). The authority can also consult third parties on the effectiveness of remedies offered by the parties involved. Third parties may usually actively engage in these discussions.

7.3 Confidentiality

Publicity of the Transaction

Brazilian law generally permits all types of administrative procedures to be made available to the public, and only confidential information is redacted in the public case files.

The transaction in a merger review is made public through the publication of a notice in *The Brazilian Official Gazette*, but only when the authority is satisfied with the first set of information sent by the parties (see **3.6 Penalties/Consequences of Incomplete Notification**). The public notice usually identifies the name of the merging parties, their lawyers, the type of transaction and the affected sector.

The non-confidential version of the filing form, as well as other non-confidential documents submitted by the parties, can be publicly accessed at CADE's official website immediately following the notice's publication in *The Brazilian Official Gazette*.

Confidential Data

Any strategic, sensitive and commercial information (eg, business secrets, information on future plans, strategy and commercial information) included in the filing form and documents submitted to CADE can be kept confidential at the merging parties' request and CADE's approval.

The parties must present redacted non-confidential versions of the filing form and all written petitions submitted to CADE. Other documents submitted to CADE (such as the transaction's binding agreement) can be kept entirely confidential.

7.4 Co-operation With Other Jurisdictions

CADE often co-operates with other jurisdictions and currently has agreements with several foreign authorities regarding general policy matters and co-operation within the context of specific transactions.

However, the parties must grant CADE a waiver to share confidential information with other jurisdictions in specific transactions. The authority has contacted other jurisdictions to maintain a coherent and balanced analysis of Merger Review No 08700.003307/2020-39 (Danfoss SA and Eaton Corporation PLC) and the remedies imposed in all jurisdictions. The transaction was also filed before the competition authorities of the USA, EU, Ukraine, Egypt, China, South Korea, Mexico, Australia and Turkey.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Administrative Review

All decisions issued by the General Superintendence clearing a transaction can be:

- appealed by an Interested Third Party;
- reviewed by CADE's Tribunal at the request of one of its Commissioners; and/or
- appealed by regulatory agencies if the transaction involves regulated markets, as explained in **3.8 Review Process** and **8.3 Ability of Third Parties to Appeal Clearance Decisions**.

If the General Superintendence recommends imposing remedies or blocking a transaction, it will be necessary for the Tribunal to review this opinion. However, parties can also present their arguments to challenge the General Superintendence's conclusions. Finally, decisions issued by CADE's Tribunal are final and cannot be appealed.

Judicial Review

Although CADE's Tribunal decision is final and not subject to appeals, as an administrative decision it can be reviewed by the judiciary.

8.2 Typical Timeline for Appeals

The General Superintendence's non-binding recommendations to impose remedies or block transactions will necessarily be reviewed by CADE's Tribunal, as explained in **8.1 Access to Appeal and Judicial Review**. However, once the opinion is issued, parties have 30 days in which to challenge the General Superintendence's conclusions.

Interested Third Parties and/or regulatory agencies (if the transaction involves regulated markets) can appeal an approval decision or CADE's Tribunal may decide to review the case by a request of one of its Commissioners. For both cases, there is a deadline of 15 days following the decision's publication.

The appeal will be assigned to a Commissioner, who will (i) submit it to trial if no further analysis is required or (ii) determine the execution of a supplementary analysis of the case.

It should be noted that the above-mentioned appeals and the submission of a case to trial do not suspend CADE's analysis deadline, as mentioned in **3.8 Review Process**. The overall timeline will remain the same – ie, 240 days, which may be extended for up to 90 additional days, totalling 330 days.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Interested Third Parties may challenge a clearance decision issued by the General Superintendence within 15 days of its publication in *The Brazilian Official Gazette*. These appeals can affect the timeline for approval and, more importantly, reverse the General Superintendence's clearance decision.

There have been a few cases in which interested third parties appealed a decision and were successful. The case in Merger Review No 08700.000627/2020-37 (Grupo SBF SA and Nike do Brasil Comércio e Participações) was cleared by the General Superintendence and, after the third party's appeal, CADE's Tribunal decided to impose remedies on the transaction.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

CADE recently issued Rule No 33/2022, which consolidated matters related to merger control previously set forth in several administrative resolutions that are now revoked (Rules No 02/2021, 09/2021 and 16/2016).

There are currently no official proposals to change the Brazilian competition legislation substantially, although the current General Superintendent has publicly stated that the jurisdictional threshold could be revised to increase the turnover criteria in order so that the number of fast-track cases to be analysed by CADE is reduced.

There is also an ongoing draft bill proposing to reduce the number of CADE's Tribunal members from seven to five. However, if this bill is approved, the merger review process and timelines shall not be affected.

9.2 Recent Enforcement Record

CADE has recently settled with Veolia Environnement SA and Engie SA in Procedure

No 08700.005713/2020-36 on an investigation related to gun-jumping practices (see **2.2 Failure to Notify**). The parties agreed to pay a fine of BRL60 million (the maximum fine and the highest ever imposed by CADE) to close the investigation.

As previously mentioned, FD do Brasil Soluções de Pagamentos and Software Express Informática have recently settled with CADE in Procedure No 08700.002914/2020-81 and agreed to pay a fine of BRL6.7 million (see **2.2 Failure to Notify**).

CADE also recently imposed remedies within the scope of Merger Reviews No 08700.000726/2021-08 (involving the acquisition of the telecom company Oi SA by its major competitors Tim SA, Telefônica Brasil SA and Claro SA) and No 08700.004426/2020-17 (concerning the incorporation of J3 Operadora Logística SA by Bus Serviços de Agendamento SA). CADE imposed structural and behavioural remedies in the first case for disinvestment of assets and sharing of the parties' infrastructure with smaller and regional players. The authority has forbidden the parties in the second case from entering into exclusivity agreements with its clients, among other remedies.

Finally, in November 2021, CADE rejected parties' proposal to comply with structural remedies imposed by the Tribunal within the scope of a merger involving two Brazilian health plan providers (Merger Review No 08700.001846/2020-33) and the transaction was ultimately rejected. Parties recently refiled the transaction with a fix-it-first solution that includes an upfront buyer and the merger is currently under CADE's review (Merger Review No 08700.002862/2022–13).

9.3 Current Competition Concerns

Overall, CADE has focused on deepening the economic analysis of the transactions, which is seen in the detailed and lengthy requests to third parties for additional data. CADE has shown a particularly conservative approach to sectors that have been subject to consolidation movements in Brazil during the past few years (eg, healthcare, telecommunication, pharmaceutical, financial and digital markets).

Recently CADE has also demonstrated concerns about digital markets and big data, including the increase of market power due to data acquisition in the following three cases.

- Merger Review No 08700.000059/2021-55 (Magalu Pagamentos Ltda and Hub Prepaid Participações SA) – CADE investigated if data acquisition could represent a competitive advantage.
- Merger Review No 08700.006373/2020-61 (Serasa SA and Claro SA) – the scope of the transaction was purely data acquisition.
- Merger Review No 08700.003969/2020-17 (STNE Participações SA and Linx SA) – CADE's analysis comprised an investigation of information asymmetry through the data acquisition.

Considering the continuous expansion of digital sectors, including the consolidation and expansion of the metaverse, CADE should continue to have a thoughtful look at all digital markets.

Contributed by: *Luis Nagalli, Julia Haddad Niemeyer, Camila Lisboa Martins and Carolina Furlani Adriano,* ***Madrona Advogados***

Madrona Advogados was founded in 2015 by seven highly experienced partners, all recommended in several national and international publications. The firm currently has 25 partners, whose achievements in their practice areas have been recognised both in the global and Latin American editions of the guides produced by Chambers and Partners. Madrona focuses on corporate law, M&A, antitrust law, capital markets, financial law, and infrastructure, and has a strong performance in antitrust, tax, real estate, civil litigation and labour law. The firm's mission is to reflect the times and invest in people by working ethically and responsibly to ensure clients reach their goals. Comprising more than 110 expert legal professionals, the Madrona Advogados team is aligned with the principles and objectives that the firm has set out to achieve.

AUTHORS

Luis Nagalli is a partner at Madrona Advogados and the head of the firm's antitrust practice. He has extensive experience of representing foreign and domestic clients from many diverse industries in merger control filings. Luis also has a substantial background in negotiating leniency agreements and settling cartel cases before the Brazilian national competition authority, CADE, and the Federal Controller General. He holds an LLM in Competition and Information Law from New York University and worked as an associate at a prestigious law firm in the United States, where he co-ordinated notifications across multiple jurisdictions and with the US Federal Trade Commission and Department of Justice.

Julia Haddad Niemeyer is a senior associate at Madrona Advogados specialising in antitrust and competition matters. She has significant experience in representing foreign and domestic clients in antitrust investigations (including negotiations of leniency and settlement agreements in major cartel investigations) before the Brazilian national competition authority, CADE. She also has solid experience in handling merger review proceedings, negotiating merger control agreements and advising clients on the creation and implementation of antitrust compliance programmes. Julia is a member of the Brazilian Bar Association, São Paulo Section.

Contributed by: *Luis Nagalli, Julia Haddad Niemeyer, Camila Lisboa Martins and Carolina Furlani Adriano,* ***Madrona Advogados***

Camila Lisboa Martins is a mid-level associate at Madrona Advogados, specialising in antitrust and competition law. She has solid experience in merger reviews (including multinational cross-jurisdictional reviews) across a wide array of industries, in addition to representing domestic and foreign companies in cartel investigations, abuse of dominance cases and vertical restraints issues before the Brazilian national competition authority, CADE. Camila has worked as a visiting attorney in prestigious law firms in England and Canada. She is a member of the Brazilian Bar Association (São Paulo Section) and the Brazilian Institute of Competition, Consumption and International Trade Studies.

Carolina Furlani Adriano is a junior associate at Madrona Advogados, where she focuses on antitrust and competition matters and represents domestic and foreign clients in M&A notifications across various sectors of the economy. She has also negotiated leniency and settlement agreements in cartel cases before the Brazilian national competition authority, CADE. Carolina is a member of the Brazilian Bar Association (São Paulo Section) and the Brazilian Institute of Competition, Consumption and International Trade Studies.

Madrona Advogados

Avenida Brigadeiro Faria Lima 3064
11th Floor
CEP 01451-000
São Paulo
Brazil

Tel: +55 11 4883 8750
Email: Luis.nagalli@madronalaw.com.br
Web: www.madronalaw.com.br

madrona advogados

Trends and Developments

Contributed by:
Mariya Papazova
PPG Lawyers ***see p.96***

Overview of Bulgarian Merger Control

The past two years have been marked by steps to modernise Bulgarian merger control. The first major amendments of the merger control system since 2008 took place in 2019–21.

Bulgarian merger control is regulated by the Bulgarian Protection of Competition Act (CPA) of 2008. The regulation has followed Council Regulation (EC) 139/2004 (the "EU Merger Regulation"), especially in terms of the control test (based on the EU concept of "decisive influence"), acquisition of control and calculation of turnover.

The CPA states that each M&A transaction resulting in a change of control over another undertaking (or undertakings), including the establishment of full-function joint ventures and pure foreign-to-foreign transactions, shall be notified before the Bulgarian Commission for Protection of Competition (CPC) if certain thresholds are met.

Notification is mandatory when:

- the aggregate turnover of the undertakings participating in the concentration in the territory of Bulgaria for the preceding financial year exceeds BGN25 million; and
- the aggregate turnover of each of at least two of the undertakings concerned – or of the target alone – in Bulgaria for the preceding financial year exceeds BGN3 million.

The CPC clears a transaction within Phase I of the assessment proceeding if the transaction does not raise competition concerns. If a transaction raises competition concerns, the CPC may open Phase II (ie, in-depth investigation) to issue clearance (with or without conditions) or prohibit the transaction.

The substantive merger assessment used to be based on the dominant test until 2021. In 2021 the CPA was amended, mainly owing to the implementation of the ECN Directive (EU) 2019/1 (the "ECN+ Directive"). The Bulgarian National Assembly took the opportunity to amend the substantive merger control test as well so some aspects of the merger control assessment proceeding could be improved. Following the CPA amendments, the CPC adopted the new Rules for Approval of Remedies for Preserving Competition in Concentrations between Undertakings (the "Rules for Remedies"), which replaced the old ones from 2011.

The process of modernising the Bulgarian merger control actually started at the end of 2019, when the CPC adopted a new notification template. One year later, the CPC also adopted the Rules for Pre-Notification Contacts regarding Concentration of Economic Activity between Undertakings (the "Rules for Pre-Notification Contacts").

The New Substantive Test and Amendments in the Assessment Proceeding

The CPA's amendments from 2021 have combined the substantive merger control test with that of the EU Merger Regulation.

Now a transaction involving notifiable concentration of economic activity (as defined by the CPA) shall be assessed by the CPC in view of its effect on competition. The CPC will only approve the transaction if it does not seriously impede effective competition in the relevant market; eg, it does not result in establishing or strengthening of a dominant position.

The CPC shall consider a particular set of factors to determine whether the notified transaction meets the above test. The market position of the undertakings concerned is no longer the leading factor following the 2021 amendments. It is just one relevant factor in the CPC's assessment.

The CPC will now assess the entire state of the relevant market before and after the concentration, including:

- the structure of the relevant market;
- the actual and potential competition from undertakings within and outside Bulgaria and the EU;
- the market position of the undertakings in the relevant markets before and after the concentration;
- the economic and financial strength of the undertaking concerned;
- existing buying power;
- possible alternatives of suppliers and customers;
- access to up- and downstream markets;
- supply and demand trends;
- consumers' preferences;
- technical and economic progress; and
- all types of market barriers.

The CPC is also free to assess other factors that it deems relevant and approve a concentration that may seriously impede the effective competition (even if it establishes or strengthens a dominant position) under certain conditions.

The positive effects of such a transaction would need to outweigh the negative effects on competition – for instance, the transaction could potentially modernise a particular economic activity, improve the market structure or better meet the consumers' interests.

The amendments of the assessment proceeding reflect the introduction of the new assessment test. The two major examples concern the right of the notifying party to propose changes in the concentration's terms and the approval of measures to maintain effective competition when the concentration could potentially have anti-competitive effects on the relevant market.

Now the ability to propose changes to the concentration's terms in Phase I of the proceeding not only belongs to the notifying party. The latest amendments to the CPA mean the CPC can instruct the notifying party to propose changes to the concentration's terms if data indicates that it will have anticompetitive effects.

The notifying party still may propose measures to preserve effective competition in the relevant market during Phase II. Following the CPA's amendments, however, the CPC may appoint an independent controlling manager to monitor the implementation of any measure it approves.

The procedures for proposing changes to the concentration's terms in Phase I and for approving measures to preserve effective competition in Phase II proceedings are further regulated by the new Rules for Remedies adopted by the CPC in July 2021.

New Rules for Remedies

These new Rules for Remedies regulate the main principles, criteria and procedure for approving any changes to the concentration's terms within Phase I or measures to preserve competition in Phase II that might be proposed by the notifying party should the notified concentration potentially raise competition issues.

The new Rules for Remedies are based on the practice of the EC and other EU member states' national competition authorities. They define two types of measures that might be proposed in both phases of the assessment proceeding: structural and behavioural measures. The CPC considers structural measures easier to control.

In general, all measures should be:

- based on clear legal and economic principles;
- aimed at preserving competition;
- able to overcome any possible negative effects the concentration may have on the competition environment;
- proportional to competition issues;
- adequate, sufficient, specific and real; and
- easy to implement without excessive costs for the undertakings concerned.

All measures are approved after a "market test" in which the CPC surveys the competitors, suppliers and/or customers about the effectiveness of the proposed changes.

The CPC adopts with the Rules for Remedies proposal template, as proposing changes could delay both phases of the assessment proceeding. This template guarantees that the notifying party will provide all the information the CPC needs to assess the proposed measures easily. The entire Rules for Remedies template is based on the principle of close discussion between the notifying party and the CPC to make these measures effective and workable.

The new Rules for Remedies also regulate the procedure for proposing and approving an independent controlling manager (eg, a monitoring trustee or divestiture trustee). This is a new figure introduced in the latest CPA amendments.

The manager should be nominated by the notifying parties, approved by the CPC upon assessment and meet certain criteria for independence. The Rules for Remedies outline the manager's responsibilities and main obligations in a hypothetical agreement to be signed by the notifying party, the CPC and approved manager.

The general purpose of this figure is to make it easier and more effective for the CPC to monitor and control any approved measures proposed within Phase II to preserve competition. The CPC has no experience of practising this type of proceeding yet.

New Notification Template

Preparations for amending the Bulgarian merger control started approximately one year earlier when the CPC adopted a new notification template with guidelines for its completion.

This new notification template, together with the guidelines, was adopted by the CPC at the end of 2019. Nevertheless, the new template reflects the new merger assessment test. The template was just slightly adjusted in June 2021 and only to mirror in full the wording of the CPA's new assessment provisions.

The template demands more detailed information about the structure and real business activity of the undertakings concerned and their economic groups, the relations between them and to the other market players prior to the concentration.

The parties must provide the CPC, according to this template, with more precise definitions of the relevant markets and how they relate to each other (ie, horizontally, vertically, or neighbouring related markets). More detailed market data is now required when the concerned undertakings' aggregate relevant market shares exceed certain levels, depending on the relationship between the relevant markets.

This data will allow the CPC to assess how the respective merger will affect competition in the relevant markets, rather than just its effect on the market position of the undertakings concerned and their competitors, thanks to the new assessment test.

Rules for Pre-Notification Contacts

The CPC adopted the Rules for Pre-Notification Contacts for the first time before the CPA's amendments at the end of 2020. The CPC had been recommending pre-notification contacts to the undertakings concerned long before these new rules were enforced in order to avoid delays during the assessment proceeding.

The notifying parties were hesitant to conduct such pre-notification contacts, owing to uncertainty how their information would be treated and the lack of written rules. The Rules for Pre-Notification Contacts give the undertakings concerned the opportunity to clarify with the CPC experts which information and pieces of evidence they should provide with the notification, especially in more complicated transactions. These pre-notification contacts might speed up the assessment proceeding and make it easier, among their other benefits.

The Rules for Pre-Notification Contacts outline what type of information can be discussed with the CPC prior to notification, what data should be provided in the discussion and when – as well as how – the discussion should be conducted. The pre-notification contacts cannot be used for receiving the CPC expert's preliminary statements and opinion on the effects of the planned merger.

The main issues that can be discussed at the pre-notification meetings concern nearly all the information required by the notification template, such as:

- nature and legal form of the concentration;
- definition of the relevant markets;
- competition concerns;
- how to avoid proposed amendments to the concentration upon notification;
- the option to not provide certain documents; and
- options for referring the concentration to the EC.

The documents provided to the CPC should also relate to these topics and will be considered as confidential. Minutes for the meeting should be prepared at its end.

Most Recent CPC Practice

The CPC issued between 32 and 36 decisions in 2019–20 on concentrations of economic activity, while beginning 35 assessment proceedings. It is notable that the number of cases and decisions in 2020 did not differ from 2019, meaning the pandemic did not have much effect on the CPC's merger control system. Nevertheless, these numbers are lower than 2016–17.

The economic sectors mostly subject to merger control by the CPC in 2019 were:

- the sale of motor vehicles and spare parts;
- banking and financial services;
- production and distribution of packages;
- road construction; and
- e-commerce.

The sectors subject to merger control in 2020 were pharmacy, energy, and production and distribution of agriculture products. Individual transactions in 2020 continued to take place in economic sectors such as road construction and the importation and sale of motor vehicles.

The CPC prohibited two concentrations during the 2019–20 period in economic sectors of great public importance – state defence and energy. The concentration from the state defence sector was prohibited because the horizontal and conglomerate effects of the transaction could establish and strengthen the undertakings' dominant position in relevant markets. The CPC found that the energy sector concentration may establish a dominant position due to conglomerate effects.

One sanction was imposed by the CPC in 2019 for early implementation of a concentration without notification. The CPC imposed another sanction on a notifying party in 2020 for not providing full, correct and comprehensive information.

Contributed by:** Mariya Papazova, **PPG Lawyers

PPG Lawyers is a boutique law firm specialising in regulatory matters, including personal data protection and cybersecurity, competition and consumer protection, public procurement, tax and certain niche sectors such as TMT, energy, environment and life science. The Competition and Consumer Protection Department provides a full range of antitrust services, including co-operation and distribution agreements, unilateral behaviour of companies with market power, and merger control. The department's work also covers unfair competition cases and it advises businesses on consumer protection matters. Services include consultations on different legal issues, as well as legal representation before the Bulgarian Commission for Protection of Competition and the competent courts. Clients are national and international but come in many sizes and from many different economic sectors.

AUTHOR

Mariya Papazova is head of PPG Lawyers' Competition and Consumer Protection Department and has 20 years' experience in competition and consumer protection. She has successfully advised clients before the Bulgarian Commission for Protection of Competition (CPC) in cartel, abuse of dominant position, unfair competition and sector analyses investigations. Relevant Bulgarian markets have been greatly impacted throughout the years by the numerous mergers in which she has advised and represented clients before the CPC. Mariya has written articles on various competition and consumer protection topics in reputable national and international publications.

PPG Lawyers

28 Tsar Assen Street
Floor 3
1000 Sofia
Bulgaria

Tel: +359 2 950 6827
Email: office@ppglawyers.eu
Web: www.ppglawyers.eu

CANADA

Law and Practice

Contributed by:
Anthony Baldanza, Huy Do, Antonio Di Domenico and Chris Margison
***Fasken** see p.118*

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant merger control legislation is contained in the Competition Act (Act), a federal statute of general application that applies across Canada. There is extensive additional guidance from the Competition Bureau (Bureau) in the form of guidelines, bulletins and policy statements, including, most importantly, the Merger Enforcement Guidelines (MEGs).

The MEGs and other applicable guidance are available on the Bureau's website.

1.2 Legislation Relating to Particular Sectors

Other potentially relevant legislation for foreign investment transactions or transactions relating to particular sectors is set out below. The Bureau works closely with the agencies responsible for enforcing this foreign investment and sector-specific legislation, although each agency exercises its mandate separately.

Investments by Non-Canadians

Investments by non-Canadians to acquire control of Canadian businesses are either reviewable according to a "net benefit to Canada" test, or merely notifiable under the Investment Canada Act (ICA). Whether an investment is subject to net benefit review or notifiable depends on several factors, including the structure of the transaction, the nationality of the investor, whether the investor is a state-owned enterprise, and the nature and value of the assets or business being acquired.

A transaction that is subject to net benefit review cannot be completed unless the Minister of Innovation, Science and Industry (in the case of non-cultural investments) or the Minister of Canadian Heritage (in the case of cultural investments) is satisfied that the investment is likely to be of net benefit to Canada. The Minister's net benefit analysis takes into account a number of factors, including the competitive effect of the investment. The administrators of the ICA rely on the Bureau to assess competitive effects.

The ICA also includes provisions allowing for the review of investments by non-Canadians that "could be injurious to national security". Significantly, in contrast to "net benefit" reviews, both controlling and non-controlling investments are potentially subject to national security review.

Canada Transportation Act (CTA)

Transactions that "involve a transportation undertaking" and that are subject to pre-merger notification under the Act must also be notified to the Minister of Transport (as well as the Canadian Transportation Agency if the proposed transaction involves an air transportation undertaking). The Minister of Transport has 42 days from such notification to determine whether the proposed transaction "raises issues with respect to the public interest as it relates to national transportation." Where the transaction is considered to raise such issues, a potentially lengthy review is triggered and any order in respect of the transaction is made by the Minister of Transport under the CTA and not under the Act (the Commissioner's role in this case is limited to providing a recommendation to the Minister of Transport).

Broadcasting and Communications

Transactions involving broadcasting undertakings that are subject to review under the merger provisions of the Act may also be subject to review and approval by the Canadian Radio-television and Telecommunications Commission (CRTC). Similarly, transactions involving radiocommunication licence holders that are subject to review under the Act may also be subject to review by the Minister of

Innovation, Science and Industry under the Radiocommunication Act.

Financial Institutions

With respect to mergers under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act, where the Minister of Finance certifies, to the Commissioner of Competition (Commissioner), who heads the Bureau, the names of the parties and that the proposed merger is in the public interest, the Competition Tribunal (Tribunal), and therefore the Commissioner, no longer have jurisdiction over that merger.

1.3 Enforcement Authorities

The Commissioner is responsible for the administration and enforcement of the Act. However, the Commissioner must refer matters that warrant criminal prosecution to the Director of Public Prosecutions (DPP). Civil reviewable matters – including mergers, abuse of dominance, competitor collaborations and various types of price and non-price vertical restraints – are reviewed by the Tribunal on application by the Commissioner or, in certain instances, by private parties with leave of the Tribunal. Criminal prosecutions are brought by the DPP before the courts. Private civil actions (often in the form of class actions) are brought by individuals, corporations and other entities before the courts.

Please refer to **1.2 Legislation Relating to Particular Sectors** with respect to the ICA, the CTA, broadcasting and communications legislation and financial institution legislation.

2. JURISDICTION

2.1 Notification

The pre-merger notification provisions in Part IX of the Act provide that the parties to a proposed transaction of a specified type, and exceeding specified thresholds, must, subject to certain exceptions, provide the Commissioner with advance notice of, and specified information with respect to, that transaction.

There are several exemptions to the pre-merger notification provisions included in Sections 111 to 113 of the Act, such as where all the parties to the proposed transaction are affiliates, the Commissioner has issued an advance ruling certificate (ARC) or the Commissioner has waived the obligation to notify.

Parties to a transaction may also seek formal clearance from the Commissioner in the form of an ARC or a no-action letter (NAL), even where the transaction is not subject to pre-merger notification. Such clearance will typically be sought in a non-notifiable transaction only where material competition issues exist and/or complaints are expected to be made by customers, suppliers or other market participants.

2.2 Failure to Notify

Failure to file a merger pre-merger notification (without "good and sufficient cause") when one is required is a criminal offence, punishable by a fine of up to CAD50,000. Where a corporation commits the offence, any officer, director or agent of the corporation who directed, authorised, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

In addition, failure to comply with the mandatory waiting period (without "good and sufficient cause") can result in a range of court orders, including orders:

- to supply information required pursuant to a Supplementary Information Request (SIR) if one has been issued;
- prohibiting any conduct directed at completion or implementation of the transaction;
- ordering the dissolution of a completed transaction or the disposition of assets or shares; and
- imposing an administrative monetary penalty of up to CAD10,000 for each day that the party failed to comply with the mandatory waiting period.

2.3 Types of Transactions

Part IX of the Act requires parties to provide a pre-merger notification to the Commissioner in respect of the following types of transactions, where specified thresholds are exceeded:

- acquisition of assets or voting shares;
- amalgamation of entities;
- formation of a combination to carry on business other than through a corporation (for example, a partnership or an unincorporated joint venture); and
- acquisition of an interest in a combination.

Notification is required only where an operating business is the subject of the transaction, whether directly or indirectly. An operating business is defined in the Act to mean a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.

Transactions that do not involve the acquisition of an operating business or do not fall within the categories described above are not subject to pre-merger notification.

2.4 Definition of "Control"

The Act includes provisions that define the concept of "control". In particular, for the purposes of the Act, a corporation is deemed to be controlled by an entity or individual that directly or indirectly holds securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation and which, if exercised, would be sufficient to elect a majority of the directors of the corporation. Similarly, an entity other than a corporation – such as a partnership, trust or other unincorporated organisation capable of conducting business – is deemed to be controlled by an entity or individual that directly or indirectly holds an interest in the entity that entitles it to receive more than 50% of the profits of that entity or more than 50% of its assets on dissolution.

2.5 Jurisdictional Thresholds

The pre-merger notification provisions contain two thresholds: a size of parties threshold and a size of transaction threshold. Both these thresholds must be exceeded for the transaction under consideration to be subject to mandatory pre-merger notification. The jurisdictional thresholds set out below apply to all sectors. However, as noted in **2.1 Notification**, there are several exemptions to the pre-merger notification provisions included in Sections 111 to 113 of the Act.

Size of Parties Threshold

The size of parties threshold is exceeded if the parties to the transaction, together with their affiliates, (i) have assets in Canada that exceed CAD400 million in aggregate book value; or (ii) have annual gross revenues from sales in, from or into Canada that exceed CAD400 million.

Size of Transaction Threshold

The size of transaction threshold is exceeded if the value of the assets in Canada being acquired, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds CAD93 million (2022 threshold). The size of transaction threshold is typically changed annually according to a GDP-based indexing mechanism set out in the Act. However, the threshold for a year may be established by regulation or may be left unchanged from the prior year. For 2022, the Minister decided to leave the threshold unchanged from 2021.

There are aspects of this threshold that vary, depending on the type of transaction, as follows.

Asset acquisition

Pre-merger notification is required in respect of a proposed acquisition of any of the assets in Canada of an operating business where the aggregate book value of the assets proposed to be acquired, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds CAD93 million (2022).

Share acquisition

Pre-merger notification is required in respect of a proposed acquisition of the voting shares of a corporation that carries on an operating business, or controls an entity that carries on an operating business, where the target corporation and any entities controlled by that corporation have assets in Canada with an aggregate book value, or have annual gross revenues from sales in or from Canada generated from those assets, exceeding CAD93 million (2022).

In addition to exceeding the CAD93 million (2022) threshold, acquisitions of shares must exceed thresholds relating to the percentage of the voting shares of the target that the acquirer acquires, to be subject to pre-merger notification. In the case of public companies, the transaction is only notifiable if, following the transaction, the acquirer will own shares carrying more than 20% of the votes attached to all outstanding voting shares of the corporation. If the acquirer already owns more than 20%, then the transaction is notifiable only if the transaction will increase the acquirer's interest to more than 50% of the votes. In the case of non-public companies, the thresholds are more than 35% of the votes, or if the acquirer already owns more than 35%, more than 50%. The interest owned by the acquirer includes any interest owned by any of the acquirer's affiliates.

Amalgamation

Pre-merger notification is required in respect of a proposed amalgamation of two or more entities where (i) one or more of those entities carries on an operating business, or controls an entity that carries on an operating business, where the aggregate book value of the assets in Canada that would be owned by the continuing entity that would result from the amalgamation or by entities controlled by the continuing entity, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds CAD93 million (2022); and (ii) each of at least two amalgamating entities, together with its affiliates, has assets in Canada or annual gross revenues from sales in, from or into Canada in excess of CAD93 million (2022).

Combination

Pre-merger notification is required in respect of a proposed combination of two or more persons to carry on business other than through a corporation where one or more of those persons propose to contribute to the combination assets that form all or part of an operating business carried on by those persons, or entities controlled by those persons, and where the aggregate book value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds CAD93 million (2022).

Acquisition of an interest in a combination

Pre-merger notification is required in respect of a proposed acquisition of an interest in a combination that carries on an operating business other than through a corporation where the aggregate book value of the assets in Canada that are the subject matter of that combination, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds CAD93 million (2022) and, as a result of the proposed acquisition, the persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the persons to receive more than 35% of the profits of the combination, or more than 35% of its assets on dissolution, or, where the persons acquiring the interest are already so entitled, to receive more than 50% of such profits or assets.

2.6 Calculations of Jurisdictional Thresholds

The asset and revenue thresholds discussed in **2.5 Jurisdictional Thresholds** are to be determined based on the aggregate book value of the assets and the annual gross revenues reported in the most recent audited financial statements of the parties and, as applicable, their affiliates, provided the end of the period covered by the statements is not more than 15 months prior to the reference date for the transaction. The "reference date" is the date on which a notification is filed in respect of the transaction or, if no notification is filed, the 30th day preceding the date on which ownership of any property that is the subject of the transaction is transferred, or, in the case of an amalgamation, articles of amalgamation are filed. Assets and revenues determined based on the most recent financial statements are subject to adjustment to reflect any subsequent transactions or events that would affect whether notification is required.

If audited financial statements are not available, assets and revenues must be determined in accordance with the books of the person, adjusted as necessary to comply with generally accepted accounting principles, and for the most recent date that the amounts can reasonably be determined, provided that the date is within three months of the reference date.

Amounts reported in foreign currency are to be converted to Canadian dollars, based on the noon exchange rate quoted by the Bank of Canada for the date on which the value of the assets is determined, or the last day of the annual period used to determine revenues. (As the noon exchange rate is no longer available on the Bank of Canada's website, the practice is to use the Daily Exchange Rate quoted by the Bank of Canada.)

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Application of the size of parties and size of transaction thresholds discussed in **2.5 Jurisdictional Thresholds** requires consideration of the assets and revenues of the parties and their affiliates, the amalgamated entity or combination and, in some cases, the entities they control.

Entities are affiliated if one is a subsidiary of the other, they are subsidiaries of the same entity, they are both controlled by the same entity or individual, or they are affiliated with the same entity at the same time. The Act defines subsidiaries in terms of control. Please see **2.4 Definition of "Control"** for a discussion of the concept of "control".

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to notification only if the thresholds relating to assets in Canada, or sales in, from or into Canada, are satisfied. If these thresholds are not satisfied, the Commissioner could nonetheless seek a remedy should they determine that the merger has resulted in, or is likely to result in, a substantial lessening or prevention of competition in any relevant market that includes all or part of Canada.

2.9 Market Share Jurisdictional Threshold

Market share is not employed to establish notifiability in Canada.

2.10 Joint Ventures

A joint venture may trigger mandatory pre-merger notification depending on how it is structured. For example, a joint venture that involves the acquisition of assets or shares may be subject to pre-merger notification where both the size of parties and the size of transaction thresholds specified in **2.5 Jurisdictional Thresholds** are exceeded. Furthermore, a joint venture that involves a sufficiently large combination may trigger mandatory pre-merger notification where the thresholds specified in **2.5 Jurisdictional Thresholds** are exceeded.

Note, however, that a combination is exempt from pre-merger notification if:

- all the persons who propose to form the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;
- no change in control over any party to the combination would result from the combination; and
- the agreement restricts the range of activities that may be carried on pursuant to the combination and contains provisions that would allow for its orderly termination.

Joint ventures that do not trigger mandatory pre-merger notification may nonetheless be subject to the substantive merger review provisions. However, certain joint ventures that are non-corporate combinations (including partnerships and trusts) created pursuant to agreements that provide for the termination of the joint venture at the end of a project are also exempt from remedial orders by the Tribunal under the merger provisions of the Act.

Non-notifiable joint ventures may be subject to substantive review under Section 90.1 of the Act, which deals with competitor collaborations. Under those provisions, the Commissioner may apply to the Tribunal for an order prohibiting any person from doing anything under an agreement or arrangement between competitors or potential competitors that prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. This is the same substantive test as the one applied to mergers. As in the case of mergers, the Act provides that the Tribunal cannot make an order under the civil competitor collaboration provisions if it finds that the agreement or arrangement has brought about, or is likely to bring about, gains in efficiency that will be greater than, and will offset the effects of, the prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

In limited circumstances, joint ventures between competitors may be subject to review and challenge under the criminal conspiracy provisions of the Act.

2.11 Power of Authorities to Investigate a Transaction

Subject to specified exceptions, all transactions that fall within the definition of "merger" may be reviewed under the substantive merger provisions of the Act. The Commissioner has the power to investigate and challenge any merger captured by the Act, whether subject to pre-merger notification or not, up to one year after the merger has been substantially completed.

2.12 Requirement for Clearance Before Implementation

Transactions subject to pre-merger notification may not be completed before the expiration or waiver of the applicable waiting period.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Please refer to **2.2 Failure to Notify**.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the statutory waiting periods for transactions that are subject to pre-merger notification. The Commissioner may waive the notification period and will do so if the Bureau concludes that the proposed transaction is not likely to prevent or lessen competition substantially in any relevant market that includes all or part of Canada. (See also the discussion in **3.8 Review Process** regarding the administrative schedule followed by the Bureau in reviewing mergers.)

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As discussed above, transactions subject to pre-merger notification may not be completed prior to expiry of the applicable waiting period without waiver by the Commissioner. Following expiry of the waiting period, parties may close a transaction subject to any timing agreement with the Commissioner and except where the Commissioner has obtained an order under the Act enjoining closing of the transaction.

Consent agreements to address anti-competitive effects of a merger identified by the Commissioner may include a hold separate requirement, pending completion of the agreed remedy or, in some cases, the determination of the appropriate remedy, and may be employed to permit a global closing even though the remedy in Canada has not been implemented or, in some cases, even determined.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Unless an ARC or NAL is issued, a transaction that is subject to mandatory pre-merger notification may not be completed until the 30-day waiting period has expired, and then only if the Commissioner has not issued a SIR that triggers a new 30-day waiting period commencing upon compliance with the SIR. A SIR is usually issued only where a proposed transaction raises significant competition issues and additional information is required.

Notwithstanding the statutory waiting periods provided in the Act, the Bureau utilises non-binding administrative service standards in relation to the conduct of its merger review. Service standards represent the maximum time within which the Bureau will endeavour to advise parties of the Bureau's position in respect of a particular transaction, assuming co-operation from the parties. The length of the service standard depends on whether the Bureau has classified the transaction as "non-complex", in which case the service standard is 14 days, or "complex", in which case the service standard is 45 days if a SIR has not been issued. The service standard commences on the day on which sufficient information has been received by the Commissioner to assign complexity. If a SIR has been issued, the service standard is 30 days, commencing on the date that the SIR has been complied with. Actual review periods may involve less or more time than the applicable service standard.

The complexity level of a transaction is based on various factors, including, for example, market shares, concentration levels and the existence of barriers to entry.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to pre-merger notification being made. Parties may file on the basis of, for example, a letter of intent or memorandum of understanding. That said, there is some risk that if the transaction that is ultimately agreed to varies materially from the transaction in respect of which notification is made, a further notification and filing fee will be required.

3.3 Filing Fees

The filing fee in respect of an ARC application or pre-merger notification is CAD77,452.36 (2022). If an ARC application and a pre-merger notification are submitted in respect of the same transaction, only the fee for an ARC is payable.

3.4 Parties Responsible for Filing

The persons responsible for filing are the parties to a transaction. In the case of a share purchase, the parties are the acquirer and the target. In asset purchase transactions, the parties are the acquirer and the vendor. In the case of an amalgamation, the parties are the amalgamating entities. In the case of a combination, the parties are the persons proposing the combination. In the case of an acquisition of an interest in a combination, the parties are the acquirer and the combination whose interest is to be acquired.

The "acquiring party" in the case of a share purchase, an asset purchase or an acquisition of an interest in a combination consists of one person, or two or more persons acting pursuant to an agreement or arrangement.

3.5 Information Included in a Filing

Section 16 of the Notifiable Transactions Regulations sets out the requirements of a notification. They include the following.

- A description of the proposed transaction and its business objectives.
- A copy of each legal document to be used to implement the transaction (or the most recent drafts thereof if not yet executed).
- A list of foreign competition authorities that have been notified of the transaction.
- In respect of each party and its affiliates with either significant assets in Canada or significant gross revenues from sales in, from or into Canada, a description of their principal businesses, including principal categories of products, along with:
  - (a) their most recent annual reports or financial statements;
  - (b) the 20 most important suppliers and customers for each principal category of product;
  - (c) the total annual volume or Canadian dollar value of purchases from and sales to all suppliers and customers for each principal category of product;
  - (d) geographic regions of sales; and
  - (e) all studies, surveys, analyses and reports that were prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, poten-

tial for sales growth or expansion into new products or geographic regions.

Although not prescribed, a competitive impact statement is almost universally filed in notifiable transactions. Often, it takes the form of a request for an ARC or a NAL. The statement is an advocacy document submitted by the parties explaining why, in their view, the transaction is unlikely to result in a substantial prevention or lessening of competition in any relevant market that includes all or part of Canada.

A pre-merger notification filing, as well as materials filed in response to a SIR, must be certified for correctness and completeness on oath or solemn affirmation by an officer of the corporation or a person authorised by the board of directors of the corporation that is making the filing, or, if the filing is by a non-corporate entity, by an individual who serves in a capacity similar to a corporate officer or other individual authorised by the governing body of the entity.

3.6 Penalties/Consequences of Incomplete Notification

If the parties submit an incomplete notification, the initial 30-day period during which the parties cannot close the proposed transaction will not begin to run.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

An officer or other person duly authorised on behalf of the notifying party must certify that, to the best of that individual's knowledge and belief, all information contained in the notification is correct and complete in all material respects. If the notifying party is determined to have supplied information that is incorrect or incomplete in a material respect, that party could be found to be preventing or attempting to impede or prevent an inquiry or examination under Section 64 of the Act, the penalty for which is a fine at the discretion of the court and/or imprisonment for a term not exceeding ten years (indictable); or a fine not exceeding CAD100,000 and/or imprisonment for a term not exceeding two years (summary). That party could also face criminal prosecution for knowingly swearing a false certificate. In practice, such cases are rare.

Note that an ARC is effective only if the facts are the same or substantially the same as those on which the ARC was issued.

3.8 Review Process

Parties to a proposed transaction are precluded from completing the transaction until the expiration or waiver of the applicable statutory waiting period under the Act. In particular, a completed notification filing triggers an initial 30-day waiting period during which time the parties to the proposed transaction are precluded from completing the transaction. The Commissioner may, within the initial 30-day waiting period, issue an additional request for information through a SIR. The issuance of a SIR to one or more of the parties triggers a second 30-day waiting period, which commences only when the Commissioner has received from each SIR recipient a certified completed response to the SIR. During the second 30-day waiting period, the parties are precluded from completing the transaction.

Requests for information, whether through a SIR or informally, are common and can be time consuming to respond to.

As noted above, the Bureau has non-binding service standards, within which it will endeavour to complete its review of a proposed transaction (described in **3.1 Deadlines for Notification**).

3.9 Pre-notification Discussions With Authorities

The Bureau encourages pre-notification discussions with parties. Pre-notification discussions allow parties to provide informal notice to the Bureau that a notification is forthcoming. Parties may also engage with the Bureau on a "names" or "no-names" basis to seek initial guidance about a proposed merger. However, the Bureau will generally not provide any substantive guidance until the parties have submitted an ARC request or filed notifications.

Subject to certain limited exceptions, the Act requires that all non-public information provided to or obtained by the Bureau remain confidential, unless the party that provided the information consents otherwise. The exceptions allow the Bureau to share non-public information with Canadian law enforcement agencies, or for the purposes of administration or enforcement of the Act. The Bureau takes the view that this latter exception permits it to share information with relevant foreign competition authorities, even in the absence of a waiver from the parties. The exceptions also allow the Bureau to share non-public information with the Minister of Transport for the purposes of administration of certain sections of the CTA and the Minister of Finance for the purposes of allowing the Minister to make a decision in respect of a merger or proposed merger subject to the financial institution legislation referred to in **1.2 Legislation Relating to Particular Sectors**. In the context of pre-notification discussions with the Bureau, the risk of disclosure of confidential information is low.

3.10 Requests for Information During the Review Process

The Bureau commonly issues written information requests during its review process. Parties must respond within three business days (for transactions the Bureau has designated non-complex), or within five business days (for transactions the Bureau has designated complex). If the parties do not respond before expiration of the applicable three-day or five-day period, the Bureau may, on the following day, pause the non-binding service standard period (discussed in **3.1 Deadlines for Notification**) until receipt of the information requested.

3.11 Accelerated Procedure

As discussed in **3.1 Deadlines for Notification**, the Bureau has non-binding service standards that represent the maximum time within which the Bureau will endeavour to advise parties of the Bureau's position in respect of a particular transaction. The service standards vary according to the complexity of the merger and assume co-operation from the parties. The Bureau aims to provide a response to notifications and ARC requests within these service standard periods.

In practice, where circumstances permit (for example, a relatively straightforward transaction combined with the absence of substantive competition issues), the Bureau has cleared transactions more swiftly than the service standard period, but early clearance cannot be assumed. Early outreach to the Bureau is advisable in cases where early clearance is necessary.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Under the Act, the Tribunal may, on application of the Commissioner, issue an order in respect of a proposed or completed merger where it is found to have substantially prevented or lessened competition (SPLC) or is likely to do so. The MEGs state that this test is satisfied by a merger only when it is likely to create, maintain or enhance the ability of the merged entity to exercise market power.

As noted in the MEGs, market power can be exercised unilaterally or in co-ordination with other competitors. A unilateral exercise of market power arises when a merger enables the merged entity to raise prices profitably or profitably influence other dimensions of competition without relying on any accommodating response from its competitors. Conversely, a co-ordinated exercise of market power arises where a merger reduces competitive vigour in a market due to accommodating responses from other competitors.

Factors Giving Rise to an SPLC

The Act expressly states that an SPLC cannot be found to exist based merely upon evidence of concentration or market share. In this regard, the Act identifies a non-exhaustive list of factors that the Tribunal (and hence the Bureau) may consider in evaluating whether a merger gives rise to an SPLC. Several of these factors, and others identified in the MEGs, are set out below.

The existence of barriers to entry and the effect of the transaction on such barriers

A key component of the Bureau's analysis is whether timely entry by potential competitors would likely occur on a sufficient scale and with sufficient scope to constrain a material price increase or other change in the relevant market as a result of the merger. Entry can come from a variety of sources, including expansion by firms already in the market, entry by firms on the fringe of the market that have assets that can be readily converted into producing and selling the relevant products, firms selling the relevant products in adjacent geographic markets, and de novo entry. Other relevant factors include the need to incur sunk costs and regulatory requirements or controls.

Whether there will be effective competition remaining after the merger

The collective influence of all sources of competition in the market is assessed to determine whether they will be able to act as a constraining factor against the exercise of market power by the merged entity acting unilaterally or interdependently with other participants in the market. If the merging parties are key competitors of one another, it may be that effective competition remaining after the merger will be imperilled.

Whether the proposed transaction will eliminate a vigorous and effective competitor

Among other things, the acquired firm will be analysed for any uniquely competitive (namely, "maverick") attributes, such as whether it is innovative in some way, is known for aggressive pricing strategies, has a history of not following price leadership, is a disruptive force in an otherwise interdependent environment, offers unique service or warranty benefits, or appears to have made impressive gains in market share. Acquisition of a maverick by a leading competitor will, all other things being equal, be regarded as more problematic than an acquisition of a less vigorous and effective competitor.

Whether one of the merging firms can be characterised as a "failing or exiting firm"

Consideration is given to whether one of the merging entities would fail or exit the industry if the merger were not to occur. A firm's likely failure or exit from a market will influence the determination of whether an SPLC will arise because the loss of the failing firm as a competitor cannot necessarily be attributed to the merger.

The extent to which foreign products or foreign competitors provide, or are likely to provide, effective competition to the business of the merging parties

The presence and viability of foreign competition to counter the increased market power of the merged entity is examined with regard to factors such as the existence of tariffs, regulations and other impediments for foreign businesses in Canada.

The nature and extent of change and innovation in a relevant market

While change and innovation are considered in relation to other evaluative criteria, a separate analysis is also undertaken with respect to the general impact that change (for example, technological change) and innovation may have on competition. This has become an increasingly important factor in the Bureau's analysis over the past several years.

Countervailing market power of buyers

Buyers may constrain the merged entity's market power if, among other things, they can immediately switch to other suppliers, they can vertically integrate their operation into the upstream market and there are potential suppliers not already in the market who may be enticed into entry by orders from buyers switching from the merged entity.

The MEGs also identify possible harm to competition resulting from vertical mergers, namely supplier and customer foreclosure, and increased likelihood of co-ordinated effects.

4.2 Markets Affected by a Transaction

According to the MEGs, the Bureau does not assume that the merging parties operate in the same relevant market(s), even when there appears to be some overlap between their products and the geographic areas in which they conduct business.

Market definition is based on substitutability and focuses on demand responses to changes in relative prices after the merger. The ability of competing suppliers to respond to a price increase is also important when assessing the potential for the exercise of market power, but the Bureau examines such responses later in the analysis, either when identifying the participants in the relevant market or when examining entry into the relevant market.

Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximising seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price above levels that would likely exist in the absence of the merger.

The Bureau has established the following thresholds to identify and distinguish mergers that are unlikely to have anti-competitive consequences from those that require more substantive analysis.

- The Commissioner generally will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger market share of the merged firm would be less than 35%.
- The Commissioner generally will not challenge a merger on the basis of a concern related to a co-ordinated exercise of market power when:
  - (a) the post-merger market share accounted for by the four largest firms in the market would be less than 65%; or
  - (b) the post-merger market share of the merged firm would be less than 10%.

4.3 Reliance on Case Law

With respect to multi-jurisdictional merger reviews, the Bureau often co-operates extensively with foreign agencies, including discussing approaches to market definition. This aside, foreign case law can be persuasive before the Bureau and the Tribunal, particularly where there is no or limited Canadian jurisprudence in relation to the relevant market.

4.4 Competition Concerns

The Bureau will investigate all relevant theories of competitive harm, including those based on unilateral effects and co-ordinated effects in relation to horizontal mergers, vertical foreclosure in relation to vertical mergers and portfolio effects in relation to conglomerate mergers. That said, portfolio effects rarely, if ever, give rise to significant concerns.

See **4.1 Substantive Test**.

4.5 Economic Efficiencies

The Act provides that the Tribunal may not make an order in respect of a merger if it finds that the merger is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result, or is likely to result, from the merger, and that the gains in efficiency would not likely be attained if the order were made.

The Bureau requires that parties intending to lead an efficiencies defence enter into a timing agreement which establishes timed stages for parties to engage with the Bureau, including the production of information and evidence regarding their efficiencies claims. A model timing agreement was published by the Bureau and has been used in some instances.

4.6 Non-competition Issues

The purpose of the Act is to maintain and encourage competition in Canada in order to achieve a number of goals that are broadly consistent with the promotion of competition. Consistent with this, intervention under the Act with respect to mergers is limited to those mergers that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market. This is the only test that the Commissioner is permitted to apply under the Act and, in practice, is the only test that is applied, save that (i) in the application of the efficiencies defence, socially adverse effects of a merger may be considered and export gains and import substitution are taken into account; and (ii) public interest tests may be invoked and override the test under the Act where a public interest review is triggered under the CTA and where a financial institution merger is found to be in the public interest by the Minister of Finance.

The Act does not contain rules for foreign direct investment in Canada. Rather, as discussed in **1.2 Legislation Relating to Particular Sectors**, some transactions (including those involving foreign direct investment) may be subject to notification or review under the ICA and/or sectoral legislation that require the consideration of other public interest issues, including industrial and cultural policy and national security.

4.7 Special Consideration for Joint Ventures

Joint ventures are assessed with reference to the criteria identified above, including whether the proposed joint venture is likely to result in an SPLC in a relevant market. Please refer to **2.10 Joint Ventures**.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

In the case of a proposed merger, the Tribunal has authority under the Act, on application of the Commissioner, to order the merging parties or any other person not to proceed with all or part of the proposed merger and to prohibit any act or matter that is necessary to ensure that the merger does not result in an SPLC. In the case of a completed merger, the Tribunal may order dissolution of the merger or direct the disposition of designated assets or shares.

In addition, with the consent of the person against whom the order is directed and the Commissioner, the Tribunal may order any party to a proposed or completed merger or other person to take any other action.

The Commissioner has negotiated and obtained a broad range of remedies to address expected competitive harm through consent agreements, including structural remedies (generally asset divestitures) and quasi-structural or behavioural remedies (such as licensing of IP rights and non-discriminatory access to facilities or supply).

The Commissioner can also seek an interim order delaying the completion or implementation of the proposed merger for a certain period to allow the Bureau to complete its review. In addition, if the Commissioner commences an application challenging a proposed merger, the Commissioner can seek an interim order preventing the completion of a proposed merger, in whole or in part, pending the disposition of the application.

5.2 Parties' Ability to Negotiate Remedies

Typically, if the Bureau determines that a merger has resulted, or is likely to result, in an SPLC, it will seek to negotiate a consent agreement that addresses the SPLC through remedies. A consent agreement that is registered with the Tribunal has the same force and effect as a Tribunal order.

Where a negotiated resolution cannot be achieved, the Commissioner may file an application with the Tribunal for a remedy in respect of the merger. The Commissioner must establish that the merger has resulted, or is likely to result, in an SPLC. As discussed in **4.5 Economic Efficiencies**, it is open to the merging parties to defend the merger on the grounds that it is likely to bring about gains in efficiency that are greater than and will offset any SPLC.

5.3 Legal Standard

The standard for achieving an acceptable remedy is set out by the Supreme Court in Canada (Director of Investigation and Research) v Southam Inc. In this case, the Supreme Court concluded that "the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."

Eliminating an SPLC sometimes means that the remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level. To this end, the Supreme Court, in Southam, emphasised the importance of ensuring that the remedy fully eliminates the SPLC: "[i]f the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective."

5.4 Typical Remedies

There are two broad types of merger remedies: structural remedies and behavioural remedies. Structural remedies directly intervene in the competitive structure of a market, such as dissolution and divestiture. In contrast, behavioural remedies modify or constrain the behaviour of the merging firms. They are normally ongoing and may require monitoring and enforcement.

The Bureau generally prefers structural remedies over behavioural remedies, as structural remedies provide long-lasting or permanent change in the relevant market. That said, it is not uncommon for structural remedies to be complemented with behavioural remedies (eg, interim supply arrangements) and/or quasi-structural remedies (eg, licence agreements).

5.5 Negotiating Remedies With Authorities

Parties can seek to negotiate remedies with the Bureau as soon as they advise the Bureau of a proposed transaction. As a practical matter, however, the Bureau will seek to negotiate remedies with the merging parties as soon as the Commissioner concludes that the merger is likely to result in an SPLC. Negotiated remedies are invariably reflected in a consent agreement registered with the Tribunal, which must indicate either that the parties agree that the proposed merger will likely result in an SPLC or that the Commissioner has concluded that the proposed merger will likely result in an SPLC. Once registered, a consent agreement has the force of a Tribunal order.

If competition concerns cannot be resolved between the Commissioner and the merging parties, the Commissioner will typically commence an application before the Tribunal to challenge the merger under Section 92 of the Act. In such circumstances, the Commissioner may also seek interim relief pending the disposition of the application.

5.6 Conditions and Timing for Divestitures

An effective remedy is based on the specific circumstances of the case and theory of competitive harm as determined by the Commissioner or, in contested cases, by the Tribunal. Further, remedies must be enforceable and capable of timely implementation so that the SPLC can be eliminated as quickly as possible. Accordingly, in the case of a divestiture (which is the most common form of remedy), an acceptable buyer of the divested assets is generally provided with the assets necessary to eliminate the SPLC as quickly as possible. In the case of a consent agreement, the divested assets and an acceptable buyer (or a process for determining an acceptable buyer) are provided for in the consent agreement. If the merging parties are unable to divest the required assets within the agreed upon timeframe, a trustee will be appointed to do so (at the cost of the merging parties).

5.7 Issuance of Decisions

The Bureau advises the merging parties of the Commissioner's conclusions regarding a proposed merger. Except where the Tribunal or other court issues a decision in respect of a contested proceeding, no formal decision is issued. However, the Bureau routinely issues "position statements" in respect of noteworthy mergers it reviews. Such position statements summarise the issues the Bureau has identified and explain its rationale for the ultimate disposition of the merger.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Bureau often requires remedies in relation to foreign-to-foreign transactions, particularly where there are Canadian-specific issues that will not be fully addressed through the remedies provided to competition authorities in other jurisdictions. For example, the Bureau required remedies in connection with Bayer AG's acquisition of Monsanto Company, Elanco Animal Health's acquisition of Bayer Animal Health and Evonik Industries AG's acquisition of PeroxyChem Holding Company LLC. In contrast, the Bureau relied on undertakings mandated by the United States Federal Trade Commission and European Commission to remedy the Canadian competition concerns arising from United Technologies Corporation's acquisition of Raytheon.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Where ancillary restraints form part of the merger transaction, they must be disclosed and are taken into account by the Bureau in its assessment of the transaction and may affect any remedy that is ultimately agreed or imposed. Separate notifications of ancillary restraints forming part of the merger transaction are not required.

As discussed in more detail in the Bureau's Competitor Collaboration Guidelines, where parties enter into any agreements that go beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement, the Bureau may decide to consider such ancillary agreements under the non-merger provisions of the Act.

Any person may apply to the Bureau, with supporting information, for an opinion on the applicability of any provision of the Act to conduct or a practice that the person seeking the opinion proposes to engage in, including ancillary restraints. If the material facts provided to the Commissioner are accurate, the Commissioner's written opinion is binding on the Commissioner so long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The Bureau generally solicits comments on a proposed transaction from third parties – including customers, suppliers and/or competitors – and will consider comments or complaints submitted by third parties. Third parties have no access to information that has been filed by the parties or others, or that is otherwise received by the Bureau for the purposes of its analysis, and have no right to participate in meetings or discussions between the Bureau and parties. If the Commissioner files an application with the Tribunal, third parties may seek intervenor status in the proceeding and may participate in the proceeding in accordance with any directions of the Tribunal granting intervenor status. The test for intervenor status requires demonstration of a direct interest in, and unique or distinct perspective on, the proceeding.

7.2 Contacting Third Parties

The Bureau typically reaches out to third-party "market contacts" for the purposes of assessing the competitive impact of a proposed merger and market testing remedies offered by the parties. The outreach by the Bureau usually takes the form of emails and telephone calls.

The Bureau takes the position that the waiting period does not commence until it is permitted to make such third-party market contacts.

7.3 Confidentiality

The Bureau publishes a merger review register on its website, which lists completed merger reviews and is currently updated on a monthly basis. The information included in the merger review register is limited to the names of parties to the transaction, the applicable four-digit code pursuant to the North American Industry Classification System 2017 and the result of the merger review (that is, whether the review resulted in the issuance of an ARC, a NAL, the registration of a consent agreement or a judicial decision).

Information obtained or provided pursuant to a pre-merger notification or ARC application is afforded confidential treatment. This confidentiality protection does not apply to the communication of such information by the Bureau to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. Information that has been made public also loses confidential treatment. Importantly, the Bureau takes the view that it does not require a waiver to supply information it receives to the competition authorities of other jurisdictions.

7.4 Co-operation With Other Jurisdictions

The Bureau operates under a number of co-operation arrangements with foreign competition authorities to facilitate the exchange of information and the co-ordination of investigations and remedies sought by the authorities in respect of mergers involving multiple jurisdictions. In these cases, the Bureau often requests waivers permitting it to access confidential information filed with foreign authorities. As noted above, the Bureau takes the view that it does not require the consent of merging parties to share information obtained by the Bureau from such parties with foreign authorities.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Decisions of the Tribunal are subject to appeal to the Federal Court of Appeal as of right on issues of law and jurisdiction, and with permission of the court on issues of fact. Further appeals can be made to the Supreme Court of Canada with leave.

8.2 Typical Timeline for Appeals

Appeals arising from decisions of the Tribunal are generally disposed of approximately 8 to 16 months from the date the Tribunal made its decision.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Pursuant to the Competition Tribunal Act, any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act (deceptive marketing practices), to make representations relevant to those proceedings in respect of any matter that affects that person.

In addition, pursuant to the Competition Act, a third party directly affected by a consent agreement may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

On 23 June 2022, a number of amendments to the Competition Act became law, including, of relevance to mergers, amendments that:

- expand the scope of the Competition Bureau's evidence gathering powers (ie, Section 11 orders);
- expand the list of factors that may be considered when assessing the prevention and lessening of competition for merger review; and
- establish an anti-avoidance provision that deems transactions to be subject to pre-merger notification if they were designed to avoid pre-merger notification.

In 2021 the Bureau responded to an invitation from Senator Howard Wetston to comment on Canada's competition policy framework by providing a detailed submission that includes 35 wide-ranging recommendations, including, in relation to mergers, introducing structural presumptions, eliminating the efficiencies defence, requiring that remedies restore competition to pre-merger levels, extending the limitation period for merger challenges to three years (from the current one year), adopting a standard better suited to address acquisitions of emerging competitors, including a more workable standard for injunctions, and closing several perceived loopholes in Canada's pre-merger notification regime. However, most of these recommendations were not adopted in Canada's Budget Implementation Act, but could be included in subsequent rounds of amendments.

In 2021, the Bureau also challenged two completed merger transactions before the Tribunal, including GFL Environmental Inc.'s acquisition of Terrapure Environmental Inc. and Secure Energy Services Inc.'s acquisition of Tervita Corporation. Each of these cases related to the waste industry.

Finally, the Federal Court of Appeal issued reasons confirming that the Tribunal has the power to temporarily block mergers in urgent circumstances under Section 104 of the Act. It is likely that this decision will embolden the Commissioner to seek "interim interim" orders in an effort to temporarily prevent merging parties from closing potentially problematic transactions until after the Commissioner's applications for "interim" orders have been heard and decided.

9.2 Recent Enforcement Record

In 2020–21, of the 193 merger reviews that were commenced, two were resolved by consent agreements and three were abandoned due to competition concerns.

In 2019–20, of the 243 merger reviews that were commenced, two were resolved by consent agreements.

In 2018–19, of the 217 merger reviews that were commenced, five were resolved by consent agreements and one was abandoned due to competition concerns.

9.3 Current Competition Concerns

Current concerns continue to include non-notifiable mergers that "fly under the radar" and avoid scrutiny before the expiration of the one-year limitation period (following substantial completion of the transaction).

Notable trends include:

- continued focus on the digital economy and digital enforcement tools (eg, establishing a new digital and data analytics team to enhance enforcement capabilities);
- continued focus on enforcement in sectors of the economy that are vital to Canada's long-term economic well-being, such as digital services, health, infrastructure, telecommunications and natural resources;
- taking steps to enhance litigation readiness for not only fully-contested proceedings, but also for seeking court orders, such as injunctions, pending a full hearing or decision from the Tribunal; and
- supporting the government of Canada's review and update of the Act, including with respect to the merger review process.

Another important development in recent years is the use of public interest reviews pursuant to the CTA. As part of these reviews, the Commissioner is required to provide the Minister of Transport (Minister), and the parties to the proposed transaction, with a report on any competition concerns that may arise as a result of the proposed transaction. This report is one of the many factors considered by the Minister in determining whether a proposed transaction is likely to raise issues with respect to the public interest as it relates to national transportation in Canada.

Public interest reviews occurred in 2019 in connection with the proposed merger between Canadian North Inc. and Bradley Air Services Limited and in 2020 in connection with Air Canada's proposed acquisition of Transat A.T. In both cases, the Bureau concluded that the transactions would result in a substantial prevention or lessening of competition. However, the Minister ultimately approved both transactions subject to certain terms and conditions.

Please refer to **1.2 Legislation Relating to Particular Sectors** with respect to transactions related to transportation undertakings.

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AUTHORS

Anthony Baldanza is a past leader and co-leader of Fasken's Competition, Marketing & Foreign Investment group, and is a recognised expert on competition and foreign investment law. Tony has served as chair of both the Foreign Investment Review Committee and Mergers Committee of the Canadian Bar Association's Competition Law and Foreign Investment Review Section. He has also served as a non-governmental adviser to the International Competition Network. He currently serves as a vice-chair of the Competition Law Committee of the Inter-Pacific Bar Association.

Huy Do is a co-leader of Fasken's Competition, Marketing & Foreign Investment group. His practice focuses on mergers, reviewable practices and criminal matters under the Competition Act. Huy also has extensive experience advising foreign clients, including state-owned enterprises, on Canadian foreign investment law (Investment Canada Act). A recognised expert in his field, Huy serves as a non-governmental adviser to the International Competition Network. He is a past chair of the Competition Law and Foreign Investment Review Section of the Canadian Bar Association.

Antonio Di Domenico is a co-leader of Fasken's Competition, Marketing & Foreign Investment group. As former counsel to Canada's Commissioner of Competition (Department of Justice Canada), and having served as counsel in many of Canada's most significant competition matters, Tony is widely recognised as one of Canada's leading practitioners in competition law and litigation. He is the author of the leading legal treatise, "Competition Enforcement and Litigation in Canada" (Emond Publishing), and is an adjunct professor of law at Osgoode Hall Law School in Toronto, where he teaches competition law and trial advocacy.

Chris Margison is counsel in Fasken's Competition, Marketing & Foreign Investment group. Chris has over 20 years of private and public sector legal experience, including as special advisor to both the Commissioner of Competition and the Senior Deputy Commissioner, Cartels Directorate at the Competition Bureau. Chris advises clients on all aspects of Canadian competition law, with a particular focus on complex mergers. Chris is an active member of the Canadian Bar Association's Competition Law and Foreign Investment Review Section and serves as a vice-chair on the section's Economics and Law Committee.

Fasken

Bay Adelaide Centre
333 Bay Street, Suite 2400
P.O. Box 20, Toronto, ON
M5H 2T6
Canada

Tel: +1 416 366 8381
Fax: +1 416 364 7813
Email: toronto@fasken.com
Web: www.fasken.com

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Law and Practice

Contributed by:
Claudio Donato Monge, Marco Lopez and Claudio Donato Lopez
Zurcher, Odio & Raven ***see p.134***

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The most relevant merger control bodies of law are the Promotion of Competition and Consumer Protection Act (the "Competition Act"), and the Act to Strengthen Competition Authorities (ASCA), which entered into force in 2019, and presented a significant amendment to the legislation. The Regulations to the Promotion of Competition and Consumer Protection Act and the Regulations to ASCA are other relevant bodies of law.

The Commission for the Promotion of Competition (Coprocom, or the "Competition Commission") has also published the Guidelines to Analyze Economic Concentrations, which contain relevant dispositions and information regarding the merger notification process.

1.2 Legislation Relating to Particular Sectors

Telecommunications is the only sector that has a special legislation pertaining merger notifications. The Superintendency of Telecommunications is the authority that enforces competition law in the telecommunications market.

There are certain sectors on which the Competition Commission may co-ordinate some issues or topics with the corresponding superintendencies (eg, financial, securities, pensions, etc). In such sectors, there may be some regulations or guidelines that are applicable only to concentrations involving regulated entities. However, these sectors are all overseen by the Competition Commission.

1.3 Enforcement Authorities

Coprocom is the authority that enforces the relevant legislation. However, in the telecommunications sector, the Telecommunications Superintendency is the entity that enforces competition law.

2. JURISDICTION

2.1 Notification

Notification is compulsory and there are no exceptions to it. If the transaction can be classified as a concentration under the definition provided by the law, and if the thresholds established by the law are triggered, the parties are obliged to notify.

2.2 Failure to Notify

In Costa Rica, there are different penalties for failing to notify.

The following penalties are established in Article 114 of the ASCA:

- the payment of a fine, which ranges from 0.1% to 10% of the parties' revenue generated in the past fiscal period;
- Coprocom may order a demerger to return the situation to its pre-merger status; and
- fines of up to 680 minimum wages (approximately USD462,400) may be imposed on the legal representatives of companies that are involved in a transaction that is not notified.

In the past, failure to notify was sanctioned with a fixed-sum penalty that did not take into account the company's revenue. However, as part of the recent legal reform, the penalties were modified and the current ones are much more severe. This reform was introduced specifically to discourage companies from running the risk of not notifying.

2.3 Types of Transactions

The definition of economic concentration contained in the Competition Act is broad and covers a whole series of business modalities, such as mergers, transfer of shares, purchase of assets, and purchase and sale of a business establishment, among others. Hence, a concentration that must be notified for the purposes of the Competition Act and its regulations would be any act or contract that contains at least the following elements:

- it is carried out between two or more independent economic agents, whether or not they are competitors;
- at least two of the participating economic agents have operations with an impact in Costa Rica;
- it involves a transfer in the control of one or more of them, either through the acquisition of control over one another, or in the formation of a new economic agent;
- it is carried out permanently or with the intention of permanence; and
- the notification thresholds are met.

Internal restructurings of companies that belong to the same group of economic interest are not caught. The main reason behind this is that there is no change of control, since the final beneficiaries of the involved parties are the same, prior to and after the transaction has been executed. As such, given that the definition of concentration according to the Competition Act focuses on the change of control, internal restructurings are not subject to notification.

2.4 Definition of "Control"

Control is defined as the de facto or legal possibility of executing a decisive influence over an economic agent or its assets, and understood as the power to adopt or block decisions that determine its strategic commercial behaviour. As such, acquisitions of minority interests that include the right to veto strategic decisions could trigger the obligation to notify.

2.5 Jurisdictional Thresholds

Once that a transaction is determined to be classified as a concentration according to the law, the parties must analyse whether or not the jurisdictional thresholds are met. There are two thresholds that need to be met by the parties:

- joint threshold – the combined assets of the parties in Costa Rica, or the combined revenue generated during the last fiscal period, has to be more than 30,000 base salaries (approximately USD20.4 million); and
- individual threshold – the individual sales or assets in Costa Rica of each party have to be more than 1,500 base salaries (approximately USD1.02 million).

Transactions that fall below these thresholds are not subject to notification.

The individual threshold is also part of the modifications that were introduced by the recent legal reform. This individual threshold poses a significant importance since it eliminates the obligation to notify when a large company that met the joint threshold by itself entered into a concentration with a very small company, that had an almost irrelevant position in the market. Prior to the reform this type of transactions required to be notified, but not anymore.

2.6 Calculations of Jurisdictional Thresholds

The jurisdictional thresholds can be met either by the parties' assets in Costa Rica or by the parties' revenues in Costa Rica. It is important to note that the only assets or revenues taken into consideration are those that are located in Costa Rica or which are generated in, or from sales to, Costa Rica. As such, multinational companies that have a minimum insignificant participation in Costa Rica do not necessarily meet the individual jurisdictional threshold.

The sales or assets value booked in a foreign currency should be converted according to the official exchange rate of the Costa Rican Central Bank. In the asset-based threshold, the asset value to be considered is the fair market value of such assets.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Generally, the seller's turnover is not taken into consideration with the turnover of the target. However, we advise analysing this on a case-by-case basis.

The group wide definition generally applies to calculate the thresholds for the buyer. In case there have been acquisitions or divestments that are not reflected in the most recent financial statements, there should be some observations made in the filing. The Competition Commission revises the company's financial statements in detail, and there will almost certainly be questions made in the request for information (RFI) regarding this issue, if it is not explained beforehand by the parties. However, this should be analysed individually for each specific case.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control. As long as the entities have executed activities with an incidence in Costa Rica in any of the previous two years, then the transaction should be notified if the other jurisdictional thresholds are met. A filing cannot be required when a target has no sales (direct or indirect) and/or assets in the jurisdiction, since it will not have an incidence in Costa Rica, which is one of the requirements to trigger the obligation to notify.

2.9 Market Share Jurisdictional Threshold

There is no market share threshold. The Commission does take into consideration the market shares of the parties when analysing the specific effects of the transaction. However, market share is not a threshold taken in consideration to determine whether the obligation to notify is triggered. There may be companies that meet the threshold on very large and fragmented markets, so that their corresponding market shares are irrelevant; but still, they would be obliged to notify.

2.10 Joint Ventures

Joint ventures that meet the definition of concentration provided by the law are subject to merger control. Again, the main issue is whether or not there is some change of control. If that joint venture results in the adoption of certain commercial measures that may impact the decision-making processes of the companies, the joint venture can be subject to notification. There are no special rules pertaining to the application of the thresholds to joint ventures.

Finally, joint ventures between competitors should also be analysed to determine whether or not they may represent a prohibited horizontal agreement according to the law.

2.11 Power of Authorities to Investigate a Transaction

Coprocom has the powers to reject the transaction or to divest or order the reversal of a transaction that was not notified. Also, Coprocom may impose hefty fines on the parties.

As part of the powers that the Authority has within the investigation, such powers are also extensive. Should the Competition Commission have substantiated indication that there was a concentration that was not notified, then it may start an investigation. In such an investigation, Coprocom may request any information and contracts associated with the transaction as well as any additional information. With the prior authorisation issued by a judge, Coprocom may also execute raids on the involved parties' premises.

The statute of limitations to sanction a concentration that was not notified is four years.

2.12 Requirement for Clearance Before Implementation

The reform to the law introduced a suspensive effect over the merger notification. As such, the transaction cannot be implemented until clearance.

However, the parties may request a waiver of the suspensive effects of the notification. In order to do so, they must file a specific application where they demonstrate the reasons or motives that justify such waiver.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Since the introduction of a suspensive effect is a recent change in the law, there have not been any penalties imposed for implementing a transaction before clearance.

2.14 Exceptions to Suspensive Effect

There are no specific exceptions to the suspensive effect. However, the ASCA states that the Competition Commission under qualified circumstances may waive the suspensive effect. There are no precedents yet regarding such waiver.

The acquisition of a failing firm could be used as a justification to request the derogation from the suspensive effect, if the parties can demonstrate that waiting for clearance prior to implementing the transaction can result in the failing firm deteriorating its position to a point where the transaction would not be closed.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under qualified circumstances, which the party will need to discuss with Coprocom, the parties may be authorised to close and implement the transaction prior to clearance.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There are no specific deadlines other than the obligation to notify the concentration prior to its closing. Other deadlines may arise during the process. For example, the deadline to provide the information requested in Coprocom's RFI, or the deadline to provide conditions. The terms of these deadlines are set forth in the law, but they will always be expressly stated by the Competition Commission in its resolutions for each particular case.

Penalties are imposed for failure to notify and such penalties are not divulged, but the Commission's resolutions are public so they can be accessed. The Commission generally communicates the penalties that it has imposed without revealing the identity of the sanctioned parties.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required for the notification. The notification may be filed with a less formal agreement, such as a letter of intent or a memorandum of understanding. The filing can also be made even without a written agreement, as long as the terms disclosed are not varied considerably once the formal agreement is drafted and signed.

3.3 Filing Fees

There are no applicable filing fees.

3.4 Parties Responsible for Filing

All of the involved parties are responsible for filing. The filing made by one party would fulfil the filing obligations of the rest of the parties.

3.5 Information Included in a Filing

The parties need to submit at least the following information regarding the transaction:

- detailed description of the transaction, including the type of operation and the required acts in order to execute and close the notified concentration;
- audited financial statements of the previous three fiscal periods – the financial statements need to be provided by all of the economic agents involved in the transaction;
- identification of all the economic agents involved in the transaction;
- identification of all the companies or individuals that control directly or indirectly the different economic agents that are involved in the transaction;
- identification of all the subsidiaries that are controlled directly or indirectly by the parties involved in the concentration;
- detailed description of the main goods and services that are produced or offered by the economic agents involved in the concentration – the parties must define their use in the market and must also disclose approximate volume sales in those markets;
- list of substitute services or goods that are normally considered in the relevant markets affected by the transaction – the parties should define their physical and technical characteristics, their uses, general profile of clients, distribution schemes in the market, among others;
- description of the distribution channels that are used by the economic agents involved in the transaction – the parties should disclose whether or not they execute the distribution by themselves or through third parties, as well as the geographical areas where their products and services are available;
- description of the relevant markets affected by the parties;
- approximate market shares of the parties in the relevant markets;
- list of competitors in the relevant markets – the parties should provide an approximate estimation of the market shares of each competitor;
- description of the main entry barriers in the relevant markets;
- economic justification of the transaction, including the purpose of the transaction and the efficiencies or benefits that derive from the transaction; and
- analysis of the possible anticompetitive effects as well as any effects that benefit competition.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed to be incomplete, Coprocom shall notify this to the applicant and will provide a ten-business day term for the parties to provide the information. This term may be extended.

Should the parties not provide the required information, then the Commission will reject the concentration.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

There are penalties that range from 0.1% to 10% of the sanctioned company's sales. These sanctions are determined based on the severity of the illegal conduct. These sanctions are applied in practice and there are recent precedents related to this.

However, the precedents regarding sanctions are all based on the previous legislation, which contemplated fines that were set according fixed sums (base salaries). These fines did not take into consideration the sales of the company. Therefore, there is currently no criteria as to how the Commission will determine what percentage of the sales will be applied to each fine.

3.8 Review Process

The different phases of the process are the following.

- Initial review – after the notification has been submitted, Coprocom will have 15 business days to execute its initial review, and request additional information.
- Initial review phase – once the information is complete, there are two possible stages of the process. The first stage consists of a 30-day maximum term where Coprocom determines if the transaction poses any risk to competition. If there are no risks, then the transaction is approved.
- Second phase – should there be a risk identified, Coprocom will open a second phase, where it shall grant the applicant ten business days to file its allegations or evidence to dispute the concerns identified by Coprocom. This second stage may extend up to another 90 calendar days.

After these phases have been completed, Coprocom shall determine whether it authorises the transaction, or it will indicate its concerns to the parties and grant them the opportunity to provide conditions that may mitigate these effects.

Should there be a need to file possible remedies, the parties may enter into discussions with Coprocom about this, as will be stated in **5. Decision: Prohibitions and Remedies**, especially **5.5 Negotiating Remedies With Authorities**.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions with Coprocom. This is something that has been done in the past and has been more common especially when a transaction falls in a grey area where it is not completely clear whether or not it may be classified as a concentration. Such process would be treated confidentially.

3.10 Requests for Information During the Review Process

RFIs are very common during the review process. RFIs are issued by the Authority at the initial review process. Generally, such RFIs are related to the company's activities in the country, where Coprocom tends to seek more information about the market, its participants, the company's sales, clients and consumers, etc.

RFIs do suspend the review term. So as long as the information has not been provided completely, the clock stops running.

One of the goals of the 2019 reform was to smooth the merger notification process and reduce the amount of information requested on transactions that clearly posed no risk to competition. However, the Commission is still requesting information on almost all mergers that are notified. Despite this, the time it takes to resolve a notification has been reduced considerably since the said reform.

3.11 Accelerated Procedure

The ASCA introduced a two-phase process. It is basically the same procedure, but in non-complex cases where it is clear that there is no potential harm to competition, the Commission may approve the transaction in 30 days or less.

Costa Rica does not have a special fast-track procedure, since any complex or simple transaction initiates the notification process in the same manner. However, if the transaction is simple and there are no implications for the market, then there will be only one phase in the process. This results in a much more expedite process to obtain clearance.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test for clearance consists of an analysis of the anticompetitive effects and the pro-competitive effects of the transaction. If the transaction clearly does not generate anticompetitive effects, then Coprocom will authorise the concentration in the first phase of the process. However, if Coprocom identifies any concerns regarding potential anticompetitive effects, it shall notify this to the parties and provide the parties the opportunity to dispute this.

In order to do so, the parties may object Coprocom's position, and it may also state the efficiencies or pro-competitive effects that derive from the concentration and offset such anti-competitive effects.

In case that, at the end of the second phase, Coprocom considers that there are anticompetitive effects associated to the transaction that pose a significant concern, it shall grant the parties the opportunity of proposing measures that mitigate those effects.

4.2 Markets Affected by a Transaction

Generally, the markets that will be analysed in more depth are the ones where there is overlap between the target and the buyer. The market shares have an impact on whether or not the Competition Commission considers that there is potential for anticompetitive effects. However, low market shares do not waive the requirement to analyse the market.

In transactions where the parties have lower market shares, it is much more likely that Coprocom will follow a one-phase process and authorise the transaction more expeditiously.

4.3 Reliance on Case Law

Authorities frequently rely on case law from other jurisdictions, mainly the USA and the EU. However, other jurisdictions such as Colombia and Mexico are also used as reference.

4.4 Competition Concerns

There is no exhaustive list of competition concerns that Coprocom needs to analyse. As such, unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and elimination of potential competition.

4.5 Economic Efficiencies

Economic efficiencies are considered in the second phase, should the Authority determine that there is a possible anti-competitive effect.

Any economic efficiency can be considered (eg, reduction of costs, economies of scale, complementation of services, avoiding losing a participant in the market, benefits to the consumer, etc).

4.6 Non-competition Issues

Non-competition issues are not considered as part of the review. One of the main reasons why the ASCA was enforced was to grant Coprocom with more independence, to ensure that there is no interference of government interests other than the ones protected by competition law. Prior to the law, there used to be some concerns about the interference of the Ministry of Economy over Coprocom. These concerns were identified by the OECD in its general economic analysis of Costa Rica and, to a very large extent, those concerns were precisely the ones that resulted in the legal reform of 2019.

4.7 Special Consideration for Joint Ventures

Joint ventures are analysed based on the same rules as any other concentration. Possible co-ordination issues are considered as a part of the joint venture analysis.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Coprocom is authorised to impose fines and order the divestment or demerger of any transaction that was not notified. As such, it has the ability to interfere or prohibit a transaction that had not been notified.

In order to reject a concentration and block a transaction, Coprocom only needs to demonstrate that the concentration causes a significant anti-competitive effect, which is not mitigated either by the pro-competitive effect of the transaction, or by the remedies suggested by the parties (if applicable).

5.2 Parties' Ability to Negotiate Remedies

If after the second phase of the process, Coprocom considers that the transaction causes an anticompetitive effect, Coprocom will grant a hearing to the parties where it may propose measures to mitigate such effects. There are no specific listed measures and the parties may propose any measure that they deem appropriate to mitigate such effects. Divestures are the most common remedy that is offered by the parties.

5.3 Legal Standard

There are no legal standards that the remedies must meet. The suitability of such remedies will depend on the assessment made by Coprocom on a case-by-case basis. There is no exhaustive list of possible remedies that may be implemented by the parties. As such, the parties have a wide range of possibilities regarding the remedies that they may offer.

5.4 Typical Remedies

Divesting is a remedy that has been applied in the past. There are no precedents of remedies that address non-competition issues. As mentioned, non-competition issues should not be a reason to reject a concentration.

5.5 Negotiating Remedies With Authorities

Generally, the parties can initiate the negotiation of remedies after the second phase of the process has been concluded and once that the Authority determines what the potential anti-competitive effects of the transaction are.

However, if from the initial notification the parties understand that the transaction will require remedies since it generates anti-competitive effects, they may approach the Authority and try to start finding a solution that would be acceptable. Coprocom has an open doors policy where it encourages this type of discussion, and there is no specific stage that needs to be reached before such discussions can start.

5.6 Conditions and Timing for Divestitures

There is no standard approach regarding the conditions and remedies, and the conditions and specific implementation of the remedies shall be determined by the Commission. Coprocom may enable the parties to complete the transaction and implement the remedies afterwards, just as it may order the implementation prior to closing the transaction.

Penalties for failure to comply with the remedies range from 0.1% to 10% of the involved agents' revenues. Also, the Commission may eventually order divestments or impose measures to ensure that the object or purpose that aims to be achieved through the measures is satisfied.

5.7 Issuance of Decisions

The formal decision is issued to the parties. This decision contains all the information regarding the analysis of the transaction, the relevant markets, the effects on such markets, etc. This decision, which is notified to the parties, generally contains sensitive information such as the sales of the parties, since it must be duly motivated to comply with administrative law dispositions.

Coprocom generally publishes a non-confidential and shorter resolution, which is publicly available. This resolution tends to be much less detailed and does not reveal any sensitive information from the parties.

Finally, the parties may approach Coprocom if they have a problem with certain information being revealed. As mentioned, usually any sensitive information will not be revealed; but, should the parties have any concerns about specific information, they may request that Coprocom keep such information confidential.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The authorities have required remedies recently but not pertaining to foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

There is no legal framework that establishes how ancillary restraints should be covered beforehand. It would be determined by Coprocom on a case-by-case basis. There are precedents where Coprocom's resolutions have covered ancillary restraints, without the need to file a separate notification.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The concentration authorisation process requires that a notice is published in a national newspaper, with the purpose of allowing any third party to appear before the Authority and express its arguments in relation to the concentration. Those third parties have the right to manifest their position. They may provide proof against the transaction, as well as their arguments as to the reasons why the concentration should be admitted or rejected.

In some cases, third parties are directly approached by the Commission, which provides them an RFI in the form of a questionnaire. However, any third party, regardless of its relation to the transaction, may submit information or documents pertaining the transaction and their position towards it.

7.2 Contacting Third Parties

The Authority typically contacts third parties as part of its review process. Generally, the entities approached by Coprocom are providers, main customers, distributors and competitors.

Usually, the most significant entities of the market are approached. These contacts are generally made through broad questionnaires.

Market testing the remedies offered by the parties may be done by the Authority as well. In such cases, the Authority would lean towards testing such remedies with the third parties that manifested opposition to the transaction.

7.3 Confidentiality

The notification of the transaction is made public since the parties are obliged to publish a notice in a national newspaper disclosing the existence of the transaction. The description that needs to be provided is very brief and does not disclose details of the transaction.

The commercial information that is disclosed is considered to be confidential and is kept on a separate casefile. Only the parties have access to this casefile.

7.4 Co-operation With Other Jurisdictions

There are internal agreements between authorities to exchange information and also to seek advice related to similar cases that other authorities may have reviewed. However, whenever such co-operation occurs, it is rarely something that is disclosed.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The ruling by Coprocom is subject to an administrative appeal before Coprocom, and then it is subject to judicial review. There have not been judicial reviews on rulings related to concentration authorisation processes. However, there have been appeals against other sanctions imposed by Coprocom.

Some of those precedents have resulted in the resolutions of Coprocom being nullified.

8.2 Typical Timeline for Appeals

An administrative appeal before Coprocom is generally resolved within one month. The judicial review does not have a clear timeframe, and it may take between six months and two years.

8.3 Ability of Third Parties to Appeal Clearance Decisions

In theory, third parties cannot appeal a clearance decision. However, there may be exceptions to this rule, if it is demonstrated that the appellant may legitimately do so, and for that purpose the appellant will need to demonstrate that it has a direct interest and was affected directly by the resolution. There are no precedents regarding this matter.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The most relevant development was the Act to Strengthen the Competition Authorities, which introduced some relevant changes to the legal framework of the competition law in Costa Rica.

The most relevant changes were:

- Coprocom has more independence and is better-equipped with more economic and human resources;
- the merger notification process now has suspensive effects, so that transactions may not be closed without previous clearance from Coprocom; and
- there was an additional individual threshold, which must be met by at least two of the parties of the transaction.

This last point is relevant as previously there were some acquisitions of minor companies with irrelevant participation in the market, which were obliged to be notified if the purchaser was a large entity. Now, most of those smaller or irrelevant transactions are not obliged to be notified.

A draft of the Regulations to the ASCA is currently under discussion. These regulations will introduce relevant criteria regarding the application and interpretation of the ASCA and the Competition Act.

9.2 Recent Enforcement Record

Recent enforcement records show that there have been three concentrations rejected, there have been fines imposed due to failure to notify, and there are currently some transactions that are being investigated. So far, there are no precedents of sanctions imposed for failure to notify foreign-to-foreign transactions.

9.3 Current Competition Concerns

The main concern or what seems to be the most significant issue on which Coprocom focuses is the establishment or strengthening of a dominant position in the market. Market share is a relevant factor that is considered in this analysis; however, the access or establishment of specific advantages that could lead to market foreclosure has also been considered in the past.

Zurcher, Odio & Raven has offered legal services and legal solutions for more than 75 years from its offices in Escazú, San José. The firm provides legal services in almost all areas of the law. Among its team of more than 50 lawyers, the firm has specialists in the following fields: public law, public procurement, corporate law, banking and securities, insurance, competition, IP, criminal law, environmental law, aviation, real estate and tax, among others. This department has worked on numerous occasions with legal counsel from multinational companies as well as with most of the largest law firms in the field of competition law. The firm has extensive experience in merger notifications, having successfully notified over 50 transactions in the past six years. The firm is also recognised for its participation in antitrust procedures and investigations, providing legal assistance as plaintiff and defendant.

AUTHORS

Claudio Donato Monge is a partner at Zurcher, Odio & Raven and heads the competition department. He is a former president of the Commission for the Promotion of Competition and one of the pioneers of competition law in Costa Rica, with more than 15 years in the field. Claudio has led various procedures before the Commission for the Promotion of Competition in the fields of merger notification and in investigations of different anti-competitive practices.

Marco Lopez is a senior associate at Zurcher, Odio & Raven and former clerk of the Constitutional Chamber of the Supreme Court of Justice. He has extensive knowledge and experience in sanctioning administrative law and public litigation. Marco has more than 15 years of experience in the field of competition law.

Claudio Donato Lopez is a senior associate Zurcher, Odio & Raven who has also focused his career on regulatory and public law, and has been an active part of the firm's counsel in the fields of competition, projects and public procurement over the last ten years.

Zurcher, Odio & Raven

Los Balcones Building, Fourth Floor
Plaza Roble Business Center
Escazú
San José
Costa Rica

Tel: +506 2201 3848
Fax: +506 2201 7152
Email: cdonatolopez@zurcherodioraven.com
Web: www.zurcherodioraven.com

CYPRUS

Law and Practice

Contributed by:
Marios Pelides and Dominique Pelides
Georgiades & Pelides LLC** **see p.156

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant merger control legislation in Cyprus is the Control of Concentrations between Undertakings Law of 2014 (L. 83(I)/2014) (the "Law").

The Law came into effect on 20 June 2014 and has not been amended since its introduction (other than purely corrective amendments). No subsidiary legislation or guidance has been issued pursuant to the Law, although as Cyprus is a member state of the European Union, the European Commission (EC) Merger Regulation is also relevant.

In practice, the Cyprus Commission for the Protection of Competition (CPC), as well as practitioners, also refer to the Commission Consolidated Jurisdictional Notice on Merger Control.

1.2 Legislation Relating to Particular Sectors

There are several areas where specific consents may be required or particular processes must be followed in order to implement a particular transaction (in addition to merger clearance). Examples include the following.

- Acquisitions of significant interests (10% or more) in certain types of institutions regulated by the Central Bank of Cyprus (including banks and credit acquiring companies) require pre-approval from the Central Bank of Cyprus.
- Takeover bids are subject to a specific regulatory regime, in addition to requiring merger clearance, if they meet the applicable thresholds.
- Acquisition of significant interests (20% or more) in insurance or re-insurance undertakings require approval by the Superintendent of Insurance.
- There are restrictions on the acquisition of significant shareholdings in entities active in the press/broadcasting industry by residents of states outside the EU.
- There are also restrictions on the acquisition of immovable property by residents of countries outside the EU.

1.3 Enforcement Authorities

The competent authority responsible for enforcing the merger control legislation in Cyprus is the CPC. The CPC is the entity to which merger control notifications are submitted, and the entity that issues decisions (both Phase I and Phase II) with respect to these notifications. The CPC is assisted by the CPC's Service (the "Service"). The Service investigates a notification and submits a report to the CPC.

The CPC's decisions may be appealed (by way of administrative recourse) to the Administrative Court. Decisions of the Administrative Court may, in turn, be appealed to the Supreme Court.

Additionally, the Minister for Energy, Commerce, Industry and Tourism (the "Minister") has the authority to declare that a particular concentration is of major importance, in which case the provisions of the Law will apply to the concentration even if the concentration in question does not meet the usual thresholds (see **2.5Jurisdictional Thresholds**). The Minister may also declare that a concentration is "of major public interest", in which case the relevant concentration is referred to the Council of Ministers which may approve or reject the proposed concentration (overriding whatever decision the CPC may have reached). This power has very rarely been used.

2. JURISDICTION

2.1 Notification

If a transaction is expected to produce a "concentration of major importance" (see **2.3 Types of Transaction**), it must be notified to the Service. There is no deadline within which parties must notify the Service, but the transaction cannot be put into effect before CPC clearance is obtained. There is no exception to the obligation to notify, although the CPC has the discretion to permit implementation of parts or the entirety of a transaction prior to clearance being obtained (see **2.14 Exceptions to Suspensive Effect** and **2.15 Circumstances Where Implementation Before Clearance Is Permitted**).

2.2 Failure to Notify

The CPC has the power to impose severe penalties for implementation of a concentration without CPC clearance, which would take effect if a concentration is implemented without being notified to the Service. Additionally, the CPC has the power to impose daily fines. These fines and other penalties are discussed in more detail in **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

2.3 Types of Transactions

Transactions that constitute "concentrations of major importance" must be notified to the CPC before they are implemented. There are, therefore, two questions to consider: (i) does the transaction in question amount to a "concentration" and (ii) if it does, is it a concentration "of major importance"?

A "concentration" will occur where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings (or parts of undertakings);
- the acquisition, by one or more persons who already control at least one undertaking or by one or more undertakings, and whether by purchase of securities or assets, by contract (eg, conclusion of a shareholders' agreement) or by any other means (eg, by amending an entity's articles of association), of direct or indirect control of the whole or parts of one or more other undertakings; or
- the creation of a joint venture which permanently fulfils all of the functions of an independent economic unit.

The Law provides a specific definition of control, which should be borne in mind when assessing whether a concentration has occurred. Control would also include negative control (see **2.4 Definition of Control**).

There are certain exceptions to the definition of concentration. These are:

- temporary holdings acquired by financial or insurance companies whose usual activity includes dealing in securities, provided the holder does not exercise the voting rights attached to the security in question with the aim of determining the undertaking's competitive conduct (or the voting rights are exercised in preparation for a sale of the securities which takes place within one year of their acquisition);
- control is vested in a liquidator or similar official;
- control is acquired by an investment company, provided that such company only exercises its voting rights to maintain the full value of its investments (and not to determine the undertaking's competitive conduct); or
- the property that forms the subject matter of the concentration is transferred on death.

An exception is also provided where a concentration takes place between an undertaking and one or more of its subsidiaries. An entity will be regarded as a subsidiary of another entity where its business activity is controlled by the second entity.

Concentrations "of Major Importance"

A concentration will be regarded as being "of major importance" where it meets certain threshold tests. These are described in **2.5 Jurisdictional Thresholds.** As noted in **1.3 Enforcement Authorities**, the Minister may also declare a concentration as being of major importance, notwithstanding that it does not meet the applicable thresholds.

2.4 Definition of "Control"

Control may result from rights, contracts or other means, which (either on their own or when combined with other means) provide a person with the ability to decisively influence the activity of an undertaking. The Law makes specific reference to the following examples of means which may produce control (the list is not exhaustive):

- preference rights;
- other rights to use; and
- rights over the composition, meetings or decision-making of an undertaking's board of directors or similar supervisory or executive body.

In practice, control is interpreted broadly and can result from a wide variety of arrangements. Examples of rights that may confer control include share options, rights acquired pursuant to shareholders' agreements (eg, as to the appointment or dismissal of senior management, approval of the budget or the business plan), amendment of an entity's articles of association, rights resulting from the taking and crystallisation or enforcement of security.

The Law does not distinguish between majority and minority interests. Minority interests that are capable of producing meaningful control (negative control) may also, therefore, be notifiable (eg, in cases where a minority interest provides its holder the right to veto an entity's strategic decisions).

2.5 Jurisdictional Thresholds

A concentration will be regarded as being "of major importance" (and will therefore be notifiable to the Service) where it meets the following thresholds:

- at least two of the undertakings participating in the concentration have an aggregate worldwide turnover exceeding EUR3.5 million each;
- at least two of the undertakings generate turnover within Cyprus; and
- at least EUR3.5 million of the combined turnover of all of the participating undertakings is achieved within Cyprus.

The thresholds set out above are applicable to all sectors, although turnover is calculated differently for certain types of enterprise (see **2.6 Calculations of Jurisdictional Thresholds**).

2.6 Calculations of Jurisdictional Thresholds

Basic Position

An entity's turnover includes proceeds from the sale of products and/or provision of services by it as part of its ordinary course of business activity during the preceding financial year. However, turnover does not include:

- sales rebates;
- VAT and other taxes that are directly connected to turnover; or
- internal transactions carried out between parties whose turnover is aggregated with that of the participant (see **2.7 Businesses/Corpo-**

rate Entities Relevant for the Calculation of Jurisdictional Thresholds).

An entity's turnover will also be aggregated with the turnover of certain other entities (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**).

All figures included in a notification must be stated in euros and should be converted using the average exchange rate for the period of reference (usually the preceding financial year). In practice, parties may use exchange rates published by the European Central Bank.

Exceptions

Where the concentration concerns the acquisition of parts of an enterprise, only the turnover relating to the parts which are the subject matter of the transaction should be taken into account. This is the case regardless of whether such part(s) are legally distinct entities.

There are also separate rules governing the calculation of turnover for certain kinds of enterprise. These are (i) credit institutions (eg, banks), whose turnover is deemed to be equal to one-tenth of their balance sheet during the preceding financial year; or (ii) insurance companies, where turnover is deemed to be equal to the value of its gross premiums during the preceding financial year. This includes all amounts received and receivable on account of its insurance contracts, but excludes taxes and duties charged on individual premiums or by reference to the total volume of premiums.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

When calculating an entity's turnover for the purposes of assessing whether it meets the jurisdictional thresholds described in **2.5 Jurisdictional Thresholds**, the turnover of the following entities must be aggregated with the turnover of the first entity.

(a) Undertakings participating in the concentration.
(b) Any entities in which the participants hold (directly or indirectly) more than half of the capital or voting rights, or otherwise have the power to appoint more than half of the members of the board of directors or similar supervisory or executive body, as well as any entities whose affairs are managed by the participants (or the participants have a direct or indirect right to manage such entities' affairs).
(c) Any entities which have the rights/powers set out in (b) in relation to the participants in the concentration, eg, the participants' holding companies.
(d) Any entities in relation to which an entity in (c) has the powers in (b) (ie, the participants' sister companies and other group entities that may not be direct holding or subsidiary companies vis-à-vis the participants).
(e) Any entities in relation to which two or more entities listed in (a) to (d) jointly hold the rights described in (b).

As noted in **2.6 Calculations of Jurisdictional Thresholds**, where the concentration concerns the acquisition of parts of an enterprise, only the turnover relating to the parts which are the subject matter of the transaction should be taken into account. This is the case regardless of whether such part(s) are legally distinct entities.

When participants in the concentration jointly hold the rights/powers listed in (b), the turnover resulting from the sale of products or the provision of services between the jointly controlled enterprise and each participant (or any other entity whose turnover is aggregated with a participant) is ignored. Turnover resulting from sales or the provision of services by the jointly controlled enterprise to third parties is apportioned (in equal parts) to the participants.

The participants' turnover should be calculated as at the end of the relevant reference period (so in practice, the end of the previous financial year). To the extent that changes in the business of a participant, such as acquisitions, divestments or business closures, have occurred and are not reflected in the participant's financial statements, these should be included as supporting documents to the notification.

2.8 Foreign-to-Foreign Transactions

Cypriot merger legislation applies equally to foreign-to-foreign transactions, provided that the thresholds set out in **2.5 Jurisdictional Thresholds** are met. Given that at least two of the undertakings must have some turnover in Cyprus, it would be very unusual for a filing to be required if the target does not have any turnover in Cyprus. However, there is no requirement for any entity to have a degree of local presence (eg, an office or similar premises).

2.9 Market Share Jurisdictional Threshold

The only thresholds that are relevant in determining whether a merger control filing is required in Cyprus are those set out in **2.5 Jurisdictional Thresholds**.

2.10 Joint Ventures

Joint ventures may also constitute a concentration of major importance for the purposes of the Law, provided that (i) the joint venture will fulfil, on a lasting basis, the role of a previously independent economic entity and (ii) the thresholds described in **2.5 Jurisdictional Thresholds** are met.

As explained in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**, where control is acquired jointly by participants in a concentration (as would be the case in a joint venture), transactions between the joint venture and each joint venture participant (and entities connected to the participants) are ignored for the purposes of calculating turnover and, therefore, for the purposes of determining whether the jurisdictional thresholds are met.

2.11 Power of Authorities to Investigate a Transaction

The CPC has wide ranging powers to enable it to perform its duties pursuant to the Law (including where the CPC suspects that a notifiable transaction was not notified to it – for example, because the CPC disagrees that the transaction does not meet the jurisdictional thresholds). In such cases, the CPC may:

- enter any premises (apart from private residences, unless it obtains a court warrant);
- check any books or other records and take copies of them;
- seal any premises or documents pending its investigation; and
- ask questions and request clarifications and/or information from any relevant person.

The CPC does not need to provide advance warning of an exercise of its powers, although it does need to provide details of the objective and scope of the exercise, its start date and the basis upon which it is exercising its powers.

There is no statute of limitations applicable to the exercise of the CPC's powers. Accordingly, the CPC could decide to investigate a transaction several years after its implementation.

2.12 Requirement for Clearance Before Implementation

Transactions (or at least the parts of a transaction that relate to Cyprus and have triggered the obligation to file a notification with the Service) may not be implemented until CPC clearance (including deemed clearance) has been obtained. For notifications that proceed to a Phase II investigation, parties can apply for permission from the CPC to implement the transaction pending clearance. See **2.15 Circumstances Where Implementation Before Clearance Is Permitted** for further details.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If a concentration is put into effect without the prior approval of the CPC, the CPC may impose a fine of up to 10% of the total turnover of the relevant party for the preceding year. Additional fines (up to EUR8,000 per day) may be imposed for each day the breach continues. The CPC also has the power to order that a concentration put into effect without its approval be (wholly or partly) reversed or disbanded, but only to the extent that this is reasonably necessary to restore functional competition on the relevant market.

Very few instances of penalties being imposed in this regard have been reported. The undertakings involved in those instances (which were published on the CPC's website) received fines ranging from EUR5,000–10,000.

It is worth noting in this regard that the Law (and consequently, the penalties described above) applies equally to foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect unless specific clearance is obtained from the CPC to implement (parts of) a transaction pending CPC clearance (see **2.15 Circumstances Where Implementation Before Clearance Is Permitted**).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Transactions subject to a Phase I investigation, or at least those parts that relate to Cyprus and have triggered the requirement to file, may not be implemented until CPC clearance (including deemed clearance) is obtained. Parties may implement the parts of the transaction that are not subject to CPC approval pending clearance. The CPC does not technically have to be notified of this; however, it is good practice to be as transparent as possible.

In cases where the CPC has decided to proceed to a Phase II investigation, the CPC may grant permission for a transaction or parts thereof to be implemented pre-clearance on the application of one or more of the parties involved. Permission is granted on a temporary basis (meaning that, if the CPC ultimately decides not to approve the concentration, any implementation steps taken by the parties must be unwound following the CPC's decision) and may be issued subject to any conditions the CPC considers appropriate.

Applicants must demonstrate that they will suffer serious damage if implementation of the transaction is delayed further. In deciding whether to grant permission, the CPC will take into account the consequences of the delay in implementation on the participants as well as on third parties and will weigh such consequences against the perceived threat to healthy competition posed by the transaction.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

The Law does not prescribe a particular deadline by which notification must be made, subject to the proviso that a concentration (or at least, those parts of a concentration that relate to Cyprus) may not be implemented without CPC clearance. See **3.2 Type of Agreement Required Prior to Notification** with regards to the timing of submission of a notification.

3.2 Type of Agreement Required Prior to Notification

A notification may only be made once an agreement as to the concentration has been concluded, or in the case of takeover offers, following publication of the public takeover bid or acquisition of a controlling interest triggering a takeover bid. In practice and given that the concentration may not be implemented before CPC clearance is obtained, parties tend to submit notifications within a few days of signing the transaction documentation.

There is one exception to the above, which is where the parties are able to demonstrate to the Service that they have a good faith intent to reach agreement or (in the case of a takeover offer) where the relevant party has publicly announced its intention to make a takeover bid.

In practice, the Service will require evidence that there is a high degree of certainty that the transaction will proceed (eg, execution versions of the transaction documentation) as well as an explanation of the urgency involved (eg, that the transaction documents cannot be signed before a separate regulatory clearance is received, but there would be serious financial or other repercussions to delaying implementation for the duration of the CPC's review period).

3.3 Filing Fees

There is a flat filing fee of EUR1,000 for a notification. If the CPC decides to proceed to a Phase II investigation, an additional fee of EUR6,000 is payable.

The filing fee is paid when submitting the notification. The CPC's review period does not begin until the filing fee is paid.

3.4 Parties Responsible for Filing

Where the notifiable transaction involves a merger of two previously independent undertakings, or the acquisition of joint control over one or more undertakings, notifications must be made, either jointly or separately, by each participant. In all other circumstances, the responsibility to notify rests with the person acquiring control (eg, in a share sale which does not involve the creation of a joint venture, the purchaser).

3.5 Information Included in a Filing

Contents of Notification

Notifications tend to be quite detailed and will typically run to between 20 and 30 pages for most transactions (and will be longer if the transaction is expected to raise meaningful competition concerns). There is no short-form version of the notification; all notifications must, at a minimum, contain the following information:

- names, addresses and contact details of all the participants in the concentration, along with a description of their business activities;
- description of the nature and extent of the concentration, including the circumstances which lead to concentration, whether the whole or only parts of an undertaking are involved in the concentration and, in the case of a public offer, whether the offer is supported by the board of directors of the offeree;
- explanation of the purposes of the concentration;
- whether the concentration has been notified to other competition authorities (and if so, whether it has been approved by them);
- description of the financial and structural aspects of the concentration, including the structure and control of the relevant

undertaking(s) following implementation of the concentration, the anticipated date the concentration will be implemented, as well as a description of any support received from any (public or private) sources;
- details of the worldwide and Cypriot turnover of each participant;
- details of profits before tax for each participant;
- the number of employees of each participant, both in Cyprus and worldwide;
- details of the group structure of each participant;
- information regarding other entities active in the affected markets, in which a participant (or its group) holds at least 10% of the shares or voting rights, or where there is an overlap between the board members of the entity concerned and a participant (or member of the participant's group);
- description and analysis of all relevant product and geographic markets, and of all reasonable alternative definitions of relevant product and geographic markets;
- description and analysis of all affected markets and other markets likely to be significantly affected by the concentration, including information regarding:
  - (a) turnovers (of the market generally and the specific participants);
  - (b) details of demand and supply on the market;
  - (c) market shares of the participants and their competitors;
  - (d) barriers to entry, including significant entries in the market in the preceding five years and expected future entries;
  - (e) economies of scale;
  - (f) impact of the concentration on final and intermediate consumers;
  - (g) impact of research and development activities; and
  - (h) distribution and supply networks;
- where a joint venture is being established, confirmation of whether the joint venture participants continue to participate in the same market(s) or on an adjacent market as the joint venture, and if so, details of their turnover, market share and activities.

The notifying parties must also confirm that all the information and estimates contained in the notification are, to the best of their knowledge, accurate, that any expressions of opinion are genuinely held and that they are aware of the potential penalties that can be imposed.

Parties may nominate a representative to sign the notification and handle queries regarding the notification on their behalf. In this case, details of the representative and evidence of their authorisation (in a prescribed form) must also be submitted.

Supporting Documents

The notification must be accompanied by the following supporting documentation:

- copies of the final (or most recent) transaction documentation;
- copies of the most recent annual returns and audited financial statements of all the participants in the concentration;
- copies of any reports or analyses produced for the purposes of the concentration (if they relate to Cyprus), which form the basis for the information included in the notification;
- an index and summary description of all reports, analyses, etc, that have been prepared for the purposes of assessing the competitive impact of the concentration, the market conditions and potential or actual competitors; and
- in the case of a public offer, a copy of the announcement of the bid and a copy of the offer document (if one exists).

Language

The notification itself must be submitted in one of the official languages of Cyprus (ie, Greek or Turkish), but is usually submitted in Greek. The supporting documentation may be filed in English.

Two hard copies of the notification (along with its supporting documents) must be delivered to the offices of the CPC. They must also be sent to the Service electronically.

Supporting documents may be submitted in either copy or original form. If copies are submitted, the notifying party must certify that the copies are genuine and complete, but there is no formal certification requirement (eg, notarisation or apostille).

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties imposed for the submission of an incomplete notification (but see **3.7 Penalties/Consequences of Inaccurate or Misleading Information** for penalties relating to the submission of inaccurate or misleading information). However, the time to the deadline for the CPC to issue a decision on the notification does not begin until the CPC considers that it has received a complete filing.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If a notifying party has submitted inaccurate or misleading information in the filing, the CPC may impose a fine of up to EUR50,000. The same fine applies where a party fails to supply information otherwise required pursuant to the Law. Fines must be accompanied by a reasoned explanation by the CPC for the imposition of the fine and parties subject to fines must be given the opportunity to be heard.

Furthermore, where the CPC discovers that it has approved a concentration on the basis of false or misleading information, it may withdraw its approval, modify the terms of its approval, or require the parties to reverse the whole or part of the implementation of the concentration.

There have been no reported cases to date of the CPC imposing a fine or other penalty as a consequence of the provision of incomplete or misleading information in the filing.

3.8 Review Process

All notifications begin their life as Phase I investigations. A Phase I investigation starts when a complete notification is submitted to the Service. The CPC must issue a decision within 30 calendar days from the date the CPC considers a complete filing has been received. "Decision", in this case, means a statement by the CPC that:

- the notified concentration does not fall within the ambit of the Law; or
- the notified concentration does fall within the ambit of the Law, but does not raise competition concerns (and the concentration is therefore approved); or
- the notified concentration does fall within the ambit of the Law, does raise competition concerns and as a result, the CPC needs to proceed to a Phase II investigation.

The CPC has the power to extend the 30-day review deadline by an additional 14 days where it considers that the review deadline might be missed as a result of the complexity or amount of information submitted as part of a notification. Any extension must be notified to the person submitting the notification at least seven days before the expiry of the original 30-day review period. The CPC rarely implements extensions in practice.

If the CPC does not issue a decision within the 30-day deadline (or extended deadline if applicable), the concentration is deemed to have been approved.

If the CPC decides to proceed to a Phase II investigation, it must issue a decision (either approving or rejecting the proposed concentration) within a further three months from the date it considers it has received all of the information it requires for its investigation. As with Phase I investigations, the CPC has the power to extend the deadline for its review by an additional 14 days (or longer if the CPC considers that the delay is due to a failure or omission by any of the participants, eg, a failure to submit requested information). Deemed clearance is given if the CPC does not issue its decision within four months of receipt of a complete filing (or within such extended timeframe as may have been notified to participants by the CPC).

In total therefore, a notification that has proceeded to a Phase II investigation may take between four to six months to resolve.

3.9 Pre-notification Discussions With Authorities

There is no official route by which parties may engage in pre-notification discussions with the CPC, and if parties attempt to do so, there is consequently no legal basis which would require the CPC to treat such discussions confidentially.

3.10 Requests for Information During the Review Process

It is relatively common for the Service to issue requests for information during the review process; however, the Service does not generally go beyond requesting information that is reasonable and proportionate to its task. Parties can minimise the likelihood that the Service will request additional information by taking care to ensure that the filing contains all the details prescribed by the Law (see **3.5 Information Included in a Filing**).

If the Service considers that it requires additional information after it has begun its review, the Service may "stop the clock" pending receipt of the information. In our experience, provided the parties respond to the Service's requests in a prompt and transparent manner (particularly if it is possible to respond on the same day or the following day), the Service will not stop the clock for minor information requests.

3.11 Accelerated Procedure

There is no accelerated, short-form or fast-track procedure for merger clearance under Cypriot law, although the CPC rarely chooses to extend its review deadline. The CPC also generally issues a decision by the applicable deadline, although in any event, failure to issue a decision on the part of the CPC within the deadline constitutes deemed clearance of the notified concentration.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The CPC will examine whether (i) the notified transaction qualifies as a "concentration of major importance" within the meaning of the Law (see **2.3 Types of Transactions**); and (ii) the concentration would significantly impede effective competition in Cyprus (or in a substantial part of Cyprus), particularly where the concentration is expected to create or strengthen a dominant position. If both questions are answered affirmatively, the concentration will not be approved.

4.2 Markets Affected by a Transaction

Any notification for clearance submitted to the CPC must include:

- a description and analysis of all relevant product and geographic markets and of all reasonable alternative definitions of relevant product and geographic markets; and
- a description and analysis of all affected markets and other markets likely to be significantly affected by the concentration.

The Law contains some guidance designed to enable notifying parties to comply with this obligation, which is summarised below.

Relevant Product Markets

A relevant product market will comprise all products and/or services that a consumer may consider interchangeable (or which can be substituted for one another) on the basis of their price, characteristics (including their physical and technical characteristics) and intended use.

Relevant Geographic Markets

The relevant geographic market will include the area in which there is supply and demand of/for the relevant products and/or services by the undertakings involved in the concentration. Conditions of competition in the relevant geographic market should be sufficiently homogenous, and the relevant geographic market should be distinguishable from neighbouring geographic areas (particularly on the basis that there are different conditions of competition in such neighbouring areas).

In determining the relevant geographic market, parties should particularly take into account the following:

- the nature and characteristics of the relevant products and/or services;
- the existence of barriers to entry;
- consumer preferences;
- differences in the participants' market shares compared to neighbouring geographic areas; and
- price differences.

Affected Markets

Relevant product and/or geographic markets (and plausible alternative product and geographic markets) will be classed as affected markets where they are within the Republic of Cyprus and either (i) two or more of the parties are engaged in business activities in the same relevant market which afford them a combined market share of at least 15%; or (ii) a party is engaged in business activities in a relevant market which is downstream or upstream to another relevant market on which a different party is engaged in business activities, provided that:

- any party has a market share of at least 25% on any relevant market; or
- the combined market share of both parties comes to at least 25%.

Other Markets Likely to Be Significantly Affected by the Concentration

Markets which may be classed as such include, but are not limited to, the following.

- Markets where any party has a market share exceeding 25% and another party is a potential competitor on the same market. The term "potential competitor" is construed relatively narrowly and will only extend to parties that plan to enter the relevant market or have developed or pursued plans to do so within the last three years.
- Markets where any party has a market share exceeding 25% and another party holds significant intellectual property rights in the same market.
- Any of the parties are engaged in business activities on closely related neighbouring markets, and their individual or combined market share on any of those markets is at least 25%. Product markets will be classed as closely related neighbouring

markets where the products concerned are complementary to each other, or where they belong to a range of products that are generally purchased by the same consumer group(s) for the same final use(s).

4.3 Reliance on Case Law

In examining definitions of relevant product and/or geographic markets, as well as in reaching its decision more generally, the CPC will have regard to (and will, in most cases, attempt to be consistent with) its own past practice. It will also have regard to decisions of the EC and the European Court of Justice, as well as decisions of other member-state competition authorities (notably, Greece).

4.4 Competition Concerns

The CPC examines a variety of competition concerns in reaching a decision. These include:

- the structure of the affected markets and other markets that may be significantly impacted by the concentration;
- potential competition posed by other enterprises;
- the market share of the participants and their connected parties;
- alternative sources of supply for the relevant products and/or services;
- supply and demand trends;
- barriers to entry;
- the interests of final and intermediate consumers; and
- the contribution to technical and economic progress.

Additional concerns are examined with respect to joint ventures in **4.7 Special Consideration for Joint Ventures**.

4.5 Economic Efficiencies

As noted in **4.4 Competition Concerns**, the CPC will take into account certain types of economic efficiencies, insofar as they relate to the interests of consumers or contribute to technical and/or economic progress.

4.6 Non-competition Issues

The CPC does not generally tend to take any non-competition considerations into account when reaching a decision, and the CPC is not expressly empowered to do so by the Law. However, as noted above, the Minister may declare that a concentration is "of major importance" (and therefore notifiable to the CPC) despite the fact that the transaction may not meet the jurisdictional thresholds described in **2.5 Jurisdictional Thresholds**. The Minister may do so where they consider that a concentration should be regarded as being of major importance on the basis of its expected impact on public safety, on pluralism of the media and/or on the principles of sound administration.

There are no general rules restricting foreign direct investment into Cyprus. However, there are specific rules governing investment into (i) certain specific sectors (eg, banks, insurance companies) and/or (ii) by specific methods (eg, public offers; see **1.2 Legislation Relating to Particular Sectors**). These rules operate entirely independently of the merger control rules and, consequently, both sets of applicable rules should be considered when assessing the steps to implementation of a transaction.

4.7 Special Consideration for Joint Ventures

Where a concentration involves the creation of a joint venture, the CPC will also examine whether the joint venture will result in coordination between the joint venture parents (or whether such coordination is in fact the objective of the creation of the joint venture). If such coordination exists or will exist, the CPC will consider whether the coordination is compatible with, or will interfere with, the ordinary functioning of competition on the market.

The CPC will in particular consider whether the joint venture parents continue to undertake significant activities on the same or adjacent markets as the joint venture enterprise, and whether any coordination resulting from the creation of the joint venture provides the parents with the ability to eliminate competition for a large part of the relevant products or services.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

As noted in **2.12 Requirement for Clearance Before Implementation** and **2.13 Penalties for the Implementation of a Transaction Before Clearance**, notifiable transactions may not be implemented prior to CPC clearance (or in circumstances where the CPC issues a decision denying clearance). If a transaction is implemented without CPC clearance, the CPC may issue fines and/or order that a transaction be unwound.

5.2 Parties' Ability to Negotiate Remedies

Where the CPC decides to proceed to a Phase II investigation, it will inform the parties that they are entitled to modify the transaction or suggest remedies to resolve identified competition concerns. As part of the Phase II investigation, the CPC will examine whether any additional information it has obtained from the participants (or from third parties), combined with any remedies and/or amendments to the transaction that may have been proposed by the participants, are sufficient to allay the competition concerns identified by the CPC during the Phase I investigation.

If competition concerns persist, the CPC may (if it has identified any remedies and/or amendments to the transaction which it believes will resolve the competition concerns it has identified) enter into negotiations regarding remedies and/or amendments with the parties.

In practice, both behavioural and structural remedies (eg, divestitures) may be accepted and/or proposed by the CPC.

5.3 Legal Standard

Any remedies or amendments to the transaction proposed by the parties must follow a form prescribed by the Law and must be submitted to the CPC within the timeframe that may be prescribed by the CPC. The Law does not specify a particular legal standard which must be met by proposed remedies, but in practice, the remedies will need to be sufficient in order to fully eliminate the competition concerns that have been identified.

In particular, a party suggesting one or more remedies should do the following:

- describe in detail the objective of the suggested remedies and the proposed conditions to their implementation;
- explain how the proposed remedies are intended to address the competition concerns identified by the CPC; and
- provide a non-confidential description of the remedies and their expected impact, to enable the CPC to market-test the proposed remedies if it so wishes (see **7.2 Contacting Third Parties**).

Where a proposed remedy involves the sale of a business, the following additional information should be provided:

- general information regarding the business to be sold, including a description of the

legal entities that make up the business, their place of operations and other areas where they undertake activities or provide services, as well as the organisational structure of the business;
- a description of any legal barriers to sale (eg, third party rights or requirements to obtain regulatory consents);
- a description of the products and/or services offered by the business, including their technical characteristics, turnover relating to each product/service, business or trade names, etc;
- a description of any supporting business functions, to the extent these are not performed at the level of the business itself (eg, research and development, sales and marketing, suppliers);
- a detailed description of the relationships between the business to be sold and other enterprises controlled by the participants (eg, common staff or assets, contracts for services concluded between such enterprises, common customers);
- a description of all tangible and intangible assets (including intellectual property rights) of the business to be sold;
- a structure diagram setting out the number of employees of each business function and a list of employees who are necessary for the continuation of each function;
- a description of the customers of the business and apportionment of the turnover of the business to each customer;
- financials of the business, including turnover and EBITDA for the preceding two years, as well as projections for the next two years;
- a description of every change in its organisational structure and the relationships with its group entities during the preceding two years and a summary of upcoming changes planned during the next two years; and
- analysis of the rationale of the sale, to an appropriate purchaser, within the suggested timeframe.

5.4 Typical Remedies

Few notifications to the CPC proceed to a Phase II investigation, and as such, there is only a small number of examples where competition clearance has been granted subject to remedies. Examples of remedies which have been used include:

- a condition that the directors of a participant of a joint venture cannot also act as directors of the joint venture itself, and that information will be treated confidentially and not shared between the two boards of directors;
- a requirement that the joint venture entity maintain a competition compliance manual;
- a commitment that any transactions between the target and its shareholders will be carried out on arm's-length terms; and
- a commitment that access be provided to new market entrants to infrastructure controlled by the concentration, at cost.

5.5 Negotiating Remedies With Authorities

Parties may propose remedies once invited to do so by the CPC (in practice when the CPC decides to proceed to a Phase II investigation). The CPC will enter into negotiations of remedies with the parties if it considers that the remedies proposed by the parties are insufficient to allay the competition concerns identified by the CPC. The CPC can also suggest its own remedies during the negotiation phase and may impose any conditions it considers appropriate in its clearance decisions.

5.6 Conditions and Timing for Divestitures

Where the CPC decides to approve a concentration subject to conditions and/or remedies, it will include details of such conditions and/or remedies in its approval decision.

If a transaction is implemented without full compliance with any remedies or conditions set out in the CPC's approval, the CPC may impose a fine of up to 10% of the total turnover of the relevant party for the preceding year. Additional fines (up to EUR8,000 per day) may be imposed for each day the breach continues. The CPC may also withdraw its approval or modify the terms upon which the approval was issued.

Finally, the CPC also has the power to order that a concentration put into effect without full compliance with applicable remedies or conditions be (wholly or partly) reversed or disbanded, but only to the extent that this is reasonably necessary to restore functional competition on the relevant market.

5.7 Issuance of Decisions

The CPC will typically issue a formal decision permitting or prohibiting a transaction within the applicable deadlines. If the CPC fails to issue a decision within the stated deadline, clearance is deemed given.

Non-confidential versions of decisions are published in the Official Gazette of Cyprus, as well as on the CPC's website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Recent remedies imposed by the CPC are outlined in **5.4 Typical Remedies**, albeit that none of the cases concerned foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

No specific legislative provision is made for related arrangements (ancillary restraints) to be captured in clearance decisions and, in practice, they are not commonly captured.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Where the CPC decides to proceed with a Phase II investigation, a person who is not a party to the concentration but may nevertheless be directly affected by the CPC's decision in relation to the concentration, may petition the CPC to submit their views in relation to the concentration. This may be done in writing or as part of an oral hearing. Relevant third parties might include:

- competitors of the undertakings participating in the concentration;
- customers of such undertakings;
- consumer protection organisations; and
- employee representative bodies.

The CPC also has the right, where it decides to proceed to a Phase II investigation, to enter into negotiations or discussions or conduct hearings with any person, where this would (in the CPC's view) assist it in its investigation.

No third-party views are usually invited in the context of a Phase I investigation.

7.2 Contacting Third Parties

The CPC will often invite the views of interested third parties where it has decided to proceed with a Phase II investigation. Typically, the CPC will (i) request that the third parties concerned provide the CPC with a list of their competitors and other relevant parties and (ii) do its own research to determine which third parties might be relevant. While the CPC usually involves third parties via the circulation of written questionnaires or conducting oral hearings, it has on occasion also used more informal means (eg, telephone calls).

Part of the information that must be submitted to the CPC when proposing a remedy is a non-confidential description of the nature and scope of the proposed remedy, including the reasons why it is expected to resolve applicable competition concerns. The CPC has the power to use this non-confidential description to market-test the remedy offered.

7.3 Confidentiality

The CPC publishes both its decisions as well as the fact that it has received a notification in the Official Gazette of Cyprus and on its website. The publications always include the names of the parties involved and a description of the concentration. When decisions are published, the relevant economic sectors are also identified. However, commercial information that has been notified to the CPC as confidential is generally not included.

7.4 Co-operation With Other Jurisdictions

The CPC co-operates with competition authorities in other EU member states, both on general policy matters and with respect to specific transactions.

The Law does, however, provide that the CPC and its members are subject to an obligation to maintain the confidentiality of sensitive information received by them in the conduct of their duties. More particularly, they must keep information confidential and not publish or circulate the information except to the extent required to evidence a breach of the Law or to otherwise ensure application of the provisions of the Law.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

CPC decisions may be appealed (by way of administrative recourse) to the Administrative Court. Decisions of the Administrative Court may, in turn, be appealed to the Supreme Court.

8.2 Typical Timeline for Appeals

Appeals to the Administrative Court must be filed within 75 days of issuance of the CPC's decision (or within 75 days of the date the decision was notified to the appellant). A party wishing to appeal a decision of the Administrative Court to the Supreme Court must file its appeal within 42 days of issuance of the Administrative Court decision. In practice, appeals can take several years to resolve and are very rarely successful.

8.3 Ability of Third Parties to Appeal Clearance Decisions

In addition to the parties involved in the concentration that is the subject of a clearance decision, third parties who are affected by the decision may also appeal the decision to the Administrative Court (however, there are no reported cases of third parties ever having done so successfully).

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

As at the date of writing, the Law has not been amended since its introduction (other than purely corrective amendments), and no subsidiary legislation has been issued pursuant to the Law. No concrete proposals exist for amendment of the Law.

9.2 Recent Enforcement Record

The CPC very rarely issues fines, and although its powers to issue fines are draconian, the limited fines that have been issued have been low. In addition, remedies recently imposed by the CPC have tended to be fairly limited; for instance, the CPC has not yet required the sale of a business or parts thereof as a remedy.

9.3 Current Competition Concerns

There has been a notable shift in approach to merger control notification by the EC, which is now encouraging referrals from national competition authorities in certain cases (including cases where the jurisdictional thresholds are not met). As a result, we may see more transactions referred to the EC than was previously the case.

Georgiades & Pelides LLC is a leading Cypriot law firm with a broad corporate, banking, commercial and litigation practice and a distinct international focus. The firm was formed in 1998 by the merger of Georgiades & Georgiades with Nicos Pelides & Co. and offers a unique blend of dynamism and experience. The firm has extensive experience and expertise in advising across all aspects of competition and merger control legislation and has helped its clients secure clearances in complex and sensitive Phase I merger control cases. In 2021 alone, the firm submitted more than 30 merger control notifications, mostly on behalf of international clients. Clients include banks, global institutional investors and multinational investment management corporations. The firm currently has 20 lawyers (including partners).

AUTHORS

Marios Pelides is a partner at Georgiades & Pelides and has been in practice for over 35 years. Marios specialises in corporate and M&A work. His main areas of practice are structuring joint ventures, M&A, cross-border mergers, takeovers, public offers and listings on regulated markets. Marios also regularly advises on merger control and competition law and is the author of a number of publications on merger control. He contributed to the cross-border merger control guide of major international law firms. Marios is a barrister of Lincoln's Inn and has a degree in law from the University of London.

Dominique Pelides joined Georgiades & Pelides in 2021 after holding the position of Vice President in the alternative funds segment of BlackRock in London. She trained at Clifford Chance LLP in London, where she worked for seven years, leaving as a senior associate. Dominique's main areas of practice include advising on international M&A and financing transactions, competition and banking regulation and the establishment and distribution of private investment funds. She holds a degree in Law (first-class honours) from University College London and completed the Legal Practice Course at the University of Law, gaining a distinction. Dominique is qualified as a solicitor in England and Wales.

Georgiades & Pelides LLC

16 Kyriakos Matsis Avenue
Eagle House, 10th Floor
Agioi Omologites
1082 Nicosia
Cyprus

Tel: +357 22 889 000
Fax: +357 22 889 001
Email: info@cypruslaw.com.cy
Web: www.cypruslaw.com.cy

Georgiades & Pelides LLC
Advocates - Legal Consultants

DENMARK

Law and Practice

Contributed by:
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle** **see p.179

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Danish merger control regulation is primarily based on the principles of the EU Merger Control Regulation (EUMR). In general, Danish merger rules are interpreted in line with EU law and case law from the European Commission and the European courts. Furthermore, the substantive test under Danish law is similar to that under EU law.

The scope of the jurisdiction is based on turnover thresholds, which are calculated largely in accordance with EU principles.

The merger control rules are laid down in part 4 of the Danish Competition Act (the "Competition Act") as well as in two executive orders, which set out the detailed rules on the calculation of turnover thresholds and the notification of concentrations. Finally, the Danish Competition and Consumer Authority (DCCA) issues and regularly updates a guidance paper on merger filings on its website.

1.2 Legislation Relating to Particular Sectors

"Foreign-to-foreign" transactions are subject to Danish merger control insofar as the merging parties meet the Danish jurisdictional thresholds. No separate legislation applies to such transactions.

With respect to particular sectors, it should be noted that a merger between two or more commercial providers of electronic communications networks in Denmark may be referred to the DCCA by the Danish Business Authority, irrespective of whether or not the jurisdictional thresholds are met.

1.3 Enforcement Authorities

The Danish merger rules are enforced by the DCCA and the Danish Competition Council (the "Council"). The DCCA prepares all cases and decides on less complex mergers on behalf of the Council, while the Council decides on the more complicated mergers.

The DCCA's and the Council's decisions may be appealed to the Danish Competition Appeals Tribunal (the "Tribunal"), which is an independent administrative appeals body. The decisions of the Tribunal may, in turn, be appealed to the Danish courts.

2. JURISDICTION

2.1 Notification

Notification to the DCCA is compulsory if the jurisdictional thresholds are met, with no exceptions.

If the parties are unsure whether notification is required, they can choose to consult the DCCA about a specific transaction. If the parties wish to receive a legally binding reply from the DCCA regarding the obligation to notify, they must submit a notification. However, informal contact with the DCCA normally provides the necessary clarity on jurisdictional issues.

2.2 Failure to Notify

If an undertaking fails to notify a merger to the DCCA or carries out a merger despite a prohibition to the contrary (ie, implements a merger before approval – so-called "gun-jumping"), fines may be imposed (see Section 23 (2), subsection 4-5 of the Competition Act). Up until now, fines for failure to notify have only been imposed on the buyer(s).

In the case of SEAS-NVE Holding A/S and Syd Energi Holding A/S, the State Prosecutor fined each of the two utility companies DKK4 million for failure to notify a joint acquisition of ChoosEV and for implementing the merger before approval. The size of the fine reflected that the parties had themselves informed the DCCA of their failure to notify.

In a case from June 2019 regarding Circle K Denmark A/S' acquisition of 72 service stations within the Shell trade mark, Circle K accepted a fine of DKK6 million for failure to notify. The acquisition of the 72 service stations should have been separately notified to the DCCA, as they had not been included in a previous merger approval of 2016 from the European Commission regarding Circle K's acquisition of Danish Fuel (comprising some of Shell's Danish activities).

Civil Fines

The competition authorities may request the courts to impose civil fines on undertakings in accordance with Danish civil procedure (see Sections 23–24 of the Competition Act). The size of the fine imposed depends on factors such as the gravity of the infringement and its duration. Regarding legal persons, the turnover will also be taken into consideration.

The new civil fine regime was introduced in March 2021 with the amended Danish Competition Act, which implements the ECN+ Directive of 11 December 2018 (Directive (EU) 2019/1).

In general, penalties are made public.

2.3 Types of Transactions

Mergers resulting in a lasting change of control are caught by the Danish merger rules. In line with the EUMR, control can be obtained by agreements or other means that do not involve the transfer of shares or assets, where such operations are caught by the merger rules, too. As internal restructurings or reorganisations do not usually result in a change of control, they are most often not caught.

The Competition Act exempts certain types of transactions from the merger concept, as follows:

- the acquisition of securities by financial undertakings for resale, which are disposed of within one year of the acquisition, and which are acquired as a customary part of the company's operations;
- transactions where a trustee in bankruptcy acquires control over a company; or
- the acquisition of control by financial holding companies, as long as the holding company uses the attached voting rights only to retain the full value of its investment.

2.4 Definition of "Control"

According to Section 12a of the Competition Act, and in line with the EUMR, the term "control" is defined as the possibility of exercising decisive influence on an undertaking.

Control can be obtained through rights or agreements or in other ways that will, separately or in combination, make it possible to exert a decisive influence on the operations of the undertaking. The acquisition of a minority shareholding may amount to a merger in so far as the acquirer obtains a decisive influence on the undertaking – for example, through agreements concerning voting rights or veto rights.

2.5 Jurisdictional Thresholds

The Danish merger rules apply to a merger if:

- the combined aggregate turnover in Denmark of all the undertakings concerned is at least DKK900 million, and the aggregate turnover in Denmark of each of at least two undertakings concerned is at least DKK100 million;

- the aggregate turnover in Denmark of at least one of the undertakings concerned is at least DKK3.8 billion, and the aggregate worldwide turnover of at least one of the other undertakings concerned is at least DKK3.8 billion;
- the Danish Business Authority, in accordance with the Danish Act on Electronic Communications Networks and Services, has referred a merger between two or more commercial providers of electronic communications networks in Denmark to the DCCA; or
- if the European Commission, in accordance with the EUMR, has referred a merger to the DCCA.

The concept of "undertakings concerned" in the Competition Act refers to the direct participants in a merger and is identical to the concept in EU merger rules. The European Commission's practice and the Consolidated Jurisdictional Notice provide guidance for further interpretation. The DCCA often consults with the European Commission and obtains guidance on jurisdictional issues.

Except for the exceptions provided by the Danish Act on Electronic Communications Networks and Services and the EUMR, there are no deviations from the jurisdictional thresholds.

2.6 Calculations of Jurisdictional Thresholds

The aggregate turnover of the undertakings is the net turnover derived from the sale of products and the provision of services falling within the undertakings' ordinary activities after the deduction of value-added tax and other taxes directly related to sales.

The calculation of turnover is based on audited accounts of the preceding financial year.

If the turnover is in a foreign currency, it must be converted into DKK based on the average ECB rate of exchange of the preceding accounting year of the undertaking concerned.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The undertakings concerned are relevant for the purpose of calculating the jurisdictional thresholds.

The turnover of an undertaking concerned shall be calculated on a group-wide basis. The turnover of a group comprises the turnover of associated undertakings, which include subsidiaries, the parent company, subsidiaries of the parent company, joint ventures and other undertakings that are subject to joint management. Where a merger is the result of the acquisition of part of one undertaking, the calculation of the turnover shall only comprise the share of the turnover of the seller that relates to the acquired part (target).

If an undertaking has been divested or has acquired control of assets after the end of the preceding financial year, the turnover related to the divestiture or assets must be deducted or added to the turnover of the undertaking concerned.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to Danish merger control if the turnover thresholds are met, even if the merger has no actual effect on the Danish market. However, it is a prerequisite that the turnover is in Denmark and comprises products sold and services provided to undertakings or consumers in Denmark (corresponding to the EU merger rules). For credit institutions and other financial institutions, the turnover in Denmark comprises revenue earned by the institution's departments or branches in Denmark.

2.9 Market Share Jurisdictional Threshold

Under Danish law, there is no market share jurisdictional threshold; the jurisdictional thresholds are based solely on turnover.

2.10 Joint Ventures

In case of a newly created joint venture, the "undertakings concerned" are each of the companies acquiring control of the newly set-up joint venture in question. Consequently, an assessment of whether the jurisdictional thresholds are met must be based on the turnover of the parent undertakings.

Where two or more undertakings acquire joint control of a pre-existing business, the undertakings concerned are each of the undertakings acquiring joint control and the target business. In this case, the turnover of the parent undertakings and the target business must be taken into consideration. Since the judgment of the European Court of Justice (ECJ) in Case C-248/16, Austria Asphalt, and in line with the Commission's practice, only the creation of a full-functioning joint venture is considered a concentration under Danish law.

In practice, the DCCA takes guidance from EU case law and guidelines from the Commission when assessing aspects of a joint venture.

A case from 2018 brought up some interesting issues in relation to joint ventures and the DCCA's jurisdiction. In 2017, Danica Ejendomsselskab ApS (Danica) had sold 50% of its shares in 16 Danish shopping centres to Arbejdsmarkedets Tillægspension (ATP), which resulted in the creation of a full-functioning joint venture. In 2018, the joint venture acquired apartment No 2 in Randers Storcenter (part of a shopping centre in Central Denmark). The DCCA based the assessment of its jurisdiction with regard to the acquisition of apartment No 2 in Randers Storcenter on the turnover of the parents (Danica and ATP) and not on the turnover of the joint venture.

Thus, the acquisition of apartment No 2 in Randers Storcenter met the turnover threshold under the Danish competition rules and was consequently subject to notification. The DCCA nevertheless accepted a simplified notification on the basis of Danish rules equivalent to Section 5(a) of the Commission Notice on a simplified procedure (the acquisition of joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities in Denmark).

2.11 Power of Authorities to Investigate a Transaction

The Danish merger rules do not apply to a transaction below the jurisdictional thresholds, except where a transaction is referred to the DCCA by the Danish Business Authority in accordance with the Danish Act on Electronic Communications Networks and Services or by the European Commission in accordance with the EUMR.

The DCCA does not have any power to investigate transactions that are not covered by the merger rules in the Competition Act.

2.12 Requirement for Clearance Before Implementation

A merger covered by the Competition Act must not be implemented until the parties have notified the DCCA, and the DCCA has approved the merger. However, pursuant to Section 12c (6) of the Competition Act, the DCCA may grant derogations from the suspensive effect at its discretion.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the parties implement a merger prior to clearance, ie, gun-jumping, the DCCA may impose fines (see Section 23 (2), subsection 5 of the Competition Act). The same applies if the parties fail to notify the DCCA, see Section 23 (2), subsection 4 of the Competition Act.

The competition authorities may request the courts to impose civil fines on undertakings in accordance with Danish civil procedure (see Sections 23–24 of the Competition Act). The size of the fine imposed depends on factors such as the gravity of the infringement and its duration. Regarding legal persons, the turnover will also be taken into consideration. As mentioned, the new civil fine regime is a consequence of the adoption of the ECN+ Directive of 11 December 2018, which entered into force with the amended Danish Competition Act in March 2021.

In general, penalties for gun-jumping are made public.

Gun-Jumping in Denmark

The Danish EY/KPMG case from May 2014 was the first example of a gun-jumping case in Denmark. In the case, the Council approved the merger subject to remedies, but also found that the parties implemented the merger before approval. The decision was brought to court and, on 7 December 2016, the Danish Maritime and Commercial Court referred preliminary questions to the ECJ, seeking guidance on how to interpret the EU merger rules on the implementation of mergers (which are indicative of the interpretation of the Danish merger rules).

On 31 May 2018, the ECJ delivered its preliminary ruling in Case C-633/16, which de facto implied that EY and KPMG Denmark did not violate the prohibition on pre-implementation of a merger. Consequently, on 13 November 2018, the Danish Maritime and Commercial Court repealed the Council's decision.

There were no cases of gun-jumping in 2020.

2.14 Exceptions to Suspensive Effect

Section 12c (5) of the Competition Act holds a general exemption to the suspensive effect for public bids and a number of transactions regarding securities, ie, securities that can be traded on a market such as a stock exchange, whereby various sellers gain control. However, this applies only to the acquisition itself. The merger may not be implemented, and the buyer may not exercise voting rights attached to the securities in question or may only do so to maintain the full value of its investment and after dispensation from the DCCA.

In the Danish DLG/Danish Agro case from February 2010, the DCCA granted a derogation from the suspensive effect for DLG and Danish Agro's acquisition of AAA's rights and obligations according to a contract for the supply of soy. DLG and Danish Agro were planning to acquire AAA, which had suspended its payments. The DCCA granted the derogation with reference to AAA's economic difficulties and as the transfer of the rights and obligations under the supply contract was necessary in order to maintain the operations of AAA during its suspension of payments.

The DCCA stressed that its decision had no influence on the Council's decision of whether the merger could eventually be approved.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Pursuant to Section 12c (6) of the Competition Act, the DCCA may grant derogations from the suspensive effect at its discretion.

There are no examples of Danish cases where global closing has been implemented before clearance in Denmark following the carve-out of the Danish business, and it is not likely that such a procedure would be possible in Denmark.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Under Danish law, no deadlines for merger notifications are applicable. However, the merger cannot be notified (in complete form) before the binding merger agreement has been agreed (signing) and may not be implemented before it has been approved by the authorities. If the parties implement the merger prior to approval, they may be subject to fines, which are made public.

3.2 Type of Agreement Required Prior to Notification

A notification may be submitted to the DCCA if the parties have entered into a merger agreement (which may be subject to conditions), if a takeover bid has been made public, or if a controlling share has been acquired (the latter covers cases where control is not gained through an agreement or a take-over bid, but, eg, through a series of transactions in securities or through inheritance).

Generally, the DCCA will not accept a notification based on less formal agreements such as letters of intent, let alone based on good faith intentions to reach agreement. However, informal pre-notification discussions with the DCCA may be based on a letter of intent.

3.3 Filing Fees

The filing fee for a simplified notification is DKK50,000. The fee for a full-form notification is 0.015% of the combined turnover in Denmark of the undertakings concerned, capped at DKK1.5 million. A merger notification will only be deemed complete once the merger filing fee has been paid.

An already-paid fee is not reimbursable, unless:

- the notified transaction was not notifiable;
- the parties withdrew the notification before it was complete;
- the parties withdrew the notification before the DCCA had reached a decision, due to the fact that another Danish authority had refused to permit a merger between undertakings that were involved in the notified transaction; or
- the Danish Business Authority did not have a basis for referring the merger to the DCCA.

3.4 Parties Responsible for Filing

It follows from the DCCA's guidelines on the notification of mergers and merger fees from 2020 that in cases involving an acquisition of joint control, the undertakings concerned are jointly responsible for filing the merger notification. In practice, fines for failure to notify have only been imposed on the buyer(s) in the transaction. In cases involving an acquisition of sole control, the acquirer of sole control is responsible for filing the merger notification.

The undertakings may choose to let one or more of the undertakings concerned submit the merger notification, or to authorise a representative to submit and receive documents on behalf of all of the undertakings concerned.

3.5 Information Included in a Filing

In a full-form notification, the DCCA requires detailed information about:

- the merging parties;
- notification to other competition authorities;
- the merger itself;
- economic information on the parties;

- ownership and control;
- the relevant markets;
- market conditions;
- market entry/exit conditions;
- research and development;
- co-operative agreements;
- trade associations; and
- efficiency gains.

Further information is required if the merger constitutes the formation of a joint venture.

In addition, the DCCA requires supporting documentation in the form of:

- annual financial statements;
- annual reports;
- all documents concerning the merger or related to the merger, including analyses, reports and minutes of board meetings;
- flow charts and similar overviews for each of the parties;
- a non-confidential version of the notification; and
- documentation of payment of the fee.

The notification is filed by means of the standard forms available on the DCCA's website. There is no requirement for certifications, notarisations or the like.

Notifications must be submitted in Danish, but notifications in English may be accepted upon prior agreement with the DCCA. Supporting documents may be submitted in Danish and English.

Less information is required under the simplified notification procedure.

3.6 Penalties/Consequences of Incomplete Notification

When the parties have submitted a final notification, the DCCA will determine if the notification is complete within ten working days. There are no penalties if a notification is deemed incomplete. However, Phase I – which is 25 working days – does not commence until the DCCA deems the notification complete.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If it appears that the approval of a merger is, to a significant extent, based on inaccurate or misleading information attributable to the notifying parties, the DCCA may revoke the approval. The parties may also be subject to a fine, as exemplified in April 2017, where a district court fined Metro Cash & Carry Danmark DKK50,000 for failure to provide the DCCA with all relevant information for its review of the contemplated merger with Euro Cater.

3.8 Review Process

Notification of a merger to the DCCA may be filed when a binding merger agreement has been completed by the parties, a takeover bid has been made public, or a controlling share has been acquired. The DCCA must declare the notification complete or specify any missing information no later than ten working days from submission of the notification.

Phase I

Phase I commences once the DCCA has declared the notification complete and takes up to 25 working days (35 working days if the parties propose commitments).

The DCCA may decide to initiate a more comprehensive Phase II investigation if deemed necessary due to, eg, the complexity of the merger, or because a final decision cannot be made within the timeframe of Phase I. Further, if the parties have proposed commitments, a Phase II investigation will often be initiated, but it may be closed as soon as an agreement on commitments has been reached.

Phase II

Phase II investigations must be completed within 90 working days. However, the timeframe for a Phase II investigation will automatically be extended by up to 20 working days if the parties propose commitments during the last 20 working days of Phase II. Finally, the Council may – at any time – extend the deadline by up to 20 working days, provided the undertakings concerned have made a request for or consented to such an extension.

Both types of extensions may be granted within the same Phase II investigation.

Overall Timeline

In a simplified merger without substantial horizontal overlap, a timeframe of up to two months should be expected (from the first initial contact being made to the DCCA). Complex merger cases can take up to – and sometimes exceed – a year from the initial contacts with the DCCA and until approval is granted. However, in general, the DCCA is becoming more efficient, especially when handling non-complicated mergers.

3.9 Pre-notification Discussions With Authorities

Pre-notification is not required by law, and there is no statutory timeframe for the pre-notification phase. The DCCA recommends that parties contact the DCCA as soon as they have established that the merger is notifiable and no later than two weeks prior to notification.

During the pre-notification phase, drafts of the notification can be submitted for review by the DCCA, which will then usually revert with questions to the parties. In practice, it will often take two to four weeks to have a simplified notification declared complete, and two to ten weeks for a full-form notification to be declared complete. However, we have seen examples of longer pre-notification phases, such as the notification of JP/Politiken/Børsen, which was not declared complete until July 2016 even though the pre-notification process was initiated in January 2016.

Discussions with the DCCA in the pre-notification phase are confidential. The DCCA does not announce the merger or initiate market research, etc, before the parties have notified the merger, unless specifically agreed to by the parties, or if the merger is known to the public.

3.10 Requests for Information During the Review Process

Information requests are common, even in simplified cases without overlap. In complex cases, information requests can be extremely burdensome, and often require the involvement of economic expertise. Until 2018, information requests did not stop the clock, but an amendment to the Competition Act introduced a "stop the clock" provision as of 1 January 2018, which entitles the DCCA to suspend the deadline for a merger review if the undertakings concerned do not disclose requested information.

3.11 Accelerated Procedure

Since 2010, it has been possible to use a full-form procedure or a short-form (simplified) procedure, both of which have their origins in the EU merger regime. Under the simplified procedure, the parties are required to submit less market data.

Formally, the same deadlines apply to both the full-form procedure and the simplified procedure (for example, 25 working days in Phase I) but, in practice, a faster approval can be expected for the simplified procedure.

The simplified notification may be submitted in the following cases:

- mergers in which two or more undertakings acquire joint control of an undertaking and where the turnover of the joint venture or of the transferred activities is less than DKK100 million in Denmark, or where the total value of the assets or the turnover generated by the assets transferred to the joint venture is less than DKK100 million in Denmark;
- mergers where one undertaking acquires sole control of another undertaking of which it already has joint control; or
- mergers where two or more undertakings are merged, or one or more undertakings acquire sole or joint control of another undertaking and in which:
  - (a) none of the parties have activities in the same product and geographic market or in a product market that is downstream or upstream from a product market in which another party to the merger is engaged;
  - (b) two or more of the parties to the merger are active in the same product and geographic market, but will have a combined market share below 15% in Denmark; or
  - (c) one or more of the parties to the merger are active on a downstream or upstream product market where another party operates, provided that neither their individual nor combined market share on these markets in Denmark is 25% or more.

Full-Form Notification and Appeals

Even where the conditions for submitting a simplified notification are met, the DCCA may still require a full-form notification. It is, therefore, recommended to engage in pre-notification discussions with the DCCA about the type of notification procedure required. A decision that a merger does not qualify for a simplified procedure may be appealed to the Tribunal, but it is rarely overturned as the DCCA has a wide discretionary margin when deciding whether a simplified notification suffices.

In January 2020, the High Court of Western Denmark ruled in the Dansk Supermarked/Wupti.com case form 2016. The DCCA had ordered Dansk Supermarked to submit a full-form notification, as the information set out in the parties' draft notification did not convince the DCCA that the conditions for a simplified notification had been met. Consequently, the parties had to pay a filing fee of DKK1.5 million rather than DKK50,000.

Dansk Supermarked complained to the Tribunal and submitted that the DCCA had not been entitled to require a full-form notification since the undertaken market investigation was very limited in scope and since the DCCA found that the merger would not give rise to any competition concerns. The Western High Court ruled that the DCCA was right in requiring a full-form notification in order to conduct a minor market investigation even though this resulted in a higher filing fee and even though no substantial competition issues were eventually found. The case demonstrates that the DCCA has a very wide margin of appreciation and is always entitled to require a full-form notification.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Section 12c of the Competition Act provides that the authorities shall approve a merger that will "not significantly impede effective competition, in particular due to the creation or strengthening of a dominant position". The authorities must approve the merger if the merging parties offer commitments that solve the problems identified by the authorities.

When assessing a merger, the authorities will apply the same tests as the European Commission (ie, the SIEC test under EUMR

Article 2(2)), where the Commission's decisions and the relevant case law from the European courts will be applied. The Commission's guidelines on the assessment of horizontal and non-horizontal mergers also provide an important contribution to the interpretation of the authorities' merger assessments.

When the authorities assess whether a merger will significantly impede effective competition, they will, as a starting point, consider whether the merger will create or strengthen a dominant position. As part of the authorities' assessment of the creation or strengthening of a dominant position, they will, inter alia, look at market shares and other aspects that may affect competition, such as the presence of actual or potential competitors, as well as buyer power.

However, instead of focusing more statically on the market shares of notifying parties, there has been a tendency in recent years where the DCCA has increasingly relied on economic evidence as well as other nuances in its assessments. This more nuanced approach is demonstrated by two recent cases where the DCCA approved two mergers with quite high market shares.

In the Polaris/Busselskaberne case, the DCCA assessed Polaris' acquisition of four bus companies operating on the tourist bus market. After the merger, Polaris would have a market share of 30-40% on the total market for tourist bus services, and approximately 90% on a narrower segment for train operator customers. However, the DCCA's assessment revealed that the parties' position on the market would not prove problematic because, among other things, there was a large number of other small players on the market exerting competitive pressure.

In the STARK/Jens Schultz case, the generalist building materials retailer, STARK, attempted to acquire another generalist building materials retailer, Jens Schultz. After the merger, STARK would obtain 30-40% of the market for sale of building materials to professionals. The DCCA was concerned that this would lead to competition issues in the local Danish market of South Funen. An Illustrative Price Rise (IPR) assessment showed that STARK would indeed have incentives to raise its price. However, other parts of the DCCA's assessment, including a significant potential for other competitors to enter the market in the area, assured the DCCA that the merger would not significantly impede competition. This led the DCCA to approve the merger unconditionally in phase 2.

The DCCA notes in its guidance paper that a merger may significantly impede effective competition even if no dominant position is created or strengthened. For instance, this may be the case in relation to vertical mergers, or in relation to mergers in oligopolistic markets. The DCCA also examines the ancillary restraints on the undertakings concerned. Restraints will only be allowed if they are necessary and proportionate to effectuate the merger.

4.2 Markets Affected by a Transaction

According to Section 5a of the Competition Act, the relevant market is determined based on studies of demand and supply substitution.

The DCCA investigates demand substitution by identifying products that consumers consider to be substitutable for the products of the undertaking concerned – ie, products that consumers would likely choose over products from the undertaking concerned in the event of a small but significant and non-transitory increase in price (the SSNIP test). Furthermore, the DCCA tests whether other suppliers, in response to a small and non-transitory increase in the relative prices of the undertaking's products, may in the short term reorganise their production to the relevant products and market them without significant additional costs or risks.

The DCCA will consider the relevant market to be affected by the transaction if:

- in cases of horizontal overlap, the merging parties hold a combined market share of more than 15%; or
- in cases of vertical overlap, the merging parties hold a combined market share of more than 25%.

If the market share is below 15% in cases of horizontal overlap and 25% in cases of vertical overlap, the merger is – on the face of it – considered unproblematic and may be notified following a simplified procedure. However, as illustrated by the STARK/Jens Schultz case, the DCCA will also assess local effects even when a broader relevant market is delineated.

4.3 Reliance on Case Law

The authorities often rely on case law from other jurisdictions and particularly the case law of the European Commission, but they may also include case law from the National Competition Authorities of other EU member states.

4.4 Competition Concerns

The DCCA will investigate the same competition concerns as the European Commission, including unilateral effects, coordinated effects, conglomerate or portfolio effects, vertical concerns, elimination of potential competition and local effects.

The DCCA notes in its guidance paper that a merger may reduce effective competition even if no dominant position is created or strengthened. For instance, this may be the case in relation to vertical mergers, or in relation to mergers in oligopolistic markets.

4.5 Economic Efficiencies

While the DCCA may take economic efficiencies into account, it does not ex officio consider economic efficiencies when it receives a merger notification. On the contrary, it is up to the parties to identify economic efficiencies; the DCCA will require the parties to substantiate such claims with, inter alia, economic expertise – and the burden of proof is, in general, high. In practice, economic efficiencies mainly play a role in complex mergers, and they will often be discussed in Phase II of the merger procedure.

4.6 Non-competition Issues

The DCCA generally only takes competition concerns into account in the review process, and the Competition Act does not expressly permit the DCCA to take non-competition factors into account. Thus, in general, non-competition concerns have not played a significant role to date in Danish merger control, if any.

4.7 Special Consideration for Joint Ventures

In accordance with the rules on anti-competitive agreements, the DCCA will examine whether a joint venture has the co-ordination of behaviour between parent companies as its object or effect.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

In practice, if the DCCA finds that a merger may significantly impede effective competition, it is up to the parties to propose structural or behavioural remedies to mitigate the DCCA's concerns. If the DCCA does not find that the remedies solve the competition concerns, the merger will be prohibited.

Examples of Authority Interference

Since the introduction of merger control in Denmark in 2000, only one merger has been prohibited: the 2008 Lemvigh Müller/A&O Johansen merger.

However, some merger notifications have been withdrawn by the parties themselves before the Council has made a decision, such as the JP/Politiken/Børnsen case from 2016 and the Metro Cash & Carry case from 2014.

Most recently, in April 2021, the Danish contracting company Arkil and the Nordic contracting company NCC withdrew a merger in which Arkil was to acquire NCC's road service activities in Denmark. The parties had notified the merger in September 2020, and the agreement between the parties had a nine-month deadline for merger approval. However, due to unforeseen complexities, the DCCA's assessment dragged out to the point where the deadline was expired. Therefore, Arkil chose to opt out of the agreement and withdraw the merger notification.

Further, in June 2020, HusCompagniet and eurodan-huse A/S withdrew a notification of a merger in which HusCompagniet was to take over 100% of the shares in eurodan-huse A/S. Both HusCompagniet and eurodan-huse A/S are construction companies whose main activities consist of designing, building and selling type houses, including detached and terraced houses, to primarily private customers. The DCCA undertook thorough market investigations, including hearings of customers, suppliers and competitors. In addition, the DCCA conducted a number of economic analyses.

The DCCA's investigations indicated that the merger could harm competition and lead to higher prices for newly built type houses. Before the Council could make a decision on whether to approve of the merger, the parties chose to withdraw the merger notification submitted in 2019. The merger will thus not be completed.

5.2 Parties' Ability to Negotiate Remedies

If a merger gives rise to concerns, the parties may propose remedies in order to obtain the DCCA's approval. Usually, such commitments will be discussed and agreed upon in Phase II.

According to the Competition Act, remedies may include:

- divestiture of a company, parts of a company, assets or other owner interests;
- granting third parties access to the merged entity's technology, production facilities, distribution facilities or similar facilities; or
- other measures that may promote efficient competition.

However, this list is non-exhaustive.

5.3 Legal Standard

Remedies proposed by the parties must eliminate competition concerns and be complete and effective in every respect. The parties must explain in detail how to implement the proposed remedies, and how the proposed remedies will solve the competition concerns. The proposed remedies must be binding and commit the parties to act or omit to act in a particular way.

If the parties fail to comply with the remedies, the DCCA may revoke its approval or impose fines on the parties.

There are no requirements as regard the format of remedies proposals. However, in June 2018, the DCCA issued two templates, including model texts for divestiture commitments and trustee mandates.

In Denmark, remedies are not used to address non-competition issues.

5.4 Typical Remedies

The DCCA has historically favoured structural remedies over behavioural remedies. There are difficulties linked with controlling a merged entity's compliance with behavioural remedies, and the competition authorities may deploy substantial resources when reassessing behavioural remedies in light of new market situations. Consistent with this approach, in the DCCA's recent publication regarding guidelines on remedies from August 2020, the DCCA states that the parties should consider structural remedies before behavioural remedies as the DCCA usually prefers structural remedies over behavioural ones.

JPPOL/DAO/Bladkompagniet

Despite a preference for structural remedies, the DCCA will also accept behavioural remedies where appropriate. In the JPPOL/DAO/Bladkompagniet case, one of Denmark's largest media companies, JP/Politikens Hus ("JPPOL"), which, among other activities, owns three major Danish newspapers, sought to acquire the majority shares of Dansk Avis Omdeling A/S (DAO) and A/S Bladkompagniet (Bladkompagniet). DAO and Bladkompagniet are the primary distributors of newspapers in Jutland and Zealand, respectively. Seeing that DAO and Bladkompagniet had a market share of 99% in each of their respective market areas, the Council was worried about the impact on the vertical market for distribution of newspapers, including worries about input foreclosure and increased prices. Thus, five behavioural remedies were proposed by the parties and accepted by the Council. DAO and Bladkompagniet committed to:

- selling distribution services on fair, non-discriminatory and average terms and prices;
- not denying distribution services unless they could document capacity limits;
- to publish their terms and prices for distribution of newspapers; and
- to handle any disputes on unfair or discriminatory prices, terms or denials of service, through mediation and, if necessary, arbitration.

JPPOL committed to:

- selling its products and services to DAO and Bladkompagniet on market terms in order to avoid any artificial increase of the costs of DAO and Bladkompagniet, which could lead to higher prices for their distribution services.

The SE/Eniig Case

Behavioural remedies were also used in the SE/Eniig case from 2019 where the two energy companies, SE A.m.b.a. and Eniig, merged into the joint company Nordlys. In the assessment of the merger, the DCCA considered the parties' activities to overlap in nine markets in Denmark, and, inter alia, that the merger posed a risk of input foreclosure towards service providers using the fibre network. SE and Eniig met the concerns of the DCCA by offering four behavioural remedies:

- to ensure the opening of Eniig's fibre-optic infrastructure and offer wholesale internet access service to other service providers on reasonable and non-discriminatory terms, making it possible for customers to choose between several providers;
- to offer access to the fibre network on commercial, fair and non-discriminating terms;
- to set up Chinese walls between Nordlys and OpenNet (a wholesale company, owned by Eniig, through which Danish fibre-companies can hire their fibre network to service providers); and

- further initiatives, which are kept confidential.

As a consequence of the proposed commitments, the DCCA approved the merger in Phase II.

The Tryg/Alka Case

In the Tryg/Alka case, the Council found that the merger between the two insurance companies would significantly impede competition in the market for property and casualty insurance (non-life insurance) for private consumers. In order to address the concerns raised by the Council and obtain an approval of the merger, Tryg offered three behavioural remedies for a duration of five years:

- to terminate exclusivity clauses in some of the partnership agreements entered into with Alka;
- to refrain from charging customers a fee when terminating their private insurance policies; and
- to annually pay DKK5 million to Forsikringsguiden (an independent insurance and price comparison website).

Orifarm/Takeda Case

In a very recent case from March 2021, the DCCA required four different remedies of both structural and behavioural character in order to approve the merger. The merger was an international merger in which the pharmaceutical company Orifarm acquired a portfolio of 50 medicines and 43 different supplements and herbal remedies from the Japanese company, Takada. Due to, inter alia, the potential impediments of competition in different national markets, the merger was taken under a Phase II review, and approved with remedies, including the divestment of:

- seven different generic medicines;
- five marketing authorisations for imported medicines;
- an over-the-counter product named "Klarigen"; and
- as a behavioural measure, it was required that Orifarm joined price cap agreements made by the Danish Pharmaceutical Industry Association (LIF).

SEAS-NVE/Ørsted

The SEAS-NVE/Ørsted case from 2020 concerned two of the largest energy companies in Denmark in which SEAS-NVE would acquire several of the B2C companies in the Ørsted group. In its assessment, the DCC applied various economic tools, and found, inter alia, that the post-merger market shares were high, that the parties were each other's biggest competitors, and that no other market players exerted a resemblant competitive pressure on the market. In order to address the concerns of the DCC, a rather straightforward structural remedy was proposed: SEAS-NVE would divest the 107.000 natural gas customers that it received from Ørsted B2C. The DCC accepted this remedy and approved the merger in Phase I.

5.5 Negotiating Remedies With Authorities

The DCCA's guidance paper on merger filings encourages parties to consider remedies as early as possible if there is a risk that the concentration may give rise to competition concerns.

Remedies may be proposed in both Phase I and Phase II. If remedies are proposed later than 20 working days before the expiry of Phase II, Phase II will automatically be prolonged by 20 working days.

It is the responsibility of the parties to propose remedies, but it may be possible – during the merger process – to arrange meetings with the DCCA and receive input on what types of remedies may be deemed suitable. In practice, remedies will often be proposed in writing by the parties and then discussed at a meeting between the parties and the DCCA. The DCCA cannot impose remedies not agreed to by the parties.

In August 2020, the DCCA released guidelines on remedies with recommendations on how to produce a streamlined and successful remedy. The main principles are to:

- make proactive preparations regarding the need for remedies and their potential design;
- use early dialogue to help the process;
- seek thorough understanding of the competition issue at hand though communication with the DCCA, before proposing any remedies;
- make remedies as clear and precise as possible;
- ensure sufficient communication and collaboration between legal advisers and the merging parties, as this creates the best results; and
- consider structural remedies before behavioural remedies as the DCCA usually prefers structural remedies over behavioural ones.

Changing/Cancelling Remedies

If a merger has been approved with remedies, these remedies may be changed or cancelled at a later stage if the circumstances have changed significantly.

This was the case for the Danish electricity producer, Dong Energy A/S. As part of a merger in 2004, Dong Energy had committed to selling 600MW of virtual electricity capacity per year to address the DCCA's concerns that Dong Energy might be able to control prices on the Danish electricity market. Since 2004, the competition had increased on the Danish electricity market due to market entries, a significant increase in the installed wind capacity, increased transmission capacity with neighbouring countries and regulatory changes. Dong Energy applied for a cancellation of the commitments, which the DCCA allowed.

By contrast, in the Nykredit case, the Danish Mortgage company, Nykredit Realkredit A/S, did not succeed in cancelling remedies. In 2003, Nykredit had agreed to a remedy that limited its fees on mortgage loans to consumers to 0.5% of the mortgage loan value. In light of declining interest and increased capital requirements, Nykredit tried to have the remedy amended or cancelled. However, in June 2014 the Supreme Court found that the remedy was not limited in time, and hence did uphold the remedy. The case shows that forcing the cancellation of a remedy through the courts may be difficult.

5.6 Conditions and Timing for Divestitures

The DCCA may condition the approval upon the agreed remedies in order to ensure that the remedies are complied with. The Competition Act does not regulate when remedies should be complied with. In practice, the question will depend on the type of remedy (structural or behavioural) and the decision of the DCCA in the individual case.

According to the Competition Act, the DCCA may issue orders and fines to ensure that remedies are complied with.

5.7 Issuance of Decisions

Once a merger is approved or prohibited, a formal decision is issued to the parties. Furthermore, the decision is made public on the DCCA's webpage. Usually, it is possible for the parties to read the public version and provide comments regarding confidentiality before it is made public.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

There are no recent examples of remedies in foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

As with EU notifications, ancillary restraints are automatically covered by Danish merger approvals. The DCCA does not, of its own accord, deal with ancillary restraints to mergers. The parties must determine whether there are any ancillary restraints requiring evaluation by the DCCA.

The Commission's guidelines and practice apply.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The DCCA decides whether it is necessary to conduct a market hearing. In transactions notified under the simplified procedure, the DCCA often grants an approval without conducting a market hearing. However, most full-form notifications involve some kind of market hearing.

If a market hearing is conducted, the DCCA will hear suppliers, competitors, customers and trade organisations. Any comments that indicate competition concerns will typically be presented to the parties (in anonymised form), who will need to address these issues.

No third party has a right to appeal merger decisions to the Tribunal. However, if sufficient legal interest is proved, a third party may bring a Council decision directly before the Danish courts.

7.2 Contacting Third Parties

The DCCA regularly conducts public hearings on its website, also in simplified notifications with only small overlaps between the parties. The DCCA will typically market test remedies proposed by the parties and will normally contact third parties directly with a request to provide comments.

In some instances, input from third parties has led the DCCA to request a full-form notification. This was the case in Arbejdsmarkedets Tillægspension/Danica Ejendomsselskab ApS, where the parties originally submitted a simplified notification.

The DCCA informed competitors and customers of the merger and, based on their comments, required the parties to submit a full-form notification, resulting in a filing fee of DKK1.5 million instead of DKK50,000. Eventually, the DCCA approved the merger following a simplified procedure. The same scenario appeared in the recent case Dansk Supermarked/Wupti.com.

7.3 Confidentiality

The DCCA usually issues a short press release, explaining that it has received a notification and that comments may be submitted to the DCCA. The decision will be made public once the transaction is approved/prohibited.

Commercial information may be kept confidential. In order to ensure this, the DCCA will normally provide the parties with a draft for review before the document is made public.

7.4 Co-operation With Other Jurisdictions

The DCCA co-operates with competition authorities in other EU and EEA jurisdictions – in relation to both general policy matters and specific, cross-border transactions. The DCCA's co-operation with the competition authorities in the other Nordic countries, ie, Finland, the Faroe Islands, Greenland, Iceland, Norway and Sweden, is based on signed co-operation agreements. The DCCA further co-operates with other European competition authorities and the European Commission as part of the European Competition Network (ECN).

Moreover, the DCCA is a member of the International Competition Network (ICN) and participates in the OECD's Competition Committee and in the WTO's working group on trade and competition.

The Competition Act regulates the sharing of information with other national competition authorities. Furthermore, national competition authorities may share information with each other, according to the EU rules on co-operation.

Due to the implementation of the ECN+ Directive, competition authorities have a duty to actively assist other competition authorities within the Union, ie, by conducting investigations on their behalf.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The notifying parties have a right to appeal the Council's merger decisions to either the Tribunal or directly to the Danish courts. An appeal can only be made to the courts if it concerns a question on substance, as opposed to decisions on formality. Any case that has been appealed to the Tribunal first may still be appealed to the courts subsequently.

8.2 Typical Timeline for Appeals

An appeal to the Tribunal or the courts must be filed no later than eight weeks after the Council has made its decision. No merger decisions have yet been appealed. However, an appeal will likely run for three to six months.

8.3 Ability of Third Parties to Appeal Clearance Decisions

As a main rule, no third party has the right to appeal merger decisions to the Tribunal or to the courts. However, if sufficient legal interest is proved, a third party may bring a Council decision directly before the Danish courts.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

On 1 January 2020, an amendment to the executive order on the calculation of turnover entered into force, aligning the Danish rules with those of the EU. The amendment implies minor technical changes regarding the calculation of turnover in Denmark and on how to determine the participating undertakings in a merger.

Moreover, on 1 July 2020, an amended executive order on the notification of mergers entered into force. The primary changes entail that the parties are asked to describe the contrafactual scenario of the merger. Further, the parties must disclose information on all potential affected markets, including potential, plausible wider or narrower market definitions. The parties are also asked to provide data illustrating demand-side substitution and supply-side substitution, if available. Lastly, the types of documents that the parties are asked to submit along with the merger notification have been specified.

With the implementation of the ECN+ Directive, a comprehensive amendment to the Danish Competition Act entered into force on 4 March 2021. Of most significance is the new civil fine regime, which entails that the competition authorities – going forward – may request the courts to impose fines on undertakings for intentional or negligent infringements of the competition rules in civil proceedings (in regard of merger control, such fines may be imposed for failure to notify a merger or for implementing a merger prior to approval). Previously, fines have been imposed solely in criminal proceedings led by the State Prosecutor. Other changes include an alignment with EU competition law of parental company liability and extended investigatory powers for the competition authorities in terms of dawn raids and interviews.

There are currently no concrete impending legislations in 2022. However, the DCCA has informed that the Danish National Parliament has reached out to the DCCA and requested that it consider how the current merger control regime could be modified so that it could become better-equipped to deal with the current issues of high-impact mergers that do not meet the turnover-based merger control thresholds. This follows discussions at EU-level on the issues related to large companies with considerable market power (often digital or medical companies) being able to aggressively acquire and squeeze out smaller competitors without undergoing merger control ("killer acquisitions"), as these smaller companies do not – yet – meet the traditional turnover criteria. These companies often have significant and promising potential, for example in the form of valuable intellectual property or other innovations, which has not yet been translated into concrete turnover.

It is not yet clear which approach the DCCA will take and which modifications will be implemented. However, the DCCA is currently looking to other neighbouring countries for inspiration. It is conceivable that the DCCA may choose to follow the same approach as Norway, Sweden and the EU Commission in its new guidance of 26 March 2021 on the referral mechanism in Article 22 of the EU Merger Regulation. In these cases, the Competition Authority is given a discretionary legal basis to pick out specific mergers for control, although they do not meet the common notification thresholds.

New National Security and FDI Act

A new act on national security and foreign direct investments (FDIs) entered into force on 1 July 2021 (covering transactions completed/closed after 31 August 2021). The act enacts two different screening mechanisms, which are overseen by the Danish Business Authority. One is a sector-specific mechanism with a mandatory notification obligation specifying that when foreign investors invest in particularly sensitive sectors and activities, such as defence or critical infrastructure, the investor must beforehand apply to the Danish Business Authority for permission to invest. The other is a general (cross-sector) mechanism with a voluntary notification option. Although this legislation is not overseen by, and thus does not directly implicate, the DCCA, it still affects the outlying framework surrounding the Danish merger system.

In connection to the FDI Act, an executive order on pre-screening was also implemented on 1 July 2021. The pre-screening allows for investors to obtain an early assessment of whether their investment would fall within the categories "critical infrastructure" or "other critical technology", which are the two categories (out of five) regarding the scope of the FDI Act connected with most uncertainty in practice.

9.2 Recent Enforcement Record

Failure to Notify

On 7 June 2019, the gas station company Circle K Denmark A/S accepted a fine of DKK6 million for failure to notify the acquisition of 72 service stations within the Shell trademark from 12 individual lessees. Further, in 2017, the State Prosecutor fined each of the two Danish utility companies, SEAS-NVE Holding A/S and Syd Energi Holding A/S, DKK4 million for failure to notify the joint acquisition of ChoosEV (which delivers charging solutions to electric cars) and for implementing the merger before the DCCA's approval. The parties had themselves informed the DCCA of their failure to notify the merger, which was reflected in the size of the fine. The cases show that failure to notify a merger is deemed to be a criminal offence under Danish competition law.

Duty of Disclosure

In April 2017, a district court fined Metro Cash & Carry Danmark DKK50,000 for failing to provide the DCCA with all information relevant for its review of the contemplated merger with Euro Cater. The case exemplifies the importance of complying with the duty of disclosure at any stage of the notification proceedings before the DCCA.

Remedies

The recent enforcement record of cases in which the competition authorities have ordered remedies includes cases from 2018 and 2019, where the Council conditioned approval of mergers between GlobalConnect/Nianet, Tryg/Alka and SE/Eniig upon remedies proposed by the parties. In 2020, the DCCA required remedies in relation to only one merger: the merger between two of the largest energy companies in Denmark, SEAS-NVE Holding A/S' acquisition of parts of the Ørsted A/S group. In 2021, the DCCA required remedies in relation to two cases, ie, the JPPOL/DAO/Bladkompagniet case and the Orifarm/Takeda case.

9.3 Current Competition Concerns

The DCCA is more frequently subjecting merger cases to econometric analysis (using, for example, UPP and conversion ratios) and it is becoming increasingly difficult to get approval for more complex mergers, even if the parties offer remedies. As a consequence, several merger notifications have been withdrawn in recent years because no agreement could be reached with the authorities.

In May 2019, the DCCA established the "Centre for Digital Platforms" as a separate entity within the authority with the intent of strengthening the enforcement of competition law when applied to digital platforms. The centre analyses digital platforms to uncover how they affect competition, the conditions of growth for smaller undertakings and the situations of consumers. The centre will also serve as a junction for the DCCA's analysis and use of big data, machine learning, AI and algorithms.

In September 2020, the Nordic competition authorities from Denmark, Sweden, Finland, Iceland and Norway released a joint memorandum on the Nordic perspective on competition in digital markets. The memorandum notes the challenge of large digital platforms leveraging their market power to increasingly expand both vertically and horizontally, for example, by the takeover and acquisition of smaller start-ups. Further, the high-speed nature and dynamic evolution of digital markets makes it more difficult to predict the counterfactual scenarios, thus forcing the competition authorities to predict counterfactual scenarios with a higher degree of uncertainty than usual.

The memorandum recommends that further guidelines be developed on how to design data-sharing remedies in relation to problematic mergers. Additionally, it recommends that more guidance be developed on theories of harm in relation to big tech mergers, so that authorities can better predict counterfactual scenarios. It is highlighted that many acquisitions of smaller start-ups often will not be notified under the standard notification thresholds based on turnover rates, which in some cases is problematic for competition.

Bruun & Hjejle has a merger control team that includes three partners, six attorneys and three assistant attorneys. The office is located in Copenhagen, Denmark, but often cross-border mergers are handled in co-operation with a network of law firms in other jurisdictions. Bruun & Hjejle has a leading competition practice covering all aspects of Danish and EU competition law, including merger control and cartel investigations. Examples of significant clients include Danske Bank A/S (a leading Danish bank), Nets Denmark A/S (a leading provider of payment solutions, information services and digital security solutions), HMN Naturgas I/S (a company within gas distribution, biogas facilities and gas fuelling stations), TV2/Danmark A/S (a leading broadcaster and media conglomerate), FIH Erhvervsbank (a financial institution), Ørsted A/S (the former Dong Energy A/S), CD Pharma AB (a Swedish pharma distributor), and Clear Channel International (an out-of-home media and advertising company).

AUTHORS

Olaf Koktvedgaard is a partner at Bruun & Hjejle and advises on a wide range of EU and competition law issues, with a main focus on disputes. He has extensive experience in merger control, including complex merger processes, dominance issues, state aid and cartel investigations, including criminal defence and follow-on damages litigation. He regularly litigates before the European Court of Justice and the Danish courts, and has litigated several of the major Danish state aid and competition cases.

Søren Zinck is a partner at Bruun & Hjejle and a member of the Association of Danish Law Firms' standing committee on competition law matters. Søren renders specialist advice on all aspects of competition law. His experience includes cartel cases, merger filings and some of the most well-known abuse cases concerning EU and state aid issues. Søren regularly litigates before the European Court of Justice and the Danish courts, and has litigated several of the major leading Danish competition cases during recent years.

Contributed by: *Olaf Koktvedgaard, Søren Zinck and Frederik André Bork,* ***Bruun & Hjejle***

Frederik André Bork is a partner at Bruun & Hjejle and provides specialist advice on all aspects of EU and Danish competition law. Frederik's experience includes merger filings, FDI filings, cartel cases, major abuse cases and several very large and multi-jurisdictional follow-on damages cases. Frederik is a member of the Danish Competition Law Society. Frederik has a comprehensive insight into the authorities' administrative and business procedures by virtue of his former position as head of division at the Danish Competition Authority.

Bruun & Hjejle

Nørregade 21
1165 Copenhagen K
Denmark

Tel: +45 33 34 50 00
Fax: +45 33 34 50 50
Email: fab@bruunhjejle.dk
Web: www.bruunhjejle.dk

EU

Law and Practice

Contributed by:
Porter Elliott and Catherine Gordley
Van Bael & Bellis see p.204

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Council Regulation 139/2004 on the control of concentrations between undertakings (the "EU Merger Regulation" or EUMR) provides the regulatory framework for the assessment all "concentrations" (including mergers, acquisitions and certain joint ventures) that have an "EU dimension" (ie, that meet the turnover-based thresholds of the EUMR (see **2.5 Jurisdictional Thresholds**)).

Commission Regulation 802/2004, as amended by Commission Regulation 1269/2013, ("Implementing Regulation") lays out the deadlines and other procedural aspects of the review process and provides the notification forms.

The European Commission (the "Commission") has published additional notices, guidelines and best practices documents, available on its website, examples of which are listed below.

Additional jurisdictional and procedural guidance includes:

- the Consolidated Jurisdictional Notice;
- the Notice on Simplified Procedure;
- the Notice on Case Referrals and Guidance on the Application of Article 22 EUMR (see **2.1 Notification**); and
- the Notice on Access to File.

Additional substantive guidance includes:

- the Notice on Relevant Market;
- the Horizontal Merger Guidelines;
- the Non-Horizontal Merger Guidelines; and
- the Remedies Notice.

1.2 Legislation Relating to Particular Sectors

There is no separate legislation for foreign transactions, nor sector-specific legislation.

1.3 Enforcement Authorities

The Commission has exclusive jurisdiction within the European Economic Area (EEA) to review concentrations with an EU dimension (ie, satisfying the EU thresholds). The EEA consists of the 27 EU member states plus three EFTA countries: Iceland, Liechtenstein and Norway.

The Directorate General for Competition ("DG Comp"), under the leadership of the current Competition Commissioner, Margrethe Vestager, administers the merger control process.

The Commission operates according to a "one-stop shop" principle. Concentrations with an EU dimension must be notified to the Commission and need not be notified to any of the EEA national competition authorities (NCAs), even if national notification thresholds are met. NCAs cannot review or apply their competition rules to a concentration that has been notified to the Commission.

Under certain circumstances, the Commission will accept exclusive jurisdiction over cases that do not meet the EU thresholds upon referral by one or more EU member state or the parties, or will agree to transfer its jurisdiction back to one or more member states (see **2.1 Notification**).

Exceptions

The Commission's exclusive jurisdiction over concentrations with an EU dimension is subject to several limited exceptions regarding:

- the "legitimate interests" of member states in public security, media plurality, prudential rules or other exceptional interests under Article 21(4) EUMR;

- the national security interests of member states relating to the production and/or trade in certain goods intended for exclusively military purposes under Article 346 of the Treaty on the Functioning of the European Union (TFEU); and
- certain products for which jurisdiction does not extend over the EFTA states per Protocol 2 of the EEA Agreement.

Brexit
As of 1 January 2021, the UK merger control regime operates entirely independently from the EU regime. The "one-stop shop" rule no longer applies to the UK, and parties will need to assess whether to notify a transaction in both jurisdictions.

2. JURISDICTION

2.1 Notification
Parties must notify any concentration with an EU dimension (see **2.5 Jurisdictional Thresholds**) to the Commission and receive clearance before it can be implemented.

The EUMR contains several referral mechanisms that allow transactions that do not meet the EU thresholds to be referred to the Commission for review and that allow deals meeting the EU thresholds to be referred to the member state NCAs.

Referral to the Commission
By the parties (Article 4(5) EUMR)

Where a transaction does not meet the EUMR thresholds but requires notification in at least three member states, the notifying parties may make a "reasoned submission" to the Commission, requesting that it review the transaction instead of the member state NCAs. If the NCAs do not object, this reduces the notification burden by allowing the transaction to benefit from the EU's one-stop shop. Historically, fewer than 4% of such referral requests have been rejected.

By the member states (Article 22 EUMR)

One or more member state NCAs may request that the Commission take jurisdiction over a transaction that does not meet the EUMR thresholds if it:

- affects trade between member states; and
- threatens to significantly affect competition within the territory of the requesting member state(s).

In practice, fewer than 10% of such referral requests have been rejected. In early 2021, the Commission clarified that a member state NCA need not have jurisdiction over the transaction in order to refer it to the Commission (see **9.1 Recent Changes or Impending Legislation**). This opens the door for deals that do not meet the notification thresholds in any member state to be referred to the Commission for review.

Referral to the Member States
By the parties (Article 4(4) EUMR)

Before notifying a transaction with an EU dimension to the Commission, the parties may make a "reasoned submission" to the Commission requesting a full or partial referral of the transaction to a member state NCA. The parties' submission must demonstrate that the concentration may significantly affect competition in a market within a member state that presents all the characteristics of a distinct market and should therefore be examined by that member state's NCA. No Article 4(4) request has ever been rejected.

By the member states (Article 9 EUMR)

A member state may request a full or partial referral from the Commission. To do so, the member state must inform the Commission within 15 days of receipt of a copy of the EU notification that the transaction threatens to significantly affect competition in a market within that member state that has all the characteristics of a distinct market (in which case the Commission will decide whether to refer the case) or that the transaction affects competition in a market within that member state which moreover does not constitute a substantial part of the internal market (in which case the Commission must refer the case). Historically, the Commission has rejected around 12% of Article 9 requests.

2.2 Failure to Notify

The EUMR imposes both a notification and a standstill obligation:

- notification obligation – Article 4(1) EUMR requires that parties notify any concentration with an EU dimension before implementation; and
- standstill obligation – Article 7 EUMR requires parties to wait to implement any concentration with an EU dimension until the transaction is notified to and cleared by the Commission (see **2.12 Requirement for Clearance Before Implementation**).

Fines for a Failure to Notify or Suspend

Under Article 14(2) EUMR, the Commission may fine parties up to 10% of aggregate worldwide turnover for "gun-jumping" if they fail to notify a transaction or implement a transaction before receiving clearance.

The Commission has become increasingly willing to impose large fines for gun-jumping and other procedural violations:

- in 2018, it imposed the largest gun-jumping fine to date (EUR125 million) on Altice for implementing its acquisition of PT Portugal before notifying the transaction; and
- other recent gun-jumping fines range between EUR20-30 million: EUR28 million in Canon/Toshiba Medical Systems Corporation in 2019; EUR20 million in 2014 in Marine Harvest/Marpol; and EUR20 million in 2009 in Electrabel/Compagnie Nationale du Rhône.

2.3 Types of Transactions

The EUMR only applies to "concentrations", ie, mergers, acquisitions of control and certain "full function" joint ventures. As a rule of thumb, in order for a transaction to be considered a concentration, there should be a change in the nature of control of an undertaking (see **2.4 Definition of Control**). How this change in control is brought about (whether through a purchase of assets, of shares or by other means) is immaterial. Purely internal restructurings or reorganisations that do not lead to a change of control will not qualify as concentrations within the meaning of the EUMR.

2.4 Definition of "Control"

The EUMR defines control as rights, contracts or other means which, together or separately, confer the possibility of exercising decisive influence over an undertaking. Such control may be held solely (ie, by one undertaking) or jointly (by two or more undertakings). The acquisition of control, including through changes in the nature of control (eg, from sole to joint or vice-versa) will generally constitute a concentration under the EUMR.

Sole Control

The classic example of an acquisition of sole control is where Company A acquires 100% of Company C. However, sole control can also arise where Company A acquires less than 100% of Company C, provided that A's stake in C allows A to determine, on its own, the strategic commercial decisions of C. This might be the case, for example, where all such decisions are to be taken by simple majority vote of C's board of directors and A is entitled to appoint the majority of the directors of C's board.

The above are examples of "positive" sole control (where A is able to take strategic commercial decisions relating to C on its own). Sole control can also be "negative". This is where A does not have the power to take strategic commercial decisions relating to C on its own but is the only shareholder of C with the power to veto such decisions.

Joint Control

Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking. In this context, decisive influence normally means the power to block decisions.

A typical example of joint control would be a 50:50 joint venture ("C"), with both shareholders ("A" and "B") having veto rights over key strategic decisions of C, such as the approval of C's business plan or budget, or the appointment of C's senior management. In such a situation, as A and B must reach a consensus in determining the commercial policy of C, they are considered to jointly control C. Veto rights that are of the kind typically granted to minority shareholders for the preservation of their basic shareholder interests, such as a veto over changes to C's corporate statute or the liquidation of C, would not normally confer control absent other factors.

Both sole control and joint control may be de jure (for example, based on contractual rights set out in a shareholders agreement) or de facto (eg, as the result of strong economic links or other factors that confer the possibility to exercise decisive influence over an undertaking). An assessment of control must therefore consider the full factual circumstances of a transaction, including the contractual and non-contractual rights of the parties involved.

Minority Shareholdings

The acquisition of a minority shareholding that does not grant sole or joint control over an undertaking is not a concentration under the EUMR. However, such transactions may be notifiable in certain EU member states.

2.5 Jurisdictional Thresholds

Concentrations that meet either of the turnover thresholds below have an "EU dimension" and must be notified to the Commission, provided that they do not fulfil the two-thirds exception. These thresholds, which are based on the parties' turnover in the last financial year for which audited figures are available, apply to all concentrations. There are no additional sector-specific thresholds.

Primary Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR5 billion; and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million.

Alternative Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion; and
- in each of at least three EU member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million; and
- in each of at least three member states included above, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million; and
- the aggregate EU wide turnover of at least two of the undertakings concerned exceeds EUR100 million.

Two-Thirds Exception

The primary or alternative thresholds will not be met if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover in one and the same member state.

2.6 Calculations of Jurisdictional Thresholds

Article 5 EUMR outlines how turnover should be calculated for the purposes of the EU jurisdictional thresholds.

Calculation of Turnover

The term "aggregate turnover" refers to revenue derived from the sale of products and/or services by the undertakings concerned in the most recent financial year for which audited accounts are available.

Turnover for each undertaking concerned normally includes all group-wide turnover, excluding intra-group turnover. If only part of an undertaking is being acquired (eg, a subsidiary or a division), only the turnover relating to that part counts as the target's turnover, and the seller's turnover is ignored.

Revenues are calculated only on the basis of net turnover (ie, after the deduction of sales rebates, value added tax and any other taxes directly related to turnover). The calculation of aggregate turnover generally excludes any extraordinary revenues that do not correspond to the ordinary activities of the undertakings concerned, such as income from the sale of businesses or assets.

Geographical Allocation of Turnover

Turnover is generally allocated based on where the customer is located, as this is normally where competition with alternative suppliers takes place. The Commission's Jurisdictional Notice provides additional detail on where turnover should be allocated for specific types of sales, including internet sales.

Revenues registered in a foreign currency must be converted to euros using the average exchange rate for the 12-month period in question, as published by the European Central Bank.

Financial Institutions

The EUMR and the Consolidated Jurisdictional Notice provide specific rules that apply to the calculation and allocation of turnover in the case of credit and other financial institutions.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Undertakings Concerned

The EUMR jurisdictional thresholds refer to the aggregate turnover of "undertakings concerned". In the case of mergers, the merging parties are both undertakings concerned. In the case of acquisitions, the undertakings concerned are the acquirer(s) and the target(s) but not the seller. If the transaction involves the acquisition of joint control over a pre-existing undertaking, then that undertaking is also an undertaking concerned.

Control Group of the Undertakings Concerned

EU turnover thresholds concern the aggregate turnover of all entities belonging to the control group of the undertaking concerned. For turnover purposes, the concept of control group includes:

- the undertaking concerned;
- any undertakings directly or indirectly controlled by the undertaking concerned;
- any undertakings that directly or indirectly control the undertaking concerned (ie, its parent companies); and

- any undertakings other than the undertaking concerned that these controlling undertakings also control.

The turnover of a target undertaking is limited to that of the target itself and its subsidiaries, but not the turnover of the target's parent companies (the sellers) or any other subsidiaries of those parent companies.

2.8 Foreign-to-Foreign Transactions

The EUMR applies to all concentrations with an EU dimension, regardless of the nationality of the parties involved. There are no special rules for foreign-to-foreign transactions or local effects test beyond the turnover thresholds.

2.9 Market Share Jurisdictional Threshold

The EU notification thresholds are based solely on turnover. There are no market-share based thresholds.

2.10 Joint Ventures

The EUMR applies only to "full-function" joint ventures (JVs). Non-"full-function" JVs are not caught by the EUMR, but are subject to the EU antitrust rules, specifically Article 101 TFEU. They may also require notification in certain member states that take a different approach to what constitutes a notifiable transaction.

A JV is considered "full function" if it performs, on a lasting basis, all the functions of an autonomous economic entity. It must therefore have sufficient staff, assets and capital to function on the market independently of its parent companies. It must also have its own market presence, and not merely perform a single function on behalf of its parent companies (such as customer service or R&D), or be overly reliant on its parent companies as either suppliers or customers.

Concentrations involving full-function JVs may arise from the creation of a new greenfield operation or through a change in control over an existing business (eg, a change from sole to joint control or the addition of a parent company to an existing full-function JV).

2.11 Power of Authorities to Investigate a Transaction

The Commission has no power to investigate or review at its own initiative transactions that do not meet the EU jurisdictional thresholds.

However, the Commission can acquire jurisdiction to review such transactions as the result of a referral request lodged by either the parties or a member state (see **2.1 Notification**).

2.12 Requirement for Clearance Before Implementation

Article 7 EUMR imposes a standstill obligation, requiring parties to a concentration with an EU dimension to suspend implementation until they have received clearance.

Definition of Implementation

The Court of Justice clarified the meaning of implementation in Ernst & Young/KPMG Denmark (2018). Actions taken in anticipation of a merger (such as the target severing legal ties with its parent company) do not constitute implementation of the transaction, even if they would not have occurred but for the merger, are irreversible and have an effect on the market. Rather, implementation in the sense of Article 7 EUMR concerns steps that contribute to a lasting change in control of an undertaking.

Multi-step Transactions

Transactions achieved through multiple steps can constitute part of the same notifiable concentration, where these steps are interdependent (ie, legally or de facto linked by condition) and control is ultimately acquired by the same undertaking(s). Under Article 5(2) EUMR, two or more transactions between the same two parties within a two-year period will be considered part of the same concentration for turnover calculation purposes (preventing parties from evading merger control by splitting transactions into smaller deals). Any multi-step concentrations must receive clearance before the first step is implemented.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Commission may impose fines of up to 10% of aggregate worldwide turnover for implementing a concentration with an EU dimension before receiving clearance (see **2.2 Failure to Notify**).

If the Commission determines that a concentration with an EU dimension was implemented without receiving clearance, it can order interim measures under Article 8(5) EUMR to restore or maintain conditions of effective competition pending a review of the transaction. If the Commission then issues a decision prohibiting the transaction (see **4.1 Substantive Test**), the Commission may order the parties to dissolve the concentration or take other restorative measures to remedy the competitive situation.

2.14 Exceptions to Suspensive Effect

Parties may only implement a transaction with an EU dimension before it has received clearance if one of two limited exceptions is met.

Exception for Public Bids

Under Article 7(2) EUMR, transactions involving a public bid or a series of transactions in publicly traded securities, in which control is acquired from various sellers, are exempted from the standstill requirement provided that:

- the concentration is notified to the Commission without delay; and
- the acquirer does not exercise the voting rights attached to the securities in question (or does so only to preserve the full value of its investments pursuant to a derogation granted by the Commission).

Exception by Reasoned Request

Under Article 7(3) EUMR, parties may obtain a derogation from the standstill requirement by submitting a reasoned request to the Commission. In practice, the Commission grants such derogations only exceptionally, where the transaction clearly does not threaten competition and where one of the parties (typically the target) would suffer serious economic harm (eg, bankruptcy) if the transaction were not allowed to proceed.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Other than the exceptions noted in **2.14 Exceptions to Suspensive Effect**, there are no circumstances in which implementation is permitted before clearance has been received.

In particular, the Commission does not permit a transaction to close in other jurisdictions pending EU clearance, regardless of whether the EU business could be ring-fenced or held separate.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no deadline to notify a transaction to the Commission. However, a notification must be made (and clearance granted) before a transaction with an EU dimension can be implemented (see **2.12 Requirement for Clearance Before Implementation**).

3.2 Type of Agreement Required Prior to Notification

A notification may be made following the conclusion of a binding agreement. However, the EUMR also allows parties to notify a transaction if they can demonstrate a good faith intention to conclude a binding agreement, for example through a letter of intent or memorandum of understanding. Public bids may be notified once the parties have publicly announced an intention to make a bid.

3.3 Filing Fees

There are no filing fees to notify a concentration to the Commission.

3.4 Parties Responsible for Filing

In the case of an acquisition, the acquirer is solely responsible for notifying the transaction.

Where the transaction involves the acquisition of joint control, all parties acquiring control are responsible for making the notification.

In the case of a merger, both merging parties are responsible for filing the notification.

3.5 Information Included in a Filing

Information Required

The notification must be made by completing the official notification form, "Form CO", which is annexed to the Implementing Regulation.

It is generally recognised that the amount of time and detail required to complete Form CO is unparalleled by any other merger control regime worldwide. Completed Form COs are frequently longer than 100 pages and can easily eclipse 1000 pages – excluding annexes – in complex cases involving numerous markets. The process is front-loaded, requiring parties to submit detailed information regarding:

- the transaction and its rationale (including extensive internal documentation of the deal);
- the corporate structure, turnover and activities of the parties;
- the definition of the relevant markets;
- competitive overlaps including details of any affected markets (see **4.2 Markets Affected by a Transaction**);
- contact details for market participants;
- any merger-specific efficiencies;
- any co-operative effects resulting from a JV (where applicable).

Increasingly, even in Phase I cases (see **3.8 Review Process**), the Commission requires parties to turn over huge volumes of internal documents – from board presentations and minutes to e-mails of key individuals – concerning either the transaction or the markets at issue.

Certain transactions may be notified under a simplified procedure using the Short Form CO (see **3.11 Accelerated Procedure**), which is less burdensome to complete than the standard Form CO, although still hefty compared to the standard forms in many other jurisdictions.

Submission

Form CO must normally be filed in hardcopy form, by hand-delivering an original, three paper copies as well as two electronic copies on CD- or DVD-ROM to the Commission Registrar's office. The Commission's website provides further guidance on the required specifications for electronic submissions. During the COVID-19 pandemic, the Commission began accepting online notifications through its "eTrustEx" platform. Parties should verify with the Commission Registrar which format to use in advance of filing.

Notifications may be submitted in any of the EU official languages, although the overwhelming majority of notifications are in English. Any supporting documents not in an official language must be translated.

3.6 Penalties/Consequences of Incomplete Notification

The Commission has the discretion to reject Form CO as incomplete. In this case, Phase I of the Commission's review will begin only once the parties have submitted a notification that the Commission considers complete.

For this reason, it is standard practice for parties to submit a draft of Form CO during pre-notification and to wait to formally file until the Commission has indicated that the notification appears complete (see **3.9 Pre-notification Discussions With Authorities**).

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Fines and Penalties

The Commission can impose fines of up to 1% of aggregate annual turnover on a party that intentionally or negligently supplies incorrect or misleading information, whether in the notification form or in response to a request for information.

The Commission can also impose periodic penalty payments of up to 5% of a party's average daily aggregate turnover for non-compliance with certain Commission decisions, including, among others, failing to provide complete and correct information in response to a formal request for information.

The Commission has recently become more active in imposing fines on merging parties that supply incorrect or misleading information. In 2017, the Commission imposed a EUR110 million fine on Google relating to its acquisition of WhatsApp. The Commission also imposed a fine of EUR52 million on General Electric in 2018 and a fine of EUR7.5 million on Sigma-Aldrich in 2021. Each of these fines related to failures to fully disclose products or capabilities still in development.

Revoking Clearance

The Commission has the power to revoke a previously granted clearance decision if it discovers that its decision was based on incorrect information for which one of the parties was responsible or where the clearance was obtained by deceit. In practice, the Commission has only revoked one clearance decision on this basis (Sanofi/Synthelabo in 1999, though this merger was ultimately cleared conditionally following a new notification and review process).

3.8 Review Process

The Commission's review process consists of two phases: a standard Phase I review and, if necessary, an in-depth Phase II investigation.

Phase I

The Phase I review process begins once a complete notification is formally submitted to the Commission. As the length of the statutory period is fixed regardless of the complexity of the case, the Commission tends to front-load the review process in pre-notification (see **3.9 Pre-notification Discussions With Authorities**) to avoid running out of time in Phase I.

Phase I lasts 25 working days, running from the working day following notification. This timeline may be extended by an additional ten working days if either:

- the Commission receives a referral request from a member state; or
- the parties offer remedies to address a competition concern.

During Phase I, the Commission will normally solicit views from the market (see **7.2 Contacting Third Parties**) and may also receive spontaneous feedback in response to its public announcement of the notification.

At the end of Phase I, the Commission must issue a decision either:

- finding that the transaction does not fall within the scope of the EUMR;
- clearing the transaction (with or without conditions); or
- opening a Phase II investigation.

The majority of cases are cleared – conditionally or unconditionally – after Phase I. Fewer than 4% of all notified transactions go to Phase II, and another 2% are withdrawn before the initiation of Phase II.

Phase II

Phase II is an exceedingly burdensome process, requiring the notifying parties to reply to detailed requests for information and to produce large volumes of internal documents and data.

Phase II runs 90 working days from the Commission's decision to open the in-depth investigation. This timeline can be extended in multiple ways:

- to 105 working days if the parties offer remedies (provided these are submitted between working day 55 and 65);
- by 20 working days at the request of the parties (made by working day 15) or at the initiative of the Commission with the parties' agreement; and
- for a variable period of time, as the result of the "stop the clock" mechanism following a formal Commission decision to request information (see **3.10 Requests for Information During the Review Process**).

Engagement with the case team in Phase II follows several major milestones:

- a 6(1)(c) Decision – at the end of Phase I, the Commission issues a detailed decision outlining its reasons to open a Phase II investigation;
- a Statement of Objections (SO) – if the Commission's initial doubts are not resolved in the course of its review, it will issue an SO outlining its concerns, typically around working day 40 of Phase II; the Commission must issue an SO if it intends to prohibit a transaction;
- access to file – if an SO is issued, the Commission must provide the parties with access to the evidence on which the SO relies; and
- an oral hearing – once an SO is issued, the parties may request an oral hearing. However, as complainants are also invited to participate, in practice notifying parties often choose not to have a hearing.

Throughout Phase II, the parties also interact regularly with the case team and usually the Commission's Chief Economist's team.

At the end of Phase II, the Commission must issue a decision either:

- clearing the transaction (with or without conditions); or
- prohibiting the transaction.

3.9 Pre-notification Discussions With Authorities

While parties are not legally obliged to engage in pre-notification discussions with the Commission, doing so has become standard practice in nearly all cases. This reduces the risk of a notification being declared incomplete after submission (see **3.6 Penalties/Consequences of Incomplete Notification**). An extended pre-notification may also reduce the risk of a Phase II investigation (see **3.8 Review Process**).

The notifying parties begin by requesting the allocation of a case team using a standard request form available on the Commission's website. Once a case team is assigned, the parties will often submit a briefing paper on the transaction and may have one or more calls and meetings with the case team. This would typically be followed by the submission of one or more drafts of Form CO and responses to any comments or requests for information from the case team.

As pre-notification is not part of the formal process, it has no fixed timeline. The case team will often wish to ensure that they have a thorough understanding of the markets and competitive issues involved in a transaction before the clock officially starts. Once the case team deems the draft to be complete, it will signal to the parties that they may file the formal notification.

In "simplified procedure" cases (see **3.11 Accelerated Procedure**), the pre-notification period may be brief, perhaps a week or two. In more complex cases, the pre-notification process can last many months.

3.10 Requests for Information During the Review Process

The Commission normally first issues requests for information to parties involved in the transaction and to third parties by "simple request".

Where necessary, the Commission can also issue information requests "by decision". In such cases, if the addressee fails to provide the information requested within the time limit specified in the request, the review clock is stopped until that information is provided. The Commission may also issue a decision imposing periodic penalty payments on the addressee until the information is provided.

The Commission may impose fines if incorrect or misleading information is supplied in response to either type of request (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**).

3.11 Accelerated Procedure

A "simplified procedure" may apply for transactions that are unlikely to give rise to any competitive concerns. The criteria are outlined in the Commission's Notice on the Simplified Procedure and include:

- JVs with no, or negligible, actual or foreseen activities in the EEA (ie, the JV generates turnover or has assets in the EEA of under EUR100 million);
- transactions in which the parties are not active on the same product and geographic market or in markets upstream or downstream from one another, or if they are, their market shares are too low for these to be considered "affected" markets (see **4.2 Markets Affected by a Transaction**);
- acquisitions of sole control of an undertaking by a party already having joint control over that same undertaking; or
- at the Commission's discretion, transactions where the parties' combined market shares do not exceed 50% on any markets where both are active and the delta resulting from the transaction is below 150 on the Herfindahl-Hirschman Index (HHI).

Concentrations that qualify for the simplified procedure may be notified using the Short Form CO, which requires less detailed information than the standard Form CO.

The length of the review period is the same for both a standard case and a simplified procedure case. In practice, however, transactions notified under the simplified procedure are sometimes cleared in advance of the 25-working day deadline.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The Commission will assess whether a transaction would "significantly impede effective competition in the internal market, or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position". This is known as the "significant impediment to effective competition" or "SIEC" test. The Commission must:

- clear any transaction that does not give rise to a SIEC;
- open a Phase II investigation if it has "serious doubts" that the concentration is compatible with the internal market at the end of Phase I;
- prohibit any transaction that gives rise to a SIEC (after a Phase II investigation).

The Commission provides guidance on how this test is applied in its Horizontal and Non-Horizontal Merger Guidelines (see **4.4 Competition Concerns**).

4.2 Markets Affected by a Transaction

Markets are:

- horizontally affected – if the parties are both active in the same market and hold a combined market share of 20% or more; and
- vertically affected – if one party is active on a market that is upstream or downstream from a market on which the other is active and in which the parties' individual or combined market share on either market is 30% or more.

In determining whether a concentration gives rise to any affected markets, the Commission considers the market definitions proposed by the notifying parties, as well as any plausible alternative markets based the Commission's or the EU Courts' prior decisional practice, market reports, feedback from competitors and customers, or the parties' own internal documents. The Commission enjoys considerable discretion in determining the scope of the relevant markets and will often define markets more narrowly than the parties may do internally.

The Horizontal Merger Guidelines indicate that competitive concerns are unlikely where the parties hold combined market shares of 25% or less, or a post-merger HHI below 1000 (or in certain other situations with a higher HHI but a low delta).

4.3 Reliance on Case Law

The Commission consistently relies on a substantial body of case law built up from its own decisional practice and judgments of the EU Courts. The notifying parties are expected to refer to this record as a point of departure when defining the relevant markets or submitting other arguments.

The Commission or the notifying parties may occasionally rely on case law from other jurisdictions, particularly if a transaction relates to markets that the Commission has not previously examined in detail. Analysis provided by member state NCAs may be particularly persuasive. However, the Commission's body of decisions is so extensive (more than 7,500 cases decided over the past 30 years) that reliance on the decisions of other jurisdictions is very rare.

4.4 Competition Concerns

The Commission will investigate whether the concentration gives rise to a SIEC (see **4.1 Substantive Test**). In making this determination, the Commission will assess the impact of the transaction on various parameters of competition, including prices, output, quality and innovation. The Commission's Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines outline specific theories of harm that the Commission is likely to consider.

Horizontal Concerns

Where parties to a concentration are active in the same markets, the Commission will typically consider whether a SIEC may arise from:

- non-coordinated (unilateral) effects, notably if the transaction creates or strengthens a dominant position, or if the transaction both eliminates an important competitive constraint that the parties previously exerted on each other and leads to an overall reduction of the competitive pressure on the remaining competitors; or
- co-ordinated effects, if the remaining market players are better able to tacitly co-ordinate their market activities as a result of the transaction, including due to the creation or strengthening of a position of collective dominance.

In practice, the vast majority of the Commission's concerns relate to unilateral effects arising from the parties having high market shares on markets where they compete.

Non-horizontal Concerns

If parties are active on vertically or closely related markets, the Commission will normally consider whether a SIEC may be created through:

- incentives for the merged entity to foreclose competitors' access to inputs or customers; or
- anti-competitive conglomerate effects due to the merged entity being able to engage in bundling of products or services.

It is rare for the Commission to object to a transaction based on vertical or conglomerate effects alone (in the absence of any horizontal effects).

Innovation Concerns

The Commission has recently increased scrutiny of transactions' potential impact on innovation and future competition. In particular, the Commission has considered that a merger may problematically hinder competition at the general level of the "innovation space," by decreasing incentives for the merged entity to compete actively in the development of new products and services.

4.5 Economic Efficiencies

The Commission will take efficiencies generated by a concentration into account under certain circumstances. Form CO contains a dedicated section in which notifying parties may present any evidence of efficiencies.

Any efficiencies claimed must:

- be merger-specific, in that they are directly created by the transaction and not achievable through any other, less anti-competitive means;
- be quantifiable and verifiable to a reasonable degree of certainty; and
- benefit consumers.

In practice, this is a difficult standard to meet. The Commission rarely accepts efficiencies put forward by parties to a concentration and has not yet cleared an otherwise problematic transaction based purely on efficiencies.

4.6 Non-competition Issues

The Commission's review process considers only competition related issues. The determination of whether a merger should be cleared or prohibited turns entirely on the SIEC test. The Commission has repeatedly emphasised the independence of its review process from political considerations and has resisted calls from certain member states to adopt a more protectionist view in order to allow for the creation of "European champions" (see **9.3 Current Competition Concerns**).

Nonetheless, in particularly sensitive or high-profile cases, the Commission will often receive lobbying pressure from national governments and third parties, which may have an impact on the overall context in which the Commission views a particular transaction. In a Phase II investigation, the Commission's decision to clear or prohibit the concentration will be taken by the full College of European Commissioners. As a result, other broad considerations (eg, employment, environment, energy, growth) may have a limited influence in some merger reviews.

The EUMR provides the limited possibility for member states to take actions to protect their national security or other legitimate interests, but such exceptional actions do not form part of the merger control process (see **1.3 Enforcement Authorities**). The Commission is also implementing legislation to establish separate mechanisms to monitor and control foreign investment and subsidies in concentrations (see **9.1 Recent Changes or Impending Legislation**).

4.7 Special Consideration for Joint Ventures

Full-function JVs are assessed using the same substantive test as all other concentrations (the "SIEC" test) (see **4.1 Substantive Test**).

In addition, the Commission may also assess whether the JV gives rise to so-called "spill-over effects" – namely a risk of co-ordination between the parents in markets where they are both active outside the JV or operate upstream or downstream from one another. The Commission will assess any risk of co-ordination between the parent companies under Article 101 TFEU, which prohibits anti-competitive agreements between undertakings.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

If the Commission determines that a notified concentration will lead to a SIEC, it must prohibit the transaction (see **4.1 Substantive Test**), unless remedies are offered that eliminate the Commission's concerns. The Commission can prohibit transactions without prior approval from the EU courts or any other EU or member state body. Prohibition decisions may be appealed to the General Court (see **8.1 Access to Appeal and Judicial Review**).

In practice, prohibition decisions are rare. To date, the Commission has prohibited only 30 transactions since 1990, out of over 8,000 notified (although over 220 notifications have been withdrawn, often as a result of the Commission's objections). Most problematic transactions are cleared, subject to remedies.

5.2 Parties' Ability to Negotiate Remedies

The parties may propose remedies to address competition concerns raised by the Commission (see **5.5 Negotiating Remedies With Authorities**).

The Commission's 2008 Remedies Notice contains extensive guidance on the legal requirements that remedies must meet (See **5.3 Legal Standard**).

5.3 Legal Standard

The Remedies Notice notes that any remedy must:

- entirely eliminate the SIEC; the remedies offered by the parties must be sufficient to restore the conditions of competition that

would have existed absent the transaction; and
- be capable of being implemented effectively within a short period of time. In particular, the remedies must offer the Commission a sufficient degree of certainty that the commercial structures or relationships resulting from the remedy can be maintained.

In assessing the likely effectiveness of a remedy, the Commission will consider the nature of the market, any risks inherent in implementing the remedy and the likelihood of the remedies being maintained over time. The Commission is sceptical of remedies that are too complex or require significant ongoing monitoring to ensure compliance.

In addition to these basic principles, the Commission's Notice on Remedies lays out more specific requirements for both structural remedies and behavioural remedies (see **5.4 Typical Remedies**).

5.4 Typical Remedies

Structural Remedies

The Commission has expressed a clear preference for structural remedies, especially divestments, as these bring about a lasting change on the market and do not require ongoing oversight.

To be acceptable, a divestment must consist of a viable business that, operated by a suitable purchaser, can compete effectively with the merged entity going forward. While the Commission prefers the divestment of an existing, standalone business, it will accept the carve-out of a particular business activity where the parties can demonstrate to the Commission's satisfaction that the divestiture has sufficient resources, assets, personnel, R&D capacity and any other capabilities needed to compete.

The Notice on Remedies requires that purchasers of divestment businesses:

- be independent of and unconnected to the parties;
- have the financial resources, relevant expertise, incentives and ability to maintain the business as a competitive force; and
- not give rise to new competition concerns by acquiring the divestment business.

Behavioural Remedies

The Commission is generally more sceptical of behavioural remedies (ie, commitments by the parties to act in a certain way on the market) as these tend to be more complex to implement and monitor. As such, they will only be accepted "exceptionally in specific circumstances". In particular, the Notice on Remedies states that commitments not to raise prices, reduce quality or output are generally not workable. The Commission has been more open to accepting behavioural remedies to resolve concerns relating to access to key infrastructure, networks and interoperability or concerns relating to exclusive long-term contracts or product bundling.

5.5 Negotiating Remedies With Authorities

The parties are responsible for offering remedies – the Commission will neither impose nor propose remedies at its own initiative. In practice, the case team will work with parties to further refine the parameters of remedies offered by the parties so that they sufficiently address the case team's concerns.

Process

Remedies are offered by submitting commitments, which become the operative terms of the remedy, accompanied by Form RM. The Commission's "Best Practice Guidelines for Divestiture Commitments" provide a model text for divestment commitments. Form RM is an annex to the Implementing Regulation. Both the commitments and Form RM require considerable time and effort to complete.

Remedies may be offered:

- during pre-notification (in draft form);
- in Phase I–before working day 20; as Phase I is very short, the Notice on Remedies specifies that in order to be accepted, remedies offered in Phase I must provide “a clear-cut answer to a readily identifiable competition concern”, and most Phase I remedies therefore take the form of divestitures; and
- in Phase II – before working day 65 (the Commission will only accept remedies submitted later in exceptional circumstances).

Market Testing and Consultation

The Commission will “market test” proposed remedies with market participants to ensure that they will resolve the competitive concerns at issue (see **7.2 Contacting Third Parties**).

The Commission will also consult with member state NCAs and (where relevant) the EFTA Surveillance Authority. If the competitive concern at issue affects markets broader than the EEA, or requires a global remedy (such as the divestment of a worldwide business), the Commission will typically also co-ordinate with other competition authorities. The Commission may be reluctant to accept global remedies that may not be accepted by other authorities.

5.6 Conditions and Timing for Divestitures

According to the Notice on Remedies, the parties may be allowed to close their transaction immediately after receiving the Commission’s conditional clearance decision. In such cases, the parties would typically have a set deadline (eg, six months from the Commission’s approval decision) to conclude a binding agreement to sell the divestment business to a suitable purchaser. (If no such purchaser is found, a divestiture trustee will have a mandate to sell the business to a suitable purchaser at no minimum cost.) The parties would then have a further period (eg, three months) after the Commission approves the purchaser to complete the sale of the divestment business.

In cases where it may be more difficult to identify a suitable purchaser, the Commission may require the parties not to implement the main transaction until they have entered into an agreement with a suitable purchaser approved by the Commission (an “upfront buyer” remedy). Less commonly, the parties may name a specific purchaser, with whom they have already entered into an agreement, in their original commitment proposal (a “fix-it-first” remedy). In that case, the buyer is approved in the decision clearing the main transaction (without need for a separate approval process) and the Commission will take its assets/capabilities into account when evaluating the sufficiency of the remedy.

In any case, between the time that the Commission accepts a divestment commitment and the close of the sale to the approved purchaser, the divestment must be held separate and ring-fenced from the parties’ other operations. The parties must appoint a monitoring trustee, who monitors the parties’ compliance with the commitments and evaluates the suitability of any potential purchasers.

Failure to Comply With Commitments

If the parties fail to comply with a condition of clearance (eg, by failing to divest or by re-acquiring the divestment business), the Commission’s clearance decision becomes automatically void. If the parties breach an obligation (ie, a step implementing the remedy, such as appointing a trustee), the Commission has the discretion to revoke its clearance decision.

The Commission may also fine the parties up to 10% of annual turnover and/or issue periodic penalty payments for failing to comply with commitments.

5.7 Issuance of Decisions

The Commission will notify its decision to the parties and to the member states and may also issue a press release providing a basic summary of its conclusions.

The Commission will publish a non-confidential version of any Phase II decision in the EU's Official Journal and on its website, often after a delay of several months. The Commission provides non-confidential copies of all its merger decisions on its website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Commission adopts the same review process, including with regard to prohibitions and remedies, regardless of the nationality of the parties to a transaction. The Commission has required remedies in numerous transactions involving non-European parties and has also blocked such transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The Commission's clearance decision covers restrictions that are "directly related and necessary to the implementation of the concentration" (otherwise known as "ancillary restraints"). The Commission's Notice on Ancillary Restraints provides guidance on the types of restrictions that commonly arise (eg, licensing arrangements, non-compete clauses, and purchase or supply obligations). Any restrictions that do not qualify as ancillary restraints are reviewable under Article 101 TFEU.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties play an important role in the Commission's review process, and the Commission will actively solicit their feedback (see **7.2 Contacting Third Parties**).

Third parties able to show a "sufficient interest" in the proceedings (eg, competitors, customers, suppliers, or recognised workers' representatives of the undertakings concerned) may be granted specific participation rights, including:

- the right to be heard – interested third parties may give oral or written evidence, including in an oral hearing, if one is held in Phase II;
- access to documents – interested third parties may be given access to a non-confidential copy of the SO (under the Best Practices Merger Guidelines, such access is only granted at the Commission's discretion in "appropriate cases"); and
- the right to appeal – interested third parties can appeal Commission clearance decisions to the General Court. In order to have standing, third parties must normally have participated actively in the Commission's investigation.

7.2 Contacting Third Parties

The Commission actively seeks input from third parties, which can decisively affect the outcome of its review.

Investigation

Form CO requires parties to supply contact details for their top customers, competitors and suppliers, and any relevant trade associations. The Commission will begin its market investigation early in Phase I (or even during pre-notification with the agreement of the notifying parties) by sending detailed electronic questionnaires to these third parties (especially customers and competitors). The Commission will also publish the announcement of the notification on its website, inviting any interested parties to provide their views on the concentration.

The Commission will continue to solicit views from third parties throughout its investigation, including through the use of additional questionnaires. Third parties may engage with the Commission in writing, through meetings, or at the oral hearing (see **7.1 Third-Party Rights**).

In practice, it will be very difficult for a transaction to be approved if it faces strong opposition from the market (particularly from customers). Likewise, the Commission is unlikely to challenge a transaction if third parties have not voiced significant opposition.

Remedies

The Commission will market test proposed remedies in order to ensure that they will resolve the competition concerns at issue and can be implemented effectively. The Commission will send third parties a questionnaire and a non-confidential version of the proposed commitments. If the market response is strongly negative, the Commission may not accept the remedies offered (see **5.5 Negotiating Remedies With Authorities**).

7.3 Confidentiality

Form CO requires the parties to supply a non-confidential summary of the transaction, which the Commission will publish in the Official Journal and on its website when the notification is filed.

The Commission has a legal obligation not to disclose any confidential information obtained during the course of the merger review process, including during pre-notification. The Commission takes this duty very seriously.

7.4 Co-operation With Other Jurisdictions

The Commission routinely co-operates with member state NCAs and other national competition authorities worldwide.

Within the EU/EEA

The Commission co-operates with member states through the European Competition Network (ECN). It provides the NCAs with copies of notifications, proposed remedies and any other major documents submitted by the parties. The Commission must consult an Advisory Committee made up of NCA representatives before it takes a decision following a Phase II review, or any decision imposing fines, but is not bound by the Committee's opinion. The Commission and NCAs also participate in an EU Merger Working Group with the aim of increasing consistency and co-operation in the merger control process.

The Commission will also consult the EFTA Surveillance Authority where a transaction is likely to have significant effects in the EFTA states.

Other Authorities

The Commission routinely co-operates with other competition authorities. The Commission must obtain a confidentiality waiver from the parties in order to share information with a non-EEA competition authority.

Bilateral co-operation

The Commission has entered into a number of co-operation agreements and memoranda of understanding with various competition authorities including those of the USA, Canada, Japan, China, South Korea and Brazil. The EU and UK are expected to conclude a merger co-operation agreement following Brexit, but this bilateral instrument is not yet in place. The degree of co-operation these arrangements envisage varies. The Commission has a very close relationship with the US competition authorities (the Federal Trade Commission and the Department of Justice's Antitrust Division), and in practice the authorities try to align their positions insofar as possible.

Multilateral co-operation

The Commission also plays an active role in the International Competition Network's (ICN) Merger Working Group.

In 2021, the Commission announced the formation of a Multilateral Working Group on pharmaceutical mergers with USA, UK and Canadian competition authorities to better harmonise the review of such transactions.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Commission merger decisions can be referred to the General Court for annulment on procedural or substantive grounds under Article 263 TFEU. The General Court's rulings may be further appealed to the Court of Justice on points of law.

The General Court is willing to engage in a rigorous review of Commission decisions, though the Commission enjoys a margin of deference, particularly in matters involving complex economic analyses. Ultimately, only a dozen Commission merger decisions have ever been annulled. As the appeals process is lengthy (see **8.2 Typical Timeline for Appeals**), costly, and rarely successful, few merger decisions are appealed. Nevertheless, the Commission carefully considers the likelihood of an appeal when issuing its decisions.

If a Commission decision is annulled, the case reverts to the Commission, which is obliged to reassess the concentration. An annulment of a prohibition decision does not automatically result in the clearance of the transaction, nor does the Commission have the discretion to avoid taking a second review.

8.2 Typical Timeline for Appeals

An application for annulment may be lodged by the notifying parties or any other sufficiently interested third party (see **7.1 Third-Party Rights**). Such actions must be filed within two months and ten days of:

- the date of notification of the decision (if filed by an addressee of the decision); or
- the date the party is made aware of the decision (if filed by a third party).

It normally takes two to three years for the General Court to issue a judgment. An expedited procedure is available, which can shorten the timeline to less than a year. The court has discretion in whether to use the expedited process, and will tend do so where the parties can show urgency and that the case revolves around a small number of clear legal issues.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Sufficiently interested third parties may appeal a clearance decision (see **7.1 Third-Party Rights** and **8.1 Access to Appeal and Judicial Review**).

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The current EUMR has remained in force and un-amended since 2004. There have been no significant changes in other Commission legislation or published guidance relating to mergers during the past year.

The Commission has opened a public consultation on potential changes to the Implementing Regulation and the Notice on Simplified Procedure, to better identify the cases that should be subject to simplified versus full notification and to streamline the information-gathering process in both types of cases.

Referral of Small but Competitively Significant Transactions

In 2021, the Commission announced that it would be encouraging the use of the Article 22 referral process to ensure that transactions that did not meet relevant EU or member state notification thresholds but that presented significant threats to competition could nonetheless be reviewed at EU level (see **2.1 Notification**). While such referrals were technically allowed in the past, it had not been Commission policy to accept referrals from member states where the transaction did not meet the notification thresholds. This change in policy will likely open many smaller transactions to possible review that would have previously escaped scrutiny (notably in the pharmaceutical and digital sectors where targets may lack the turnover needed to meet any jurisdictional thresholds). The Commission's first decision to accept a referral under this new policy, in the Illumina/Grail transaction, was upheld on appeal to the General Court on 13 July 2022..

Assessment of Foreign Funds in EU Transactions

On 11 October 2020, Regulation 2019/452 entered into force, establishing a mechanism to harmonise member state approaches to screening foreign direct investment (FDI) and enabling the Commission to provide its opinions on particular investments. Decisions on FDI are ultimately at the discretion of the member states affected.

Then, on 5 May 2021, the Commission published a Proposal for a Regulation on foreign subsidies distorting the internal market, which complements the 2020 FDI screening Regulation. Among other things, the proposed Regulation would:

- require the mandatory notification of concentrations where the target or a merging party is established in the EU and has EU turnover of at least EUR500 million, and the parties have received at least EUR50 million in subsidies over the past three years; and
- empower the Commission to investigate ex-officio any other "market situations" (including smaller concentrations) involving financial contributions by non-EU governments to companies active in the EU (subject to a de minimis exception for contributions under EUR5 million).

If this proposed Regulation goes into effect, it will not alter the standard EU merger control process as laid down in the EUMR. However, it may considerably increase the time and effort needed to notify, clear and close a transaction in the EU.

9.2 Recent Enforcement Record

In 2021 and the first four months of 2022, 518 cases were notified to the European Commission. During that period, 594 cases were cleared unconditionally in Phase I, either through the normal or simplified procedure. Ten cases were withdrawn in Phase I (though some of these may have subsequently been re-filed). Eight cases were referred to Phase II. During the period, six Phase II cases were cleared with remedies, none were cleared unconditionally and four were withdrawn. The Commission does not keep separate statistics for, nor does it draw any distinction with regard to, foreign-to-foreign transactions.

9.3 Current Competition Concerns

Protectionism and the Creation of European Champions

The Commission has been engaged in a debate – especially since it prohibited the Siemens/Alstom merger in 2019 – over what role merger control should play in allowing the emergence of “European champions” to combat competition from non-EU state-subsidised (notably Chinese) companies. Commissioner Vestager has remained firm that DG Comp’s role should remain solely focused on reviewing potential harm to competition, without regard to European industrial policy concerns. This debate is certain to reignite in future transactions.

Protecting Innovation

The Commission has expressed increasing interest in assessing the competitive effects of mergers on innovation (see **4.4 Competition Concerns**).

Reliance on Internal Documents

The EU process increasingly relies on the production and review of large volumes of internal documents requested from the parties (see **3.5 Information Included in a Filing**). Notifying parties should take care that information contained in Form CO and other submissions to the Commission is consistent with and supported by any internal records or communications.

Enforcing Procedural Compliance

In recent years, the Commission has increased its enforcement efforts against parties that commit procedural violations under the EUMR, in particular by gun-jumping (see **2.2 Failure to Notify**) or by supplying incorrect or misleading information (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**).

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, Van Bael & Bellis' competition team has assisted clients in cases at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

AUTHORS

Porter Elliott is the co-head of competition law at Van Bael & Bellis and a leading expert on EU merger control law. For the past 25 years, he has successfully guided dozens of complex and high-profile transactions through the regulatory process, both in Europe and elsewhere. He has also represented third parties in successfully challenging proposed mergers and preventing their approval. Porter regularly teaches, writes and speaks on issues of competition and merger control law and has conducted training for merger control authorities.

Catherine Gordley is a counsel specialising in EU competition law. Her practice includes advising clients in EU and multi-jurisdictional merger proceedings, and in antitrust and abuse of dominance investigations. Catherine's experience spans a range of sectors, including financial services, media, basic industries and consumer goods. Catherine is a contributing author of many publications, including Van Bael & Bellis' recently published 6th edition of Competition Law of the European Community.

Van Bael & Bellis

Glaverbel Building
Chaussée de la Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Tel: +32 2 647 73 50
Fax: +32 2 640 64 99
Email: brussels@vbb.com
Web: www.vbb.com

GERMANY

Law and Practice

Contributed by:
Daniela Seeliger, Carsten Grave and Christoph Barth
Linklaters see p.225

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

German merger control rules are contained in Section 35 et seq of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB) or ARC). Furthermore, the German Federal Cartel Office (*Bundeskartellamt* or FCO) has issued several guidance papers on its website; eg, in relation to domestic effects, market dominance and the size-of-transaction threshold.

1.2 Legislation Relating to Particular Sectors

Germany has one of the most established and active foreign investment control regimes in Europe. If a transaction raises concerns, the transaction may be subject to remedies or, in severe cases, even prohibited.

The regime essentially has two prongs:

- a screening process for non-EU/EFTA investors, which applies a 25% filing threshold for all sectors and a reduced 10% filing threshold for transactions in sensitive industries (such as critical infrastructures, cloud computing services or media companies), and a reduced 20% filing threshold for specific high tech and future technologies as well as certain healthcare target companies; and
- a screening process for non-German investors, which applies a 10% filing threshold for transactions in the wider military sector.

In addition, asset deals are also in scope of the foreign investment regime.

Transactions triggering a mandatory filing requirement are subject to a comprehensive prohibition on gun jumping, which carries severe criminal penalties for non-compliance. Since the regime has generally become significantly stricter in recent years and the coordination of regulators on an EU level increases, companies engaged in M&A activities should consider the potential applicability of any foreign regime early on and allow for a lengthier approval process.

The foreign investment regime has been subject to numerous changes in the past years. After three amendments in 2020, the 17th amendment to the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) entered into force on 1 May 2021. These changes related in particular to an expansion of sectors in which transactions are subject to a mandatory filing requirement. In addition, various legal issues were clarified by law and the previous practice of the Federal Ministry of Economic Affairs and Climate Protection (*Bundesministerium für Wirtschaft und Klimaschutz*) was codified. Following these far-reaching amendments, we have seen a significant increase in the number of foreign investment filings. The Federal Ministry will evaluate the new measures in mid-2022 with a view to reducing the administrative burdens for companies where appropriate. Most recently, the sanctions package adopted by the EU in response to Russia's invasion of Ukraine led to a further change in fine provisions for the financial sector.

1.3 Enforcement Authorities

The German merger control regime is enforced by the FCO, which has its seat in Bonn. The FCO is headed by a president, currently Andreas Mundt.

If a merger has been prohibited by the FCO, the parties may apply to the Federal Ministry of Economic and Climate Protection under Section 42 of the ARC and ask for a ministerial authorisation of the transaction.

2. JURISDICTION

2.1 Notification

Notification is mandatory.

2.2 Failure to Notify

The ARC does not sanction a failure to notify but does impose sanctions for the implementation of a notifiable transaction prior to clearance (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**).

2.3 Types of Transactions

For merger control purposes, the ARC exhaustively defines concentrations as any of the following transactions:

- an acquisition of assets constituting the whole or a substantial part of an undertaking;
- a transaction conferring direct or indirect control of the whole or parts of an undertaking;
- the acquisition of shares in another undertaking if such shares alone, or together with shares already held, amount to or exceed 25% or 50% of the undertaking's share capital or voting rights; or
- any other combination of undertakings where one or several undertakings can exercise, directly or indirectly, competitively significant influence over another undertaking.

This covers acquisitions of minority stakes of less than 25% in another company. Such transactions have to be notified if they confer upon the acquirer the ability to exercise influence on commercial policy and, thus, affect the competitive behaviour of the target company.

As in the EU merger control regime, the acquisition of shares for resale by credit institutions, financial institutions or insurance undertakings is not considered a concentration as long as the acquirer does not exercise the voting rights attached to the shares and resells the shares within one year.

Exemptions

Internal restructurings or reorganisations within the same economic entity are not subject to merger control.

Further, concentrations of public institutions in the framework of municipal reforms (situations where municipalities decide to merge their institutions or where municipalities merge themselves) are explicitly not subject to merger control review. In practice, this rule particularly affects hospitals and savings banks.

Also, concentrations between hospitals are exempted from merger control, provided that such hospitals qualify for government subsidies by the hospital structure fund (*Krankenhausstrukturfonds*) and that the Federal State responsible for handling the application for such subsidy confirms that the merger otherwise complies with competition law. Such transactions will need to be closed by 31 December 2027 in order to benefit from the exemption. However, parties will have to file a short post-completion notice to the FCO.

In contrast, the merger control provisions are applicable (analogously) to voluntary mergers of statutory health insurers. Prior to a prohibition in this sector, the FCO has to consult with the relevant supervisory authorities and, partly, different time limits and further specific rules apply.

2.4 Definition of "Control"

The concept of control follows the EU merger control system and is regularly interpreted within this framework by the FCO. Control means the effective possibility of exercising decisive influence on an undertaking on a lasting basis. The actual exercise of control is not required. Control may be conferred through rights, agreements or other means (legal or factual) that individually or jointly enable the acquirer(s) to determine the target company's strategic business decisions.

In terms of acquisition of minority, or other interests less than control, a transaction must be notified if the acquirer, following the transaction, holds 25% (or more) of the capital or the voting rights in another undertaking, or gains a competitively significant influence on another undertaking.

The latter scenario covers acquisitions of minority stakes of less than 25% in another company. Competitively significant influence arises where the acquired interest confers upon the acquirer the ability to influence the commercial policy and, thus, to affect the competitive behaviour of the target company. The FCO determines on a case-by-case basis whether this has occurred. In doing so, it considers the rights resulting from the amount of acquired shares as well as so-called plus factors as identified in FCO case law. These plus factors are, for example, voting and veto rights, and board representation rights of the acquirer; other personal links between the parties; options and pre-emptive rights, and information rights of the acquirer; and separate agreements with the target company.

Plus factors do not necessarily have to be ensured by binding agreements: it is sufficient if they provide the acquirer with a factual and lasting influence.

2.5 Jurisdictional Thresholds

German merger control law provides for a turnover thresholds test and, since 2017, for a subsidiary transaction value test. Furthermore, a new notification obligation based on prior FCO decision was introduced in January 2021.

Turnover Thresholds Test

Pursuant to Section 35(1) of the ARC, a transaction falls within the scope of German merger control law if in the last financial business year:

- the combined worldwide turnover of all participating undertakings exceeded EUR500 million;
- one participating undertaking achieved a German turnover of more than EUR50 million;
- another participating undertaking achieved a German turnover of more than EUR17.5 million; and
- the merger has an effect on the German market.

Size-of-Transaction Test

There is a size-of-transaction test that alternatively applies if the second domestic turnover threshold of EUR17.5 million is not met. A concentration has to be notified if in the last financial business year:

- the combined worldwide turnover of all participating undertakings exceeded EUR500 million; and
- one participating undertaking achieved a German turnover of more than EUR50 million; and
- neither the target nor another participating undertaking achieved a German turnover of more than EUR17.5 million; and
- the value of the transaction (the financial compensation) exceeds EUR400 million; and
- the target has significant activities in Germany.

An exemption to both threshold tests can apply to the credit and banking sector if companies do not provide end consumer services.

The FCO Guidance on Transaction Value Thresholds for Mandatory Pre-merger

Notification (published together with the Austrian Competition Authority in July 2018) contains additional information on the interpretation of the new Section 35(1a) of the ARC.

Notification Obligation Based on Prior FCO Decisions

The FCO is entitled to impose a filing obligation by decision on a company to notify all transactions in designated sectors; the decision will be valid for three years. Requirements are:

- the acquirer's worldwide turnover exceeds EUR500 million;
- the target has achieved a worldwide turnover of more than EUR2 million, of which two-thirds were generated in Germany;
- the acquirer must command a share of at least 15% of the supply or demand in the relevant economic sector in Germany; and
- there must be indications that future concentrations may restrict competition in the relevant sector.

However, before imposing a filing obligation, the FCO must have carried out a sector inquiry by means of which the structures and competitive conditions in the relevant economic sector were examined and analysed.

2.6 Calculations of Jurisdictional Thresholds

Calculations of Jurisdictional Thresholds – General Rules

For the assessment of the turnover thresholds, the group turnover of the participating undertakings in the last financial business year has to be considered. This includes the consolidated revenues of all companies belonging to the same group, controlled by the same ultimate parent company, to which the respective participating undertaking belongs. If a participating undertaking is jointly controlled by several undertakings, the full group turnover of all parent companies has to be taken into account.

If parts of one or more undertakings are acquired, only the turnover relating to those parts is considered when calculating the turnover on the seller's side. This does not, however, apply if the seller keeps control of 25% or more of the shares.

The internal turnover generated within a group of undertakings as well as sales or turnover taxes are excluded from turnover calculations.

As in the European Merger Control Law, several acts of acquisitions between the same undertakings (and with the same acquirer) conducted within a period of two years are calculated together for the purpose of the turnover thresholds, provided that they are subject to separate agreement acts and completion, and they meet the turnover thresholds. The entire transaction history within that period is then relevant for the turnover calculation, from the time of the last transaction.

Turnover can be calculated in accordance with Section 270(1) of the German Commercial Code (*Handelsgesetzbuch*) or based on internationally recognised accounting standards such as IFRS. Thresholds are related to turnovers and thus are not asset-based.

Special Turnover Calculation Rules

Special turnover calculation rules apply to:

- banks, credit institutions, building societies and insurance companies (premium income – the same rules as in the European Merger Control Law);
- undertakings wholly or partly engaged in the distribution of goods (only three-quarters of the turnover resulting from distribution is taken into consideration); and

- undertakings wholly or partly engaged in the publication, production or distribution of newspapers or periodicals and broadcasting companies (the turnover must be multiplied by four).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

For the assessment of the turnover thresholds, the group turnover of the participating undertakings in the last financial business year must be considered.

Acquirer and Target

Participating undertakings are usually the acquirer (including its parent companies and its subsidiaries) and the target (either the legal entity and its subsidiaries or the business/assets to be acquired). Thus, on the acquirer's side, all undertakings controlling the acquirer and all undertakings controlled by the acquirer form a group and have to be considered for the calculation of turnover.

On the target's side, only turnover achieved by the entities controlled by the target and the target's turnover are taken into account.

If parts of one or more undertakings are acquired, only the turnover relating to those parts is considered when calculating the turnover on the seller's side. This does not, however, apply if the seller keeps control of 25% or more of the shares.

Joint Venture Company

In the case of a joint venture company, the turnover of all "parent" companies that, following the concentration, will either jointly control the joint venture or have a shareholding of at least 25% is relevant with a view to the turnover thresholds.

Seller

The turnover of the seller is generally not taken into account. However, this does not apply if the seller keeps control of 25% or more of the shares in the target. In these cases, the seller is a participating undertaking within the meaning of German merger control. This is, in particular, relevant for the setting up of a joint venture with no previous business activities.

Scope of Turnover Information

Turnover information has to be provided for the last business year. However, with respect to subsequent acquisitions and divestments, the date of the notification is relevant for the basis of consolidation. All acquisitions, divestments or business closures that were implemented until the date of notification of the intended transaction have to be considered. When calculating the relevant turnover, it has to be determined what the turnover of the group (as it stands at the notification date) would have been in the last completed business year.

2.8 Foreign-to-Foreign Transactions

Generally, German merger control rules also apply to mergers taking place outside Germany, as long as the relevant turnover thresholds are met and the proposed merger has a domestic effect.

The FCO's Guidance on domestic effects in merger control (2014) is dealing with domestic effects of foreign-to-foreign mergers and joint ventures. According to these guidelines a transaction has domestic effects if it is likely to influence competition on the German market directly (appreciable effect). Different factors are taken into account; eg, the involved parties' business activities in Germany or parties' domestic subsidiaries/branches.

However, it is not explicitly required that the target company has a presence or assets in Germany for establishing these effects.

2.9 Market Share Jurisdictional Threshold

There are no market share thresholds under German merger control law.

2.10 Joint Ventures

The following joint ventures are subject to merger control legislation:

- the acquisition of joint control of another undertaking;
- the acquisition of shares reaching 25% or 50% of the capital or the voting rights in a situation in which at least one other undertaking holds 25% or more of the shares; and
- the acquisition of a competitively significant influence in an undertaking controlled by a third party.

In Germany, joint ventures generally have to be notified if two or more acquirers gain joint control, or if each of them acquires at least 25% of the shares, or if they acquire a competitively significant influence on the target. Contrary to the EU merger control regime, this also includes non-full-function joint ventures.

If a participating undertaking is jointly controlled by several undertakings, the full turnover of all parent companies is considered when the turnover thresholds are calculated. Likewise, in cases where a parent company is a participating undertaking in a transaction, the full turnover of the joint venture has to be considered for the turnover calculation, not only in the amount of the interest held.

2.11 Power of Authorities to Investigate a Transaction

If a transaction does not meet the jurisdictional thresholds, the FCO does not have any competence to make further investigations.

2.12 Requirement for Clearance Before Implementation

The participating undertakings are prohibited from implementing the transaction prior to clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the participating undertakings infringe this suspension obligation, they are subject to fines of up to 10% of the undertaking's total group turnover in the preceding business year. Individuals (eg, board members) who violate the suspension obligation are subject to fines of up to EUR1 million.

Fines

In the past, the FCO has issued fines in several cases where a concentration has been implemented prior to clearance and is certainly willing to continue this practice. The highest fines imposed on an undertaking at the time of writing amounted to EUR4.5 million in 2008 and EUR4.1 million in 2009 (which in the latter case, however, was revoked). The average fine for undertakings ranges between EUR200,000 and EUR400,000. In most cases, the FCO issues a press release indicating the penalty for gun jumping and the undertakings concerned.

Based on publicly available information, the FCO has already imposed a fine of EUR40,000 on a board member for breaching the suspension obligation (however, this was later revoked by the courts). In practice, individual fines for gun jumping seem to be rare.

Demerger Proceedings

Legal acts (eg, the transfer of shares) that infringe the suspension obligation are void. However, legal invalidity resulting from gun jumping may be remedied. Remedying such actions requires notification of the implementation of the transaction to the FCO. The FCO then opens demerger proceedings, in the course of which it applies the same substantive test as in a standard merger control review. Demerger proceedings are not subject to any deadlines.

Should the FCO be satisfied that the transaction does not meet the requirements for a prohibition (as it is or after removal of the relevant competition concerns through obligations and conditions) or if the Federal Minister of Economics and Energy grants permission to implement the transaction (as discussed below), the FCO will close the demerger proceedings. This has an effect tantamount to a clearance decision, so the legal acts carried out in relation to the transaction will retroactively become valid. Otherwise, if the FCO does not approve the transaction, it may dissolve it.

Furthermore, under the ARC, the invalidity of specific transactions caused by gun jumping may be cured by way of registration. This applies to real estate agreements once they have become legally valid by entry into the land register; to certain agreements on the conversion, integration or formation of an undertaking; and to enterprise agreements once they have become legally valid by entry into the appropriate register.

2.14 Exceptions to Suspensive Effect

The suspension obligation does not apply to public takeover bids or to the acquisition of shares in a series of transactions via stock exchanges as long as those concentrations have been notified to the FCO and the acquirer does not exercise the voting rights related to the shares, or exercises them only to maintain the full value of its investment on the basis of an exemption granted by the FCO.

The FCO may, upon application, grant derogations from the suspension obligation if the parties can justify such exemptions; however, in practice, derogations are rarely granted. In clear-cut Phase I cases, it is normally faster to obtain a clearance decision than derogation from the suspension obligation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Apart from exceptions in relation to public takeovers or a specific authorisation by the FCO, parties are prohibited from closing the transaction before clearance, which usually includes carve-out solutions. Only in very exceptional circumstances may such scenarios be conceivable, and only then if separation and completion will, beyond any doubt, have no impact on the German market.

In any case, all carve-out solutions should be carefully prepared, analysed and discussed, together with the FCO, prior to implementation.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no formal deadline for filing a notification.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not a prerequisite for filing. Parties only have to demonstrate a good faith intention to implement the transaction.

3.3 Filing Fees

The FCO charges an administrative fee on the basis of a general fee regulation act. The FCO has discretion in determining the amount and various criteria are considered in this regard.

The main factors that are considered are:

- the parties' German turnover;
- the FCO's workload (if the transaction will require a detailed or simple investigation); and
- the economic relevance of the case, including the parties' shares in the relevant markets.

The maximum statutory amount is EUR50,000, or, in exceptionally complex cases, EUR100,000. In practice, fees usually vary between EUR5,000 and EUR15,000 (simple Phase I clearances), EUR10,000 and EUR25,000 (complex Phase I cases) or EUR20,000-plus (Phase II investigations).

Usually, the administrative fee is payable within one month following clearance of the transaction.

3.4 Parties Responsible for Filing

In theory, the acquirer and the target are obliged to notify in the event of an acquisition. If shares or assets are being acquired, the seller is also subject to a notification obligation.

In practice, however, the FCO is usually satisfied if one of the parties (normally the acquirer) submits a notification (ideally but not necessarily in co-ordination with the other parties that are obliged to notify). The other parties may also "join" the acquirer's notification by submitting a one-line letter.

It is also possible (but not common) to notify jointly.

3.5 Information Included in a Filing

The FCO publishes as guidance a filing form on its website; however, this form is not mandatory and is rarely used in practice. Notifications are usually filed in the form of a letter to the FCO. The following information is mandatory for a complete filing, which triggers the deadlines.

- A description of the transaction, including, in the case of an acquisition of shares, the size of the interest acquired and of the total interest held.
- Information on the participating undertakings; ie, worldwide, European and German group turnover information, and a list of subsidiaries, including, for both the participating undertakings and the subsidiaries, information on registered seat and business activities; if the size-of-transaction test applies (Section 35(1)(a) ARC), parties have to submit information on the transaction value and the relevant calculation methods.
- Information on market shares reaching at least 20% within Germany (national or regional markets) and underlying sources; although not explicitly required, it is best practice to submit general market share information for the relevant market affected by the transaction (which can be defined wider than Germany) and to provide names of the parties' main competitors and their market share estimates.
- Indication of a person authorised to accept services in Germany if the registered seat of a participating undertaking is not located in Germany.

Submitting a Filing

The filing has to be submitted in German. Parties are not obliged to submit further documents; eg, sale and purchase agreements. However, the FCO may ask for underlying agreements; in particular, in joint venture transactions.

It may also ask for other documents, such as market reports or case studies. Any accompanying documents, such as annual reports (which are usually enclosed), may be submitted in English.

3.6 Penalties/Consequences of Incomplete Notification

The FCO's review period to clear or prohibit the transaction does not start to run. The FCO can also issue a fine of up to 1% of the undertaking's total turnover for incomplete filings. In January 2013, the FCO imposed a personal fine of EUR90,000 on the principal shareholder of a German meat manufacturer for submitting incomplete information in the merger control proceedings regarding a planned acquisition of an abattoir.

The review process may take longer than one month if the FCO declares the filing incomplete (in which case the one-month period only starts from the submission of the missing information).

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The FCO can impose fines for (negligently or deliberately) providing incorrect information in merger control filings. Fines can reach up to 1% of the undertaking's total turnover.

In October 2015, the FCO initiated divesture proceedings against Andechser and Söbbeke, which had submitted incorrect information in merger control proceedings, and finally also imposed a fine of EUR90,000 on the parent company Bongrain Europe SAS (now Savencia SA) in 2016.

3.8 Review Process

The German merger control regime provides for a two-stage review process, with an annual average of more than 95% of cases receiving clearance after the first stage (Phase I). Very few cases are analysed in in-depth proceedings during the second stage (Hauptprüfverfahren – Phase II), discussed further below.

Phase I

A Phase I review formally takes one calendar month following the filing of a complete notification. In practice, clearance may be granted earlier (eg, two/three weeks following submission of the notification), but this essentially depends on the case handler (workload, availability, etc).

In Phase I, the FCO will focus particularly on testing the market definition and market share information submitted by the parties using existing information on the relevant industry sector or by contacting market players and other stakeholders, such as trade associations.

Should the FCO not be satisfied, during the Phase I period, that the proposed transaction does not significantly impede effective competition, it may enter into in-depth investigations. The parties are informed accordingly, usually by a formal letter.

Phase II

A review resulting in a Phase II investigation may take up to five months following the filing of a complete notification (up to six months if the parties submit a first proposal for conditions and obligations). The review process may also be extended subject to the parties' consent and it is not uncommon for the FCO to express that it would strongly prefer an extension.

3.9 Pre-notification Discussions With Authorities

There is no formal pre-notification process and informal pre-filing contact with the FCO is still not that typical. They are, however, commonly seen in very complex cases or cases where confidentiality is a crucial issue.

For informal pre-filing contact, the FCO usually wants to receive at least the minimum information concerning the parties, the transaction and the market before entering into pre-notification discussions.

3.10 Requests for Information During the Review Process

It is not uncommon that the FCO asks for additional information after receiving the filing documents. Detailed questionnaires can be burdensome and providing answers may be subject to tight deadlines.

The timetable would only "(re)start" if the parties had filed an incomplete notification and subsequently submit the additional information. Further, the five-month examination period is put on hold if the undertakings concerned do not provide the information requested by the FCO completely or in due time.

3.11 Accelerated Procedure

There is no formal fast-track review process.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The FCO prohibits concentrations that would lead to a significant impediment to effective competition (the "SIEC test"). As with European merger control law, the main example of the SIEC test is the creation or strengthening of a dominant position. The test allows, among others, the prohibition of anti-competitive concentrations in oligopolistic markets, even if undertakings are not or will not become dominant.

4.2 Markets Affected by a Transaction

FCO Analysis

The FCO determines post-merger effects on the basis of a forecast detailing how the relevant market will develop within an average period of three to five years. This period may be shorter or, in exceptional cases, longer, depending on the specific characteristic of the market structure. Such post-merger effects have to be likely to occur.

In cases where the post-merger effects result in a significant impediment to effective competition, the FCO has to demonstrate that they are caused by the transaction. By contrast, the parties have to show that the transaction has pro-competitive effects that outweigh the relevant anti-competitive effects.

Market Dominance

Market dominance continues to play an important part in the analysis of a transaction. The ARC provides for presumptions of market dominance. A company is presumed to be dominant if it has a market share of at least 40%.

A group of undertakings is presumed to be dominant if it consists of three undertakings or fewer that account for a combined market share of 50%, or if it consists of five undertakings or fewer that account for a combined market share of 66%.

Presumptions can also be rebutted. To do so, the parties have to show either that competition conditions allow for the assumption of continuous substantial competition between the respective undertakings or that the (group of) undertaking(s) has no paramount market position over the remaining competitors.

Presumptions do not keep the FCO from assuming a dominant market position in cases where market shares are lower than those discussed. In March 2012, the FCO published on its website extensive guidance on substantive merger control and the test of market dominance that details its approach and shows a sharper focus on economic findings and concepts in the decision-making process in line with the criteria of the SIEC test.

Special Rules

Special rules apply to concentrations in so-called de minimis markets. These are markets where goods or commercial services have been offered for at least five years and where sales of less than EUR20 million were generated in Germany in the last calendar year, unless the market is characterised by the offer of products or services free of charge. This assessment is carried out on a combined-market basis. While these concentrations have to be notified, the FCO cannot prohibit the transaction on the basis of a significant impediment to effective competition in such markets. The de minimis rule does not apply to notifications filed on the basis of the size-of-transaction threshold.

4.3 Reliance on Case Law

The FCO is an independent body performing its own assessment of the case. However, in practice, it also includes the decisional practice of the Commission and Courts in its assessment.

4.4 Competition Concerns

The FCO broadly distinguishes between horizontal mergers, vertical mergers and conglomerate mergers. Generally, it will investigate in each case the creation or strengthening of single or collective dominance (or, on the demand side, of buyer power in cases of horizontal mergers) and consider both co-ordinated and non-coordinated effects.

Horizontal Mergers

In the case of horizontal mergers, in order to establish single dominance, the FCO investigates which factors determine the parties' market positions in the relevant market and whether, or how, these positions change as a result of the transaction. In addition to market share and concentration levels in the relevant market, various market and company-related factors may be relevant for the assessment: capacities and capacity constraints, customer preferences and switching costs, IP rights and know-how, market phase, access to suppliers and customers, corporate and personal links with other companies, financial resources, barriers to entry and countervailing buyer power.

In cases of collective dominance, the FCO analyses whether the transaction enables the parties to co-ordinate their behaviour in the market or if the transaction facilitates existing co-ordination or makes it more stable.

Vertical Mergers

In the opinion of the FCO, vertical mergers are considered to have more indirect competitive effects. Still, the FCO also increasingly assesses these mergers in detail.

The FCO assesses in detail any foreclosure effects (input and customer foreclosure) on upstream and/or downstream markets taking into account pre-existing links between the merging companies, alternative supply sources for competitors and the degree of vertical integration of other market players, etc. However, such effects may create competition concerns only if the parties additionally have the ability and the incentive to foreclose.

A further concern may be that the vertically integrated company might gain access to the competitively sensitive information of its competitors.

In the case of collective dominance, the FCO assesses whether the vertical merger enhances co-ordination between the dominant companies.

Conglomerate Mergers

Conglomerate mergers are generally less likely to raise competition concerns than horizontal mergers because they do not entail the loss of direct competition between the merging firms. However, competition concerns may arise if the parties are active in economically related markets; ie, their products are complementary or close to substitution. Typically, this requires that at least one of the parties already has a sufficiently strong market position in one of the relevant markets.

As with vertical mergers, in the case of collective dominance, the FCO will assess whether the conglomerate merger facilitates co-ordination between the dominant companies.

4.5 Economic Efficiencies

The FCO will consider the countervailing benefits of a transaction. A concentration that would significantly impede effective competition may not be prohibited if the parties prove that the concentration will also have pro-competitive effects that outweigh the significant impediment to effective competition.

4.6 Non-competition Issues

The FCO does not consider factors other than competition issues in its decisions.

The situation is different with regards to the procedure for obtaining an authorisation from the Federal Minister of Economics and Energy (*Ministererlaubnis*). The Minister can overrule the FCO on the basis of social or political considerations (if the concentration's benefits for the economy as a whole outweigh the disadvantages for competition); however, this is rare in practice. Public interest factors that have been accepted in the past are, eg, safeguarding technical know-how of companies being in financial or industrial difficulties, the potential for reductions of subsidies, the long-term security of energy supply, research in the health sector, the protection of employees through collective agreements and operational co-determination and, most recently, to know-how and potential for innovation for energy turnaround and sustainability.

Germany has a separate foreign direct investment control regime consisting of a mandatory sector investment review, a mandatory cross-sector notification review and a voluntary investment review. Filings to the Federal Ministry for Economic Affairs and Climate Change have to be made in separate proceedings (see **1.2 Legislation Relating to Particular Sectors**). Over the past four years the German legislator has substantially strengthened and extended the rules in Germany. More than ever, it is imperative for dealmakers to consider foreign investment issues upfront in order to mitigate potential risks and/or delays.

4.7 Special Consideration for Joint Ventures

In principle, joint ventures may be subject to a twofold assessment, both under the merger control provisions and the antitrust rules. Under the merger control regime, the SIEC test also applies to joint ventures.

The antitrust rules will additionally come into play in the case of co-operative effects, which particularly applies if the parent companies remain active in the joint venture's fields of activity, or if they are competing in upstream or downstream markets. Only the extent to which the concentration, as such, creates anti-competitive concerns has to be assessed exclusively within the merger control process, which takes priority over the antitrust rules.

Contrary to the EU merger control regime, merger clearance does not automatically entail an exemption for ancillary restraints. Moreover, the deadlines that are applicable with regard to the merger control procedure do not apply to proceedings relating to Section 1 of the ARC/Article 101 of the Treaty on the Functioning of the European Union (TFEU). Therefore, the FCO usually gives priority to the merger control review of the joint venture. In addition, it aims to analyse the joint venture under the antitrust rules and to form at least an opinion on potential infringements and possible exemptions in the course of the merger control proceedings. However, it is also not unusual for the FCO to postpone this assessment until a later stage, usually after the merger control process.

Should the FCO conclude that co-operation in the joint venture violates Section 1 or the ARC/Article 101 of the TFEU and that the conditions for an exemption are not fulfilled, the FCO may issue a prohibition decision, pursuant to Section 32 of the ARC. This is possible even after merger control clearance. Divergent decisions with regard to merger control and antitrust proceedings have, in fact, already occurred in practice.

Following the introduction of the SIEC test, there have been discussions about whether such a twofold assessment is still possible. Clearance of a joint venture would imply that it does not significantly impede effective competition. Accordingly, it would be difficult to argue later, under Section 1 of the ARC/Article 101 TFEU, that the joint venture impedes competition and therefore should be dissolved.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The FCO does have the power to prohibit or interfere with a transaction. It may do so in the course of the regular merger control process or in the course of demerger proceedings after the completion of the transaction.

5.2 Parties' Ability to Negotiate Remedies

The FCO is legally obliged to consider whether an authorisation with remedies would alleviate the competition concerns. However, this does not create an obligation to accept any offer of remedies. The FCO only has to accept remedies that will remove the significant impediment to effective competition.

In turn, the FCO must not impose remedies that the parties have not offered. It may propose remedies that it considers suitable, but it is not obliged to do so – it is ultimately up to the parties to develop and offer remedies.

5.3 Legal Standard

There is no binding legal standard for remedies. However, the FCO published a Guidance on Remedies in Merger Control in May 2017 that describes the most important types of remedies and explains the requirements that they must fulfil.

5.4 Typical Remedies

Standard remedies are the divesture of part(s) of the undertakings' business or the granting of licences to third parties. However, the removal of structural or contractual links with competitors ma be appropriate in certain situations, eg, in oligopolistic markets. In the past, the FCO has, among others, allowed the decommissioning of production plants as a suitable (behavioural) remedy, but has not accepted remedy proposals aiming at organisational obligations or investment controls.

Further, it has already imposed a prohibition to co-operate in the area of purchasing on parents that were parties to a joint venture transaction as part of a remedy package. Behavioural remedies, such as granting licences for important technologies or granting customers special termination rights for long-term contracts of the parties may also be appropriate. The mere closure of capacities or the use of "Chinese walls" within merged entities, however, is not generally considered an effective behavioural remedy.

5.5 Negotiating Remedies With Authorities

Commitments in general can be submitted at any stage of the procedure, during or even before the first phase of merger control. In order to achieve a successful solution, it is highly recommended to co-operate with the FCO fully and at an early stage.

Remedy negotiations usually start as a result of competition concerns that are expressed by the FCO, informally or formally. Procedurally, before prohibiting a transaction, the FCO informs the notifying parties of its competitive concerns and related objections to the transaction. It does this by sending a so-called statement of objections, usually in the form of a draft prohibition decision. The statement of objections may be issued at any time during Phase II.

If remedy discussions start early and are successful, the statement of objections may never be formally issued. However, typically the FCO will send it out towards the end of Phase II. The parties can respond to the statement of objections. In order to prepare this response, they can have access to the FCO file.

Since the FCO is under a legal obligation to consider whether an authorisation with remedies (conditions and obligations) would alleviate the competition concerns, the statement of objections will also deal with possible remedies – even if the parties have not submitted a related proposal. However, as discussed above, the FCO cannot impose specific remedies on its own. It can only issue a clearance decision subject to conditions and obligations that have been offered by the parties.

If the parties agree with the FCO on suitable remedies, the FCO will lay down the conditions and obligations in its final clearance decision, which will also be published in a non-confidential version.

5.6 Conditions and Timing for Divestitures

In the case of a divestiture remedy, the parties must generally provide evidence that the divestiture has been completed. It can, however, be sufficient for companies to take all necessary steps to initiate the transfer of ownership at a time when only the entry into the commercial register remains to be submitted, provided that an application for the entry has been lodged with the register.

In appropriate cases, it may be sufficient for the fulfilment of the remedy to provide evidence that all contracts necessary for the divestment have been concluded in a legally binding way. In cases where this appears to be a suitable approach, this will normally be explicitly mentioned in the text of the remedy decision. Any merger control proceedings that may be required with regard to the acquisition of the divestment business by the buyer have to be concluded within the time limit for the implementation of the divestment.

In so far as the remedies include other commitments in the form of a condition precedent, the parties have to prove that they have been implemented as well before they are allowed to complete the transaction.

If the divestitures commitment is a condition precedent (which is the common form) for the clearance decision, a period of six months should be sufficient to meet the requirements.

The divestiture period should be as short as possible. However, this will vary from case to case and will usually be set in the text of the remedy decision. An extension of the time limits provided by the remedies is only possible in exceptional cases.

5.7 Issuance of Decisions

Phase I

In Phase I cases the FCO informs the parties by informal letter that the transaction does not fulfil the criteria for prohibition and therefore can be implemented. It does not issue a formal decision.

If the FCO does not inform the parties, within the one-month period of Phase I, that it has authorised the transaction or entered into Phase II proceedings, the transaction is deemed to have been cleared.

Phase II

In Phase II proceedings, the FCO issues a formal decision prohibiting or authorising the transaction (unconditional or subject to conditions and obligations). If the FCO does not issue a decision within the relevant deadline, the transaction is deemed to have been cleared.

The FCO publishes on its website that a concentration has been cleared or prohibited. Clearance/prohibition decisions may only be published in Phase II proceedings. The parties will be asked to review the decision and to mark any business secrets. The FCO usually accepts that turnover and market information is confidential. Market share information, however, may be replaced by ranges.

Since 2009, the FCO has also published short summaries (*Fallberichte*) of important Phase I and Phase II cases on its website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

There is no recent case law on the imposition of remedies or prohibitions of concentrations in foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

A clearance decision does not automatically entail an exemption for ancillary restraints. There is also no separate notification procedure for ancillary restraints. The parties themselves have to assess any competition concerns in horizontal or vertical agreements.

As is the case with joint ventures, the FCO may analyse ancillary restraints at a later stage, independent of the merger control process. In practice, separate assessments during the merger control process appear to be more common.

Generally, the FCO applies more or less the same principles that apply under EU competition law, namely that ancillary restraints should be permitted if they are necessary and indispensable to the successful implementation of the transaction.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties may apply to be admitted as interveners in the merger control proceedings at any stage of the process. They have to demonstrate that their economic interests will be substantially affected (directly or indirectly) by the decision. However, an application does not automatically result in an admission. The FCO has considerable discretion in this regard.

Although there are no legal provisions related to this issue, competitors, suppliers and customers will usually be deemed to have an economic interest. Associations and trade unions will have to prove that their own interests, or at least the interests of their members, will be affected by the decision.

Third parties that have been admitted as interveners have the right to be heard and to access the file. In practice, this applies mainly to Phase II investigations. However, prior to granting access to the file, any business secrets will be removed.

7.2 Contacting Third Parties

The FCO usually contacts third parties and competitors during its review process to "market test" the transaction as well as the remedies. In most of the cases the FCO sends out questionnaires.

7.3 Confidentiality

The fact that a notification has been submitted is published on the FCO's website. In general, this happens a few days after the filing. Only in very rare cases has the FCO been willing to postpone the publication and only then under very special circumstances.

Besides file number and responsible decision division, the FCO publishes the names of the parties, the date of the filing and the relevant industry sector. The fact of an initiation of Phase II proceedings is published as well. At the end of the proceedings, the FCO will also publish the result of its analysis; ie, clearance (unconditional or subject to conditions and obligations) or prohibition.

Generally, the FCO is obliged to ensure that confidential commercial information, including business secrets, that is obtained during the merger control process remains so. Interveners may have limited access to the file, but not to the business secrets of the parties. Phase II decisions are published in a non-confidential version that has been agreed with the parties.

7.4 Co-operation With Other Jurisdictions

The FCO is, among others, part of the International Competition Network (currently chaired by FCO president Andreas Mundt), the European Competition Network (ECN) and of the network of the European Competition Authorities (ECA). The ECA is a forum for discussion of all competition law-related matters between the NCAs within the EEA as well as the Commission and the European Free Trade Association (EFTA) supervisory authority. This discussion includes the exchange of information on all merger cases that are notifiable in more than one ECA country (multiple filings).

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Phase II Appeals

The parties may file an appeal against Phase II decisions of the FCO to the Higher Regional Court of Düsseldorf within one month following the service of the decision. The appeal can be made on both legal and factual grounds, including new facts and evidence. The period of the appeal proceedings may vary significantly depending on the case, but an average duration of one to three years should be expected.

The decision of the Higher Regional Court may be appealed to the Federal Supreme Court within one month following the service of that decision. This appeal can only be made on legal grounds and the Higher Regional Court has to have permitted such appeal. The decision not to permit a legal appeal may be appealed to the Federal Supreme Court as well.

The proceedings of the Federal Supreme Court may vary in terms of duration, but again it might take one to three years before a final decision is reached.

In the event of mergers between statutory health insurers, the same rules for an appeal apply, with the exception that the Social Courts have competence.

Applications to the Federal Minster for Economic Affairs and Climate Action

In the event that the FCO prohibits a concentration or orders the unwinding of a non-notified concentration, the parties may also apply to the Federal Minister for Economic Affairs and Climate Action to request permission to implement the transaction. The deadline for such application is one month following the service of the decision of the FCO. The regular review period for the Federal Minister amounts to four months.

If they go beyond the regular four-month period for authorising a concentration that had been prohibited by the Federal Cartel Office, they have to decide on the submission within six months. Additionally, another prolongation of the six-month period for a further two months is possible.

While under previous rules third parties were admitted to appeal proceedings if their interests were substantially affected by the decision, they now have to claim the violation of individual rights.

The ministerial decision may also be fully appealed to the Higher Regional Court of Düsseldorf.

The proceedings for an application for ministerial permission do not preclude the appeal against the original decision of the FCO, the deadline for which starts to run only after service of the ministerial decision.

8.2 Typical Timeline for Appeals

Regarding the typical timeline for an appeal, see the explanations above. Although it is not uncommon to challenge a FCO prohibition decision, in practice, successful appeals are rather rare. One example is the Phonak (now Sonova)/GN Resound transaction that was prohibited by the FCO in 2007. The Düsseldorf Higher Regional Court confirmed the FCO prohibition, however, was finally overruled by the Federal Supreme Court.

As an example of an unsuccessful case, in the EDEKA/Tengelmann case, EDEKA and Tengelmann appealed in parallel the FCO's decision (that only comprises of judicial aspects) and applied for a Ministererlaubnis. The Düsseldorf Higher Regional Court rejected the appeal and confirmed the FCO's prohibition of the merger (which did not have a practical effect because of the Ministererlaubnis).

8.3 Ability of Third Parties to Appeal Clearance Decisions

The right of appeal is also granted to third parties if the FCO decision directly and individually affects their competition interests. A further prerequisite is that such third parties must have been party to the FCO proceedings. This requires that they have at least applied to the FCO to be admitted as interveners and complied with all procedural requirements in this regard.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The latest German Competition Law Reform (GWB-Digitalisierungsgesetz) came into force on 19 January 2021. The amendments re-focused German merger control rules in light of the very high number of unproblematic notifications, the increasing number of filings submitted to the FCO, as well as the many competitively relevant transactions that are not within the scope of merger control in Germany.

The second domestic turnover threshold was increased from EUR5 million to EUR17.5 million and the de minimis threshold was increased from EUR15 million to EUR20 million. The reform introduced a new filing obligation based on a prior FCO decision and subject to specific requirements. The maximum duration of the Phase II review period was extended from four to five months (six months in case of remedies). Any additional extensions of the review period, by consent of the parties, were limited to one month only.

The standard post-completion notice to the FCO following clearance of a transaction was abolished. Further, companies are now able to calculate their turnover based on internationally recognised accounting standards such as IFRS. In addition, submitting filings electronically has been simplified.

9.2 Recent Enforcement Record

Based on the most recent available figures, the FCO examined about 1,000 transactions in 2021. Of these, 14 notifications were assessed in Phase II proceedings. Three cases were unconditionally cleared, two cases were cleared subject to conditions and obligation and two transactions were prohibited (Funke Mediengruppe/Ostthüringer Zeitung and ACO Severin/BIRCO). In six other cases, notifications were withdrawn. One case is currently still ongoing following an extension of the review deadline.

9.3 Current Competition Concerns

In general, competition authorities face new challenges in digital markets, such as internet platforms and online sales, as well as the commercial usage and valuation of personal data. Following an overhaul of the German provisions on abuse control last year, the focus is now back on merger control and structural intervention in markets with a high degree of consolidation. FCO president Andreas Mundt recently stated that it is extremely difficult and lengthy to “fix” markets via abuse control. He therefore invites competition authorities to assess whether the current merger control tools are still appropriate to prevent the creation or strengthening of dominant positions on digital markets and how they could be improved.

Referring to the recent Meta/Kustomer transaction, the FCO president said that the introduction of the size-of-transaction threshold is helpful to pick up relevant cases in digital markets, but the tools to intervene are lacking. The FCO had asked Meta/Kustomer in December 2021 to file the transaction (in parallel to EU proceedings); however, it could not establish evidence to prohibit the case. In June, the Federal Ministry of Economics and Climate Protection published a paper on key issues of the upcoming German Competition Law Reform. The paper discusses the possibility of breaking up companies in oligopolistic markets as ultima ratio instrument, the revision of the rules on benefit skimming following antitrust infringements and stronger FCO powers in the area of sector inquiries. The Ministry will start working on a first draft this year.

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AUTHORS

Daniela Seeliger is a partner in the Düsseldorf office. She has long-standing expertise in European and German competition law, particularly in merger control, the co-ordination of complex multi-jurisdictional filings, antitrust proceedings and compliance work. Daniela teaches competition law at the University of Halle and publishes widely on competition and compliance topics, most recently on the "German Competition Law Digitisation Act", "Competition Law in M&A Transactions" and "Competition Law and ESG". She is a non-governmental adviser in the International Competition Network, a board member of the Studienvereinigung Kartellrecht eV, and a member of the Competition Law 4.0 Commission of the Federal Ministry of Economics and Energy.

Carsten Grave is a partner in the Düsseldorf office with 20 years of professional experience in competition law. He holds a degree in both law and economics. He specialises in European and German competition law, with a focus on merger control and the co-ordination of multi-jurisdictional proceedings. Moreover, he advises on antitrust-related litigation, state aid cases and cartel proceedings. Carsten has extensive experience in the energy, financial services and logistics/postal services sectors. He teaches at the University of Düsseldorf and regularly publishes on competition law, most recently on topics such as big data, networks and two-sided markets, and private enforcement of competition law.

Christoph Barth is a partner in the Düsseldorf office with extensive expertise in international merger control and foreign investment proceedings. He regularly advises on all other competition law aspects, including cartel and abuse of dominance proceedings. Christoph has particular experience in the energy/utilities, mining, financial services and industrials sectors. He leads the Innovation and Efficiency Initiative within the global competition practice, which aims to constantly improve the services the competition team delivers to its clients. He regularly contributes to legal journals and compendiums, most recently on current changes to foreign investment rules and a competition law compendium for board members of German companies.

Linklaters LLP

Königsallee 49-51
40219 Düsseldorf
Germany

Tel: +49 211 229 770
Fax: +49 211 229 774 35
Email: daniela.seeliger@linklaters.com
Web: www.linklaters.com

Linklaters

Trends and Developments

Contributed by:
René Grafunder, Jörg Karenfort,
Maria Brakalova and Josef Hainz
Dentons ***see p.234***

Merger Control Following the Increase of Turnover Thresholds

In January 2021, the long-awaited tenth amendment to the Act Against Restraints of Competition (ARC) entered into force. While it mainly focuses on the digital economy, earning it the byname "ARC Digitisation Act", there were some significant changes regarding merger control. Arguably, the most important change concerned the turnover thresholds. Both domestic turnover thresholds were significantly increased. One company must now generate more than EUR50 million (instead of the previous EUR25 million threshold) in Germany, whereas another relevant company must generate more than EUR17.5 million (instead of the previous EUR5 million threshold).

One of the main objectives of the increase to the turnover thresholds is to relieve the regulatory burden on small and medium-sized enterprises as well as on the Federal Cartel Office (FCO). It was expected that the increased thresholds will reduce the number of annual notifications by 30-40%. The FCO expressly welcomed these changes, as more resources can now be dedicated to potentially critical cases. Yet, the decrease of notifications was not as substantial as expected. In 2020, the FCO received 1,200 notifications, whereas in 2021 there were 1,000, a 16% decrease as opposed to the expected decrease of around 30-40%. In 2021, only 14 notifications were subject to in-depth Phase II review proceedings. Within these, three were cleared without obligations and one with obligations, whereas five of the notifications were withdrawn by the parties. The FCO prohibited one merger. The remaining four cases were still ongoing in 2021.

The tenth amendment also introduced a new mechanism, which enables the FCO to require companies to notify transactions involving smaller target companies under certain conditions. Most importantly, there must have been a prior sector inquiry in the relevant economic sector. Furthermore, the acquirer must achieve a worldwide turnover of more than EUR500 million and have market shares of at least 15% within the sectors concerned, and the target company must achieve turnover of more than EUR2 million in Germany. Moreover, there must be indications that future mergers could impede effective competition within the economic sectors concerned. The regulation is primarily aimed at step-by-step acquisitions that lead to widespread market concentration and which were exempt from merger control in the past. The legislator expects that this regulation will be applied to between one and three companies per year. In early 2022, the FCO made use of this tool for the first time and started a sector inquiry in the household waste industry, as explained in detail below.

Further changes in relation to merger control include:

- Phase II proceedings extended by one month to a total of up to five months from notification;
- the removal of the obligation to notify the implementation of a merger (post-completion notification);
- the turnover threshold for a so-called "minor market" (in which a merger cannot

be prohibited despite the creation or strengthening of a dominant position) increased from EUR15 million to EUR20 million;
- the turnover multiplier reduced from eight to four for press mergers; and
- merger control shall not apply for a limited period of time for certain mergers in the hospital sector.

Merger control remains to be the most powerful tool of the FCO. The president of the FCO, Mr Mundt, regularly makes clear that the FCO will continue using the merger control tool consistently, especially in the digital economy.

Catching "killer acquisitions"

In innovative sectors, certain companies with a strong market position are suspected of systematically removing emerging competitors from the market through targeted acquisitions, commonly referred to as "killer acquisitions". This practice has sparked public debate and raised the question as to the effectiveness of merger control regimes in innovative sectors.

German merger control law (so far) provides two tools to capture potential killer acquisitions. In addition to the FCO's new powers to oblige certain companies to notify any merger (see above), a further means of capturing such acquisitions under German merger control was introduced in 2017. At that time, the merger control thresholds were revised to include a threshold that is based on the transaction value (EUR400 million). The reason for this was, inter alia, the "Facebook/ WhatsApp" merger, which did not fall under German merger control despite a significant purchase price and significant competitive concerns.

In this context, a recently published joint statement by Germany, France and the Netherlands, in which the three countries suggest supplements to the EU's proposed Digital Markets Act, is worth mentioning. The three member states stress the importance to strengthen and speed up merger control in particular vis-à-vis certain gatekeeper platforms. They call for setting value-based thresholds on EU level and for adapting the substantive test to effectively address cases of potentially predatory acquisitions.

The same rationale of capturing transactions that do not meet turnover thresholds has led to the European Commission changing its practice regarding case referrals from member states under Article 22 of the EU Merger Regulation. In certain cases, the national competition authorities are encouraged to refer cases to the European Commission even if the transaction is not notifiable in that member state. It remains to be seen whether the FCO will actually make use of this highly controversial new referral option or whether it finds the national tools sufficient.

According to the coalition agreement, the current government in Germany plans to adopt stricter rules for killer acquisitions, which may include reforming the ministerial veto power.

Call for further reform: stringent merger control indispensable in digital economy

The FCO continues to focus its work on the digital economy, and in this regard, it plays a pioneering role. In April 2021, the FCO released a joint statement on merger control enforcement together with the UK Competition and Markets Authority (CMA) and the Australian Competition and Consumer Commission (ACCC). Together with its counterpart authorities, the FCO emphasises that consistent merger enforcement is key to preserving competition and diversity. In light of the particularly strong market concentration in the digital economy, "stringent merger control is indispensable".

Following the recent changes in the ARC, the FCO has additional tools to avoid that important acquisitions cannot be reviewed by the FCO. However, the FCO must still meet the evidentiary thresholds to prove that a merger harms competition, which is not always easy. Mr Mundt called for a merger reform that would make substantive merger review less complex and easier to be "court-proof". Indeed, very recently a court in Germany annulled a merger clearance with remedies (as explained below in detail), which seems to impose an even higher burden on the FCO. Mr Mundt's plea towards lawmakers is also triggered by the recent greenlight decision given by the FCO to the Facebook /Kustomer deal despite having "serious doubts" about the transaction. According to Mr Mundt, the FCO lacked the tools to ban the transaction.

First application of new Section 39a ARC

As mentioned above, the FCO used Section 39a ARC for the first time in January 2022. The FCO has initiated another sector inquiry in the waste management sector following the results of a previous inquiry conducted in 2021. The FCO intends to examine in particular the specific market position of the Rethmann Group, which is a leader in this sector. The inquiry will determine whether the Rethmann Group can be obliged to notify future acquisitions of smaller companies. In Germany, the waste management sector is characterised by regional markets whereby the municipalities (as opposite market side) often do not have much choice. If smaller competitors were to be acquired one by one without any merger control, the larger competitor would be able to gain a dominant position and/or consolidate its market power without the FCO being able to intervene.

State-owned enterprises under close observation

In recent times, state-owned or subsidised companies, particularly from China, have increasingly come under the scrutiny of German regulators.

In April 2020, after an in-depth Phase II examination, the FCO cleared the takeover of a German manufacturer of shunting locomotives (Vossloh) by the Chinese state-owned company CRRC. In its decision, the FCO dealt in detail for the first time with the acquisition of a competitor by a state-owned company domiciled in a centrally planned economy. In the view of the FCO, in cases involving companies in which the People's Republic of China directly or indirectly holds a majority stake, all state-owned enterprises are to be treated as a single economic unit for the purpose of merger control. This results in the requirement to provide information on all group companies in the merger notification.

In Vossloh/CRRC, the FCO encountered some challenges in the course of carrying out its investigations into the affiliated group of companies. As the notification is not complete without such information and only the receipt of a complete notification triggers the review deadlines, failure to provide this information may significantly delay closing of the transaction. However, it seems that the FCO is willing to take a pragmatic approach in cases where the parties are in a position to prove that the transaction will not lead to significant impediments of effective competition, eg, by demonstrating that there are no, or only insignificant, horizontal or vertical overlaps. In these cases, the FCO may clear the transaction although the notification is (formally) incomplete.

It is worth noting in this context, that such mergers may not only fall within the scope of merger control but may also be closely examined under Germany's foreign direct investment (FDI) control regime. FDI control has become even more important in light of the increasing activity of third country investors, particularly (but not only) when state-owned or subsidised companies are involved. Notably, Germany's FDI control regime has become significantly stricter in recent years.

Following three amendments in 2020, the most recent update came into force in May 2021. Transactions involving a foreign investor now require a mandatory FDI notification if "critical technologies" (such as satellite systems, artificial intelligence, robots, and autonomous driving/unmanned aircrafts) are affected and the relevant thresholds are met. This led to an increased workload of the Ministry for Economic Affairs and Climate Action as the FDI notifications almost tripled in 2021 due to the legislative changes. The ministry considered that the increased workload was well-absorbed as it cleared 87% of the 300 cases within two months. However, it needs to be taken into account that the review of more critical cases can take longer.

The complexity of some cases even led to a unique situation whereby the ministry was unable to complete its review before the relevant deadline under capital market law for the takeover bid. As the buyer, Taiwan's GlobalWafers, was not successful with urgent proceedings before the Administrative Court of Berlin and a subsequent appeal before the Higher Administrative Court of Berlin-Brandenburg, their deal with Germany's Siltronic failed after 14 months of proceedings. Before the courts, the Ministry successfully argued that they could not finish their review without analysing the merger control decision of China's competition authority in detail and assess its potential effects on German security interests.

The national screening of state-owned investments will be supplemented on EU level: on 5 May 2021, the European Commission published a draft regulation to control foreign subsidies. The new rules would allow the Commission to investigate and remedy the potentially distortive effects of foreign subsidies in the EU internal market. On 4 May 2022, both the EU Member States and the European Parliament published their position as to the Commission's regulation and endorsed the proposal with certain amendments. Now, the negotiations between these institutions will continue.

Market definitions

With regard to market definition, the FCO continues to leave open the question of whether brick-and-mortar and online retail belong to the same product market. In the Thalia/Mayersche Buch-handlung case, the FCO explicitly stated that, although there were some indications against full substitutability, there was strong competition between online and mail-order retailing and stationary book retailing due to substitution. In the Signa/SportScheck proceedings, the FCO also found significant competitive pressure from online retailers in the retail of sports and outdoor articles.

Parship/Elite Partner/Lovoo

In 2020, after extensive market investigations, the FCO cleared the acquisition of the dating app Lovoo by the ProSiebenSat.1 group. The portfolio of ProSiebenSat.1 already included the dating platforms Parship and Elite Partner. Although the FCO found the parties to have market power in the dating app segment, a significant impairment of the market was not expected. This finding is supported by the fact that the online dating market is characterised by dynamic growth, market entries and competition. In particular, there would still be sufficient alternative platforms such as Tinder.

The FCO also considered the planned launch of Facebook Dating in Europe in its competitive assessment. Finally, the investigations in this case revealed that television advertising is diminishing and online advertising is growing significantly in importance, particularly when it comes to reaching younger target groups. Therefore, the strong position of the acquirer, ProSiebenSat.1, on the TV advertising market did not prevent the merger.

PayPal/Honey

In April 2020, the FCO cleared PayPal's acquisition of Honey. Honey operates a browser extension that finds and automatically applies promotional and discount codes in the process of online shopping. As Honey's sales numbers in Germany were very low in the relevant fiscal year, it did not meet the second domestic threshold of (then) EUR5 million. Nonetheless, the merger had to be notified as the consideration provided by PayPal significantly exceeded the transaction value threshold of EUR400 million.

The fact that the target had not (yet) achieved noteworthy sales figures in Germany, did not reflect its significant economic and competitive potential. The FCO concluded that online-based business models such as those implemented by Honey are usually characterised by a high degree of scalability and can often be rolled out very quickly. Despite PayPal's relatively strong market position for internet payment methods, the FCO did not expect any vertical or conglomerate effects. In this context, the FCO pointed out that various fast-growing payment providers have entered the market in the recent past, including Apple Pay and Google Pay.

Hospital sector

Concentration in the hospital sector has been continuously growing in recent years despite the rather stringent approach of the FCO. Recently, there has been a relatively high number of prohibitions in this sector (or withdrawals to avoid a prohibition). However, in absolute terms, only very few hospital mergers were actually prohibited (7 out of 315 within the last 17 years). As a result of the lack of price competition due to regulation, the FCO strives to preserve competition between hospitals regarding the quality of services and ensure that patients in a particular region continue to have actual alternatives. In September 2021, the FCO published its final report on the sector inquiry into hospitals. It confirms the important and consistent role played by competition in ensuring the quality of healthcare for the population, especially at the local level.

Court Decisions Related to Merger Control

Remondis/DSD

In Remondis/DSD, the Düsseldorf Higher Regional Court confirmed the prohibition of the foremost vertical merger in the waste management and recycling sector because of a horizontal overlap in one segment. In this area, market circumstances are currently fast-changing, which led the court to emphasise, in line with established case law, that when assessing the decision of the FCO, the factual and legal situation at the time of the oral appeal proceedings before the court is decisive. This is due to the character of the prohibition order as an administrative act with permanent effect. Changes in the legal and factual situation up to the conclusion of the oral proceeding must be taken into account. This may result in the FCO's decision being overturned, even though it was correct at the time it was issued.

Miba/Zollern

In Miba/Zollern, the Düsseldorf Higher Regional Court deemed the challenge of the FCO's prohibition decision inadmissible. The reason for this was that the parties had previously been granted a ministerial approval – a special instrument allowing the Federal Minister of Economics to overrule the FCO's decision for reasons of "public welfare". While some wished for this rather political instrument to be abandoned or at least modified in the latest reform to the ACR, surprisingly, it was left untouched. The court found that once such approval has been granted, the parties lack legal interest in bringing proceedings against the FCO's prohibition.

EnBW/MVV

In EnBW/MVV the German Federal Court, for the first time, shed some light on the question of whether a target is entitled to appeal a clearance decision in the case of a "hostile takeover". If a takeover is perceived as hostile, target companies typically defend themselves with all legal means. It now seems that merger control can also be brought into play.

The first instance court was of the opinion that only third parties outside the group of the parties to the concentration could be entitled to a substantive complaint. While it ultimately left this question open, the German Federal Court seemed to consider a different approach in a costs decision in this case (the parties have previously settled the case). The court pointed out that the target company may be adversely affected in its entrepreneurial and competitive activities by the clearance of a merger, for example if it is prevented from developing and implementing an independent competitive strategy as a result of a "hostile takeover".

XXXLutz/ Tejo Möbel and Roller

In November 2020, the FCO approved the acquisition by XXXLutz Group of Tejo Möbel and Roller, subject to the divestment of 23 stores. The FCO's decision was challenged by XXXLutz. The Court annulled the FCO's decision and requires that the FCO adopts a higher threshold for finding SIEC without market dominance. In its decision, the court considered that the FCO should not have excluded Ikea from the category of "discount" furniture stores. The combined market shares of the merger parties, in addition to Ikea's market share, may not have been high enough for the merger to threaten a significant impediment to effective competition.

Conclusion

Although the figures may suggest otherwise, the FCO continues to follow a stringent approach to merger control and is very diligent in its investigations. This is true for all sectors, but certainly when it comes to digital economy, hospital mergers and investments by foreign state-controlled investors. The recent legislative amendment means the FCO can now devote more resources to difficult cases. It will certainly continue to work on maintaining its reputation as a leading competition authority in the world.

Contributed by: *René Grafunder, Jörg Karenfort, Maria Brakalova and Josef Hainz,* ***Dentons***

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AUTHORS

René Grafunder is a partner in Dentons' Frankfurt office and co-head of the competition and antitrust group in Germany. He advises clients on EU and German competition matters, including merger control, state aid, compliance and distribution issues. René has substantial experience with cartel, abuse and merger control proceedings before authorities and courts. He also focuses on advising clients along the retail chain on topics such as price communication, selective distribution, agency and online sales. René, who holds an LLM from Bruges, is a lecturer of DeutscheAnwaltAkademie and a regular speaker at competition law events. He regularly publishes on EU/German competition matters, including retail price maintenance, leniency regimes, gun-jumping and cartel settlements.

Jörg Karenfort is global head of the competition and antitrust practice group (Berlin/Brussels). He advises clients in European and German competition and regulatory matters. Jörg has comprehensive expertise in dealing with German and European merger control as well as in cartel and abuse of dominance proceedings before European and national competition authorities and courts. He also advises national and international companies and trade associations in connection with compliance issues and regulatory proceedings both at national and EU level. Jörg is an experienced litigator in complex competition cases and an expert for complex settlement matters.

Maria Brakalova is a partner in Dentons' Berlin office and a member of the competition, antitrust and regulatory practice and the public procurement practice. She focuses mainly on foreign trade law and public procurement law. Apart from her substantial expertise in sanctions and export control matters, one major area of Maria's expertise in foreign trade law relates to German foreign direct investment control (FDI control). She supports foreign investors and German targets on the implications of FDI control on M&A transactions and prepares the clearance process, closely interacting with the Federal Ministry for Economics and Energy.

Josef Hainz is a partner in Denton's Berlin office and advises clients on all matters of European and German competition law. His practice focuses on abuse of dominance cases, cartel investigations and merger control proceedings. In addition, he regularly assists clients in competition law-related damage claims and in setting up preventative compliance management systems. He has particular expertise in the energy, telecommunications, banking and life sciences sectors. Josef is a lecturer in European and German competition law at the EBS Law School in Wiesbaden.

Dentons

Markgrafenstr. 33
10117 Berlin
Germany

Tel: +49 30 264 730
Fax: +49 30 264 73 133
Email: berlin@dentons.com
Web: www.dentons.com/de

GREECE

Law and Practice

Contributed by:
Anna Manda, Maria Kallidopoulou and Maria-Christina Raptopoulou
***Karatzas & Partners** see p.256*

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant Greek merger control provisions are enshrined in Law 3959/2011 (the "Greek Competition Act"), which was recently amended by Law 4886/2022. In addition to these provisions, the Hellenic Competition Commission (HCC) has issued decision no 558/VII/2013, which clarifies the requirements of the long and short notification forms ("HCC Guidelines"), as well as well as Decision 524/VI/2011, which determines the content of the remedies form. Lastly, the HCC has issued a manual for its operational procedures, which includes practical guidelines for the application of the Greek Competition Act.

In interpreting and applying the Greek merger control legislation, the HCC takes also into account all the relevant EU legislation, notices and guidelines, as well as the EU case law.

1.2 Legislation Relating to Particular Sectors

The Greek Competition Act applies in principle to all transactions (including foreign-to-foreign transactions) and to all sectors, and the HCC is the competent authority to implement the Greek competition rules, apart from the transactions relating to electronic communications, and postal services, for the review of which the Hellenic Telecommunications and Post Commission ("EETT") is the competent authority.

Mass Media Sector

Concentrations relating to informative media (eg, television, radio, papers and magazines) are governed by both the Greek Competition Act and Law 3592/2007, as amended by Law 4279/2014. On the other hand, as regards concentrations relating to entertainment (ie, non-informative) media, only the Greek Competition Act applies.

There are no foreign direct investment filing requirements under the Greek legal regime.

1.3 Enforcement Authorities

The HCC is the competent authority for the enforcement of the relevant legislation applicable to merger control, as well as for the review of the notified concentrations. The HCC is an independent authority with administrative and economic autonomy, which is supervised by the Minister of Development and Investments.

For the review of mergers involving undertakings active in the markets of electronic communications and postal services, the EETT is the relevant competent authority.

Decisions issued by the HCC and EETT are subject to judicial review by the Greek administrative courts.

2. JURISDICTION

2.1 Notification

In case the respective thresholds described in **2.5 Jurisdictional Thresholds** are met, a notification to the HCC, prior to the implementation of the transaction, is compulsory (see also response to **2.14 Exceptions to Suspensive Effect** on derogations from the suspensive effect of the implementation of a notifiable concentration). There is no exception as to the mandatory nature of the filing requirement. The notification shall be submitted within 30 calendar days after the signing of the relevant binding agreement, the acquisition of controlling interest, or the announcement of a public bid that confers control on a lasting basis.

2.2 Failure to Notify

The HCC can impose administrative fines of at least EUR30,000 and up to 10% of the aggregate national turnover of the undertakings responsible for the filing for failure to notify. The Greek Competition Act explicitly states that the fine imposed must be calculated on the basis of the economic power of the undertakings involved, the number of the affected markets, the competitive conditions therein and the potential effect of the contemplated concentration on competition.

The executives of the undertakings involved are personally and jointly liable for paying all fines imposed against the undertakings by the HCC. In addition, the HCC may also impose administrative fines on the executives for failure to comply with the merger control rules, which range from EUR200,000 to EUR2,000,000.

Finally, the executives of the undertakings involved are subject to criminal sanctions, the fines of which range between EUR15,000 and EUR150,000.

The HCC initiated a gun-jumping investigation in 2021, which is still ongoing. The HCC has also recently imposed a fine of EUR50,000 on an undertaking for failure to notify (HCC Decision 659/2018 – ALTER EGO MEDIA/DOL SA). In the same decision, the HCC has also imposed on the undertaking concerned an additional fine of EUR30,000 for gun-jumping.

2.3 Types of Transactions

All transactions meeting the turnover thresholds described in **2.5 Jurisdictional Thresholds**, are caught by the Greek Competition Act, as long as there is an acquisition of control on a lasting basis. An acquisition of control is deemed to arise in any merger between two or more previously independent undertakings or parts thereof, in an acquisition of direct or indirect control over the whole or part of one or more undertakings, by one or more persons already controlling at least one undertaking (or by one or more undertakings), and in a creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Therefore, internal restructurings and reorganisations do not qualify as concentrations under the Greek merger control regime. Operations not involving the transfer of shares or assets may qualify as concentrations, as long as the nature of control changes and there is an acquisition of control as a result of the operation (eg, through veto rights): see also **2.4 Definition of “Control”**.

2.4 Definition of “Control”

The definition of “control” under the Greek Competition Act is identical to the one under the European Union Merger Regulation (“EUMR”).

Control derives from rights, contracts, or other means which, either separate or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- rights of ownership or rights to use all or part of the assets of an undertaking; or
- rights or contracts that confer the possibility of exercising decisive influence on the composition, voting or decisions of the organs of an undertaking.

In light of the above, control is acquired by the person(s) or undertakings that (i) are holders of the rights or entitled to rights under the contracts concerned; or (ii) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

Control may be acquired in the form of (i) sole or (ii) joint control and in both cases, control may be acquired on a de jure or a de facto basis.

Sole Control

Sole control is acquired when a person or an undertaking is capable of exercising decisive influence on another undertaking. This is normally accomplished by the acquisition of the majority of the voting rights or when a minority shareholder is vested with ‘special’ rights allowing it to define the business strategy of the acquiring entity by, eg, blocking decisions of strategic commercial matters.

Joint Control

Joint control exists where two or more undertakings have the possibility to exercise, directly or indirectly, decisive influence over another undertaking. This is the case, for example, where there jointly controlling undertakings have equal voting rights. Furthermore, the acquisition of a minority shareholding may also confer joint control, where it allows the minority shareholder to block strategically important decisions through, eg, veto rights. Joint control may also be the result of an agreement between minority shareholders to exercise their voting rights in the same way or where there is a commonality of interests between minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the undertaking concerned.

2.5 Jurisdictional Thresholds

Pursuant to Article 6 (1) of the Greek Competition Act, a concentration shall be notified to the HCC, provided that the following turnover thresholds are satisfied, and the concentration does not have an EU dimension. In particular, the turnover threshold is met when:

- the combined aggregate worldwide turnover of all the undertakings concerned is at least EUR150,000,000; and
- the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds EUR15,000,000.

Special turnover thresholds apply to concentrations in the informative media sector. In particular, according to Article 3 (7) of Law 3592/2007, as amended by Law 4279/2014, concentrations of informative media must be notified to the HCC where:

- the combined aggregate worldwide turnover of all the undertakings concerned is at least EUR50,000,000; and
- the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds EUR5,000,000.

The acquisition of informative media is not allowed when it triggers the market share thresholds referred in Article 3 of Law 3592/2007 (see also **4.1 Substantive Test**).

2.6 Calculations of Jurisdictional Thresholds

In calculating the turnover to assess whether the jurisdictional threshold is met, the Greek Competition Act mirrors the EUMR. Turnover must correspond to the “ordinary activities” of the undertakings concerned, which is the turnover generated from the sale of all products and services in the normal course of their business.

Moreover, sales rebates, VAT, other turnover-related taxes, and intra-group sales figures, shall be excluded from the calculation.

In case of an acquisition of a part or parts of an undertaking, irrespective of the legal personality and status of those parts, only the turnover of this part or parts is calculated.

Furthermore, in case of a group of undertakings, the turnover must reflect the turnover of the entire group of each of the undertakings concerned, as explained in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

Where a currency conversion is necessary, the HCC will use the average yearly exchange rates provided by the European Central Bank.

The relevant period for calculating the turnover is the last audited financial year (adjustments must be made for any acquisitions or disposals of businesses subsequent to the date of your audited accounts, in order to reflect the true value of group turnover).

Lastly, specific rules also apply for the calculation of the turnover with respect to credit institutions, insurance companies and other financial companies, which mirror the equivalent EUMR provisions.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

As previewed in **2.6 Calculations of Jurisdictional Thresholds**, turnover must reflect the turnover of the entire group of each of the undertakings concerned. In order to calculate the aggregate turnover of the undertakings concerned, it is necessary to add together the respective turnovers of:

- the relevant undertaking;
- all subsidiaries that are controlled directly or indirectly by the relevant undertaking;
- the turnover of any person/company that control(s) the relevant undertaking;
- if there are any persons/companies that control the relevant undertaking, the turnover of any persons that control those persons/companies; and
- the turnover of any joint ventures, allocated on a proportionate basis to the number of undertakings that control the joint venture.

Control for these purposes means that a person/company, either directly or indirectly:

- owns more than half of the capital or business assets; or
- has the power to exercise more than half the voting rights; or
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the company; or
- has the right to manage the company's affairs.

However, where a transaction concerns the acquisition of a part of one or more undertakings, only the turnover of the transferred part is taken into account, in addition to the aggregated turnover of the acquirer's group.

In practice, in case of an acquisition of control, one takes into account the turnover of the acquiring entity's group (as explained above), and the turnover of the target and its subsidiaries that fall within the scope of the transaction.

2.8 Foreign-to-Foreign Transactions

As explained in **1.2 Legislation Relating to Particular Sectors**, the Greek Competition Act also applies to foreign-to-foreign transactions. As long as the foreign entities meet the worldwide and national turnover threshold (ie, the combined aggregate worldwide turnover of all the undertakings concerned is at least EUR150,000,000 and at least two of the undertakings concerned have generated turnover in the Greek market that exceeds EUR15,000,000), a notification to the HCC is compulsory. If no turnover is generated in Greece by one of at least two undertakings, then no filing in Greece will be required.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold under the Greek Competition Act. See also **4.1 Substantive Test** for the market share thresholds in relation to the acquisition of informative media.

2.10 Joint Ventures
Only full-function joint ventures fall under the ambit of the Greek Competition Act. Specifically, in order for a joint venture to be caught by the Greek merger control provisions, such joint ventures must be able to perform on a lasting basis all the functions of an autonomous economic entity, as per the provisions of the European Commission's Consolidated Jurisdictional Notice ("Jurisdictional Notice"). In cases where such a joint venture does not constitute an independent undertaking under the meaning of the Jurisdictional Notice, eg, where a joint venture takes over only a specific function within the parent companies' activities without its own access or presence in the market, that joint venture would not be subject to the Greek merger control provisions.

For calculating the turnover, the HCC applies the relevant paragraphs of the Jurisdictional Notice (ie, paragraphs 169-194 of the Jurisdictional Notice).

2.11 Power of Authorities to Investigate a Transaction
The HCC (and the EETT where applicable) does not have the power to investigate transactions that do not meet the minimum jurisdictional thresholds.

Nonetheless, in accordance with Article 6(7) of the Greek Competition Act (as recently amended by L. 4886/2022), the Minister of Finance and the Minister for Development and Investments may amend the notification thresholds, as well as impose separate/ad hoc thresholds for different sectors of the economy. See also **4.1 Substantive Test** for the market share thresholds in relation to the acquisition of informative media.

2.12 Requirement for Clearance Before Implementation
The Greek Competition Act (Article 9) requires the automatic suspension of a notifiable concentration, until the latter is cleared by the HCC. This inter alia means that the implementation of a notifiable transaction should be suspended until it has been cleared by the HCC (or the relevant timeframe for the HCC to issue a decision has lapsed without the HCC having reached a decision). See also the derogations to the suspensory effect in **2.14 Exceptions to Suspensive Effect**.

2.13 Penalties for the Implementation of a Transaction Before Clearance
If a notifiable transaction is implemented prior to the HCC's clearance decision, the HCC may impose administrative fines to the undertakings having an obligation to notify. The fine will be at least EUR30,000 and up to 10% of the aggregate turnover of the undertakings concerned. In calculating the fine, the HCC will take into account the economic power of the undertakings concerned, the number of affected markets and the competitive conditions prevailing in these markets, as well as the estimated impact of the concentration on competition.

In addition, criminal sanctions ranging between EUR15,000 and EUR150,000 may be also imposed to the undertaking's executives for violation of the merger control provisions.

Although the HCC is closely monitoring this issue, no such administrative fines and criminal sanctions have been imposed since 2020 to the best of our knowledge.

To the best of our knowledge, no penalties have been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

Notwithstanding the suspensive effect of the implementation of a notifiable concentration, the Greek Competition Act provides for two derogations:

- First, the implementation of a public bid or the acquisition of a controlling interest in the context of stock exchange transactions shall not be prevented provided that (i) the concentration is notified to the HCC within the 30-day deadline; and (ii) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on the grant of a special derogation by the HCC. Hence, in case of non-clearance of the transaction, the risk shifts on the acquirer, since the acquirer would need to dispose of the shares.
- Second, the HCC may, upon request, grant a derogation from the obligation to suspend the completion of a transaction that is notifiable, in order to prevent serious effects to the detriment of one or more of the undertakings concerned or to the detriment of a third party. HCC's decision to grant a derogation may be issued subject to conditions and obligations aimed to safeguarding effective competition and preventing situations that could jeopardise the enforcement of an eventual HCC decision prohibiting the concentration. A derogation granted by the HCC may be revoked where: (i) the derogation is based on incorrect or misleading information; or (ii) the undertakings concerned violate the conditions attached to the derogation. In recent years, the HCC has been hesitant to grant such derogations.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no other derogations to the suspensory effect for the implementation of a notifiable concentration, apart from the two described in **2.14 Exceptions to Suspensive Effect**. With respect to a potential carve-out, the HCC will follow the relevant case law of the EU Courts and the EC, especially in relation to interim implementation measures, such as warehousing, etc.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

As analysed in **2.1 Notification**, a concentration that satisfies the relevant turnover thresholds (see **2.5 Jurisdictional Thresholds**), shall be notified to the HCC within 30 calendar days after the signing of the relevant binding agreement, the acquisition of controlling interest, or the announcement of a public bid that confers control on a lasting basis. For the penalties imposed in the event that the deadline for notification is not met or for a failure to notify, please refer to **2.2 Failure to Notify**. All penalties are made public.

3.2 Type of Agreement Required Prior to Notification

The 30 calendar days timeframe may be triggered when there is a binding agreement, an acquisition of controlling interest, or an announcement of a public bid that confers control on a lasting basis. According to the HCC case law, the aforementioned deadline could be deemed to commence upon the execution of any sort of binding preliminary document, which could be deemed to trigger the concentration process (eg, pre-agreement, binding memorandum of understanding). The HCC will assess whether a preliminary agreement could trigger the notification obligation on a case-by-case basis.

As such, and pursuant to the HCC Guidelines, a notification may be submitted to the HCC prior to the conclusion of a binding agreement, as long as the notifying parties demonstrate to the HCC their intention to enter into a conclusive agreement or, in the event of a public bid, as long as the parties have publicly announced their intention to make such bid.

In case of mergers, the HCC will review the notification at the pre-binding stage, but as soon as the board of directors of the two entities have initiated the merger procedures, but will only issue a decision once it has received the resolutions of the general shareholders' meetings approving the merger, since the latter are considered as binding acts for the purposes of the notification.

3.3 Filing Fees

The notification form must be accompanied with the proof of payment of a filing fee of EUR1,100. Absent the proof of payment of the filing fee, the notification will be rejected on the grounds of inadmissibility.

3.4 Parties Responsible for Filing

Where the concentration arises from a merger agreement, all parties involved are responsible for the filing.

In case of an acquisition of sole control, the party acquiring control is responsible for the filing, whereas in case of an acquisition of joint control, the notification must be made by all parties acquiring control.

3.5 Information Included in a Filing

The information required for a notification (long or short form) under an HCC filing is similar to what it is required for the submission of the Form CO before the European Commission ("EC"). In general, the information typically required to complete a filing includes, inter alia, the following:

- description of the transaction;
- information about the participating parties and their activities;
- the ownership and control structure of the participating parties;
- definition of the relevant product and geographical markets and any affected markets;
- turnover and market share information on the affected markets;
- information on the structure of supply and demand in the affected markets; and
- efficiencies expected to result from the transaction.

The filing shall be accompanied by the following documents:

- a copy of the binding agreement or of the tender document in case of a public bid;
- copies of the most recent annual reports/financial statements of the undertakings concerned;
- copies of all relevant market studies providing information of the structure of the affected markets (such as market shares, competition conditions, existing and potential competitors, structure of supply, etc);
- a copy of the notification announcement as published in the newspaper;
- a power of attorney for representation by a legal counsel (PoA), which should be dully notarised;
- presentations made from/to the Board of Directors or presented to the Board of Directors or the general assembly, which include competitive assessments; and
- a proof of payment of the filing fee.

The notification itself and the accompanying documents should be submitted in Greek. If the accompanying documents are drafted in a language other than Greek, an official (ie, certified by an attorney) translation in Greek should be also submitted.

3.6 Penalties/Consequences of Incomplete Notification

The HCC officially commences the review process of the notified concentration as soon as the filing is deemed to be complete. In case the filing is found to be incomplete, further clarifications are requested by the HCC through RFIs. Only when the HCC considers that the filing is complete, the Phase I review period commences.

In cases where the information requested by the HCC is being refused, obstructed, delayed, or in the event that the information provided is incomplete, the HCC may impose to the undertakings concerned fines up to 3% of their aggregate worldwide turnover on a daily basis (and for as long as the infringement takes place). In addition, the HCC may also impose fines to the undertakings' executives ranging from EUR15,000 to EUR30,000 per day.

Lastly, those that refuse or obstruct the requested information may be also subject to imprisonment of at least six months.

In 2011 the HCC imposed a fine of EUR20,000 and EUR15,000 respectively on two gas-providing companies for inter alia delaying to provide the information requested (HCC Decision 516/VI/2011 – EPA Thessalias/EPA Thessalonikis).

3.7 Penalties/Consequences of Inaccurate or Misleading Information

In the event that the parties provide inaccurate or misleading information, the same penalties described in **3.6 Penalties/Consequences of Incomplete Notification** apply.

3.8 Review Process

After the HCC deems the notification to be complete, the HCC will follow the below review and decision process:

- In case the HCC concludes that the notified concentration does not fall within the jurisdictional thresholds, the President of the HCC will issue a decision within 30 calendar days from the receipt of a complete notification.
- In case the HCC considers that the notified concentration does not raise any adverse effects on the relevant markets, the HCC will issue a decision approving the concentration within 30 calendar days from the receipt of a complete notification (Phase I process).
- In case the HCC considers that the concentration raises serious doubts as to its compatibility with competition law in the relevant markets, the President of the HCC will issue a decision within 30 calendar days from the date of the notification and will initiate the procedure of full investigation of the notified concentration (Phase II process). The participating parties should be immediately informed of this decision. The case is subsequently introduced before the HCC within 45 days from the date on which the in-depth assessment is initiated ("hearing"). Prior to the hearing, the HCC will issue a report summarising its findings, similar to the statement of objections ("SO") of the EC under the EUMR, on which the parties will be invited to comment. The parties can offer remedies within 20 days of the HCC's SO. Under the Phase II process, the HCC must issue its decision within 90 calendar days following the initiation of the Phase II review process. In case the deadline of 90 days lapses unused,

it is assumed that the HCC has approved the concentration.

The timeframe within which the HCC shall issue its decision under Phase I and Phase II review process may be extended subject to the parties' consent.

In terms of an overall estimated timeline, it is estimated that the HCC would issue its decision approximately 75 days after the submission of the notification in Phase I proceedings, and approximately 165 days after the submission of the notification in Phase II proceedings.

3.9 Pre-notification Discussions With Authorities

The Greek Competition Act does not provide for pre-notification discussions with the HCC. Nonetheless, there may be informal discussions with the HCC and the parties may also submit formal questions, as long as the 30-day filing deadline is observed.

3.10 Requests for Information During the Review Process

It is pretty common for the HCC to request additional information by the parties. In particular, once the notification is filed, the HCC has seven working days in order to assess whether the data provided by the parties is sufficient. If the HCC finds that further data is needed, it shall notify the parties and the 'clock will stop ticking'. Namely, the deadline within which the HCC must reach a decision in Phase II or Phase II will not start running, until the HCC has deemed that it has at its disposal all the data that it requires.

3.11 Accelerated Procedure

A short notification form may be submitted, if one the following conditions is met:

- none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships), provided that their combined market shares shall not exceed 15%;
- one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that their individual or combined market shares at either level shall not exceed 25%; or
- when a party to the concentration is to acquire sole control of an undertaking over which it already has joint control.

When following the receipt of the short notification form, the HCC considers that the long notification form is required, the filing will be deemed incomplete, and the HCC will request all of part of the long form notification information through RFIs.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The key substantive test employed by the HCC in its assessment of a concentration is that a concentration should not significantly impede effective competition, similarly to what is applied under the EUMR ("SIEC test"). Pursuant to the SIEC test, the HCC will examine whether the concentration may significantly impede effective competition in the Greek market or in a substantial part thereof, in particular through the creation or reinforcement of a dominant position.

In its assessment, the HCC will take, inter alia, into account, the structure of all the relevant markets, actual and potential competition, barriers to entry, the market position and economic strength of the participating undertakings, any alternatives available to suppliers and users, supply and demand trends for the products and services involved, and the bargaining power of suppliers and customers.

With respect to horizontal mergers, the HCC will assess whether a concentration may lead to a significant impediment to effective competition, by creating or by enhancing a dominant position, either by eliminating substantial competitive constraints (unilateral or non-coordinated effects), or by altering the nature of competition and thus facilitating the coordination between previously competitive/non-coordinating undertakings (coordinated effects).

With respect to vertical mergers, the HCC will assess whether the concentration may result to coordinated or non-coordinated effects on the vertically affected markets or lead to input or customer foreclosure.

Concerning conglomerate mergers, the HCC will assess whether the concentration would result in foreclosure through tying or bundling.

Regarding full-function joint ventures, please refer to **4.7 Special Consideration for Joint Ventures**.

As regards concentrations in the (informative) media sector, Law 3592/2007 expressly provides that a concentration is not permitted where it involves undertakings that hold a dominant position in this sector or where the concentration would result in the creation of such dominant position. Dominance is thereby defined by reference to specific market share thresholds, which range from 25% to 35%.

4.2 Markets Affected by a Transaction

The HCC closely follows the EC's practice and the relevant EU case law when determining which markets may be affected by the transaction.

In particular, an affected market is deemed to arise when:

- two or more of the participating undertakings are engaged in business activities in the same product and geographic market (horizontal relationships), and the concentration would result in a combined market share of at least 15% in the relevant market (for horizontal mergers); or
- one or more of the participating undertakings are engaged in business activities in a product market that is upstream or downstream from a product market in which any other participating undertaking is engaged (vertical relationships), and either their individual or combined market shares in either level is at least 25%.

In the event that the aforementioned thresholds are not satisfied, no affected markets are deemed to exist, and the competitive concerns are generally deemed unlikely. The same applies where there is no incremental market share increase.

4.3 Reliance on Case Law

The HCC heavily relies on EU case law and takes into account all relevant notices and guidelines issued by the EC in relation to the EUMR, which the HCC interprets and implements having regard to the Greek regulatory regime applying to specific sectors, eg, banking and financial services and other regulated activities, such as energy, which may differ in certain aspects from other EU countries.

4.4 Competition Concerns

The HCC will examine all potential competition concerns (see also **4.1 Substantive Test**).

4.5 Economic Efficiencies

When assessing a concentration, the HCC will consider efficiency considerations that could offset its possible anti-competitive effects, including the development of technical and economic progress. Nonetheless, these efficiency considerations are taken into account only if:

- they produce benefits to consumers;
- they constitute a direct consequence of the concentration;
- they cannot be achieved to a similar extent by less anti-competitive methods; and
- they are verifiable.

4.6 Non-competition Issues

Under the Greek Competition Act, non-competition issues, such as industrial policy, national security, are not expressly prescribed and are generally not taken into account as part of the HCC's review process.

Nevertheless, the HCC has recently expressed its interest in the relationship between sustainable development and competition law and in particular, the extent to which sustainability and environmental considerations may be taken into account when assessing a concentration. However, the HCC has not relied upon such sustainability arguments in any merger case to date.

In addition, the HCC has also considered the potential effects of a concentration on the national economy. More specifically, public interest objectives, such as the liquidity in the banking sector and the stability of the financial system, have been taken into account by the HCC in its decisions regarding concentrations in the banking sector during the financial crisis (HCC Decision 574/2013 – Piraeus Bank/Bank of Cyprus-Cyprus Popular Bank, HCC Decision 568/2013 – National Bank of Greece/FBB, HCC Decision 566/2013 – Piraeus Bank/Millennium Bank, HCC Decision 562/2013 – National Bank of Greece/Eurobank Ergasias Bank).

There are no foreign direct investment filing requirements under the Greek legal regime.

4.7 Special Consideration for Joint Ventures

The Greek Competition Act reserves special consideration for the effect that full-function joint ventures may have on competition. In particular, apart from examining whether the full-function joint venture will significantly restrict effective competition, the HCC will also examine possible cooperative effects between the previously independent undertakings. Such coordination will be examined by the HCC under the principles set out in Articles 1(1) and 1(3) of the Greek Competition Act (equivalents of Articles 101(1) and 101(3) of the Treaty on the Functioning of the EU). In particular, the HCC will consider:

- whether two or more parent undertakings retain to a significant extent activities on the same market as the joint venture, or in an upstream or downstream or closely related neighbouring market; and
- whether the coordination that results directly from the creation of the full-function joint venture enables the participating undertakings to eliminate competition in a substantial part of the markets where they are active.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The HCC has the power to prohibit a concentration, provided that the latter leads to a significant restriction of effective competition. A prohibition decision shall be issued within 90 calendar days following the initiation of the Phase II review process.

In addition, in the event that a concentration has been implemented in breach of the Greek Competition Act, or in breach of a prohibition decision, the HCC may require the undertakings concerned to dissolve the concentration, so as to restore the situation prevailing before the implementation of the concentration.

5.2 Parties' Ability to Negotiate Remedies

The parties can offer remedies within 20 calendar days from the HCC's Phase II SO. The HCC may exceptionally accept remedies even after the expiry of the aforementioned 20-day period. In such cases, the HCC may increase the 90-day time limit for the issuance of its decision to 105 calendar days.

In addition, under the recent amendments of the Greek Competition Act, the parties may also offer remedies during Phase I investigation within 20 calendar days from the date of the notification.

5.3 Legal Standard

Similar to the EC's practice, the HCC deems the proposed remedies to be acceptable when these are:

- appropriate;
- comprehensive;
- of a lasting character; and
- capable of being implemented effectively without requiring further medium- or long-term monitoring mechanisms and heavy HCC involvement.

The purpose of the remedies would be to ensure that the competition concerns arising from the concentration are being removed. Thus, there is often pushback for behavioural remedies.

5.4 Typical Remedies

HCC's decision 524/VI/2011 determines the content of the notification form on remedies and its accompanying documents. The HCC's decision also includes a model text for divestiture commitments and a model text for trustee mandates.

In general, the HCC follows the EC's Notice on Remedies and the relevant EU case law in assessing remedies.

In this respect, it is considered that structural commitments are generally preferable since they are deemed to avert the competition concerns over the longer term. Nonetheless, the HCC has accepted behavioural remedies in a number of cases thus far. For instance, in Case 682/2019 (Mytilineos/EPALME), the HCC has accepted behavioural remedies that aimed at addressing vertical foreclosure concerns. Moreover, the HCC, in the very recent Case 775/2022 (Delivery Hero/ALPHA-INKAT-E-TABLE) accepted a series of behavioural remedies. The concentration concerned the acquisition by an online delivery platform, Delivery Hero, of the sole control over companies that are active in the wholesale supply of goods to supermarkets and run online platforms that provide intermediation services for orders and reservations in restaurants. The HCC was concerned that the combination of end user data collected from these online platforms would allow the merged entity to implement personalised promotion strategies, by thereby having a competitive advantage to such an extent that the combined entity's competitors would no longer be able to compete effectively. The HCC eventually cleared the concentration with behavioural remedies, which included, inter alia, the obligation by Delivery Hero (i) not to tie the online intermediation services for food ordering with the online reservation services in restaurants when offered to business users; (ii) not to provide special discounts to business users; and (iii) not to use end user data collected from its platform in order to implement personalised promotion strategies.

It is also often the case that the HCC accepts both structural and behavioural remedies. For example, in 2017, the HCC accepted both structural and behavioural measures when granting clearance to the acquisition by supermarket Sklavenitis of sole control over the Marinopoulos supermarket chain. With respect to the structural measures, the acquiring company undertook to divest 22 supermarket stores within nine months from the publication of HCC's decision (HCC 637/2017). With respect to behavioural remedies, the acquiring company undertook to continue the commercial cooperation with Marinopoulos' local suppliers and other mutual suppliers for a period of three years commencing from the publication of HCC's decision. Likewise, in 2018, the HCC cleared the acquisition of Hellenic Seaways by Attica Group (HCC Decision 658/2018 – Hellenic Seaways/Attica Group), subject to both behavioural and structural commitments. As per the commitments undertaken, the Attica Group was bound not to increase ticket prices in certain itineraries, to proceed with the divestiture of certain boats, add routes to certain island connections, and to facilitate the entry of competitors in the relevant markets.

5.5 Negotiating Remedies With Authorities

Until the recent modification of the Greek Competition Act (see **1.1 Merger Control Legislation**), remedies could only be proposed by the parties during the Phase II review process. However, under the current Greek merger control regime, remedies can be proposed and submitted both under the Phase I and the Phase II review process. In particular, remedies should be submitted within:

- 20 calendar days from the notification date, when remedies are proposed in Phase I; or
- 20 calendar days from the date on which the case is introduced before the HCC with the submission of the SO by the Rapporteur allotted to the case, when remedies are proposed in Phase II. Exceptionally, the HCC may accept remedies proposed after the aforementioned deadline. In this case, the 90-day time limit for the completion of Phase II may be extended to 105 calendar days.

Under the Greek Competition Act, there is no "earliest" point in the procedure when the parties can begin negotiating remedies with the HCC. In practice, the parties would seek to start negotiating the proposed remedies with the HCC as early as possible in the process, and even before the Rapporteur issues its SO in the Phase II review.

The HCC can only impose the remedies proposed by the parties and does not have the power to impose remedies not agreed by them. In practice, however, the remedies proposed by the parties often result from unofficial discussions with the HCC, during which the HCC often guides the parties as to the type of remedies that could address the competition concerns.

5.6 Conditions and Timing for Divestitures

As analysed in **5.5 Negotiating Remedies With Authorities**, HCC's decision 524/VI/2011 determines the content of the notification form on remedies and its accompanying documents. The latter decision sets out the information that should be included in the submission of remedies, and also includes a standard notification form for divestment remedies.

Remedies have to be implemented in accordance with the relevant merger clearance decision of the HCC, normally within a prescribed period post-completion of the transaction. To date, the HCC has issued only one decision where the divestment was imposed as a condition for clearance (HCC Decision 515/2011 – Vivartia/MEVGAL).

A divestment remedy would normally require keeping the business/asset to be divested separate until the completion of its sale. The parties will be also required to report to the HCC regarding the actions taken in order to implement the agreed remedies. If necessary, the HCC may also appoint a trustee to monitor the implementation of the agreed remedies.

If the parties do not comply with any of the agreed remedies, the HCC may revoke its clearance decision. In addition, the HCC may also impose a fine up to 10% of the combined aggregate turnover of the participating undertakings. The relevant undertakings may also request for the modification of the agreed remedies, in the event that the circumstances significantly change.

5.7 Issuance of Decisions

HCC's decisions that either clear (without remedies), clear with remedies, or prohibit a concentration are notified to the parties within the prescribed time limits (ie, 30 calendar days for Phase I and 90 or 105 calendar days for Phase II). A non-confidential version of the HCC's decision is also published on HCC's website and on the Greek Government Gazette.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The HCC has not to date required remedies or prohibited transactions as regards foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

An HCC clearance decision covers any ancillary restraints that are directly related to and necessary for the implementation of the concentration, such as long-term service agreements, etc. The HCC examines such restrictions on the basis of the EC's Notice on ancillary restrictions.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Under the Greek Competition Act, third parties, including inter alia customers, and competitors can play an important role in the assessment of a notified concentration.

First, when the HCC conducts its market testing in order to assess the competitive conditions in the relevant markets, it sends requests for information to third parties, the opinion of which may be critical for the assessment of the transaction.

Moreover, within 15 calendar days from the publication of the announcement of the proposed concentration in the newspaper, any interested third party may submit comments or provide information regarding the notified concentration to the HCC.

In addition, third parties may be invited by the HCC to the hearing before it during the Phase II investigation, provided that the HCC considers that their participation will be essential for the examination of the case.

Furthermore, any third party establishing a legitimate interest may intervene during the HCC proceedings by submitting written pleadings at least 15 calendar days prior to the aforementioned hearing.

Finally, third parties are also entitled to appeal against HCC's decisions before the Administrative Court of Appeal of Athens within a period of 60 calendar days from the publication of the HCC decision, provided that they establish a legitimate interest.

7.2 Contacting Third Parties

Third parties are a source of information and evidence for the HCC in relation to the assessment of a proposed concentration. In particular, the HCC may when considered necessary, contact third parties as part of its review process by sending written questionnaires to third parties, such as competitors, customers and consumer organisations. These questionnaires should be replied within five calendar days and there are fines in case of non-compliance and for providing inaccurate or misleading information (see also **3.6 Penalties/Consequences of Incomplete Notification** and **3.7 Penalties/Consequences of Inaccurate or Misleading Information**). In the same manner, the HCC also typically sends written questionnaires to third parties regarding the sufficiency of the proposed commitments and their ability to eliminate the competition concerns raised by the concentration.

7.3 Confidentiality

A summary of the notified concentration, including the undertakings concerned, the form of control acquired, and the relevant markets is published in a national daily financial newspaper, as well as on the HCC's website, within five working days of the submission of the notification to the HCC.

HCC's decisions are also published both on the HCC's website and the Greek Government Gazette. The HCC publishes the non-confidential versions of its decisions, meaning that the parties' commercially sensitive information, including business secrets, are protected from disclosure.

7.4 Co-operation With Other Jurisdictions

As a member of the European Competition Network, the HCC cooperates closely both with the EC and the national competition authorities in other EU member states regarding the enforcement of EU competition law. The HCC also participates in the International Competition Network.

Furthermore, over the past year, the HCC further enhanced its cooperation with other national competition authorities outside the EU, by signing several memoranda of cooperation with the national competition authorities of North Macedonia, Albania, Armenia, Serbia and Morocco.

In order to share information with other jurisdictions, the HCC should seek relevant permission.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

HCC's decisions may be appealed before the Administrative Court of Appeal of Athens. Neither the timeframe for filing the appeal nor its filing may suspend the enforcement of HCC's decision.

The judgment of the Administrative Court of Appeal of Athens may in turn be appealed before the Council of State (ie, the Supreme Administrative Court of Greece).

8.2 Typical Timeline for Appeals

The timeline for filing an appeal against an HCC decision is 60 calendar days from its publication or, in the absence thereof, of its notification to the parties. There are not any examples of successful appeals against HCC's decisions to date.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Any third party that establishes a direct, personal and present legitimate interest regarding the clearance decision may appeal against the HCC decision before the Administrative Court of Appeal of Athens. The relevant timeframe for the appeal (60 calendar days) starts to run from the publication of the HCC's decision in the Greek Government Gazette. To the best of our knowledge, there has not been any successful appeal against an HCC clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

As described in **1.1 Merger Control Legislation**, in January 2022, the Greek competition Act was modified by Law 4886/2022. Among the most important amendments is the envisaged possibility for the parties to submit remedies during the Phase I investigation (see also **5.5 Negotiating Remedies With Authorities**).

9.2 Recent Enforcement Record

Among the 21 concentrations notified to the HCC in 2021 and 2022 (as of 30 May 2022), only one was cleared with commitments and all the rest were cleared unconditionally. Hence, the HCC has not prohibited any concentration recently.

In a nutshell, from the 21 notified concentrations brought before the HCC:

- 20 were cleared in Phase I without remedies; and
- one was cleared in Phase II with remedies (HCC 775/2022).

Out of the 21 notified transactions, none of them concerned a foreign-to-foreign transaction.

Moreover, no other fines and penalties have been imposed within the past five years for failure to notify or gun-jumping apart from the ones mentioned under **2.2 Failure to Notify**.

9.3 Current Competition Concerns

As described in **5.4 Typical Remedies**, the HCC has recently expressed its interest in the relationship between sustainable development and competition law and, in particular, the extent to which sustainability and environmental considerations may be taken into account when assessing a concentration. By virtue of the above, the HCC has recently proposed the creation of a supervised environment for experimentation for sustainable development (sustainability) and competition in the Greek market ("sandbox"). Such mechanism will enable the submission (to the HCC) of business proposals aimed at enhancing the conditions for sustainability and which, in order to materialise, will require greater legal certainty in relation to competition law enforcement.

In addition, the HCC has also acknowledged as one of its policy priorities to adapt its enforcement on the basis of the developments in the digital markets space.

The HCC has also recently appeared to demonstrate privacy concerns and to be particularly sensitive regarding the protection of the consumers' personal data (see also **5.4 Typical Remedies**).

Contributed by: Anna Manda, Maria Kallidopoulou and Maria-Christina Raptopoulou, ***Karatzas & Partners***

Karatzas & Partners holds Tier 1 rankings in most of the significant sectors and was recently recognised by Chambers Europe as the Greece Law of Firm of the Year for 2022. In the area of competition law, and, in particular, merger control, Karatzas & Partners has a well-established practice handling a steady stream of merger control advice and clearances relating to significant M&A transactions undertaken by the firm. The firm is renowned for its business-oriented approach, which is critical to advising clients on the competition aspects of M&A transactions and achieving merger clearance even in particularly complex and novel concentrations that lead to Phase II investigations. Karatzas & Partners routinely advises clients on the most innovative transactions in Greece with novel competition law elements, such as the creation of complex joint ventures in high technology sectors, the creation of new relevant product markets and complex (geographical/product) market definitions, thus being at the forefront of competition law developments in Greece.

AUTHORS

Anna Manda joined Karatzas & Partners in 2000 and became partner in 2004. She specialises in competition law, TMT, pharma, M&A and corporate and commercial law. Anna leads the Antitrust and Competition, TMT and Pharma departments of the firm. She has extensive experience in antitrust and competition, including advice on highly complex merger control matters (including the proposed merger between two of the four Greek systemic banks, involving more than 20 markets, which was cleared by the antitrust authorities after a Phase II investigation), as well as state aid issues, cartel investigations and leading the K&P team advising on a number of antitrust compliance matters. In the context of her extensive experience and expertise in M&A, Anna has participated in many high-profile transactions in these fields, with particular focus in the TMT and pharma markets. She is a member of the Athens Bar Association, and she speaks Greek, English, French and Italian.

Maria Kallidopoulou joined Karatzas & Partners in April 2022 as an associate. She specialises in EU and Greek competition law. She advises on all aspects of European, Greek and cross-jurisdictional competition law matters across a wide range of sectors, including merger control proceedings, cartels and abuse of dominance investigations, horizontal and vertical agreements, and antitrust compliance, as well as state aid. Her practice also includes public procurement and EU trade law. Prior to joining Karatzas & Partners, Maria worked on competition law with two leading international law firms in Brussels. Maria has also worked at the Public Procurement Unit of the European Commission's Directorate General for the Internal Market, Industry, Entrepreneurship and SMEs. Maria holds an LLB and an LLM from Aristotle University of Thessaloniki and an LLM from the University of Oxford. She is a member of the Thessaloniki Bar Association, and she speaks Greek, English and German.

Maria-Christina Raptopoulou joined Karatzas & Partners in March 2022. She specialises in Competition (both free and unfair) and corporate law. Her practice includes advising on corporate transactions, including M&A due diligence, and on all aspects of national and European competition law, including merger control proceedings, cartels, abuse of dominance, horizontal and vertical agreements, as well as antitrust compliance. Prior to joining Karatzas & Partners, Maria-Christina worked as an intern at the Hellenic Competition Commission and the Permanent Representation of Greece to the EU in Brussels. Maria-Christina holds an LLB in Hellenic Law and an LLM in Private Law & Business Transactions, both from the National and Kapodistrian University of Athens. She is a member of the Athens Bar Association and she speaks Greek, English, German and Italian.

Karatzas & Partners

The Orbit, 5th floor
115 Kifissias Ave
115 24
Athens
Greece

Tel: +30 21 0371 3600
Linkedin: Karatzas & Partners
Email: mail@karatza-partners.gr
Web: karatza-partners.gr

Trends and Developments

Contributed by:
Stamatis Drakakakis, Konstantinos Sidiropoulos and Ellie Gavriilidou
Zepos & Yannopoulos ***see p.263***

Greek Merger Control in 2021–22: Reforms, Increased Merger Activity and Consolidation of Sectors

Introduction

The Greek merger control regime is enshrined primarily in Law 3959/2011 (the "Greek Competition Act") and, as a rule, the Hellenic Competition Commission's (HCC) decisional practice is aligned with EU case law, taking into account all the relevant EU legislation, notices and guidelines, as well as policy trends at the EU level.

In the context of transposing into the Greek legal order the ECN Plus Directive (Directive 2019/1), the Greek Competition Act was substantially amended with effect from 24 January 2022 by Law 4886/2022. Indeed, Law 4886/2022 has introduced a wide range of modifications to the full spectrum of the Greek competition rules, including certain important reforms to merger control rules. The most notable amendment in this regard is the introduction of a possibility for the relevant national authority to impose remedies in Phase I clearance decisions.

In terms of policy, the HCC has generally followed the policy trends and priorities established at EU level, often adopting innovative initiatives and being at the forefront of discussions regarding the challenges of the application of the competition rules in the (now accelerated) transition to a sustainable and digital economy. In particular, first, the HCC has recently expressed its interest in the relationship between sustainable development and competition law, and the potential relevance of sustainability and environmental considerations for the assessment of concentrations. Moreover, the HCC has also acknowledged as one of its policy priorities to adjust its enforcement to the developments in the digital markets space. Finally, the HCC has also emphasised the significance of concerns relating to privacy, being particularly sensitive with protection of consumers' personal data.

Lastly, in the last couple of years there has been a record number of transactions notified to the HCC. The level of merger activity in Greece is currently high, especially in certain sectors, such as paytech, energy and private insurance, while the HCC seems to be vigilantly monitoring transactions related to e-commerce and digital platforms.

Revisions of statutory framework

Post-closing remedies generally

The remedies option was inaugurated pursuant to the provisions of Article 8 of the Greek Competition Act and the HCC's Decision 524/VI/2011. This tool enabled the HCC to clear a concentration subject to conditions, ie, subject to certain post-closing requirements imposed on the parties involved. Such post-closing requirements are not statutorily pre-defined and are in concreto customised in view of the concentration under examination. The proposed remedies may include structural obligations, behavioural obligations, or (more commonly) a combination of both.

The remedies option appears to have gained popularity in recent years with the HCC, which seems eager to impose corrective measures in order to alleviate potential anticompetitive concerns, especially in high-profile mergers.

Moreover, due to a heavy workload and/or understaffing, the HHC appears to be imposing increasingly higher demands on parties to provide voluminous (and sometimes insignificant) data, in order to prolong the statutory deadline within which the authority may reach a decision. Also, until the most recent modification of the Greek Competition Act, remedies could only be proposed by the parties during the Phase II review process, which on occasions led the HCC to initiate a fully fledged Phase II assessment due to the inappropriateness of a Phase I unconditional clearance under the case-specific circumstances.

Remedies in Phase I proceedings

As of 24 January 2022, Law 4886/2022 has amended the Greek Competition Act to introduce the possibility for the parties to a transaction to offer commitments during a Phase I investigation and the corresponding power of the authority to impose them as remedies for a conditional Phase I clearance decision (see Article 8(4A)). As such, under the current Greek merger control regime, remedies may be proposed and submitted both under the Phase I and the Phase II review process. In particular, remedies should be submitted within:

- 20 calendar days from the notification date, when remedies are proposed in Phase I; or
- 20 calendar days from the date that the case was introduced before the HCC with the submission of the SO by the Rapporteur allotted to the case, when remedies are proposed in Phase II.

Imposition of ad hoc notification thresholds

In principle, the HCC has no discretion under the merger control rules to review transactions that fall below the notification thresholds set out the Greek Competition Act. However, in accordance with Article 6(7) of the Greek Competition Act (as amended by Law 4886/2022), the Minister of Finance and the Minister for Development and Investments may, by joint decision published after a public consultation, amend the notification thresholds and impose separate, ad hoc thresholds for different sectors of the economy. This decision must be based on statistics collected by the HCC, based on a detailed mapping of the relevant markets and the competitive conditions therein for the past three years.

The provision of Article 6(7) pre-existed but had not been used to date. The fact, however, that it has been amended to include as a prerequirement for any decision the need for a detailed mapping of the relevant markets, and the competitive conditions therein, illustrate that there may be appetite to employ this tool if and where necessary.

Policy trends

On 22 June 2022, the HCC launched an innovative initiative, the so-called Sandbox for Sustainable Development and Competition, which aims to strengthen competition in par with a sustainable development. The adoption of the Sandbox follows the various recent initiatives at national and European level pertaining to the integration into competition law of the objective of sustainable development. Even though this initiative is not directly related to merger control, it certainly displays the HCC's appetite to take due regard of sustainability and environmental considerations in the context of the application of the competition rules. As such, in the context of assessing the efficiencies of a transaction, it is a conceivable scenario for the HCC to take into account whether it contributes significantly to sustainable development and the public interest.

A major development is the European Commission's (EC) new policy of encouraging Member States to refer transactions to it, even if they are not notifiable under the national rules, provided those transactions could be perceived as stifling future competition. The EC has started claiming the right to review mergers that would normally not be notifiable, by calling in two deals since its policy change (Illumina/Grail and Facebook/Kustomer). In this regard, it is worth mentioning that the HCC has been a warm supporter of this policy shift, and thus will most probably align itself to the newly adopted approach to Article 22 of the EU Merger Regulation.

Merger control decisions

Statistics

According to publicly available information, the HCC issued in 2021 30 decisions in total, 16 of which were merger control decisions. Specifically, out of these 16 merger control decisions:

- 14 were cleared in Phase I;
- one involved the withdrawal of some of the undertaken commitments under a previous conditional clearance decision and the extension of some others; and
- one provided exemption from commitments undertaken under a previous conditional clearance decision.

In the first half of 2022 (as of 28 June 2022), according to information available on the HCC's site, the HCC cleared unconditionally six notified transactions (Phase I), while one concentration, ie, Delivery Hero's acquisition of companies Alpha Distributions SA, Inkat SA, Delivery.gr Single Member PC and E-Table Single Member PC, was approved subject to commitments following an in-depth review (Phase II).

Delivery Hero/Alfa Distributions, Inkat, Delivery.gr and E-table.gr

Following an in-depth Phase II investigation, the HCC cleared on 18 April 2022 Delivery Hero's acquisition of (a) Alfa Distributions SA, (b) Inkat SA, (c) Delivery.gr Single Member PC and (d) E-table Single Member PC, subject to commitments offered by Delivery Hero. This transaction concerned essentially the acquisition of sole control by one of the largest online delivery platforms in Greece (Delivery Hero's "e-food") over three companies active in the markets for wholesale trading, e-commerce and electronic reservations for restaurants. This was the first instance where the HCC had to deal with the markets for online intermediation for restaurant reservations (where e-table is active) and online intermediation for food ordering (where e-food is active). The HCC was concerned that the transaction would give rise to conglomerate effects, mindful of both platforms' significant market power in the respective markets in Greece.

Following the acquisition of control, the HCC was concerned that: (a) the merged entity would have both the ability and the incentive to bundle the two services vis-à-vis their business; and (b) the combination of end-user data collected from e-food and e-table would allow the merged entity to implement personalised promotion strategies. In response to these concerns, Delivery Hero offered several behavioural commitments, subject to which the transaction was eventually cleared. The proposed commitments included, among others, the following obligations: (a) refrain from tying the online intermediation services for food ordering with the online reservation services in restaurants (through e-table) when offered to business users (ie, restaurants); (b) refrain from providing special discounts to business users and/or not to charge reduced commissions/fees; and (c) refrain from using end users' data collected from the e-food platform to implement personalised promotion strategies for the e-table services, and vice versa.

This transaction was of particular importance for the HCC, as it fell within its current focus on e-commerce and digital platforms. Particularly, the HCC launched in April 2020 an e-commerce sector inquiry and published an interim report in August 2022. In line with this, the HCC carried out earlier this year several unannounced inspections (dawn raids) looking into potential restrictions of sales through online platforms. All in all, it should be expected that the digital and e-commerce fields will certainly be one of HCC's enforcement priorities for the years to come, both in antitrust and merger control.

Increased merger activity and consolidation of sectors

Even though merger activity has evidently increased in general, certain sectors and industries have been characterised by particularly high merger activity and consolidation.

Financial services

In the financial services sector and, specifically, the paytech industry, all four systemic banks in Greece have now carved out and sold their merchant acquiring services to foreign companies. Within the last couple of years, the HCC cleared the acquisition of sole control (a) by EFT Services Holding BV (part of Euronet Worldwide Inc group) of sole control of the Pireaus Bank merchant acquiring activities;(b) by Worldline on the Merchant Acquiring Business Unit of Eurobank SA; and (c) by Nexi SpA on the Merchant Acquiring Business Unit of Alpha Bank SA. Greek banks are following the global trend of banks moving away from the payment sector, which requires special and accurate know-how and large investment costs.

Energy

The HCC cleared in the course of 2021 and early 2022 several important concentrations in the energy sector. In March 2022, the HCC approved (Decision 770/2022) the acquisition of sole control, by Italgas Newco SRL, 100% subsidiary of Italgas SpA on company DEPA Infrastructure SA and in the gas transmission and distribution market, one of the most important energy-related privatisations in Greece. The HCC has also reviewed and cleared several transactions in the markets for the generation and wholesale and retail supply of electricity, including but not limited to (a) DEPA Commercial's (gas supplier) move into the renewable energy sector through the acquisition of joint control over North Solar, a company developing solar energy projects (Decision 733/2021); (b) the acquisition of joint control by the Public Power Corporation Renewables SA (PPC Group) and Geoenergy Aegean Single Member SA (ELLAKTOR Group) of company Geothermal Target TWO II Single Member SA, for development of four geothermal fields in Greece (Decision 740/2022); and (c) the acquisition by Gek Terna SA of sole control over Heron I and Heron II and its energy production and supply activities (Decision 747/2022).

Insurance

Concentration in the healthcare services sector in Greece has been continuously growing in recent years. Of particular interest is the ever-increasing consolidation of the private insurance sector, as marked by the two recent HCC decisions clearing two transactions between four of the largest companies in the sector, ie, (a) the acquisition of sole control by Allianz SE over the company European Reliance General Insurance Co (Decision 782/2022), and (b) the acquisition of sole control by Assicurazioni Generali – Societa per Azioni over Axa Insurance SA (Decision 732/2021). In the same vein, the EC's unconditional clearance decision of CVC Capital's acquisition of sole control over the Hellenic General Insurance Co SA, one of the largest private insurance companies in Greece, is noteworthy, mindful of the fact that CVC controls most of the Greek private hospitals.

Conclusion

Following the latest amendment of the Greek Competition Act and the introduction of the possibility to submit remedies in Phase I proceedings, the HCC has an important tool in its toolbox to become more agile and prompt in its review of notifiable transactions. Even though the HCC has a longstanding practice of rarely blocking transactions, which was also the case in 2021, this should not be interpreted as the Greek competition authority not being vigilant enough. On the contrary, the HCC has risen to the challenge of reviewing an ever-increasing number of transactions, while attentively assessing the complex competition-related considerations arising from increased merger activity and increasing levels of concentration.

Contributed by: *Stamatis Drakakakis, Konstantinos Sidiropoulos and Ellie Gavriilidou,* ***Zepos & Yannopoulos***

Zepos & Yannopoulos is one of the longest-established law firms in Greece. With more than 127 lawyers and 75 business professionals, it is one of the largest law firms in Greece and the only one offering comprehensive legal and tax and accounting services. Its experienced practice team has a unique focus on the full spectrum of antitrust and competition matters. Since the enactment of the first Greek Competition Act back in the late 1970s, the proliferation of EC (now EU) rules and guidelines, the decentralisation of EU antitrust enforcement, the changes in merger control and the development of EU state aid law, the firm has been at the forefront of specialised services in this field.

AUTHORS

Stamatis Drakakakis is a member of the Zepos & Yannopoulos corporate commercial practice and head of the firm's antitrust and competition team. Stamatis covers the full range of competition law, including state aid and sector-specific regulation. He advises clients from a very wide variety of industries, including electronic communications, the financial sector, construction, energy, consumer goods, pharmaceutical, chemicals, steel, and defence. He represents clients before the Hellenic Competition Commission and the Greek Appellate and Supreme administrative courts, the European Commission and both the General Court and the Court of Justice of the EU. He has also litigated landmark antitrust cases before Greek courts. Stamatis is a member of the firm's executive committee.

Konstantinos Sidiropoulos is a member of the Zepos & Yannopoulos antitrust and competition law practice group. He advises on all aspects of European, Greek and cross-jurisdictional competition law matters, with an emphasis on investigations concerning cartels and similar collusive practices, abuse of dominance, antitrust compliance and merger control proceedings, as well as state aid and other public restrictions of competition. His expertise also involves the field of European law in its widest sense, including, in particular, sector-specific regulation and EU trade law. Konstantinos is a lecturer at the European Law and Governance School, teaching EU consumer law, and holds a teaching position at the Aristotle University of Thessaloniki, delivering lectures on competition law in the pharma sector.

Ellie Gavriilidou is a member of the Zepos & Yannopoulos antitrust and competition law practice group. Her practice covers a wide range of matters pertaining to EU, Greek and UK competition law. She assists clients on competition law matters and, specifically, issues related to cartels, vertical agreements, abuse of dominance, antitrust compliance and merger control proceedings. Ellie is admitted before the Court of First Instance.

Zepos & Yannopoulos

280 Kifissias Ave.
152 32 Halandri
Athens
Greece

Tel: +30 210 6967 000
Email: info@zeya.com
Web: www.zeya.com

ZEPOS & YANNOPOULOS

INDIA

Law and Practice

Contributed by:
Shweta Shroff Chopra, Aparna Mehra, Ritwik Bhattacharya and Kshitij Sharma
***Shardul Amarchand Mangaldas & Co** see p.286*

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Contributed by: *Shweta Shroff Chopra, Aparna Mehra, Ritwik Bhattacharya and Kshitij Sharma,*
Shardul Amarchand Mangaldas & Co

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The merger control regime in India is primarily governed by the Competition Act, 2002 (Competition Act) read with the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 (Regulations). There are various other regulations and government notifications issued from time to time that also affect the merger control framework in India.

The Competition Commission of India (CCI) (which is the relevant enforcement authority) has also provided additional guidance in the form of:

- "guidance notes" on the preparation of notification forms;
- frequently asked questions (FAQs) on merger control, which are updated from time to time;
- a compliance manual for enterprises; and
- a "do-it-yourself" online toolkit to assist with examining whether or not the authorities must be notified of a transaction.

1.2 Legislation Relating to Particular Sectors

Under Indian competition laws, there are no separate provisions that deal with merger control for foreign transactions/investments or transactions relating to specific sectors. However, there are exemptions for particular transactions in the banking, oil and gas and financial institutions sectors. These are discussed further in **2.1 Notification**.

For the sake of completeness, it should be noted that there are other Indian laws and statutory authorities that deal with foreign investments and investments in particular sectors.

1.3 Enforcement Authorities

The CCI is the central enforcement authority for merger control (and all other competition law issues) in India. Certain orders of the CCI can be appealed before the National Company Law Appellate Tribunal (NCLAT), and orders of the NCLAT can be appealed before the Supreme Court of India (Supreme Court).

2. JURISDICTION

2.1 Notification

The notification requirement is mandatory in nature. All transactions that meet the prescribed jurisdictional thresholds, and are not otherwise exempt, are required to be pre-notified to the CCI.

However, there are various exemptions available to the notification requirement, as discussed below.

Exemptions Under Schedule I of the Regulations

Schedule I of the Regulations identifies various categories of transactions that are ordinarily not likely to cause an appreciable adverse effect on competition (Appreciable Adverse Effect on Competition (AAEC)) in the relevant market in India and are therefore not normally required to be notified to the CCI. These categories of transactions are:

- an acquisition of shares/voting rights entitling the acquirer to hold less than 25% of the shares/voting rights of a target, "solely for investment purposes" or "in the ordinary course of business", provided that this does not lead to the acquisition of "control".

Acquisitions of less than 10% of shares/voting rights will be treated as being "solely for investment purposes" if the acquirer:

- has the ability to exercise only the rights of ordinary shareholders exercisable to the extent of their respective shareholding;
- is not a member of the board of directors of the target nor has the right or intention to nominate such members in future; and
- does not intend to participate in the management or affairs of the target.

In its decisional practice, the CCI has interpreted this exemption narrowly, and has held that it does not apply to transactions where the acquirer and target operate either in the same horizontal market or vertically related markets. Further, the CCI has not provided any significant guidance on the scope of the "ordinary course of business" limb of this exemption. The definition and scope of "control" (which is also critical, while examining the applicability of this exemption) is discussed separately in **2.4 Definition of "Control"**.

- An acquisition of additional shares/voting rights by the acquirer/its group where, prior to the acquisition, the acquirer/its group already holds 25% or more shares/voting rights of the target, but does not hold 50% or more of the shares/voting rights of the target either prior to or after that acquisition. This exemption is unavailable if the transaction results in the acquisition of sole or joint control of the target by the acquirer/its group.
- An acquisition of shares or voting rights where the acquirer/its group already holds 50% or more of the shares/voting rights in the target enterprise, except where the transaction results in a transfer from joint to sole control.
- An acquisition of assets not directly related to the business of the acquirer, or made solely as an investment, or in the ordinary course of business, not leading to control over the target enterprise. This exemption does not apply to transactions where the acquired assets represent substantial business operations in a particular location or for a particular product/service of the target, irrespective of whether or not those assets are organised as a separate legal entity.
- Intra-group reorganisations, which include:
  (a) an acquisition of shares/voting rights or assets by an enterprise of another 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 (for definition of group, see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**); and
  (b) a merger or amalgamation of two enterprises where one of the enterprises has more than 50% of the shares/voting rights of the other enterprise, or merger/amalgamation of enterprises in which more than 50% of the shares/voting rights in each merging enterprise is held by enterprises within the same group (this exemption is not available if the transaction results in a transfer from joint to sole control).
- An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.
- An acquisition of shares/voting rights by a person acting as a securities underwriter or registered stockbroker on behalf of their clients, in the ordinary course of its business and in the process of underwriting or stockbroking.
- An acquisition of shares/voting rights pursuant to a buy-back or a bonus issue or a stock split or consolidation of face value of shares or subscription to rights issue, not leading to an acquisition of control. Care will need to be taken in the case of an acquisition of control through a renunciation of rights.

- An amended/renewed tender offer where a notice to the CCI has already been filed by the party making such an offer.
- An acquisition of shares/control/voting rights/assets by a purchaser approved by the CCI (in the case of a divestiture in a remedies package).

Additional Exemptions by Way of Government Notifications

The Government of India has also introduced the following exemptions by way of notifications.

- Target Exemption – a de minimis target-based exemption had initially been introduced for a period of five years (until 27 March 2022), pursuant to which transactions where the value of Indian assets being acquired, taken control of, merged or amalgamated is less than INR350 crores (approximately USD46 million), or Indian turnover attributable to those assets is less than INR1,000 crores (approximately USD131 million), do not need to be notified to the CCI (Target Exemption). The validity of the Target Exemption has been extended for another five years, ie, until 28 March 2027. The thresholds for the Target Exemption have remained unchanged.
- Banking Exemptions – for a period of five years (until 10 August 2022), transactions involving certain regional rural banks are not required to be notified to the CCI. Separately, for a period of ten years (until 30 August 2027), transactions involving reconstitution, amalgamations or transfer of whole/part of nationalised banks under specific banking laws do not have to be notified to the CCI (Banking Exemptions).
- Oil and Gas Exemption – for a period of five years (until 22 November 2022), all transactions involving central public sector enterprises operating in the oil and gas sectors (under specific legislations in this sector), do not have to be notified to the CCI.

Exemptions for Certain Financial Institutions

It is not necessary to pre-notify the CCI of any acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds, pursuant to any covenant of a loan agreement or an investment agreement. Rather, these transactions need to be notified to the CCI within seven calendar days of the completion of such a transaction. It is pertinent to note that a failure to notify such transactions post-closing does not attract penalties from the CCI.

2.2 Failure to Notify

Previously, parties were required to notify reportable transactions to the CCI within 30 calendar days of the “trigger event”. However, in June 2017, the government introduced an exemption removing the 30-day filing deadline, initially for a period of five years (until 29 June 2022). This exemption was further renewed for another five years (until 29 June 2027). Therefore, parties can notify reportable transactions at any time after the trigger event, but before consummating any step of such a transaction (Trigger Exemption).

However, if parties fail to notify a reportable transaction prior to closing (or at all), the CCI may levy a penalty of up to 1% of the combined turnover or assets of the transaction, whichever is higher. The CCI additionally has the power to “unscramble” a reportable transaction that was not notified to it and that was subsequently found to cause an AAEC in India, although it has not done so to date.

The CCI has levied fines for a failure/delay in notifying a transaction in approximately 25 transactions to date, with fines generally ranging between INR100,000 (approximately USD1,310) and INR50 million (approximately USD655,000). However, in one recent case (as mentioned below) a fine of INR2 billion (approximately

USD26 million) was imposed. This case was likely a one-off instance because of the distinct factual scenario. The CCI has also levied fines for "gun-jumping" in approximately 22 cases (discussed separately in **2.13 Penalties for the Implementation of a Transaction Before Clearance**).

Trends for the Last Three Years

In one of its recent penalty orders (December 2021) arising from failure to notify, the CCI has imposed the highest-ever fine of INR2 billion (approximately USD26 million) on Amazon.com NV Investment Holdings LLC (Amazon) (Amazon/FCPL, C-2019/09/688) for failure to notify and other breaches. The CCI held that Amazon had: (i) failed to identify and notify all the interconnected steps of a transaction (it had identified and notified only certain select steps, and went ahead and consummated certain non-notified steps); and (ii) made false and incorrect representations, and concealed/suppressed material facts.

In addition to the penalty for failure to notify, the CCI also separately imposed a penalty of INR20 million (approximately USD261,000) for misrepresentation. See **3.7 Penalties/Consequences of Inaccurate or Misleading Information**.

This is a first-of-its-kind order passed by the CCI, as CCI directed Amazon to re-notify a transaction that was approved by the CCI in 2019 and held that, until the decision on the revised notification form, the approval granted by the CCI for the already notified steps should remain in abeyance. Further, this case is also unique based on the amount of penalty, as prior to this, the maximum penalty levied by the CCI for failure to notify was INR50 million (approximately USD655,000). The penalty amount levied in the Amazon case was around 40 times the previous maximum penalty levied by the CCI.

Following the Amazon order, the CCI has issued five more penalty orders arising from failure to notify, with fines ranging between INR 500,000 (approximately USD6,530) and INR 2million (approximately USD26,140). The failure to notify in these cases were as a result of: (i) incorrect turnover computation (in two cases); and (ii) incorrect belief that sectoral regulator under the Electricity Act had exclusive jurisdiction to regulate combinations in the electricity sector (in three cases).

The CCI frequently monitors news and other public sources for non-notified transactions, and issues letters of inquiries for transactions it believes may have been notifiable.

Penalty Orders Available Publicly

The CCI's (and the NCLAT/Supreme Court's) penalty orders are public and are uploaded on their website.

2.3 Types of Transactions

The Competition Act covers all acquisitions (of shares, voting rights, assets or control), mergers and amalgamations that meet the prescribed jurisdictional thresholds, and are not otherwise exempt. Therefore, apart from transfers of shares and assets, transactions involving the transfer of voting rights and/or control (for instance, through a shareholders' agreement or changes to articles of association) may also trigger a notification requirement.

Further, as discussed in **2.1 Notification**, while certain internal restructurings/reorganisations are exempt, other internal restructurings may trigger a notification requirement. Further, certain joint ventures may also be notifiable, as discussed in **2.10 Joint Ventures**.

2.4 Definition of "Control"

As explained in **2.3 Types of Transactions**, transactions giving rise to a change in control may be notifiable (in addition to various other forms of notifiable transactions) if the prescribed jurisdictional thresholds are met.

The CCI, in its previous decisional practice, has interpreted control to mean “the ability to exercise decisive influence over the management or affairs and strategic commercial decisions” of a target enterprise, whether that decisive influence is being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants (Independent Media Trust/Network 18- C-2012/03/47). However, it has also adopted a lower standard of “material influence” instead of “decisive influence”, which has blurred the lines to some extent (Ultratech/Century- C-2015/02/246) (ChrysCapital/Intas-C/2020/04/741).

The CCI has considered the ability to veto (or cause a deadlock in respect of) strategic commercial decisions (such as the annual business plan, budget, recruitment and remuneration of senior management, and the opening of new lines of businesses) as sufficient to confer at least joint control. Given the lack of clear guidance from the CCI (and the change in standards from “decisive influence” to “material influence”), a case-by-case approach needs to be adopted when assessing control. Parties are often required to “make a call” on whether or not their acquisition will be viewed by the CCI as an acquisition of control.

As discussed in **2.1 Notification**, the interpretation of control is also critical from the perspective of examining whether a transaction may benefit from the relevant exemptions. For instance, Item 1 of Schedule I to the Regulations ordinarily exempts transactions that involve the acquisition of less than a 25% shareholding, solely as an investment or in the ordinary course of business, provided they do not result in an acquisition of control. As already discussed in **2.1 Notification**, an acquisition of less than 10% of total shares/voting rights will be treated as being “solely as an investment” if certain prescribed conditions are satisfied.

Accordingly, acquisitions of minority shareholdings may be notifiable if:

- there is an acquisition of any rights amounting to “control”; or
- it is determined that the acquisition is not made solely as an investment or in the ordinary course of business (ie, strategic acquisitions).

As a result, several private equity deals (such as Claymore Investments-C-2018/12/623, General Atlantic Singapore Fund-C-2018/07/582, Metlife International Holdings-C-2018/06/576, Lighthouse Funds-C-2021/07/851 and Sienna Limited-C-2022/02/907) have been notified to the CCI, although it is not evident what “control” would result from the investments. Further, the CCI, through its decisional practice, has held that minority acquisitions (even without any control rights) between enterprises operating in the same horizontal market or vertically related markets, would not be able to avail of the Item I exemption (Amazon/Shoppers’ Stop-C-2017/12/538, Alibaba/Snapdeal-C-2015/08/301, and Mylan/New Moon-C-2014/08/202).

2.5 Jurisdictional Thresholds

The Competition Act (read with relevant government notifications) provides jurisdictional thresholds on a parties’ basis and a group basis. If either the parties test or the group test (based on either assets or turnover) is met, and there is no applicable exemption, the transaction must be notified to the CCI. The jurisdictional thresholds are as follows.

Contributed by: Shweta Shroff Chopra, Aparna Mehra, Ritwik Bhattacharya and Kshitij Sharma,
Shardul Amarchand Mangaldas & Co

Parties Test
Either:

- the parties have combined assets in India of INR2,000 crores (approximately USD261 million) or a combined turnover in India of INR6,000 crores (approximately USD784 million); or
- the parties have combined worldwide assets of USD1,000 million, including combined assets in India of INR1,000 crores (approximately USD131 million) or a combined worldwide turnover of USD3,000 million, including a combined turnover in India of INR3,000 crores (approximately USD392 million).

Group Test
Either:

- the acquirer's group has assets in India of INR8,000 crores (approximately USD1,046 million), or turnover in India of INR24,000 crores (approximately USD3,137 million); or
- the acquirer's group has worldwide assets of USD4,000 million including assets in India of INR1,000 crores (approximately USD131 million) or a worldwide turnover of USD12,000 million, including turnover in India of INR3,000 crores (approximately USD392 million).

The relevant entities to be considered while examining these tests are discussed in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

There are no special jurisdictional thresholds applicable to any particular sectors.

2.6 Calculations of Jurisdictional Thresholds

Computation of Asset/Turnover Values
The jurisdictional thresholds are calculated based on the asset and turnover values of the relevant entities, based on the audited financial statements for the last financial year. The CCI's FAQs clarify that if audited statements are unavailable, unaudited financial statements or best available estimates may be used (which should preferably be certified by a statutory auditor).

The asset value is calculated by taking the book value of the assets, as shown in the last audited financial statements. The value of assets is to include the value of the brand, goodwill, copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any. The setting-off of current liabilities (ie, subtracting the value of current liabilities from the total asset value) is not permitted.

The turnover value is calculated based on the value of sale of goods or services, excluding indirect taxes, if any. Through its FAQs, the CCI has also clarified that intra-group turnover and turnover derived from operations not directly connected with the operations of the parties (ie, income from ancillary operations/"other income") shall be excluded; however, turnover from exports shall be included when computing the turnover value.

The FAQs also provide some guidance on the manner of computing turnover, specifically in the banking sector and the insurance sector.

Where only a portion of an enterprise, division or business is being acquired, the assets/turnover values attributable to the actual portion/division/business being transferred are required to be considered. These values should be certified by a statutory auditor or based on the last available audited accounts.

Exchange Rate

The rate of conversion of the foreign exchange currency into INR or USD is to be based on the average spot rate of the last six months quoted by Financial Benchmark India Private Ltd from the date of the "trigger event". This is further explained in **3.1 Deadlines for Notification**.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

As stated in **2.5 Jurisdictional Thresholds**, the Competition Act provides jurisdictional thresholds on a parties' basis and a group basis.

The term "group" has been defined to mean two or more enterprises which, directly or indirectly, are in a position to:

- exercise 26% or more of the voting rights in the other enterprise;
- appoint more than 50% of the members of the board of directors in the other enterprise; or
- control the management or affairs of the other enterprise.

In the case of an acquisition, for the parties' test, the entities to be considered are the acquirer and the target. For the group test, the group to which the target would belong after the acquisition is to be considered. For assessing the Target Exemption, only the target enterprise would need to be considered.

In the case of a merger or amalgamation, for the parties' test, the enterprise remaining after the merger or the enterprise created as a result of the amalgamation is to be considered. For the group test, the group to which the enterprise would belong after the merger or amalgamation is to be considered. For assessing the Target Exemption, the enterprise(s) being merged or wound up would need to be considered. If two or more enterprises are being wound up to form a new entity, all such enterprises would need to be considered as the targets.

In the case of the acquisition/merger/amalgamation of only a portion, a division or business of an enterprise, the assets/turnover figures attributable to the actual portion/divisions/business being transferred are required to be considered. Accordingly, the seller's asset/turnover figures need not be included with that of the target.

In addition, in transactions involving a series of interrelated transactions, where assets are being transferred to an enterprise for the purpose of that enterprise entering into a combination, the Regulations provide that the value of the transferring enterprise's assets and turnover is to be attributed to the transferee enterprise.

Further, as stated in **2.6 Calculations of Jurisdictional Thresholds**, jurisdictional thresholds are to be assessed based on the last audited financial statements. Any later material changes – for example, the acquisition of a new business after the last audited accounts – should, however, be intimated to the CCI in the notification, or at any time during the CCI's review period.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control review in India if the prescribed jurisdictional thresholds are met.

Nevertheless, as set out in **2.5 Jurisdictional Thresholds**, the jurisdictional thresholds have a minimum asset/turnover value requirement in India, and a local nexus test is therefore effectively built into the jurisdictional thresholds.

It should be noted that a local presence is not always required, as foreign entities may have direct sales in India (through exports by foreign subsidiaries) through which they generate turnover, which may result in the prescribed jurisdictional turnover thresholds being met. However, in transactions where the enterprise/assets being acquired/taken control of/merged/amalgamated have no sales or assets in India, the parties may avail themselves of the Target Exemption, relieving them of the obligation to notify.

2.9 Market Share Jurisdictional Threshold

There are no jurisdictional thresholds based on market shares in India, and accordingly, a transaction may be notifiable even in the absence of any overlap, if the thresholds are met.

2.10 Joint Ventures

The creation of a "greenfield" joint venture is, in itself, not required to be notified. However, joint ventures may be notifiable if one or more parent enterprises is contributing existing assets, including fixed assets, businesses, customers, contracts, intellectual property and employees (provided the jurisdictional thresholds are satisfied).

Typically, only the value of the assets being contributed by the parent entities should be considered while assessing the applicability of the Target Exemption for a joint venture (and the asset attribution rule should ordinarily not apply).

2.11 Power of Authorities to Investigate a Transaction

If a transaction does not meet the jurisdictional thresholds, the CCI does not have the power to investigate it under its merger control provisions. However, the CCI may separately examine any agreements between the enterprises under Section 3 (anti-competitive agreements) or the conduct of the (joint) enterprise under Section 4 (abuse of dominance) of the Competition Act.

The CCI can exercise its power to investigate notifiable transactions and, if required, unscramble a notifiable transaction only within one year of that transaction taking effect (although the CCI has expressly held that it can still levy a penalty even after the one-year period has expired).

2.12 Requirement for Clearance Before Implementation

The Indian merger control regime is suspensory in nature. Accordingly, a reportable transaction (or any part/step of such a transaction) typically cannot be consummated until clearance has been obtained from the CCI or the review period of 210 calendar days has expired, whichever is earlier.

A relaxation to this general rule is the "green channel" route, under which a transaction will be "deemed approved" on the day of filing the complete notification form (in the prescribed format) with the CCI. Therefore, under this route, parties do not have to wait for the CCI's approval after the filing before consummating a transaction.

The "green channel" route may only be used in cases where the parties, their respective group entities and/or entities in which they have: (i) direct or indirect shareholding of 10% or more; or (ii) the right or ability to exercise any right (including any advantage of commercial nature) that is not available to an ordinary shareholder; or (iii) the right or ability to nominate a director or observer to the board, have no horizontal overlaps, vertical relationships and are not engaged in any complementary businesses. The entities that cross the abovementioned thresholds are required to be mapped for ascertaining overlaps.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The power to impose a penalty under Section 43A of the Act (discussed in **2.2 Failure to Notify**) is taken by the CCI to extend to gun-jumping. Accordingly, if parties consummate a transaction (or any step of a notifiable transaction) prior to

CCI approval (or expiry of the waiting period), the CCI can impose a penalty of up to 1% of the combined turnover or assets of the transaction, whichever is higher.

The CCI has used these powers regularly, and has penalised parties for gun-jumping in approximately 22 cases. The conduct found to be problematic has previously included:

- allowing the acquirer to provide inputs on the business of the target prior to closing;
- a valuation methodology allowing the acquirer to exercise notional control over the target even prior to closing;
- pre-payment of consideration;
- the grant of a loan to the target prior to closing;
- providing a corporate guarantee on behalf of the target, to secure a loan prior to closing;
- gaining permissions to use the target's trade marks prior to closing; and
- closing the global leg of a deal pending CCI approval, etc.

Further, there have also been instances of imposition of penalties in foreign-to-foreign transactions. For instance, in Baxter/Baxalta (C-2015/07/297) and Eli Lilly/Novartis (C-2015/07/289) (which were foreign-to-foreign transactions) the CCI imposed a penalty of INR10 million (approximately USD131,000) each, as the parties had closed the global leg of the respective transactions before receiving the CCI's clearance.

As previously stated, the CCI's penalty orders are publicly available on its website.

2.14 Exceptions to Suspensive Effect

Presently, there are no general exceptions to the suspensory effect and the CCI is not empowered to grant any waivers or derogations.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As stated in **2.13 Penalties for the Implementation of a Transaction Before Clearance**, no step of a notifiable transaction can close prior to the CCI's approval (or until the expiry of 210 calendar days of the review process, whichever is earlier).

However, as stated in **2.1 Notification**, certain limited transactions involving financial institutions do not need to be pre-notified and can be notified post-consummation.

Further, the CCI has made it clear that it is not possible to carve out the India-related part of a global transaction and implement the global closing prior to obtaining CCI approval (see, for example, Baxter/Baxalta and Eli Lilly/Novartis).

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

As set out in **2.2 Failure to Notify**, parties can notify reportable transactions at any time after the trigger event, but before consummating any step of the notifiable transaction.

If the parties fail to notify a reportable transaction prior to closing, or at all, the CCI has the power to impose a penalty of up to 1% of the combined turnover or assets, whichever is higher, of the transaction (and the CCI has regularly relied on such powers to penalise enterprises). These penalty orders are public.

3.2 Type of Agreement Required Prior to Notification

In the case of acquisitions, an executed agreement or any other binding document (for instance, a term sheet, a letter of intent, a memorandum of understanding that sufficiently captures the key commercials of the transaction) can act as a trigger document. A public announcement under the relevant takeover regulations can also act as a valid trigger document.

For mergers/amalgamations, the final board approval approving the merger is the relevant trigger event.

It should be noted that a filing cannot be made when there is nothing in writing, for instance, based on good-faith intentions to reach an agreement.

3.3 Filing Fees

The filing fee for Form I (Short Form) (including the "green channel" route) is INR2 million (approximately USD26,500) and for Form II (Long Form) is INR6.5 million (approximately USD85,000). The filing fee is to be paid at the time of filing the notification form by the party responsible for the filing (as discussed in **3.4 Parties Responsible for Filing**).

3.4 Parties Responsible for Filing

In an acquisition, the acquirer is responsible for the filing and payment of the filing fee. In a merger/amalgamation, the parties are jointly responsible for the filing and payment of filing fee.

3.5 Information Included in a Filing

Detailed information is required for both Form I and Form II.

In Form I, parties are required to submit information such as a description of their activities and products (worldwide and in India), transaction structure and rationale, asset and turnover values, control/shareholding and other details of their relevant groups, all investments (including minority investments) in the relevant market, sector overview, description of the relevant market (including for horizontal overlaps and vertical relationships), market shares, customer and supplier details, and structural/financial links between the parties. The documents required to be filed along with Form I include transaction documents, financial statements, proof of authorisation, declaration, market reports and documents considered by the board (for competitor deals).

Form II requires more detailed information/documents. The CCI has recently amended Form II with effect from 1 May 2022, with the aim of removing duplication and certain information/data requirements that may have not been strictly required for the competitive assessment of the transaction. However, it has increased the level of information required to be provided for vertical relationships, and other data-related queries.

In addition to the information/documents required to be submitted with Form I, Form II also requires parties to submit details of all major shareholders, details of all antitrust cases in the past five years, and significantly more information on the market, such as market-facing data for the past five years (including market share of parties for horizontal overlaps and information regarding competitors, customers and suppliers), detailed analysis and market shares for vertical and complementary arrangements, details of level of concentration in terms of number of enterprise CR4 Index (in addition to the HHI), entry/exits, proportion of imports and exports, entry barriers, local specifications, list of applicable laws and R&D/pipeline products.

3.6 Penalties/Consequences of Incomplete Notification

If certain information that is not very significant is missing from the notification, the CCI typically issues a "request for information" to the parties during the review process to gather that missing information. However, if the notification is significantly incomplete (with key/basic details missing), the CCI has the power to invalidate the notification, and often does so. As a result of invalidation, the review clock is reset (leading to a longer overall review process) and the 210-day statutory review period restarts.

There are no penalties for this invalidation, and the Regulations state that the filing fees will be adjusted to the new form filed. Separate penalties/consequences may accrue for inaccurate/misleading information, as discussed in **3.7 Penalties/Consequences of Inaccurate or Misleading Information**.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Under the Competition Act, parties may be fined between INR5 million (approximately USD65,500) to INR10 million (approximately USD131,000) for providing false information or omitting to state material information.

The CCI has imposed these fines in at least four cases in the past, with the latest being in the Amazon/FCPL case, discussed in **2.2 Failure to Notify**. In Amazon/FCPL, the CCI imposed a fine of INR20 million (approximately USD261,000) on Amazon for suppressing the actual scope and purpose of the transaction, ie penalty of INR10 million (approximately USD131,000) each under the provisions of Section 44 and 45 of the Competition Act (in addition to the penalty imposed for failure to notify certain steps). Therefore, parties should be cautious and disclose complete facts concerning the market, related transaction steps and competitive landscape.

3.8 Review Process

The CCI's review process involves two phases, namely, Phase I and Phase II. The latter is for more problematic transactions that are not cleared in Phase I.

Phase I Review

In its Phase I review, the CCI is required to form a prima facie opinion on whether a transaction causes or is likely to cause an AAEC within the relevant market in India, within 30 working days of the filing. This period will be extended by 15 working days if the CCI reaches out to third parties (such as customers, competitors, suppliers and government agencies). This period may be further extended by 15 calendar days if the parties offer remedies in Phase I.

If the CCI requests information or requires parties to remove defects, it "stops the clock", which is restarted only after the parties have filed the complete information sought. Therefore, in practice, the Phase I review lasts between 60 and 90 days in non-problematic transactions. To date, all but eight transactions have been cleared by the CCI in Phase I.

Phase II Review

If the CCI forms a prima facie view that a transaction is likely to cause an AAEC in India, the CCI will issue a show-cause notice (SCN) asking the parties to explain within 30 calendar days why an in-depth investigation should not be conducted. After reviewing their response, if the CCI is still of the view that the transaction is likely to cause an AAEC in India, it will proceed with a detailed Phase II investigation.

If the transaction moves to Phase II, parties are required to publish details of the combination in four leading national daily newspapers and on the parties' websites, inviting comments from the public. The public has 15 working days to furnish their comments. Thereafter, the CCI may call for additional information from the parties. After receipt of this additional information, the CCI has 45 working days to allow or block the transaction or propose modifications (ie, remedies). Therefore, in Phase II, the CCI first proposes modifications (although, informally, it allows parties to initiate this through informal discussions). The parties may then accept those modifications or propose their own amendments to the modifications, within 30 working days. If the amendments are rejected by the CCI, the parties have 30 additional working days in which to accept the original modifications proposed by the CCI. If the parties accept the proposed modifications, the combination is approved. If the parties still fail to accept the CCI's modifications, the combination is deemed to have an AAEC in India and cannot take effect.

The CCI has an overall period of 210 calendar days from the date of notification to conclude its entire review. However, this 210-day period excludes two periods of 30 working days (the time taken to negotiate modifications), as well as any extensions taken by the parties to furnish additional information. Therefore, in several cases, the overall period has exceeded 210 days.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions (termed as "pre-filing consultations" in India) with the CCI, on both procedural as well as substantive issues.

On procedural issues, parties can seek the CCI's guidance on various interpretational issues, such as on notifiability of certain "grey-area" transactions, computation of assets/turnover, availability of specific exemptions, or whether to file a short form or a long form. The pre-filing consultation can be done on a no-names basis and, although not statutorily protected, confidentiality is usually granted for the process.

In relation to substantive consultations, parties have the option of submitting draft notification forms to the CCI to ascertain gaps, and to align on relevant market definitions, etc, which will help to expedite the review once the actual notification form has been filed. Lately, the CCI has been encouraging the parties to use this tool.

The CCI's advice during such consultations is informal, verbal and non-binding.

3.10 Requests for Information During the Review Process

Information requests are fairly common in both Phase I and Phase II. The scope of these information requests can often be burdensome, and parties are often required to file information/documents that may not be strictly relevant for the competitive assessment.

The time taken by parties to furnish the complete information sought for is excluded from the review timeline.

3.11 Accelerated Procedure

The short form (Form I) is the default notification form and can be filed where:

- the parties are competitors and have a combined market share in the same market of less than 15%; or
- the parties are in vertically linked markets and the combined/individual market share in any of these markets is less than 25%.

The short form is itself quite burdensome and requires more detailed information than comparable short-form filings in other jurisdictions.

As also mentioned in **2.12 Requirement for Clearance Before Implementation**, the CCI has introduced a "green channel" route, under which transactions with no horizontal overlaps, vertical or complementary relationships may be deemed approved on the same day of filing the complete notification form with the CCI.

There are no other formal provisions to expedite the CCI review process, although parties can informally engage with the CCI to ascertain what additional information they should submit to accelerate their review process.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test employed by the CCI is whether the transaction causes or is likely to cause an AAEC in the relevant market in India. While undertaking such an assessment, the CCI is required to consider various factors provided under Section 20(4) of the Competition Act, including market shares, barriers to entry, ability to raise prices post-transaction, countervailing buyer power, etc.

In practice, the CCI relies heavily on market shares for its assessment.

4.2 Markets Affected by a Transaction

The CCI's review is primarily focused on:

- horizontal markets where the parties have overlapping activities;
- vertically related markets, where the parties have an actual or potential vertical relationship; and
- complementary activities between the parties.

The CCI defines both relevant product and geographic markets.

While defining relevant product markets, the CCI considers both demand and supply-side substitutability along with other relevant factors. While defining a relevant geographic market, the CCI considers various factors such as regulatory trade barriers, local specification requirements, transport costs, etc.

In cases where the CCI defines the relevant market broadly (or ultimately does not define a relevant market), it typically still requires parties to submit data at the narrowest level.

There are no pre-defined market share thresholds above which a transaction is considered problematic. This will need to be determined on a case-by-case basis, based on various factors including the market shares of the remaining competitors, nature and structure of the markets, pricing power of the parties following the transaction, etc.

Typically, cases where the parties have combined market shares below 35%, along with the presence of strong competitors in the market, would not be considered problematic.

4.3 Reliance on Case Law

The CCI frequently relies on its own past precedents and in the absence of any CCI precedents, it will often look at case law in other jurisdictions, particularly those of the EU and the USA. To a lesser extent, it also relies on precedents from jurisdictions such as Brazil, China, Russia, South Africa and the UK.

4.4 Competition Concerns

The CCI focuses more on unilateral effects. Typically, the CCI relies on a market share analysis as a starting point for this assessment.

With the CCI becoming more experienced, it has also started to examine closely co-ordinated effects and vertical concerns, as well as portfolio effects (which has lately become a hot topic for the CCI).

4.5 Economic Efficiencies

The Competition Act prescribes various efficiency-related factors that the CCI may consider while reviewing a transaction, including potential innovation, economic development, and whether the benefits of the transaction outweigh any adverse impact.

In its limited decisional practice on efficiencies, the CCI has indicated that any efficiencies claimed by the parties should be:

- merger-specific;
- verifiable;
- quantifiable (including what will be passed on to consumers); and
- outweigh competition concerns.

To date, the CCI has not unconditionally cleared any transaction that was likely to cause an AAEC in India, solely on the grounds that the efficiencies outweighed the competition concerns.

4.6 Non-competition Issues

The Competition Act does not mandate the CCI to consider any non-competition issues in its review process and it has not done so in practice. In fact, in Walmart/Flipkart (C-2018/05/571), the CCI expressly held that it would not consider any non-competition issues.

However, it should be noted that the CCI is able to take account of the relative advantage through economic development, and, to that extent, a limited non-competition issue may be taken into account (although this does not appear to have happened in practice).

There are also separate laws governing foreign direct investments (FDI) into India, prescribed under the FDI Policy (separate from the merger control laws in India). Separate filings may be required with the Foreign Investment Promotion Board depending on the sector involved.

4.7 Special Consideration for Joint Ventures

The CCI does not appear to give any special considerations in its substantive review of joint ventures.

The CCI's decisional practice has suggested that it may consider co-ordination issues between parent entities, their groups and their other joint ventures. In at least two cases, the CCI has required remedies in the form of information-sharing and other restrictions, to prevent any "spill-over" effects and potential co-ordination in relation to the other businesses of the parent entities (not forming part of the joint venture). Further, the CCI may also examine co-ordination issues between joint-venture parents outside its merger review, under its enforcement provisions (ie, anti-competitive agreements).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The CCI is able to prohibit or require modifications to a transaction if it is of the view that the transaction is likely to cause an AAEC in the relevant market in India.

The CCI has cleared a number of cases in Phase I, where parties have voluntarily offered a number of modifications. These include the scope of non-compete obligations, undertakings to comply with competition law, giving access to infrastructure, divestments and ring-fencing commitments.

During the course of its Phase II investigation, the CCI may propose appropriate modifications if it is of the view that a transaction causes or is likely to cause an AAEC in India, but such concerns can be eliminated through modifications. The parties then have an opportunity to accept those modifications or propose their own (which may or may not be accepted by the CCI). If the CCI believes that the adverse effect cannot be eliminated by suitable modifications, it can prohibit the transaction, although in practice it has never done so.

The CCI also has the ability to initiate inquiries on its own motion into reportable transactions that were not notified to it.

5.2 Parties' Ability to Negotiate Remedies

The Regulations allow the parties to offer remedies first in Phase I, in order to avoid the transaction moving to a Phase II review.

In Phase II, it is the CCI that first proposes remedies (and the parties have a right thereafter to file a counter-offer, which may or may not be accepted by the CCI). The detailed remedy process has been set out in **3.8 Review Process**.

The CCI typically tailors remedies to the specific circumstances of each case, after considerable negotiations.

5.3 Legal Standard

The remedies offered must be sufficient to address the specific AAEC concerns identified in a particular transaction in India. The CCI has made it clear that it will tailor remedies to the facts of each case and that it will not follow a "one-size-fits-all" approach. In addition, the remedies should be such that they can be monitored and implemented effectively.

5.4 Typical Remedies

To date, the CCI has imposed:

- structural remedies in approximately 12 cases;
- hybrid remedies (ie, a mix of structural and behavioural) in approximately three cases; and
- behavioural/non-structural remedies in approximately seven cases.

While the CCI has been receptive towards behavioural/hybrid remedies in certain cases, it typically prefers structural remedies, given that it is a "one-time fix".

Some of the key decisions pertaining to structural remedies are:

- divesture of the business of the target (Abbott C-2016/08/418);
- divesture of the relevant products sold by the target in India (China National Agro/Sygenta C-2016/08/424);
- divesture of specified products of each party (Sun/Ranbaxy C-2014/05/170);
- divesture of one of the parties' stake in a joint venture with a competitor (Linde/Praxair C-2018/01/545);
- divestiture of the business in India through an exclusive and irrevocable licence of the technology in India (Metso/Outotec C-2020/03/735); and
- divesture of shareholding in companies involved in the same relevant market and a commitment not to acquire a stake in such companies for a specified period (Agrium/Potash C-2016/10/443) (ZF/WABCO C-2019/11/703).

The CCI has also accepted hybrid or non-structural remedies in various cases (PVR/DT C-2015/07/288, Bayer/Monsanto C-2017/08/523, L&T/Schneider C- 2018/07/586, ChrysCapital/Intas C-2020/04/741, etc). Non-structural remedies have largely been accepted to address concerns in relation to access, spill-over effects, consumer protection and structural links. However, in one case (L&T/Schneider), the

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Shardul Amarchand Mangaldas & Co

CCI has also accepted behavioural remedies to address unilateral effects where the parties were direct competitors (remedies including price-caps, white-labelling, grant of technology licence, amendments to distribution agreements, etc, were accepted).

In ChrysCapital/Intas (2020), for the first time, the CCI imposed a remedy in a minority acquisition by a private equity fund. The CCI approved the transaction on the condition that the acquirer will remove its nominee director on the board of a competing portfolio entity and will not exercise its veto rights on certain strategic matters in that entity. This represents a shift in the CCI's approach to transactions involving common minority ownership.

As the CCI's concerns are restricted to AAEC in India, remedies are not required to address non-competition issues.

5.5 Negotiating Remedies With Authorities

As previously stated, parties can voluntarily offer remedies during Phase I to address any AAEC concerns and avoid the transaction moving to a Phase II review. In Phase II, it is the CCI that will first propose remedies (although it allows the parties to set the ball rolling themselves through informal discussions), and parties may thereafter submit a counter-offer, which may or may not be accepted by the CCI. See **3.8 Review Process** for the detailed steps/process on remedy negotiations.

5.6 Conditions and Timing for Divestitures

The necessary condition for the CCI to propose remedies is a prima facie finding that the transaction causes an AAEC in India. The timing of the remedy process has been set out in **3.8 Review Process**.

Parties may be able to consummate a transaction prior to the remedies being implemented, if a "fix-it-later" divestiture (rather than a "fix-it-first", where a buyer is required to be found before consummating the transaction) is imposed by the CCI. A "fix-it-first" divestment has only been required in one case, and in all others the CCI has allowed a "fix-it-later".

If the remedies are not implemented, the CCI has the power to revoke the approval order and/or impose penalties of up to INR100,000 per day (approximately USD1,300), subject to a maximum of INR100 million (approximately USD1.3 million). A term of imprisonment may also be imposed in certain cases.

5.7 Issuance of Decisions

A formal decision permitting or prohibiting the transaction is issued to the parties. A public version of the decision (which does not contain any confidential information) is also uploaded on the CCI's website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As stated in **5.4 Typical Remedies**, the CCI has required remedies in a number of transactions. While several of these were transactions between two foreign entities (for instance, Holcim/Lafarge, Linde/Praxair, ChemChina/Syngenta, ZF/WABCO), both companies had a substantial presence in India.

To date, the CCI has not prohibited a transaction.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The CCI requires parties to file all ancillary arrangements along with the notification form. The CCI's approval of the transaction also typically covers ancillary restraints, and separate notifications are not possible for them.

If these arrangements are not covered by the clearance, the CCI may review such arrangements separately under its enforcement provisions.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties may be involved in both Phase I and Phase II of the review process.

In Phase I, the CCI can reach out to third parties for their comments and observations on the transaction (this typically happens through written questionnaires and interviews). The CCI is increasingly contacting third parties during the Phase I review period. Third parties have no right to be formally involved in the Phase I process, and it is at the CCI's discretion whether to reach out to such third parties.

If the review goes into the detailed Phase II process, public consultation is a mandatory requirement. Any member of the public may file written objections within 15 working days from the date of publication of the details of the combination. In various cases (for instance, PVR/DT, Bayer/Monsanto, L&T/Schneider, etc), numerous third parties filed their objections to the transaction.

Third parties can only present their submissions/objections in writing to the CCI and there is no provision for an oral hearing for third parties before the CCI.

7.2 Contacting Third Parties

The detailed framework for contacting third parties is discussed in **7.1 Third-Party Rights**.

7.3 Confidentiality

The fact of the notification and description of the transaction is made public when the CCI publishes a non-confidential summary of the transaction on its website, after the parties have filed the notification form. Separately, the CCI's final order (which does not contain any confidential information relating to the transaction) is made public. These decisions are published on the CCI's website.

The CCI allows requests for confidentiality to be made in writing by parties. Parties are permitted to claim confidentiality of information in cases where disclosure:

- would result in disclosure of trade secrets;
- would result in destruction or appreciable diminution of the commercial value of any information; or
- can reasonably be expected to cause serious injury.

The CCI has recently amended its confidentiality framework, including the introduction of a "self-certification" requirement, pursuant to which parties have to certify that their confidentiality claims are consistent with the CCI's prescribed requirements.

7.4 Co-operation With Other Jurisdictions

The CCI can and does reach out to competition authorities in other jurisdictions, especially the EU, the USA, Brazil, Russia and South Africa. However, before exchanging information on specific transactions with other competition authorities, the CCI typically seeks a specific waiver from the parties.

On general policy matters, the CCI has signed MOUs with several foreign competition authorities, including authorities in the EU, the USA, Brazil, Russia, South Africa, Canada, Japan and Australia.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Any person aggrieved by an order of the CCI approving/prohibiting a transaction, or imposing fines for gun-jumping/delayed filing, may file an appeal with the National Company Law Appellate Tribunal (NCLAT) within 60 days. Orders of the NCLAT can be further appealed to the Supreme Court.

8.2 Typical Timeline for Appeals

The Competition Act provides that appeals before the NCLAT must be dealt with expeditiously and the NCLAT must endeavour to dispose of appeals within six months. An appeal before the Supreme Court may take two to three years or even longer.

The appellate authorities have generally upheld the CCI's order on merits, or have refrained from interfering on the grounds of absence of locus standi of the appellant.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Under the Competition Act, only an "aggrieved party" may file an appeal against the CCI's decisions (including clearance decisions). Previously, in Jet/Etihad, the appellate authority held that a third party was not an "aggrieved party" and the appeal was dismissed. However, in the Walmart/Flipkart case, the NCLAT adjudicated an appeal filed by a third party on its merits. It therefore appears that third parties may have a right to appeal merger decisions in certain limited cases.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

Recent Amendments

- As highlighted in **2.1 Notification** and **2.2 Failure to Notify**, the CCI has extended the validity of: (i) the Target Exemption; and (ii) the Trigger Exemption.
- As highlighted in **3.5 Information Included in a Filing**, the CCI has amended Form II with effect from 1 May 2022, with the aim of streamlining the information requirement.
- As highlighted in **7.3 Confidentiality**, in April 2022, the CCI amended the confidentiality regime to include the "self-certification of confidentiality claims".

Proposed Amendments

The Government of India had launched a public consultation on a new draft Competition Amendment Bill (dated 12 February 2020). Proposed amendments included revisions in the process for setting thresholds (including introduction of deal-value based thresholds), changes to the definition of "control", reducing the review timeline, and introducing the possibility of seeking waivers of the standstill obligation. The bill has yet to be reviewed and approved by Parliament.

The CCI had previously (in November 2019) sought to introduce provisions allowing waivers of the standstill obligations, through an amendment to the Regulations itself, and had sought public comments on its draft amendments. It remains to be seen whether these proposed amendments will be implemented.

9.2 Recent Enforcement Record

The CCI has regularly imposed fines for failure to file, and for gun-jumping, with fines ranging between INR100,000 (approximately USD1,300) to INR50 million (approximately USD655,000), barring the Amazon order, which seems to be a one-off case.

As highlighted previously, in the past three years (2020-2022), the CCI has imposed fines for gun-jumping in around seven transactions, with the fine ranging from INR500,000 (approximately USD6,530) to INR50 million (approximately USD655,000), barring the Amazon order.

The CCI has imposed structural, behavioural and hybrid remedies in a number of cases (including foreign-to-foreign transactions, which had a strong impact in the Indian market).

As further highlighted in **5.4 Typical Remedies**, in April 2020, the CCI imposed for the first time a remedy in a minority acquisition by a private equity fund in order to address its concerns in relation to common minority shareholdings (ChrysCapital/Intas). Further, in June 2020, the CCI accepted a remedy pursuant to which the target would effectively transfer its business in India through an exclusive and irrevocable licence of the technology in India (Metso/Outotec).

Therefore, the CCI has not followed a "one-size-fits-all" approach to remedies and has tailored remedies to the specific facts of a case.

The CCI has not blocked any transaction to date.

9.3 Current Competition Concerns

Greater Scrutiny for Private Equity (PE) Deals/Minority Investments

Of late, the CCI has been scrutinising private equity (PE)/minority investment deals more closely. It is seeking a greater level of information/details regarding a PE firm's other investments (including minority investments) in the same sector.

The CCI has also announced that it is conducting a market study on the private equity investments landscape in India.

More Holistic Competitive Analysis

The CCI's competitive assessment has become much more detailed and granular over the years. The CCI no longer focuses only on unilateral effects; rather, it is also focusing on vertical and portfolio effects, as seen in Siemens/Varian, Bayer/Monsanto and L&T/Schneider.

Review of Internal Documents

The CCI is increasingly relying on internal documents (including board agendas, studies, internal analysis, research data) while examining transactions (Adani/SB Energy, Amazon/Future, CPPIB/ReNew, Adani Ports/SEZ). Therefore, parties should ensure that nothing contained in these documents could potentially be used against them in current or future deals.

Contributed by: *Shweta Shroff Chopra, Aparna Mehra, Ritwik Bhattacharya and Kshitij Sharma,*
Shardul Amarchand Mangaldas & Co

Shardul Amarchand Mangaldas & Co is one of India's leading law firms recognised by international organisations, law directories and professional journals. It is a full-service law firm that delivers solutions in the field of mergers and acquisitions, tax, competition law, dispute resolution and arbitration, regulatory litigation, capital markets and private equity practices. It has over 730 lawyers, including over 140 partners, with offices in New Delhi, Mumbai, Gurugram, Ahmedabad, Kolkata, Bengaluru and Chennai. The competition law team of SAM & Co has a proven track record of successfully steering clients through some of the largest transactions, complex investigations and high-stakes litigation. It has the largest competition law practice in India, with close to 50 dedicated lawyers, including ten partners.

AUTHORS

Shweta Shroff Chopra is a partner in SAM & Co's competition law practice, and has over 18 years' experience in advising on financing, corporate and competition law matters. On the merger control front, Shweta has significant experience and has led on various landmark deals, such as Reliance/Future, Holcim/Lafarge, Vodafone/Idea, GE/Alstom, PVR/DT, and Flipkart/Walmart. Shweta is a non-governmental adviser to the International Competition Network (ICN) for India and has worked closely with the Competition Commission of India (CCI) on changes to India's merger control rules over the years. She has also co-authored several guides on the law of dominance and merger control in India.

Aparna Mehra is a partner in SAM & Co's competition law practice. She is a merger control specialist and has been involved in several high-profile merger control matters, including ZF/WABCO, Aakash/BYJU'S, Reliance Retail/Future Group, ChrysCapital/Intas, L&T/Schneider, GE/Alstom, PVR/DT, Zuari/Mangalore Chemicals, HP/Samsung and Videocon/Dish. Aparna has co-authored several competition law publications. Aparna also conducts an elective course on merger control at O.P. Jindal Global University.

Ritwik Bhattacharya is a principal associate in SAM & Co's competition law practice, with nine years of experience in this field. He has been involved in some of the most landmark merger control cases before the CCI, including ZF/WABCO, L&T/Schneider, PVR/DT Cinemas, Suzuki/Toyota, Facebook/Jio, Siemens Healthineers/Varian, HP/Samsung, Konecranes/Terex, OMERS/Azure and Capgemini/iGate. He has co-authored several competition law publications.

Kshitij Sharma is an associate with SAM & Co's competition law practice. He has advised national and international clients on all aspects of Indian competition law, with a specific emphasis on merger control, spanning a wide variety of business segments, including e-commerce, education, manufacturing, automotives, pharmaceuticals and financial services. He has been involved in a number of high-profile merger control cases before the CCI, including Reliance Retail/Future Group, ChrysCapital/Intas, ZF/WABCO, Aakash/BYJU'S, and Kubota/Escorts. He has co-authored several competition law publications.

Shardul Amarchand Mangaldas & Co

Amarchand Towers
216, Okhla Industrial Estate Phase III
New Delhi - 110 020
India

Tel: +91 11 4159 0700
Fax: +91 11 2692 4900
Email: aparna.mehra@amsshardul.com
Web: www.amsshardul.com

Shardul Amarchand Mangaldas

Trends and Developments

Contributed by:
Vaibhav Choukse, Farhad Sorabjee, Nripi Jolly and Faiz Siddiqui
***JSA** see p.296*

Introduction

The Indian merger control regime is governed by the Competition Act 2002 (Competition Act), the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended) (Combination Regulations), and notifications issued by the Government of India (GoI) from time to time. The Competition Commission of India (CCI) carries out an ex-ante review of transactions proposed to be undertaken to ensure that these do not cause an appreciable adverse effect on competition in India (AAEC). The merger control regime in India has been in force for 11 years.

Under Section 6 of the Competition Act, all "combinations" require prior approval of the CCI. A combination means the acquisition of control, shares, voting rights or assets, or a merger or amalgamation exceeding the "thresholds" prescribed under Section 5 of the Competition Act. However, a combination does not require approval of the CCI if it is exempt under the Combination Regulations or any of the GoI notifications. The parties cannot consummate a combination or any part thereof before receipt of CCI approval or until the lapse of 210 days from the date of notification of a combination to the CCI.

Despite the upheavals caused by the COVID-19 pandemic, the CCI has continued its merger enforcement activities apace, and 26 months into the pandemic, there has been little change in the CCI's responsiveness or its priorities. Since March 2020, the CCI has been functioning virtually with the standard operating procedure in place for virtual hearings and it has now started accepting physical filings of merger notifications.

Between June 2021 and April 2022 (Relevant Period), the CCI reviewed 75 merger notifications, out of which 50 were reviewed under the regular Form I (Short Form), 21 under the green channel (GCR) Form I, and four under Form II (Long Form). Separately, three notices were invalidated by the CCI, and the parties were asked to file again.

As the CCI evolves, it demonstrates maturity in its approach to dealing with complex combinations such as Reliance Industries/Sintex, Byju/Aakash Educational Services, Tata Digital/BigBasket, Tata Group/Air India, FedEx Express/Delhivery, Heineken International/United Breweries, and internal restructuring of TV Sundaram Iyengar & Sons Private Limited (TVS) Group.

To date, over 98% of the notified transactions have raised no competition concerns and were approved without much ado. During the Relevant Period, the CCI took an average of approximately 17 working days to approve a combination. No combination has been prohibited to date. However, in an unprecedented move, in December 2021, the CCI for the first time suspended its approval granted to Amazon in November 2019 for acquiring a 49% shareholding in Future Coupons.

Key Changes in the Law

Extension of Small Target Exemption

The GoI vide notification dated 16 March 2022 extended the applicability of the small target exemption for another five years, ie, until 29 March

2027 (Small Target Exemption), and the asset and turnover threshold remains unchanged. The Small Target Exemption exempts a transaction from notification to the CCI in case the target entity either has assets less than INR350 crores (approximately USD46.45 million) or turnover less than INR1,000 crores (approximately USD132.72 million) in India.

Extension of exemption from notifying a combination within 30 days of the trigger event

The GoI vide notification dated 17 March 2022 extended the exemption from reporting a combination to the CCI within 30 days from a trigger event, for another five years, ie, until 29 June 2027, thereby allowing a notifying party to notify a combination at any time after the trigger event. Usually, a trigger event is the date of signing of the definitive/binding document(s) in relation to a combination.

Revision of the long form (Form II)

On 31 March 2022, the CCI modified the Long Form. The Combination Regulations prescribe two forms for filing a merger notification. Ordinarily, all combinations are required to be notified to the CCI in Short Form. However, based on self-assessment, the parties remain free to notify a combination in Long Form. A Long Form is recommended to be filed if the parties to a combination are:

- competitors and have a combined market share of more than 15% in the same market; or
- vertically linked and the combined or individual market share in any of these markets is greater than 25%.

Pursuant to the amendment, parties will be required to provide the following additional information:

- market-facing information of parties and their top five competitors, suppliers and customers for the past five years;
- details concerning potential disruptions in the relevant market(s) including technological disruptions, changes in business models, supply arrangements, etc;
- level of concentration on the basis of four-firm concentration index; and
- regarding pipeline products/services, acquisitions and expansion (in terms of capacity/geographies) of the parties.

The CCI has also eased the information-gathering process and removed the requirement of seeking information such as details of: (a) pricing policies and price lists of the parties and their competitors; (b) in-house consumption in terms of quantity and value for each relevant product/service; (c) parties' distribution channels and service networks, etc. The CCI also intends to publish guidance notes for revised Long Form.

Amendments to confidentiality provisions

On 8 April 2022, after public consultation, the CCI amended the confidentiality provisions in the CCI (General) Regulations 2009 (General Regulations). As per Combination Regulations, a request for confidentiality in case of a combination is required to be considered after having due regard to the procedure laid down in the General Regulations. The key amendment having an impact on a combination is the requirement to furnish an undertaking while seeking confidentiality and the creation of a confidentiality ring.

Self-certification of confidential information: parties seeking confidentiality on any information will have to submit an undertaking certifying that the confidentiality claims are in terms of the parameters enlisted under the General Regulations. This self-certification will automatically grant confidentiality over information claimed as confidential.

Confidentiality ring: where necessary, the CCI can create a confidentiality ring comprising authorised representatives of the parties, for accessing confidential information of other parties. The CCI will have the power to decide the extent of information to be made accessible through, as well as the number of members to be included in, the confidentiality ring.

Developments Relating to Merger Remedies

The Indian merger control regime has seen a noticeable shift in the nature of the CCI's review of combinations. In its initial days, the CCI's review and modifications dealt with benign changes to the transaction structure, such as the duration of the non-compete obligation. After a couple of years, the CCI's approach to address AAEC concerns resulted in ordering several divestitures. In the recent past, the CCI's approach demonstrates restraint, but ensures that the competition dynamics in the markets are not adversely affected.

To date, the CCI has imposed modifications in 37 notified transactions (including modifications to non-compete obligations). The industry also seems to have understood the areas that may be of concern to the CCI and have often adopted the option of offering voluntary modifications (since October 2018). In the Relevant Period, all the combinations were approved unconditionally.

Developments Relating to Gun-Jumping and Suppression of Material Facts

The Indian merger control regime is mandatory and suspensory in nature. Accordingly, if any party, partially or in full consummates a combination, prior to the approval of the CCI, it would be considered "gun-jumping". Additionally, the CCI has also increased its focus on instances of suppression/omission of material information by the parties in the notification form.

The penalty for gun-jumping may extend up to 1% of the total turnover or the assets, whichever is higher, of the combination. The penalty for the omission of material facts in relation to a combination (Section 44) shall not be less than INR50 lakhs (USD66,357) but can reach up to INR1 crore (USD0.13 million).

To date, the CCI has found gun-jumping violations in 45 out of approximately 900 combinations.

In the Relevant Period, the CCI issued six orders on gun-jumping and one order on Section 44 of the Competition Act:

Amazon/Future Coupons

On 23 September 2019, Amazon filed a notice for the acquisition of a 49% shareholding in Future Coupons, which was approved by the CCI on 28 November 2019 (referred to as the "Amazon-Future Transaction").

Prior to the execution of the Amazon-Future Transaction, Future Coupons had acquired equity warrants (equivalent to a 7.30% shareholding) of Future Retail Limited (FRL) (referred to as the "Warrants Transaction") pursuant to the execution of the shareholders' agreement dated 12 August 2019 (FRL SHA).

Amazon (through its group entities) had entered into certain business arrangements with FRL (collectively referred to as "Commercial Arrangements"). In the notice to the CCI, Amazon had submitted that the Commercial Arrangements and the FRL SHA were not connected with the Amazon-Future Transaction and that it had limited investor protection rights in Future Coupons to protect its investment. Additionally, certain rights that were granted to Amazon with respect to Future Coupons' investment in FRL could only be exercised through Future Coupons.

In March 2021, Future Coupons filed an application before the CCI stating that Amazon had submitted before the arbitration and court proceedings that the FRL SHA is linked to the Amazon-Future Transaction, which is contradictory to their submissions before the CCI. Further, the actual purpose of the Amazon-Future Transaction was to achieve a strategic alignment with the Future Group to attain a 'foot-in-door' in the Indian retail sector via FRL, which was not disclosed to the CCI.

On the basis of the available evidence, the CCI noted that: (a) Amazon's earlier intent was to acquire an approximately 10% shareholding in FRL directly, along with entering into business arrangements with Future Group. However, since the said acquisition could not be implemented, Amazon, indirectly through the Amazon-Future Transaction, sought to acquire a shareholding in FRL; and (b) FRL SHA and Commercial Agreements were negotiated as a part of the Amazon-Future Transaction and were interconnected but were not disclosed as such in the notice to the CCI.

Accordingly, the CCI imposed a penalty of INR200 crores (USD26.54 million) for gun-jumping, and INR2 crores (USD0.13 million) for not furnishing certain material information. This has been the highest penalty imposed on any party for gun-jumping so far by the CCI. Further, the CCI also directed Amazon to file the notice for the Amazon-Future Transaction in Long Form within 60 days from receipt of the order and until then, the Amazon-Future Transaction stands suspended.

Aggrieved, Amazon filed an appeal before the National Company Law Appellate Tribunal (NCLAT). On 13 June 2022, the NCLAT passed its final order upholding the order of the CCI and held as follows:

- In the notice filed with the CCI for seeking approval of the Amazon-Future Transaction, Amazon categorically mentioned that the Commercial Arrangements were not part of the said transaction. This is contrary to their stand before the arbitrator and High Court of Delhi.
- Amazon failed to disclose certain documents to the CCI, which revealed that the real purpose of the Amazon-Future Transaction was an investment in FRL and establishing a strategic partnership between Amazon and Future Group in the Indian retail sector. Due to such non-disclosures, the CCI was misled into approving the said transaction.
- When an approval has been obtained by fraud/misrepresentation, the CCI has residuary powers under Section 45(2) of theCompetition Act to suspend/revoke it.
- Amazon had not made full disclosure or notified the complete/actual transaction to the CCI and in absence of the said notification, and the consequent approval from the CCI, the period of limitation as mentioned under Section 20(1) of the Competition Act will not be applicable.

In view of the above, the NCLAT dismissed the appeal and upheld the penalty of INR 200 crores (USD26.54 million) on Amazon for gun-jumping. However, it reduced the penalty of INR2 crores (USD0.26 million) for suppressing the actual scope of the Amazon-Future Transaction to INR1 crore (USD0.13 million).

The NCLAT has also directed Amazon to file a notice with respect to the actual transaction before the CCI in Long Form within 45 days from the date of the judgment and until then the approval order of the CCI shall be kept in abeyance.

Investcorp India Asset Managers Private Limited/Venture capital fund and alternate investment funds managed by IDFC Alternatives Limited

On 1 February 2019, Investcorp India consummated its acquisition of venture capital fund and alternate investment funds (Target Funds) managed by IDFC Alternatives (referred to as the "Investcorp Transaction") without seeking CCI approval.

Investcorp's primary contention was that the Transaction availed the benefit of the Small Target Exemption and was not notifiable to the CCI. Additionally, only the value of assets and turnover of the Target Funds alone need to be considered for assessing the Small Target Exemption.

The CCI inter alia noted that: (a) through the Investcorp Transaction, Investcorp India became the investment manager of the Target Funds and acquired operational control over them and resultantly gained control over the portfolio companies as well; (b) the value of assets and turnover of the controlled portfolio companies of the Target Funds would also need to be considered and the same breach the Small Target Exemption and Section 5 financial thresholds; and (c) Section 5 financial thresholds do not operate on the basis of proportionality for the purpose of computing the financial thresholds. Accordingly, the CCI imposed a penalty of INR20 lakh (USD26,643) on Investcorp India.

Tata Power Company Limited/Western Electricity Supply Company of Odisha Limited, Southern Electricity Supply Company of Odisha Limited and Central Electricity Supply Company of Odisha Limited

In 2016 and 2020, the Orissa Electricity Regulatory Commission (OERC) initiated the competitive bidding processes for the sale of 51% shareholding of: (a) Western Electricity Supply Company of Odisha Limited (WESCO); (b) Southern Electricity Supply Company of Odisha Limited (SOUTHCO); and (c) Central Electricity Supply Company of Odisha Limited (CESU). Tata Power Company Limited (TPCL) was declared as the successful bidder for each of the bids. TPCL closed the acquisition of 51% in WESCO, SOUTHCO AND CESU, without seeking CCI's approval (collectively referred to as the "TPCL Transactions").

Subsequently, TPCL filed three separate notices seeking approval of the CCI for the TPCL Transactions, which were approved on 7 June 2021. During the review of the notices, the CCI noted that TPCL had consummated the TPCL Transactions before seeking its approval.

TPCL contended that the: (a) TPCL Transactions cannot be compared with typical commercial transactions as they are entirely regulated by the OERC under the relevant provisions of the Electricity Act 2003; and (b) jurisdiction to assess the TPCL Transactions vests exclusively with the OERC.

The CCI inter alia noted that: (a) even though OERC is a sector regulator, the jurisdiction of the CCI cannot be ousted; and (b) the OERC, vide a letter, expressly recognised the CCI's jurisdiction and directed TPCL to comply with the provisions of the Competition Act in relation to TPCL's acquisition of a 51% shareholding of North-Eastern Electricity Supply Company of Odisha Limited.

However, taking into account several mitigating factors, including the strict timeline imposed by OERC to comply with tender conditions, the CCI imposed a nominal penalty of INR5 lakh (USD6,636) on TPCL for each TPCL Transaction.

Green Energy Limited/SB Energy Holding Limited

Adani Green notified its acquisition of 100% equity share capital of SB Energy (referred to as the "Adani Transaction").

At the time of review of the notice, the CCI observed that a clause in one of the share purchase agreements allowed: (a) the parties to discuss the ongoing business and operations of SB Energy; and (b) Adani Green to provide its inputs on the business of SB Energy (Clause). The CCI prima facie opined that the Clause may have led to partial consummation of the Adani Transaction, thereby violating the standstill obligations as contained in Section 6(2A) of the Competition Act (Standstill Obligations).

The CCI inter alia noted that: (a) the Clause could potentially lead to coordinated outcomes and could not be considered proportionate to the objective of preserving the economic valuation of SB Energy; and (b) potentially, clean team arrangements can safeguard the exchange of competitively sensitive information; however, Adani Green failed to furnish details of any clean team formed for the exchanging such information. Accordingly, the CCI imposed a penalty of INR5 lakh (USD6,636) on Adani Green for violating the Standstill Obligations.

Notable Combinations Reviewed by the CCI

Apart from the above combinations, the CCI has reviewed transactions and their impact on competition in varied sectors in the Relevant Period.

In the healthcare and pharmaceuticals sector, the CCI, inter alia, approved the:

- acquisition of GSK Asia by GSK-Pfizer joint venture; and
- acquisition of minority shareholding in BDR Pharmaceuticals by Multiples Private Equity Fund III and others.

In the automobile sector, the CCI approved the internal corporate reorganisation of the Daimler AG Group under GCR.

In the e-commerce and digital sector, the CCI approved the:

- acquisition of majority shareholding of BigBasket by Tata Group;
- acquisition of minority shareholding of Swiggy by SoftBank;
- acquisition of minority shareholding of Grofers India by Zomato; and
- acquisition of shareholding of OFB Tech by SoftBank under GCR.

In the power and energy sector, the CCI approved the acquisition of:

- majority shareholding of WESCO, SOUTHCO, CESU and NESCO by TPCL;
- SB Energy by Adani Green;
- minority shareholding of Azure Power by OMERS under GCR;
- minority shareholding of ONGC Tripura Power Corporation by GAIL;
- at least a 40 per cent shareholding of Sterling and Wilson Renewable Energy by Reliance Group; and
- minority shareholding of IRB Infrastructure by GIC Group.

In the logistics sector, the CCI approved the combination between FedEx and Delhivery and acquisition of:

- certain shareholding of TVS Supply Chains Solutions by Exor Special Opportunities Master Fund under GCR;
- minority shareholding of Busybees Logistics by ChrysCapital and others, under GCR; and
- minority shareholding of Busybees Solutions by TGP Group.

In the finance and insurance sector, the CCI approved the acquisition of:

- majority shareholding of Magma Fincorp by Rising Sun;
- Yes Mutual Fund by White Oak Group;
- shareholding of PNB Housing Finance by Carlyle Group and Salisbury Investments under GCR;
- sole control of Indiabulls AMC and Indiabulls Trustee by NextBillion;
- sole control of Exide Life Insurance by HDFC Life Insurance;
- additional shareholding of PNB MetLife by MetLife International under GCR; and
- additional shareholding of Future Generali by Generali Group.

Insolvency Cases

Since the launch of the insolvency resolution process under the IBC, a number of merger notifications have been filed with the CCI in relation to the acquisition of companies undergoing insolvency.

Given the time sensitivity, the CCI has swiftly reviewed and approved several insolvency cases, despite few being Long Form notifications and during the Relevant Period, the CCI took approximately 29 calendar days to approve a transaction. So far, the CCI has reviewed about 30 combinations under the IBC, including four in the Relevant Period, such as acquisition of: (a) majority shareholding of Sintex by Reliance Industries; (b) sole control of Jaypee Infrapech by Suraksha Realty and Lakshdeep Investments and Finance Private; (c) sole control of Jhabua Power by NTPC and Secured Financial Creditors; and (d) majority shareholding of Kamachi Industries by Suryadev Alloys and Power.

Determination of Relevant Turnover

For the first time, in Phoenix Parentco/Parexel International, the CCI provided guidance with respect to the treatment of intra-group turnover for the purposes of examining financial thresholds.

In this regard, the CCI clarified that: (a) the import turnover in India, ie, turnover originating from outside India and terminating in India must be considered; and (b) in relation to intra-group export turnover, ie, if a company sells goods or services to its group company, and that group company makes a further sale of such goods or services to a third party, the revenue of such further sales must be included for calculating the Indian turnover.

CCI Market Studies in Various Sectors

The Relevant Period saw the CCI releasing its much-anticipated sectoral study report on the pharmaceutical sector in India (Pharma Report). The Pharma Report focuses on: (i) generic drugs; (ii) role of trade associations; and (iii) online pharmacies.

It was noted that generic drugs dominate the pharmaceutical sales and manufacturers of generic drugs compete on brand rather than price.

In order to shift the focus from brand competition to price competition, the CCI suggested certain measures including: (a) uniformity in the application of quality standards; (b) ensuring transparency at every stage of drug approval; (c) ensuring periodic drug testing; (d) creating a National Digital Drugs Databank and making it available to various stakeholders to address information asymmetry; and (e) strengthening the supply chain management, etc. Additionally, the CCI urged online pharmacies to adopt self-regulatory measures in the areas of collection, use, sharing of data, and privacy.

As per the media reports, the CCI also intends to conduct a market study on the film distribution

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industry. The said study is likely to be carried out to better understand the competition law concerns that might arise in the said industry, including the impact of over-the-top platforms, and also to explore the possibility of self-regulation for ensuring healthy competition.

The CCI is also studying private equity (PE) investment in India to understand the impact that common ownership may have on competition in the market. On 31 March 2022, an implementing agency engaged by the CCI submitted its key findings and observations regarding common ownership in India, which is likely to be published soon.

Proposals in the Pipeline

The Competition Law (Amendment) Bill, 2022 (Bill) is likely to be tabled before the Parliament during the monsoon session, which is commencing from July 2022. The Bill proposes to substantively overhaul the Competition Act by: (a) making it more receptive to address the challenges posed by new age markets (specifically digital markets); and (b) making certain structural changes in the governing structure of the CCI.

Notes to Form II

On 4 April 2022, the CCI announced its intent to issue guidance notes for the revised Long Form in due course.

Conclusion

The CCI, in the past 26 months, has remained active despite the challenges posed by the COVID-19 pandemic. Much like 2020, most of 2021 has been a challenging year. The year 2022 is expected to be a crucial year for the Indian competition law regime in terms of the passage of the Bill by the Parliament, Notes to Long Form to be introduced, and several market studies expected to be published soon. Recognising the need to adapt and innovate, not only has the CCI moved to an entirely electronic mode of functioning but has also recently updated its website, making it more user-friendly. The CCI has rejected a one-size-fits all approach and has been flexible with respect to the review of combinations.

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JSA is a leading full-service national law firm with over 300 professionals operating out of eight offices, in Ahmedabad, Bengaluru, Chennai, Gujarat International Finance Tec-City (GIFT), Gurugram, Hyderabad, Mumbai and New Delhi. The JSA competition team comprises six lawyers, including two partners, and offices in New Delhi and Mumbai. The team advises on all aspects of the Indian competition regime, including multinational merger approvals, cartels (including leniency), abuse of dominance, compliance and other areas of antitrust litigation. The team's expertise spans a wide variety of sectors. Recently, JSA secured the CCI's approval for the acquisition of a minority shareholding in BDR Pharma by Multiples Private Equity Fund III along with other investors; the internal restructuring of TVS Group; the acquisition of a shareholding in TVS Supply Chains Solutions by Exor Special Opportunities Master Fund under GCR; and IBM's separation of its managed infrastructure services business to Kyndryl.

AUTHORS

Vaibhav Choukse is a partner and heads the competition law practice at JSA. He focuses on complex enforcement (cartel leniency and abuse cases) and merger control cases. He represents and advises clients on a broad range of competition law issues spanning across several sectors. On the merger control side, he has successfully advised and obtained approvals from the CCI for complex transactions in both the Form I and Form II formats, including Multiples Private Equity/BDR Pharma, Teleperformance/Intelenet, IBM/Kyndryl Holdings, Ford Motor Company/Mahindra & Mahindra, Goldman Sachs/ReNew Power (SPAC), Teleperformance/Intelenet and Trafigura/Essar Oil. He is recognised as one of India's leading competition lawyers by Chambers & Partners.

Farhad Sorabjee deals with a broad range of competition law and policy issues, as well as diverse multi-jurisdictional national and international commercial arbitrations and disputes. He advises on a full range of competition matters, including cartel enforcement, abuse of dominance, leniency applications, dawn raid, merger control, competition law audit and compliance. He has acted in India's first cartel investigation and first substantive abuse of dominance proceeding before the CCI. He has advised on several complex merger control cases, including ChemChina's USD44 billion investment in Syngenta AG, one of the biggest agro-chemical deals in India, and the formation of a joint venture between Mahindra & Mahindra and Ford Motor Company.

Nripi Jolly is a senior associate. She has handled several high-profile cases relating to merger control in various sectors, such as healthcare and pharmaceutical, financial technology, petroleum and natural gas. She is currently representing several corporations in various behavioural proceedings. On the merger control side, she has successfully advised and obtained approvals from the CCI for complex transactions including Multiples Private Equity/BDR Pharma, TVS Group restructuring, IBM/Kyndryl Holdings, Visa International/IndiaIdeas.com, Radiant and Kayak Investments/Max Healthcare, Bandhan Bank & GRUH/HDFC, Total/Adani Gas, Hitachi/ABB, BAC Acquisitions Private Limited & Ors/Essel Mutual Fund.

Faiz Siddiqui is an associate. He is currently handling several high-profile enforcement matters relating to cartel, other anti-competitive agreements and abuse of dominance. On the merger control side, he has successfully advised and obtained approvals from the CCI for complex transactions including Multiples Private Equity/BDR Pharma, Mahindra & Mahindra/Ford Motor Company and Goldman Sachs/ReNew Power (SPAC).

JSA

B-303, 3rd Floor, Ansal Plaza
Hudco Place, August Kranti Marg
New Delhi
110049 India

Tel: +91 11 4311 0600
Fax: +91 11 4311 0617
Email: newdelhi@jsalaw.com
Web: www.jsalaw.com

jsa
advocates & solicitors

ISRAEL

Law and Practice

Contributed by:
Boaz Golan and Nimrod Prawer
Goldfarb Seligman & Co** **see p.320

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

In Israel, merger control is regulated under the Economic Competition Law, 5748-1988 (the "Law"), and regulations that are being promulgated accordingly.

The Israeli Competition Authority (ICA) and the Director General that heads the ICA (the "Director-General") have published several additional documents regarding mergers, including the following:

- Guidelines of the Director-General of the Israel Competition Authority for Reporting and Evaluating Mergers Pursuant to the Restrictive Trade Practices Law, 1988 (2008);
- Public statement 2/11 – guidelines Regarding Remedies to Mergers Raising a Reasonable Likelihood of Substantial Harm to the Competition; and
- Public statement 1/11 – The Director-General's Guidelines to a Competitive Assessment of Horizontal Mergers.

The Restrictive Trade Practices Regulations (Registration, Publication and Reporting of Transactions), 5764 – 2004 (the "Regulations"), regarding merger control, were enacted on 24 March 2022. Among others, the regulations adopted a new merger notification form.

See further developments in 2022 in **9.1 Recent Changes or Impending Legislation**.

1.2 Legislation Relating to Particular Sectors

There is no legislation that is relevant to foreign transactions or investments relating to particular sectors.

1.3 Enforcement Authorities

The ICA is the agency responsible for enforcing the Competition Law and other regulations promulgated under it. The ICA is an independent governmental agency headed by the Director-General. Since 1 August 2021, the new acting Director-General is Advocate Michal Cohen.

In cases in which a merger notification is filed, and the activity of merging parties falls under the jurisdiction of one of the government ministries, the Director-General shall forward a copy of the application to the Director-General of such ministry.

The Competition Tribunal (the "Tribunal") is an administrative court that hears appeals on the Director-General's merger decisions (for elaboration regarding the appeal process, see **8.1 Access to Appeal and Judicial Review**).

Prior to clearing a merger, the Director-General is obliged to consult with the Exemptions and Mergers Committee, comprised of representatives from the government and the public. Although there is no legal duty to consult with the committee prior to blocking a merger, in practice, its advice is also sought when a negative decision is considered.

Since the appointment of DG Cohen, the significance given to the Mergers Committee is considerably higher.

2. JURISDICTION

2.1 Notification

Notification in Israel is compulsory, such that if one of the filing thresholds mentioned in Section 17(a) of the Law is met, notification must be filed. Usually, if one of the filing thresholds is met, there are no available exceptions. The only case where an exception could be applied is when only the monopoly threshold is met (for further elaboration regarding the filing thresholds, see **2.5 Jurisdictional Thresholds**).

In such cases, if the monopoly is in a market that is unrelated to the market in which the merger takes place, an exemption from filing could be provided by the ICA (a "waiver"). Obtaining such an exemption requires to file a request to the ICA in which the parties describe the specific circumstances of the transaction and the lack of any linkage to the monopoly. Recent experience shows that the ICA is adopting a much stricter approach to waivers, and it tends to insist on full merger notifications, even in cases in which waivers were previously granted.

2.2 Failure to Notify

According to the Israeli Law, any violation of the Competition Law could be criminal and thus, theoretically, failure to notify may be a criminal offence, punishable by imprisonment and criminal fines. The ICA has once before applied criminal sanctions due to failure to notify. It should be noted, however, that the specific case included a long list of other violations of the Law, including abuse of monopoly status and restrictive arrangements.

In all other cases, however, failure to notify in mergers that do not raise significant competitive concerns will be enforced by administrative fines in lieu of criminal means.

Administrative fines could amount to up to 8% of the company's previous year revenues with a ceiling of approximately USD30.8 million. In addition, personal administrative fines of up to approximately USD300,000 are possible.

If the Tribunal believes that there is a reasonable likelihood that competition in the relevant sector would be significantly harmed or that the public would be injured, as a result of a merger made contrary to the provisions of the Law, it may order to hold separate the merged companies (ie, "unscramble the eggs"). In practice, the Tribunal has applied this authority only once (Prinir/Miloz case, 2009). In addition, private enforcement is available to aggrieve third parties, including by way of injunctions.

Recent Cases

In 2021, the Director-General announced that she is considering imposing financial sanctions of approximately USD1.8 million on Facebook Israel and its parent company, Facebook Inc, for "failure to notify". Facebook did not report its purchases of two Israeli companies, Redkix and Servicefriend, while according to the ICA, this transaction had to be reported under the "monopoly threshold" (see **2.5 Jurisdictional Thresholds**). Facebook received a hearing letter from the ICA.

In 2022, Milgam Ltd and Maccabi Entrepreneurship Ltd entered into an agreement according to which Eitan will purchase from Milgam and Maccabi 33.3% of the shares of the subsidiary Maccabi Home Ltd. The merger was not reported to the ICA as required. Two consent decrees were issued to the parties – Milgam Ltd had to pay USD25,000 to the State Treasury, and Maccabi Entrepreneurship Ltd had to pay USD30,000 to the State Treasury.

In addition, in 2022 the ICA published a consent decree with Em Hahita and the Gatnio brothers, requiring a fine of USD90,000 paid separately or together. Em Hahita Ltd is the only producer in Israel of kosher flour during Passover, and the Gatnio Brothers Ltd produces matzah cookies. The parties entered into a merger agreement that was not reported to the ICA as required.

2.3 Types of Transactions

According to the ICA's guidelines, any transaction that creates (or significantly strengthens) a substantial and continuous influence link between the decision-making mechanisms of the companies involved in the transaction, either directly or indirectly, falls within the definition of a "corporate merger". The definition of a "corporate merger" in Section 1 to the Israeli Competition Law includes the acquisition of the majority of the assets of a company by another company, or the acquisition of shares in a company by another company through which the acquiring company is accorded more than a quarter of the nominal value of the issued share capital, or of the voting power, or the power to appoint more than a quarter of the directors, or participation in more than a quarter of the profits of such company; the acquisition may be direct or indirect or by way of rights accorded by contract.

Nevertheless, this is not a "closed list". The ICA's guidelines state that the definition of corporate mergers covers "all transactions that give one company a substantial structural link to another company (or which strengthen an existing link, in a not inconsequential manner), whatever the formal structure of such transaction and whatever technique is used to create such link".

Defining the Existence of a Corporate Merger

According to the ICA's guidelines and several of the Director-General's decisions, a corporate merger exists when one company receives a foothold in another company's decision-making mechanism. For instance, in light of this standard, the appointment of a joint CEO could be regarded as a corporate merger.

According to the ICA's policy, any crossing of a 25% threshold will be considered a corporate merger. Thus, a transaction in which a company is holding 20% of the voting rights in a different company acquires an additional 10% will be considered a corporate merger as it crosses the 25% threshold. Similarly, a voting agreement between two shareholders, each holding 15% of the company's shares, in which they agree to use their voting powers jointly would be deemed a corporate merger, since together, these shareholders would exceed the 25% threshold.

With regard to internal restructurings or reorganisations, the ICA's policy is not to demand filing when the rights in all of the involved entities (ie, the transferring and the receiving) are held entirely by the same entity.

Finally, the size of a shareholder's effective holding of a type of rights in a company can change without any transfer of shares such in shareholder agreements or through the Articles of Association.

2.4 Definition of "Control"

Due to the definition of a corporate merger, the definition of control does not play a role in determining which transactions will be caught. As mentioned in **2.3 Types of Transactions**, any crossing of the 25% threshold with respect to each of the criteria defined thereto will be considered a merger.

It is possible that in cases in which more than 25% of any of such rights are sold, filing will be required even if each of the purchasers, by itself, did not acquire more than 25% of any such right. The ICA views acquisitions made by different entities as a shared purchase in an array of circumstances, especially when voting agreements exist between such purchasers. It is important to note that in several cases the ICA position was that a transaction in which less than 25% of an interest in a competitor has been acquired does not amount to a merger but might nevertheless be considered a restrictive arrangement.

Finally, under the Law any purchase of the "majority of assets" of another entity is considered as a merger of companies even if there is no change in control in the shareholders.

2.5 Jurisdictional Thresholds

The jurisdictional thresholds for filing merger notifications apply only if both parties have sufficient presence in Israel (for elaboration, see **2.4 Definition of "Control"**). In such cases, filing would be required if any of the following thresholds apply:

- one of the merging companies is a monopoly in any market in Israel (where "monopoly" is defined as "a person that controls more than one half of the total supply or acquisition of an asset or a service within the relevant Israeli market");
- as a consequence of the merger, the market share of the merging companies in the production of a certain asset/service and of similar assets/services, or in the provision of a certain asset/service and of similar assets/services, will exceed one half (thus creating a monopoly under the above-mentioned definition); or
- the total turnover in Israel of the merging companies in the previous financial year exceeds USD110million, and the turnover in Israel of at least two companies that are a party to the merger is not less than USD6 million each.

Both the market share and the turnover thresholds are not limited solely to the merging entity but rather also include any entity that controls it, directly or indirectly, and any entity that is controlled by both the latter and the merging entity.

Turnover Thresholds

The amended Regulation 9(2) sets the minimum sales turnover of at least two of the companies in the transaction that triggers filing in Israel. Following the change, the minimum sales turnover obliging the companies to file notice is USD6 million each for at least two parties to the transaction.

2.6 Calculations of Jurisdictional Thresholds

In the case of a merger with an entity that conducts business in and outside Israel, the provisions regarding the jurisdictional thresholds apply only to the entity's turnover, or market share, in Israel.

While there are no clear guidelines regarding the conversion of foreign currency, in practice it is converted according to the official rate published at the time of the transaction.

Both the market share and turnover thresholds are not limited solely to the merging entity but also to any entity that controls it, directly or indirectly, and any entity that is controlled by the latter or the merging entity.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The sales turnover threshold seeks to identify all the economic entities involved in a merger transaction according to the volume of their activity. Therefore, Regulation 9 of the Antitrust Regulations directs that for the purpose of calculating the sales turnover of the merging company, the sales turnovers of all the entities that it controls or that are controlled by it must be combined. However, in merger transactions in which the seller is completely separated from the business operation that the seller owns, the merger creates a delineated structural connection, between the acquirer and the sold operation.

In such a case, on the assumption that all links between the selling entity and the sold operation have indeed been cut off, there is no need to deal with the sales turnover of the selling entity in its other lines of business that have no part in the structural joinder that is the subject of the merger. This is the ICA's position only in situations in which all links between the selling entity (including any affiliated entities) and the sold operation have been removed. Moreover, the ICA's position in this regard also applies as relevant, to the sale by a party with a monopoly position of a company or operational division, to the extent that the transaction leads to a complete de-linkage of the sold operation from the party with a monopoly position.

2.8 Foreign-to-Foreign Transactions

The Israeli Competition Law is territorial; however, it can apply to foreign-to-foreign mergers if presence in Israel exists. The ICA's position is that a foreign entity has sufficient presence in Israel if one of the following applies:

- the foreign entity has an interest of 25% or more in an Israeli entity; or
- it has a "place of business" in Israel.

According to the ICA's guidelines, a "place of business" in Israel is defined as follows: "A foreign company may be regarded as having a place of business in Israel whenever it has a substantial influence on the activity of a local representative. In this regard, the Authority will examine whether the foreign company has the ability, either through an arrangement or de facto, to determine, with respect to the Israeli representative (be it called an agent, a distributor, a representative, or otherwise), the price level, the level of inventory, the nature of display or any other aspect of the business management. The more a foreign company has powers and rights of this kind – the stronger will be the tendency to regard it as having a presence in Israel and as an entity that operates a business in Israel through a long arm..."

The mere fact that an entity's products are sold into the Israeli market does not, by itself, establish sufficient presence for it in Israel. Note that, with respect to mergers, neither the Law nor the ICA applies the "effect doctrine" for extraterritorial jurisdiction.

Foreign-to-foreign transactions are frequently reviewed by the ICA and can be approved, blocked or approved subject to remedies (see **5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**).

2.9 Market Share Jurisdictional Threshold

If the monopoly threshold is met by either one of the merging firms, filing would be required, even if there is not any overlap whatsoever. However, when notifying duty is based solely on the "monopoly alternative" and under these circumstances there is no horizontal or vertical affinity, the ICA may inform the parties that under these circumstances it will not insist on complying the obligation to file a merger notice, by virtue of the monopoly alternative, and on obtaining the approval of the Director-General.

Such a waiver from the ICA may be decided only based on a separate request from the parties to the merger that will include full disclosure of all the relevant information, and only if the ICA will conclude that the information presented indicates that, under the circumstances, there is no competitive affinity (horizontal, vertical, or other) between the monopoly and the merger.

According to the ICA-published Q&A, if the products of the parties are sold together to the same type of customers, the ICA will not allow a waiver and will insist on filing merger notifications, by virtue of the monopoly threshold.

It should be noted that the ICA does not rule out competitive affiliation easily and might find relatively small affiliations as sufficient enough to require a merger notification request.

2.10 Joint Ventures
There are some circumstances in which joint ventures may be regarded as mergers and are thus subject to the merger control regime. It is essential to draw the line between a joint venture and a merger.

The main guideline is to determine whether one party receives a foothold in the decision-making process with regard to the majority of the assets in a relevant market of the other party, which prior to the agreement acted independently. In such cases, the ICA will consider the transaction to be a corporate merger.

Note that a transaction which will not be viewed as a merger could be categorised as a restrictive arrangement. According to the ICA guidelines with regard to joint ventures, it is important to distinguish between a venture that creates a new type of activity (regarding which the tendency is to categorise it as a restrictive arrangement) and one which involves the granting of a foothold in an existing operation that is already carried out by one of the parties (regarding which the tendency is to categorise it as a corporate merger).

Separating Joint Ventures and Mergers
Drawing the line between a joint venture and a merger is essential since while a merger requires notification to ICA, a joint venture enjoys a broad block exemption. On 13 November 2018, antitrust rules (block exemption for joint ventures) (temporary order) 2006 were amended. Revision of the block exemption rule seeks to expand and apply it on restrictive arrangements which meet two cumulative conditions:

- the arrangement is not "naked restraint", ie, it is not an arrangement whose primary purpose is to reduce competition or to prevent it, and it does not include restrictions that are not necessary to fulfil its principle; and
- the compliance with a material criterion of non-significant injury in the market competition.

However, the block exemption for joint ventures does not allow self-assessment of any joint venture. Joint ventures between competitors regarding marketing will be required for an individual examination by the Commissioner given their competitive concerns.

2.11 Power of Authorities to Investigate a Transaction
As long as the jurisdictional thresholds are not met, the authorities have no power to investigate a transaction. The statute of limitations is irrelevant as the ICA is not allowed to investigate such transactions either way.

2.12 Requirement for Clearance Before Implementation
A merger that requires the ICA's clearance cannot be executed by any means prior to obtaining the Director-General's clearance. Such means include closing, transferring assets or shares, transferring payment or otherwise being involved in the management of the acquired entity. Execution of any of these actions, prior to obtaining the clearance, might be considered as "gun-jumping" and the enforcement will be by means of financial sanctions, even if there was no harm to competition.

2.13 Penalties for the Implementation of a Transaction Before Clearance
If the parties implement the transaction, or any part thereof, before the ICA clearance, they are exposed to administrative and criminal enforcement.

Examples of acts that were viewed as "gun-jumping" are the execution of a loan agreement related to the merger transaction (payment of part of the debt), and the payment of the consideration in the transaction, or part of it.

Administrative fines have been an important tool in the ICA's toolbox since 2012, and it is likely that future completions of transactions prior to receiving the Director-General's clearance would continue to be treated with such tools. The Competition Law does not separate between "gun-jumping" and "failure to notify". Hence additional examples of penalties imposed can be found in in **2.2 Failure to Notify**. Penalties are made public.

2.14 Exceptions to Suspensive Effect

An exception to the suspensive effect could be granted following a specific request to the ICA. The ICA may grant such requests in cases of financially distressed companies or public bids and must allow this exception before the parties take any action.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The ICA will not permit closing before clearance or carving out any businesses. Based on a specific request to the ICA, it could allow transfer of funds to the target prior to clearance, if there is a concern to the target's survival absent the cash.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

As mentioned in **2.1 Notification**, notification is compulsory and must take place before the merger is consummated. There is no deadline for filing, except for the fact that the merger cannot be completed prior to receiving the clearance.

3.2 Type of Agreement Required Prior to Notification

It is possible to file the merger to the ICA prior to reaching a binding agreement (for example, based on a memorandum of understanding). It is required, however, that the agreement will be concrete and that prior to filing, certain fundamental issues would be agreed upon, such as the amount of rights transferred in the transaction, the price, and the timeframe. In any case, it is within the ICA's discretion to decide that it will not examine transactions in which the probability of their occurrence is low.

The ICA will not examine a transaction without any written agreement.

3.3 Filing Fees

There are no filing fees in Israel.

3.4 Parties Responsible for Filing

The target and the acquirer are the parties to the merger, and both are responsible for filing.

3.5 Information Included in a Filing

The new Regulations were adopted in March 2022 and as of 20 May 2022, merging companies will be required to submit requests to the ICA via a new form and the previous forms will no longer be accepted.

The new form is far more detailed and comprehensive than the previous one.

Merger Notification Form

The merger notification form is modular, so the information provided depends on whether the merger classification is horizontal, vertical or conglomerate and also on the market share of the parties.

In May 2022, alongside to the amendment of the Restrictive Trade Practices Regulations, the merger notification form has been replaced by a new and more comprehensive merger notification form. The scope of information that is required from the merging parties in the new merger notification form has significantly increased.

In general, the information required includes details concerning the filing entity; highlights of the merger transaction; business and areas of activity; classification of business and areas of activity; the parties' products (substitute, vertical or complementary goods); the scope of activities in the relevant markets (sales and market shares, revenues and quantities); competitors and their market shares (depends on the parties' market shares); and list of suppliers and customers, including their contact details, etc.

In addition, the merging parties are required to provide information regarding the structure of their holdings, such as the identity of the rights-holders in the person filing the merger notification (and some additional information regarding their holdings); the ultimate controlling owner of the person filing the merger notification and its holdings; and the holdings of the person filing the merger notification.

It is acceptable to attach to the notice of merger a cover letter in which the competitive picture is drawn more extensively.

Filing Documents

The filing must include the following documents:

- the binding agreement and its appendices (elaborated in **3.2 Type of Agreement Required Prior to Notification**);
- audited financial statements of the last two fiscal years of the entity filing the notification (a foreign company that files a notification may attach audited financial statements of entities through which it operates in Israel, instead of filing its financial statements);
- prospectuses filed by the entity filing notification during the last five fiscal years; and
- a detailed diagram describing the holdings before and after the execution of the merger transaction.

There are no special requirements for the submission of documents (eg, certifications, notarisations or apostilles).

The merger notification form can be in English, but a translation to Hebrew is also needed. All other documents (the agreements, financial statements, and prospectuses) could be filed in English without accompanying translation.

3.6 Penalties/Consequences of Incomplete Notification

The ICA has emphasised that the Director-General will insist on accurate and meticulous fulfilment of the merger notice. Since a missing merger notice, or a notice filled with inaccurate details, does not meet the requirements of the law, it shall not be considered a merger notice. In such a case, a submission does not start the count of days set for the assessment (see **3.8 Review Process**), and it may be returned to the submitter without examination.

Yet, no penalties for incomplete notifications made in goodwill have been given. Nevertheless, as mentioned, in consequence, the ICA will not start (or may discontinue) the review process, and the timeframe for the process will not commence until the complete notification is filed.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The entity filing the notice of merger is obliged to provide full and correct information and must declare that all the information contained in the notice of merger is, indeed, accurate, complete and current; that the documents annexed to the notice of merger are correct and complete, and do not lack any material information or exhibit; and that it is known that the Director-General will use the information contained in the notice and in its exhibits in deciding whether to approve the merger that is the subject of the notice.

A party that files inaccurate or misleading information could be deemed as filing an incomplete notice and thus merging the firms without the ICA's clearance.

There is no specific penalty concerning inaccurate or misleading information in the Restrictive Trade Practices Law, but there are prohibitions from the general law that could be relevant in such cases.

Misleading Information

This firm does not recognise a case in which the ICA has taken enforcement measures against misleading information in a notice of merger, although it is reasonable to assume that in such cases, the ICA will not "save" any efforts.

In a recent case, the ICA fined the acquirer for not disclosing its part in drafting information submitted by a third party. In the merger between two internet marketing content companies, Taboola and Outbrain, a major customer expressed its negative response to the merger at first, but later sent a letter in which he praised it. During the merger examination, it became clear to ICA that the force behind the letter was Taboola, who did so while it is negotiating to renew the contract with the same customer.

In these exceptional circumstances, the ICA initiated criminal enforcement proceedings, which were eventually closed by an agreed decree of a USD1.5 million fine.

Due to the consent decree, there are no clear guidelines for what is allowed and forbidden regarding communications with third parties.

3.8 Review Process

Under the Israeli Competition Law, within 30 days of submitting notices from all parties to the ICA, the Director-General shall notify whether the merger is approved, approved subject to conditions or blocked. Failure to give such notice according to the timeframe mentioned means the merger is cleared, unless there has been an extension. In practice, however, the ICA will reach a formal decision rather than letting the timeframe end.

The Director-General may extend the time limit for two further 30-day periods (60 days in total). In addition, after consulting the Exemption and Merger Committee, the period could be extended by another 60 days (ie, 150 days in total). The Director-General shall give the parties a reasoned written notice of such extensions.

In practice, the ICA usually requests the parties' consent to extensions and refrains from extending the time period unilaterally.

The Reviewing Process

The first step of the reviewing process is a preliminary assessment by the ICA's economic department.

Under the regime of the current Director-General, the merger examination process has become more rigid and significantly lengthened. In most cases, the current merger reviewing process takes more than 30 days, regardless of its complexity (namely, even in case of a simple merger that does not raise significant competitive concerns). In the event of a complex merger, the reviewing process might take much longer than 30 days (and might even take up to six months).

In the framework of the current reviewing process, the ICA conducts phone calls to each of the merging parties in order to better understand the transaction structure, the merging parties' activities, and the motivation for the transaction. Then, in most of the cases, the ICA conducts additional phone calls to relevant suppliers, customers and competitors, in order to understand better the relevant markets and the effect of the merger, from their point of view.

In addition, the ICA usually issues requests for information ("RFI") to the merging parties or to third parties (such as customers, suppliers and competitors) in order to obtain additional information that is required for a decision. RFIs can include requests for financial and quantitative information (eg, sales of different products), requests for additional information and explanations, and requests to provide the ICA with documents (such as meetings of the board of directors, business plans). Refusal to provide information required by Section 46(b) of the law constitutes a criminal violation punishable by a year in prison or a high rate fine.

At the end of the ICA's examination process, an economic opinion is provided to the Director-General along with a recommendation to either approve the merger, approve it conditionally, or oppose it. Then, the Director-General consults with the Exemptions and Mergers Committee, which will come to a decision to approve the merger, establish conditions for its approval or oppose it in cases where the merger creates a reasonable risk to harm the competition, which cannot be resolved by imposing appropriate conditions.

Eventually, the Director-General will notify the parties of their decision regarding the transaction and publish it in the Official Records, in two daily newspapers, and on the ICA's website.

Before the ICA notifies the parties of blocking a merger, it conducts a hearing, in which the parties can present their arguments.

3.9 Pre-notification Discussions With Authorities

Parties can engage in formal or informal pre-notification discussions with the ICA. A formal process of pre-ruling exists and theoretically could be relevant in cases in which there is a substantial question of whether clearance would be granted. Additionally, the parties can approach the ICA in an informal procedure to discuss the merger.

Both formal and informal pre-notification discussions are not frequent and are recommended only when the specific circumstances of the transaction justify such discussions. The parties may ask the Director-General to keep confidential the fact of the submission of the pre-ruling, the contents of the application, or any portion of its details. If the parties make such a request, the Director-General shall not publish the details for which confidentiality is requested.

However, it shall not preclude the Director-General from refusing to discuss the pre-ruling if it is convinced that it is essential to examine the contents of the application with other parties in order to form the pre-ruling.

3.10 Requests for Information During the Review Process

Requests for information during the review process are very common and can be quite burdensome; such requests, however, do not stop the clock or suspend the review.

It is important to note that a request for information can be sent not only to the merging parties but also to third parties, additional competitors, suppliers, customers and more.

3.11 Accelerated Procedure
As part of the amendment to the regulations and the new merger notification form, the accelerated procedures were cancelled (before the amendment, under certain circumstances the parties could file abbreviated merger notifications or file a notification by way of cross-reference to a previous merger filing).

There is a fast-track for the approval of mergers that clearly do not harm competition (called the "Ultra Green Merger Procedure"). The merging parties can request from the Director-General to review their merger under the fast-track; however, under the current merger regime, only in rare cases a merger will be reviewed under this fast-track.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test
The substantive test for reviewing a merger in Israel is quite similar to the substantive test practices worldwide. The Israeli substantive test examines whether there is a reasonable likelihood that competition in the relevant sector would be significantly harmed or the public would be harmed as a result of the merger.

If the merger does not raise such a reasonable likelihood, the Director-General will clear the merger. If the Director-General believes that there is a reasonable likelihood that as a result of the merger, competition in the relevant sector would be significantly harmed or that the public would be injured, it will subject the merger to remedies that fully restore any harm to competition. If no such remedies apply, the Director-General will block the merger.

4.2 Markets Affected by a Transaction
The ICA has rich experience in determining which markets may be affected by the transaction. The starting point is the notice of merger of the parties, although if the ICA finds that there may be other relevant markets that may be affected by the merger, they will also be examined. Markets, as mentioned, could be both horizontal and vertical.

Where parties' activities overlap, the ICA would examine their market shares (as well as additional details such as entry and expansion barriers). Although there is no fixed overlap below which competitive concerns are deemed unlikely, if the aggregate market share is low, any competitive concern will be deemed unlikely.

4.3 Reliance on Case Law
In general, the ICA examines market definitions (as well as other examinations) on their own, without relying on case law from other jurisdictions. However, if there are no indications for unique consumer behaviour in Israel, case law from different jurisdictions may be at least a good starting point.

4.4 Competition Concerns
The ICA routinely investigates a wide array of competitive concerns. Such concerns include unilateral effects, co-ordinated effects, foreclosure concerns and portfolio effects. In conglomerate mergers, the ICA has investigated only concerns relating to the elimination of potential competition.

4.5 Economic Efficiencies
In the context of economic efficiencies, in practice, there are two stages. Before the ICA considers the economic efficiencies of the merger, it starts with determining whether the merger raises competitive concerns. If the merger does, indeed, raise the ICA's concern, it will only then move to the next stage and consider efficiency

factors. However, as we have reached this stage, the chances of approving the merger are not in our favour.

The discussion about economic efficiencies consideration is secondary to the competitive concerns. The ICA will examine efficiencies to decide whether they can counteract the adverse effects on competition that the merger might otherwise have. The ICA will consider efficiency claims that substantially benefit consumers (such as lower prices due to cost efficiencies).

The ICA will only consider merger-specific efficiency claims and would ignore efficiencies that could be achieved by less anti-competitive alternatives.

It should be noted that the above-mentioned ICA guidelines regard only to horizontal mergers (there are no guidelines regarding non-horizontal mergers). Nevertheless, in practice, the ICA will consider efficiency considerations in vertical mergers.

4.6 Non-competition Issues

The ICA does not take into consideration non-competitive issues during the review process.

4.7 Special Consideration for Joint Ventures

There are no special considerations for the review of joint ventures that amount to a merger. While reviewing the merger, the ICA would examine, among other concerns, possible co-ordination effects between the joint venture's parent companies. Joint ventures that do not amount to a merger enjoy a block exemption (see **2.10 Joint Ventures**).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

As noted, the substantive test for reviewing a merger is whether there is a reasonable likelihood that as a result of the merger as proposed, competition in the relevant sector would be significantly harmed or that the public would be injured (see **4.1 Substantive Test**).

If such concerns apply, the ICA could clear the merger subject to remedies, given that such remedies would sufficiently mitigate the competitive concerns the merger raises. If no such remedies exist, the ICA will block the merger. In any case, the ICA would issue a formal decision regarding the merger.

5.2 Parties' Ability to Negotiate Remedies

The Law provides that the Director-General may approve a merger subject to conditions, and this process is generally negotiated with the parties. Both the initiative and the discretion to set remedies belong to the Director-General. The power to impose remedies does not subject to the parties' willingness to accept them.

From the ICA's perspective, parties' acceptance of the remedies is preferable. These remedies could be structural (such as divestiture) and/or behavioural, but there is an obvious preference for structural conditions.

5.3 Legal Standard

The purpose of the remedy is to restore the competitive situation that prevailed in the market or would have prevailed in the market, prior the merger. The selected remedy, or combination of remedies, adopted is to provide a full and complete response to the competitive concern, such that competition level after the merger will not be less than it had been previously. This is the standard by which the ICA operates.

Where structural conditions are imposed, the ICA firmly insists on carrying them out before the merger is implemented – a "Fix It First" approach.

5.4 Typical Remedies

According to the ICA guidelines, the ICA clearly prefers structural remedies over behavioural ones. In practice, during the previous year, the majority of the mergers that have been cleared subject to remedies were subject to structural remedies.

The ICA has no authority to subject the merger to remedies for non-competitive concerns and in practice, it does not do so.

Structural remedies come mainly in the form of divestitures, under the "fix-it-first" approach. For example, in 2021 the ICA approved subject to remedies the acquisition of a commercial centre owned by Yishparo Center Ltd by Big Shopping Centers Ltd. As part of the fix-it-first approach, Big had to sell all its rights in another commercial property to a competitor that would be approved by the ICA, before it would acquire Yishpro's commercial centre.

In 2022, the ICA approved subject to remedies the Cellcom/Xphone/Clear transaction. This case involves two merger transactions as part of a debt settlement procedure. The Director-General approved the merger between Cellcom Israel Ltd and Xphone, subject to a behavioural condition that prohibits granting credit between the parties without prior written approval from the ICA. As mentioned above, although the ICA subjected the merger to a behavioural remedy in this case, the majority of the remedies are structural.

5.5 Negotiating Remedies With Authorities

The negotiation of remedies starts after the ICA reaches its preliminary decision that the merger raises competition concerns, and the ICA is considering blocking the merger or approving it subject to remedies. When competitive concerns arise, and remedies are being negotiated, it is highly likely that the 30-day period would need to be extended.

The ICA can, and often does, offer remedies at its initiative. There is no formal procedure regarding remedies, but the common practice is as follows:

- the ICA orally informs the parties of its competitive concerns that need to be mitigated; and
- following this notification, negotiations commence between the sides.

Down the road, the ICA would present a written draft of remedies, after which a discussion will be held based on that document. According to case law, the possibility of approving the merger under conditions must be exhausted before deciding on an objection.

The merger's approval is conditional to the fulfilment of the terms by the parties to the merger, and thereby raises – as they decide to execute the merger – the obligation to comply with the conditions, ie, the ICA does not impose the remedies, but the parties have two options: to fulfil the conditions, or renounce the merger. Yet, as part of the examination of the possibility to approve a conditional merger, the ICA sees fit to discuss it with the parties in order to consider various alternatives, and the ICA even encourages the parties to propose possible solutions.

5.6 Conditions and Timing for Divestitures

According to its guidelines, the ICA will tend to require divestiture to an extent large enough to enable long-term competition. Preferably the ICA will order the selling of independent economic entities over selling specific assets.

The ICA's clear preference is a "fix-it-first" approach in which the divestiture must be completed prior to the merger (see **5.4 Typical Remedies**). According to the public statement 2/11: Guidelines Regarding Remedies for Mergers that Raise Reasonable Concerns of Significant Harm to Competition, if the divestiture is not completed until the time of the merger, the time period for the divestiture would be within few months to a year after the merger.

While this is the ICA's formal position, in practice, when there are compelling arguments as to why the "fix-it-first" approach is impractical in the circumstances of the specific case, the ICA is willing to forgo this demand.

Compliance

Compliance with the ICA's remedies is crucial; the ICA's stated policy is to seek criminal proceedings for violations of merger remedies. The violation of remedies is held as one of the hardcore violations of the law and is considered to be only one step ahead of an explicit cartel. A few years ago, the Supreme Court (the highest court in Israel) sentenced the CEO of a major retail chain store to imprisonment for violation of merger remedies (CA 5823/14 Shufersal et al v State of Israel (10.8.2015)).

In 2016, the ICA cleared, subject to remedies, a merger between two major food chain retailers, Mega Retail Ltd and Yeinot Bitan Ltd. Due to geographical concerns, the ICA found that the acquirer ought to sell stores in eight locations. The ICA's position, which is coherent with its Merger Guidelines, was that the parties must apply a "fix-it-first" approach, thus selling these eight stores prior to performing the merger.

Nevertheless, the parties approached the ICA and asked for a longer time period, allowing the acquirer 80 days to sell one of two stores in a specific location. The parties approached the ICA to reconsider its position due to a substantial change in the circumstances, but the ICA upheld its preliminary position. An appeal was filed, and the Competition Tribunal rejected the appeal, stating the clear preference of a "fix-it-first" approach to mergers.

5.7 Issuance of Decisions

Under Section 5 of the Regulations, when the Director-General's decision has been granted, a merger file shall be opened, and will be available to the public. The merger file contains documents relating to the merger.

The ICA's decision whether to approve or to block a merger is formally issued to the parties, and decisions are made publicly available. An approval or an approval subject to remedies is rarely, if ever, explained, while the Director-General must always reason a decision to block a merger.

Nevertheless, parties are allowed to withdraw their filing prior to the Director-General's formal decision. In this case, no formal decision would be made, and no information regarding the merger would become public. Therefore, if the ICA intends to block a merger, in many cases the parties would decide to withdraw their filing prior to a formal decision. However, if the parties intend to appeal the ICA's decision, they would insist that the ICA issue a reasoned decision.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In general, the ICA does not require remedies frequently; according to the ICA's yearly statement in 2020, only 1.67% % of all merger notifications filed were cleared subject to remedies. It should be noted that the data above may be misleading since, in cases in which the parties receive negative signalling from the ICA, they tend to withdraw their filing. Prohibitions and remedies for foreign-to-foreign transactions are even fewer than transactions with local linkage.

In many cases, when the effect of the merger on the Israeli economy is minor (eg, when the parties activities in Israel are minor), the ICA would align with other competition authorities' decisions. In order to review the merger, the ICA might request from the parties a waiver of confidentiality to receive and share information regarding the transaction with the other relevant competition authorities.

An example of a foreign-to-foreign transaction that was approved subject to remedies is the acquisition of Cemex, a cement plant located in Spain, by Çimsa, located in Turkey. The ICA determined that the merger is relevant to the Israeli economy because Çimsa is a significant supplier of white cement in Israel, and Cemex also supplies white cement in Israel through its subsidiary Readymix.

The Director-General decided to approve the merger subject to remedies that would remove the activities in Israel from the acquisition agreement. The remedies require Cemex to contractually associate with a new white cement supplier, which is not affiliated with the merging companies and which has the resources and skills required to import a similar or greater amount of white cement than Cemex imported into Israel prior to the merger. The merger will not come into effect until Cemex sells an initial quantity of white cement purchased from the new supplier ("fix-it-first").

Another recent example of a foreign-to-foreign merger relates to the merger between Cargotec Corporation and Konecranes Plc. The merger has been approved by the ICA subject to remedies, mainly the fulfilment of the commitments set forth by the European Commission in Case M.10078.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

In 2018, the Block Exemption for Restraints Ancillary to a merger was updated. Prior to the amendment, only restraints that met certain technical conditions were exempted. Parties that wished to agree upon restraints that did not meet these technical requirements had to file separate requests for exemption to the ICA, even if the arrangement did not raise a concern of harm to competition.

The amendment to the block exemption transfers the examination to a material examination of the predicted influence on competition and allows the parties to self-assess whether the arrangement is likely to harm competition. Thus, in cases in which self-assessment leads to the conclusion that the ancillary restraints are not expected to harm competition, and provided that these are not "naked restraints", the parties can perform the agreements without filing additional requests to the ICA. An example would be "non-compete" clauses, which in the past had to meet technical conditions to be exempt. Today, non-competition clauses ancillary to a merger will be self-assessed.

These amendments are currently valid up until November 2023.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Under the new Director-General's regime, it has become common that during the review process, the ICA approaches clients, suppliers and competitors of the merging parties, requests information and ask for their view regarding the merger. The ICA is experienced and well-aware of the commercial interests of such third parties, and any complaints regarding the merger that have no real merit do not usually play a significant role in the Director-General's final decision.

The ICA will hear third parties that, on their initiative, wish to object to the merger. If the ICA believes that a meeting is required, such third parties will be able to meet with the ICA to raise their objections.

7.2 Contacting Third Parties

Under the new Director-General's regime, it is highly likely that the ICA would contact third parties, usually by phone call first. It also may deliver a request for information (the notice of merger includes questions regarding competitors and, if necessary, details of suppliers and consumers). In contrast to other jurisdictions, the parties could not offer possible remedies.

The remedies, if needed, will be set according to the ICA's discretion only. However, the ICA may examine the appropriateness of the remedies it is considering with third parties.

See **3.6 Penalties/Consequences of Incomplete Notification** on the ambiguity regarding communications between the merging parties and third parties.

7.3 Confidentiality

The fact that merger notifications were filed does not make the merger public. The information regarding the transaction is not public until the ICA decides whether to approve or block the merger. After the ICA's decision is made, the ICA's formal decision and some parts of the merger notification become public and are published on the ICA's website.

The parts of the merger notification form that become public include general information concerning the person filing the notice of merger; the reason for filing the merger notification; the purchased activities; and the highlights of the merger transaction, its motivation and consideration. The other parts of the merger notification will remain confidential, unless the ICA or a court decides to disclose them. Such details include, for example:

- the holdings structure of the parties and their holders;
- sales turnovers;
- the parties' competitive linkage;
- the merging parties' shares of activities;
- general information about the competition and competitors in the market;
- arrangements with related parties;
- names of customers and suppliers;
- barriers in the markets for the parties' products; and
- information relevant to the analysis of the impact of the merger on competition.

Although in the period of post-filing and pre-ICA's decision, the filing is not public (until the ICA's decision is published); therefore, the information regarding the filing remains confidential and the filing could be made public as a result of the ICA's RFI's and the ICA's conversations with third parties (such as customers, suppliers and competitors).

Freedom of Information

Additionally, the Freedom of Information Law, 5758-1998, allows disclosure of information relating to governmental bodies, including the ICA, after submitting a formal request following the procedure set out under the Law. The Freedom of Information Law provides a list of circumstances in which the relevant governmental authority has discretion as to whether to refrain from transferring certain kinds of information, such as the protection of business secrets.

The ICA must receive the permission of the entity that provided the information prior to revealing it to third parties. If the ICA is convinced that the information does, indeed, include business secrets, it will not transfer such information (or transferred subject to blackening). The ICA's decision is subject to the courts' review.

Third-Party Appeal

In case of an appeal made by a third party concerning the Director-General's decision to clear a merger, the appellant is entitled to review the information in the ICA's files. Similarly, the procedure under the Freedom of Information Law, protection of trade secrets, is a possible valid ground for restricting the review rights of the appellant.

In practice, procedural arrangements that balance the appellant review rights and the information provider interest are agreed upon.

7.4 Co-operation With Other Jurisdictions

General policy discussions are mostly conducted within the framework of the Organisation for Economic Co-operation and Development's Competition Committee (of which the ICA is a member).

It is unusual for the ICA to approach other competition authorities concerning specific cases. Nevertheless, there are cases in which the ICA would ask for assistance regarding another competition authority's policy on certain kinds of transactions. Recently, the ICA requested information on the OFT's and the Swedish competition authority's general policy concerning network-sharing agreements between cellular providers.

The ICA is not required to supply information regarding a specific case to other competition authorities. If the ICA were to consider supplying such information, it is likely that it will first receive the information provider's position.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The parties to the merger may appeal the ICA's decision to block the merger or to approve it subject to remedies to the Competition Tribunal. The Tribunal, once hearing the appeal, applies an "error in the decision" standard of review and can reaffirm the Director-General's decision, revoke it, or amend it.

8.2 Typical Timeline for Appeals

The timeline requires to file the appeal within 30 days from the Director-General's decision. However, it is possible to extend the period by the parties' consent, and this is done as a matter of routine. The Tribunal decision is usually rendered within a year or so from the appeal.

In practice, there are very few successes in appeals against the Director-General's decisions regarding mergers. In recent years, the few times that an appeal was accepted, the Supreme Court (the highest instance in Israel) revoked the appeal decision, thus reaffirming the ICA's original view.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Any person, including third parties, who might be harmed by the merger, as well as industry associations and consumers' organisations, may appeal to the Tribunal against the Director-General's decision to approve or conditionally approve a merger. Case law has held that the harm to the plaintiff must be a competitive injury of the type that the Law seeks to prevent, ie, an antitrust injury.

Even though third parties have appealed a clearance decision made by the ICA to the Tribunal in the past, this has never been done successfully.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

In 2022, The Restrictive Trade Practices Regulations have been amended, as well as regulation 9(2) regarding the turnover threshold.

The two main changes in the Regulations are: (1) raising the turnover threshold for filing in Israel – the minimum annual turnover of each of the two merging companies has to exceed USD6 million (it should be noted, that even if the parties do not meet the minimum turnover threshold, other thresholds might obligate filing a merger notification, see **2.5 Jurisdictional Thresholds**); and (2) the Regulations adopted a new merger notification form, which is more detailed and comprehensive. Accordingly, the scope of information required is more comprehensive.

Alongside the regulatory changes, there were personnel changes in the ICA. The merger regime under the current ICA's officials is stricter, and this has an impact on the merger reviewing process, in terms of its length and the requirements from the parties.

9.2 Recent Enforcement Record

In 2021, the Director-General announced that she is considering imposing financial sanctions of approximately USD1.8 million on Facebook Israel and its parent company, Facebook Inc, for "failure to notify". See **2.2 Failure to Notify**.

Imposing Fines

The majority of the fines in relation to merger transactions are related to "failure to notify". Except for the Facebook case mentioned above, in 2022 the ICA published two consent decrees, both of them as a result of "failure to notify".

See **2.2 Failure to Notify**.

Remedies

During 2019, the ICA approved a merger between Mercantile Bank, Discount Bank and Dexia Israel, subject to remedies that require the merging companies to sell the credit portfolio in full and irrevocably to the purchaser prior to the merger. The purchaser must not be one of the merging companies and/or related to them and/or an officer thereof.

Also during 2019, the ICA approved a merger between Reshet Media Ltd and the 10 New Channel Ltd, subject to conditions that will obligate the merging companies not to perform any act that constitutes a full or partial merger before sale and transfer in a final and irrevocable manner of all its holdings and rights in the new company to an independent body whose identity will be approved by the Director-General in advance.

Recent Record

The ICA's recent record regarding the outcome of the review process is as follows:

- 2018 – 97.9% of mergers cleared, 2.1% of mergers blocked, 0.5% of mergers cleared subject to remedies.
- 2019 – 98.53 of mergers cleared, 0% of mergers blocked, 1.47% of mergers cleared subject to remedies.
- 2020 – 98.33% of mergers cleared, 0% of mergers blocked, 1.67% of mergers cleared subject to remedies.

9.3 Current Competition Concerns

Conglomerate Mergers

The ICA is reviewing conglomerate mergers more closely than before, particularly when big companies are involved in the merger. The ICA has recently published a call for public comments with respect to the manner of examining conglomerate mergers and the competitive considerations to be taken into account when examining such mergers. Therefore, an updated policy with regard to the reviewing process of conglomerate mergers may be published.

"Killer Acquisitions" Phenomenon

The ICA recently participated in the OECD's discussion on the acquisition of start-ups by large technology companies. Because start-ups are sometimes acquired in the early stages of development or activity, they lack indications to guide competition authorities concerning their competitive potential. Therefore, competition authorities are concerned that large technology companies are acquiring start-ups to prevent, eliminate or remove from the market products or technological developments that may compete with them in the future – a phenomenon known as "killer acquisitions".

Following this discussion, the ICA conducted an examination of acquisitions of Israeli start-ups between the years 2014-19 by the five major high-tech companies – Google, Apple, Facebook, Amazon and Microsoft. The results, which were submitted to the OECD, found no indication for the removal of the purchased product from the market. However, the ICA noted that the test itself does not necessarily rule out the need to increase the control of acquisitions of start-ups by large technology companies and the need to re-examine the traditional way of examining mergers.

In this context, it should be noted that ICA's interest in the "killer acquisitions" phenomenon is inseparable from the enforcement proceedings it has recently initiated against Facebook (see **2.2 Failure to Notify**).

Recent Decisions

Strauss/Weiler – merger prohibition

The ICA blocked a merger between the companies Strauss and Weiler. Strauss is a public company that manufactures, sells and distributes a wide range of food products. Weiler is engaged in the production of fresh tofu products and plant beverages products. Strauss is a distributer of Weiler's tofu products. Strauss and Weiler entered into an agreement according to which Strauss would purchase the control of Weiler. The ICA blocked the merger due to the fact the Weiler is the largest tofu manufacturer, and the likelihood of the entry of competitors is low. Therefore, the merger raises competitive concerns of rising prices and reducing the range of options offered to consumers.

Cellcom/Xphone – clearance subject to structural remedies

See **5.4 Typical Remedies**.

Yishparo Center Ltd/Big Shopping Centres – clearance subject to behavioural remedies

See **5.4 Typical Remedies**.

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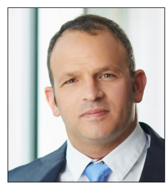
AUTHORS

Boaz Golan is head of the antitrust and competition department at Goldfarb Seligman. He possesses extensive experience and significant expertise in Israeli antitrust and competition law, including managing civil and criminal litigation proceedings in the field. Boaz served as chief legal counsel of the Israeli Antitrust Authority for five years, following which he developed an extensive private practice in the antitrust field. Boaz specialises in all aspects of antitrust and competition. He teaches a course on antitrust and economic regulation at the Hebrew University of Jerusalem, and serves as professional development co-ordinator for the antitrust professional development programme offered by the Israel Bar Association. He writes regularly for industry publications.



Nimrod Prawer is vice-head of the antitrust and competition department at Goldfarb Seligman. He possesses extensive experience and expertise in antitrust law and competition regulation. Nimrod regularly advises multinational and domestic companies regarding antitrust matters related to complex M&A transactions. He has conducted multinational cross-jurisdictional reviews of merger notifications, and represents his clients before the Israeli Antitrust Authority and the Antitrust Tribunal. Nimrod represents both Israeli and international clients on the unique antitrust and competition aspects of the Israeli market, and provides expert competition and antitrust counsel to numerous leading local and international corporations from a wide variety of sectors. He writes regularly for industry publications.

Goldfarb Seligman & Co

Ampa Tower
98 Yigal Alon Street
Tel Aviv
6789141
Israel

Tel: +972 360 899 99
Fax: +972 360 899 09
Email: info@goldfarb.com
Web: www.goldfarb.com

ITALY

Law and Practice

Contributed by:
Elisa Teti and Alessandro Raffaelli
Rucellai & Raffaelli see p.344

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The rules governing merger control in Italy are set out by the Italian Antitrust Law, No 287/1990 of 10 October 1990 (the Law). The procedural concerns, including those relating to merger control, are defined by Presidential Decree 217 of 30 April 1998 (Procedural Regulation).

The Italian Antitrust Authority ("IAA") provides specific guidance on merger control in its 1996 Merger Notification Instructions, last amended on 6 September 2017 (hereinafter "Merger Instructions"). The document offers some clarifications regarding the types of transactions that do and do not need to be notified, according to Article 5 of the Law, the definition of the market/s affected by the transaction and the calculation of turnover. The IAA also provided the short-form and full-form templates for the notification of transactions.

The Italian rules on merger control are significantly similar to the corresponding EU merger control rules and must be interpreted in light of the EU principles developed by the European Commission and EU courts. These principles are automatically integrated into the Italian system (Section 1(4), of the Law). The rules are interpreted and applied in light of the Commission Consolidated Jurisdictional Notice adopted under the EU Merger Regulation ("Commission Jurisdictional Notice").

The IAA also provides guidelines on pre-notification discussions and the calculation of turnover thresholds, and criteria for the determination of the filing fees, which are defined annually. In the application of fines, the IAA refers to the general rules contained in Law No 689 of November 1981 (*Legge di depenalizzazione*).

1.2 Legislation Relating to Particular Sectors

Law Decree No 21 of 21 March 2022 (converted into Law No 51 of 20 May 2022) strengthened (amending Law No 56 of 11 May 2012) the legislation granting the Italian government special powers to protect national interests in strategic sectors. This regulation provides for the obligation to notify the Presidency of the Council of Ministers of certain operations that are likely to affect the ownership of tangible and intangible assets and resources considered to be of strategic importance: traditionally, essential national interests have been identified in defence and national security. Over time, they have been extended to include the sectors of energy, transport, communications and 5G broadband electronic telecommunications networks. As a result of regulatory interventions during the pandemic, they have been further expanded to include the financial sector, infrastructure and critical technologies, including water and health, food security, access to sensitive information, including personal data, artificial intelligence, robotics, semiconductors, cybersecurity, as well as nanotechnology and biotechnology.

For special rules for banks, insurance companies, communications industries, see **1.3 Enforcement Authorities**.

1.3 Enforcement Authorities

The IAA is the enforcement authority for merger control and has both investigative and decision-making powers.

The IAA normally co-operates with the following main regulatory authorities:

- the Bank of Italy in the banking sector;
- the Institute for the Supervision of Insurance (IVASS) in the insurance sector;
- the Communications Regulatory Authority (AGCOM) in the communications sector; and

- the Regulatory Authority for Energy, Networks and Environment (ARERA) in the fields of energy and gas.

In this respect, the IAA and the IVASS signed two Memorandums of Understanding in 2013 and 2014, intended to strengthen their collaboration in their respective fields (Other Memorandums of Understanding with IVASS were signed or supplemented in 2018, 2019 and 2021). Moreover, according to Article 20 of the Law, the IAA has to ask the IVASS to give a mandatory but non-binding opinion on the operation.

The IAA also signed two Memorandums of Understanding in 2013 and in 2016 with AGCOM.

With reference to the banking sector, the operations of concentration are evaluated – independently – by the IAA and the Bank of Italy, which applies its powers in relation to the rules on sound and prudent management. At the same time, Article 20 of the Law provides for some exceptions: the Bank of Italy can ask the IAA to approve an operation that leads to a dominant position if the concerned banks have particular stability problems. This authorisation, however, cannot go further than that which is strictly necessary.

As regards the communications sector, reference should be made to Law No 249 of 31 July 1997, which requires the IAA to ask for a compulsory but non-binding opinion from the AGCOM. Moreover, when at least one of the parties involved in a concentration operates in the "integrated communications system" (which includes, among others, newspapers, internet, radio and television broadcasting), the operation must be notified not only to the IAA but also to the AGCOM. Both authorities will conduct the necessary analysis as per their respective powers.

In addition, Article 25 of the Law confers a wide margin of discretion on the IAA where relevant interests to the national economy arise. More specifically, upon a proposal of the Ministry of the Economic Development, the Council of Ministers may set forth some general criteria to allow the IAA to clear concentrations that would otherwise be forbidden, provided that the operations do not eliminate competition in the market.

The Prime Minister can also – following a proposal from the Ministry of the Economic Development – prohibit a concentration involving undertakings or entities from countries that do not protect the independence of undertakings or entities under provisions that have an equivalent effect to those provided by the Law, or countries that apply discriminatory provisions or impose clauses that have similar effects in relation to acquisitions by Italian undertakings or entities.

2. JURISDICTION

2.1 Notification

Notification to the IAA is compulsory if the transaction meets the jurisdictional thresholds (see **2.5 Jurisdictional Thresholds**). In these terms, even transactions with little significant – or even no – effects on the Italian market must be notified to the IAA, which will assess the impact on competition. The sole exception is provided for "foreign-to-foreign" transactions (see **2.8 Foreign-to-Foreign Transactions**).

2.2 Failure to Notify

According to Article 19.2 of the Law, the IAA may impose an administrative fine on undertakings that fail to notify a transaction that reaches the Italian thresholds, of up to 1% of their turnover in the financial year preceding that in which the failure to notify is challenged.

In order to determine the amount of the fine, the IAA's evaluation has to take into account the subjective elements of the infringement – ie, the behaviour of the undertakings (both wilful and negligent behaviour are relevant), the existence of excusable error, spontaneous notifications, etc – and the objective elements (the competitive impact).

The IAA has the power to impose fines pursuant to Article 28 of Law No 689/81 (see cases C12430B/2022 – Dea Capital Alternative Funds Sgr/Calvi Holding; C12352B/2021 – Doreca-Abruzzo Distribuzione/Ad Beverage; C12295B/2020 – ACEA-Mediterranea-Alma CIS/ Pescara Distribuzione Gas; in this latter case, IAA applied fines for around EUR154,000 on the three companies involved); this power is subject to a limitation period of five years.

The decisions are published on the IAA's website and the Official Bulletin.

2.3 Types of Transactions

The Law classifies the following transactions as concentrations:

- a merger between two or more undertakings;
- an acquisition by one or more subjects controlling at least one undertaking or one or more undertakings, of the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract, or by any other means; and
- the creation between two or more undertakings of a joint venture by setting up a new company (see **2.10 Joint Ventures**).

In general, a concentration arises whenever a transaction involves a change in control on a lasting basis (see **2.4 Definition of "Control"**).

Article 5 of the Law expressly provides for some transactions that do not give rise to a concentration, as follows:

- the acquisition by banks or financial entities of shares in companies newly set up or through a capital increase, when such purchase is made only for resale (provided that the shares are resold within a period of 24 months, during which the relevant voting rights are not exercised); and
- transactions that have as their main object or effect the co-ordination of the actions of independent undertakings (in this case, the operations may be evaluated under Article 2 of the Law and/or Article 101 TFEU).

The following transactions also do not give rise to a concentration:

- internal restructurings or reorganisations;
- transactions between undertakings that are part of the same group (except in specific circumstances indicated in paragraph 2 letter c) of Merger Instructions – ie, the absence of interdependence between the subjects involved); and
- the acquisition or incorporation of a company that does not carry out economic activities and does not hold, either directly or indirectly, any other undertaking (however, an operation of this kind qualifies as a concentration when the target company holds – or controls another company that holds – licences, permits, grants or other titles by which a business activity may be carried out). Moreover, paragraph 2 letter d) of Merger Instructions specifies that the mere acquisition of a licence does not constitute a concentration if it is necessary to enable the transferee to undertake its activity.

When the operation arises out of the acquisition of part of one or more undertakings (where "part of an undertaking" means any asset or set of assets to which a turnover is clearly attributable), two or more operations that individually do not meet the jurisdictional thresholds and that were concluded between the same companies in the last two years will be considered as a single operation completed on the day of the last transaction.

Shareholders' agreements or changes to articles of association are not included when they do not involve a change in the structure of control of an undertaking.

2.4 Definition of "Control"

Article 7 of the Law provides a broad definition of control, which includes both direct and indirect control as well as sole and joint control. More specifically, control is acquired:

- in the cases provided for by Article 2359 of the Italian Civil Code, according to which controlled companies are companies where another company holds the majority of voting rights exercised in ordinary shareholders' meetings; companies where another company holds sufficient voting rights to exercise a significant influence in ordinary shareholders' meetings; or companies that are under the significant influence of another company pursuant to particular contractual relationships entered into with the latter;
- by the holding of rights, contracts or other legal relations which, separately or in combination, and having regard for the considerations of fact and law involved, confer the possibility of exercising a decisive influence on an undertaking. These cases include, for example: property rights or rights of use of all or part of the assets of an undertaking; or rights, arrangements or other legal relations that confer a decisive influence over the composition or the decisions of the corporate governance bodies (for example commercial licences, see case C12354/2021 – Telecom Italia/Rami di azienda BT Italia; licence agreements, see case C12207/2019-Sky Italia/R2; maintenance contracts, see case C11528/2012-Otis Servizi/Ramo di Azienda di Adm Ascensori).

In any case, the IAA generally refers to the definition of control provided by the Commission Consolidated Jurisdictional Notice (2008/C 95/01). Acquisitions of minority shareholdings are caught only when such operations lead to a change in the structure of control (for example, when the minority shareholder holds veto rights over strategic decisions of the given undertaking).

2.5 Jurisdictional Thresholds

A concentration shall be notified in advance to the Authority:

- if the combined aggregate national turnover of all the undertakings concerned exceeds EUR517 million; and
- if the aggregate domestic turnover of each of at least two of the undertakings concerned exceeds EUR31 million.

The above-mentioned thresholds (subject to annual review – see IAA's decision No 30060 of 15 March 2022) are cumulative.

2.6 Calculations of Jurisdictional Thresholds

These thresholds are based on nationwide revenues realised by the parties involved in a transaction.

In particular:

- in the case of a merger, the relevant turnover is the consolidated turnover realised by the group to which each merging party belongs;

- in the case of a joint venture, the relevant turnover is the consolidated turnover realised by the group to which each parent company belongs;
- in the case of the acquisition of sole control, (a) as regards the acquiring party, the relevant turnover is the consolidated turnover realised by the group to which it belongs; (b) as regards the acquired party, the relevant turnover is the turnover realised by it;
- in the case of the acquisition of joint control: (a) as regards the acquiring parties, the relevant turnover is the consolidated turnover realised by the group to which each acquiring party belongs; and (b) as regards the acquired party, the relevant turnover is the turnover realised by it.

The group's consolidated turnover includes that realised by the undertaking concerned, that realised by its subsidiaries and their subsidiaries, and that realised by its parent companies and their parent companies. In the acquisition of control, the target's turnover includes that realised by the target and that realised by its subsidiaries and their subsidiaries. Should the target be a branch of business, the relevant turnover is generally estimated having regard to the costs required to perform its activity.

According to the Merger Instructions, aggregate nationwide turnover means the turnover deriving from the sale of products and/or the provision of services during the previous financial year on the Italian market after deducting returned products, discounts, and taxes directly related to the sale of products and the provision of services. The national allocation of turnover depends on direct sales in Italy and is hence determined by the location of the customer to whom the products have been sold and/or the services have been provided at the time of the transaction. According to the Merger Instructions, for foreign-registered undertakings, the amounts in foreign currency must be converted into euros at the average exchange rate of the relevant financial year.

The Law provides special rules for the method of calculation of turnover for banks (turnover is equal to the value of one-tenth of their total assets, memorandum accounts excluded) and insurance companies (turnover is equal to the value of premiums) collected (Article 16, paragraph 2, the Law).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The first threshold (aggregate Italian turnover of all the undertakings concerned) requires consideration of the following data:

- in the case of a merger, the relevant turnover is the sum of the turnovers of all merging entities (on a group-wide basis); and
- in the case of the acquisition of joint control, the turnover of the undertaking to be considered must be divided equally between all entities acquiring control.

Intra-group sales must not be considered part of the group's turnover. Moreover, the turnover of the seller does not have to be taken into account unless the seller retains joint control (it is thus an entity acquiring joint control).

Please note that, after Law No 124/2017, the national turnover of each of at least two of the undertakings concerned has to be considered as a second threshold.

With regard to changes in the business during the reference period, the IAA follows the principles set out at European level due to the lack of any specific national provision (particularly paragraphs 172 and 173 of the Commission Consolidated Jurisdictional Notice No C 95/01 of 2008).

2.8 Foreign-to-Foreign Transactions

Mandatory notification to the IAA is not required (despite attainment of the above thresholds) if a transaction does not produce effects on the Italian market, as follows:

- acquisitions/mergers through incorporation involving foreign-registered undertakings that have not, directly/indirectly, generated any turnover in Italy, at the time of the transaction and (cumulative condition) during the previous three years; or
- joint ventures/mergers when at least one party is a foreign-registered undertaking and has not generated any turnover in Italy at the time of the transaction and (cumulative condition) in the preceding three years.

However, prior notification is required if the foreign-registered undertaking(s) concerned will start performing an economic activity in Italy following the transaction.

2.9 Market Share Jurisdictional Threshold

Italian merger control rules do not consider market share jurisdictional thresholds.

Market shares held by the companies involved in the concentration are considered in the assessment of the impact of the transaction on the market (see **3.5 Information Included in a Filing** and **4.2 Markets Affected by a Transaction**).

2.10 Joint Ventures

A joint venture constitutes a concentration if the following cumulative conditions are met:

- two or more undertakings set up a new company;
- these parent companies acquire joint control over the new company;
- the new company will operate on the market as an autonomous economic entity (full-function joint venture); and
- the new company's main object or effect is not the coordination of the competitive behaviour of the parent companies.

To evaluate whether a joint venture is a full-function joint venture, the criteria set forth in the Commission Jurisdictional Notice apply.

Should a joint venture not operate as an autonomous economic entity so that the co-ordination effects prevail over the structural effects, the transaction constituting a joint venture shall be evaluated under the rules on restrictive agreements and practices (Article 2 of the Law).

2.11 Power of Authorities to Investigate a Transaction

If the transaction does not meet the jurisdictional thresholds, the IAA does not have the power to open an investigation.

If the responsible entities fail to notify a concentration that meets the turnover thresholds, the IAA may impose fines. In this regard, it is necessary for the Authority to start its investigation within five years of the transaction (see **2.2 Failure to Notify**). Additionally, where the parties fail to notify and the IAA is informed of the concentration by any other means, the IAA shall commence investigations within 30 days.

2.12 Requirement for Clearance Before Implementation

There is no standstill obligation under the Italian merger control regime, so sanctions would apply for failure to notify and/or implementation of the transaction in spite of a prohibition decision by the IAA.

However, pursuant to Article 17, paragraph 1, of the Law, when opening a phase two investigation (see **3.8 Review Process** and **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**), the IAA may order the undertakings not to implement the transaction until its final decision.

For example, in the case C11524/2012 – Unipol Gruppo Finanziario/Unipol Assicurazioni-Permafin Finanziaria-Fondiaria Sai-Milano Assicurazioni, the IAA set the suspension of the merger, and of any other preparatory measure, with the decision to initiate the investigation, given that the preliminary assessment found certain competition concerns. In public takeover bids, Article 17, paragraph 2 provides that, notwithstanding the provision of paragraph 1, the acquisition of the target's shares can be completed, provided that the acquiring entity does not exercise the relevant voting rights until the IAA issues its decision.

In the implementation of a prohibited transaction or a transaction in breach of obligations imposed by a conditional clearance decision, the IAA may do the following:

- impose a fine ranging from 1% to 10% of the turnover of the business forming the object of the concentration; and
- require the parties to take measures to restore effective competition and remove any anti-competitive effects of the transaction. For this reason, it is advisable not to implement a transaction during the review process, when competition concerns are likely to be raised by the IAA.

For the quantification of fines, the IAA takes into account the same criteria for failure to notify (ie, remedial action, the personality and economic conditions of the perpetrator, the duration of the infringement – see **2.2 Failure to Notify**).

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Italian framework does not provide for a standstill period, so there are no specific penalties if the parties implement the transaction before the clearance.

In any case, as defined under **2.12 Requirement for Clearance Before Implementation**, the IAA may impose the suspension of the concentration, with any breach of the suspension leading to sanction.

2.14 Exceptions to Suspensive Effect

See **2.12 Requirement for Clearance Before Implementation**.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

A transaction shall be notified prior to its implementation – ie, before the acquisition of the effective ability to exercise a decisive influence over the behaviour of the target – but after the parties have agreed on the essential aspects of the transaction.

Indeed, the IAA must be aware of the essential elements of the operation in order to develop its assessment. More specifically, the merger instructions (paragraph D, section 2) distinguish between:

- mergers where notification has to take place before the drafting of the merger deed;

- acquisitions of direct/indirect control under Article 5 (b) of the Law, namely through the purchase of shares/quotas of a company, where the prior notification requirement is fulfilled if the full effectiveness of the acquisition agreement is suspended until the IAA has cleared the operation; and
- joint ventures where notification to the IAA shall be made before the incorporation deed is filed with the Register of Companies.

Pursuant to Article 19(2) of the Law, where the responsible company fails to notify the operation, the IAA may impose an administrative fine of up to 1% of the undertaking's turnover in the financial year preceding that of the omission of notification or late notification.

3.2 Type of Agreement Required Prior to Notification

A notification can be made prior to signing a definitive agreement, provided that the parties have agreed on the essential aspects of the transaction – for instance, in the context of a signed framework agreement or a signed letter of intent.

3.3 Filing Fees

The payment of a filing fee is not required.

3.4 Parties Responsible for Filing

Generally, all undertakings acquiring control are responsible for filing, which can also be made by the company that directly or indirectly controls the acquirer.

More specifically, according to Merger Instructions:

- in the acquisition of control or the creation of a joint venture, all the companies acquiring control are responsible;
- for mergers, all merging entities are considered responsible.

In these cases, the filing could be executed jointly by the parties.

Lastly, in the case of a public takeover bid, the responsibility is attributed to the bidder.

3.5 Information Included in a Filing

There are two different kinds of notification: the long-form and the short-form. The standard forms are available on the IAA's website.

The long-form notification is required when the concentration meets one of these conditions:

- two or more companies involved in the concentration operate in the same affected market(s) and the concentration allows them to reach a combined market share of 25% or more; and/or
- one of the undertakings involved will reach a market share of 40% following the concentration, where at least one of the other entities operates in an upstream or downstream market.

If the acquired or merged undertaking has a market share of less than 1%, the long-form notification is not required. When the transaction does not meet the above conditions in the affected market(s), the companies will submit a short-form notification.

As specified by the Merger Instructions, the Authority can require the information to be provided in a long-form notification when the information provided by the short-form does not allow for an appropriate evaluation of the transaction.

The two notifications require different information, which has to be collected following the respective forms.

In the short one, the parties have to provide the following:

- background information and data about the companies involved in the transaction;
- a detailed description of the transaction (aims of the concentrations; the proposed structure of ownership and control after the operation; ancillary restrictions that are directly related and necessary to the implementation of the concentration);
- information on ownership and control of the parties (specifying which entities exercise control on the parties involved);
- a description of the economic activities of the entities;
- the turnover generated over the past three years by the entities;
- information on the financial and personal links of each of the parties with other entities that operate in the affected markets;
- information about the affected markets regarding market shares, competitors, sales and further clarifications; and
- documentation (see below).

The long-form notification requires more details on the affected markets. For example, in addition to the elements required for the short-form, in the long-form notification it is necessary to include information about the structure of supply and demand, market entry, clients, trademarks, cooperation agreements, and research and development agreements.

The notification form must be sent with other documents that are relative to the concentration, including:

- a definitive draft or the most updated version of the documents concerning the operation;
- the balance sheets and annual accounts for the last three financial years; and
- in the case of a public bid, a copy of the offer document.

In addition to the fundamental information, parties may attach the evaluation about the affected markets, reports, analyses, studies and surveys prepared for the shareholders or the directors, to provide aid to the IAA.

The IAA's instructions for the notification form do not provide specific rules about language, but the notification forms are usually drafted and submitted in Italian. As regards the relevant documents attached to the notification, the Authority usually accepts the English version; there are no specific rules about the use of other languages.

The notification form shall be undersigned by the legal representative of the notifying party, who expressly certifies that the information submitted is complete and accurate.

3.6 Penalties/Consequences of Incomplete Notification

If the IAA deems the information reported in the notification and related documents or annexes to be seriously inaccurate, incomplete or untruthful, it will require the parties to integrate the filing.

According to Article 16 (7) of the Law, the IAA may commence the investigation beyond the time limits provided by this section when the information notified by the undertakings is seriously inaccurate, incomplete or untrue.

In these terms, the period of time provided for the opening of an investigation starts from the date when the IAA receives the complete notification, with all the necessary elements. When the operation requires the long-form notification, the completion of a short-form one may be viewed as incomplete.

Although no specific penalties are provided for incomplete notification, the IAA considers the administrative fine provided by Article 19(2) of the Law for failure to notify to be applicable where the information notified by the undertakings is seriously inaccurate, incomplete or untrue.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Authority will inform the undertakings pursuant to Article 5(3) of the Procedural Regulation and the 30-day time limit will start from the moment the complete notice is received by the IAA (see for example C12419/2022 – New FDM/Docici punti vendita di coop alleanza 3.0).

3.8 Review Process

The review process is divided into two phases that could be pre-empted by pre-notification discussions with the IAA.

In this preliminary and informal dialogue, the parties may submit an informal document, which will be treated as strictly confidential, at least 15 days before the date of the formal notification (see **3.9 Pre-notification Discussions With Authorities**). The document must include the following information:

- the identity of the parties to the acquisition or merger;
- a short description of the operation;
- indications of the relevant and affected markets;
- the market shares of the parties; and
- other foreign antitrust authorities involved by notification.

In "phase one" (the period of 30 days from the notification of the transaction), the IAA may adopt different decisions (it is relevant to know that, for public takeover bids, the term is reduced to 15 days, while for concentrations concerning the acquisition of control of a bank the term is increased to 60 days, pursuant to Article 20(5) of the Law).

First, the IAA can decide on the inapplicability of the Law. This happens, for example, when the operation has an EU dimension, when the transaction does not constitute a concentration, or when the thresholds are not met (see for example C12408/2021 – Unione amiatina/Due rami di azienda di Unicoop tirreno where the turnover thresholds were not met; in case C12413/2021 – Eurospin/Tredici rami di azienda di zero1, the IAA affirmed that the operation does not constitute a concentration according to Article 5(1) of the Law).

The IAA could decide to clear the transaction without opening an in-depth investigation if the operation evaluation does not give rise to competition issues. In these terms, the operation can proceed because it does not give rise to serious doubts about the compliance with merger rules.

The IAA may decide not to open an investigation if corrective measures are taken.

The IAA could refer to the Commission a concentration that does not have a Community dimension but that affects trade between the Member States and threatens to significantly affect competition within its territory (see case C5819/2003-General Electric/Agfa Ndt – Rami di azienda di Agfa Gevaert).

Otherwise, the Authority can decide to open an in-depth investigation when it deems it possible that the concentration may lead to a prohibition decision. This last decision opens "phase two" of the review process.

Once the IAA has started the "second phase", it may adopt the final decision within 45 days. The IAA can decide on clearance, on clearance with necessary measures to avoid anti-competitive outcomes, or on the prohibition of the transaction. Moreover, this period may be extended during the investigation for a further period of no more than 30 days where the undertakings fail to supply the information and the data in their possession upon request.

When the IAA proceeds with the second phase of the investigation, the overall time for clearance is normally 75 days from the notification of the operation. However, the Authority often extends this period, uses its power to stop the time limit of the first phase, or takes advantage of the 30 extra days of phase two.

When the concentration involves undertakings that are active in the communications or insurance sectors, the Law provides for co-ordination with the competent authorities: AGCOM and IVASS, respectively. In this case, time limits are suspended until the Authorities return their opinion. The suspension also ends if the opinion is not returned within the period provided by the law (30 days).

3.9 Pre-notification Discussions With Authorities

The phase prior to the formal notification of mergers is regulated by Procedural Notice – 20 June 2005, which was adopted in response to the Authority's experience that showed the need for the parties to consult the Authority before formally notifying a merger or acquisition.

This informal procedure is seemingly being encouraged by the IAA, but it has no common application.

Thereby, this informal dialogue, which is strictly confidential, aims to streamline the procedure and enable the Authority to issue its determinations more promptly.

3.10 Requests for Information During the Review Process

As said, the 30-day time limit is interrupted when the information notified by the undertakings is seriously inaccurate, incomplete or untrue and it applies from the date the IAA received the notification, with all the necessary elements.

3.11 Accelerated Procedure

Transactions may be notified using the short-form in lieu of the full-form. The short-form can be used where a transaction does not require a full-form notification (for differences in full-form and short-form, please see **1.1 Merger Control Legislation**). There are no differences in the timing for clearance with respect to the full- and short-form.

There are no cases in which clearance can be otherwise expedited.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

In its legal assessment of the operation, the IAA uses the so-called dominance test, based on which a transaction is prohibited if it creates or strengthens a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis. Therefore, the IAA's evaluation is strictly related to the concept of dominance, which is the essential starter element of the assessment. The national approach is significantly different from the one adopted by the European legislator, which has instead introduced the "significant impediment of effective competition" test. According to this different approach, the existence of a dominant position is not necessary to prohibit a concentration; the assessment must be based on a more general valuation of the effects on the affected market (the increase of prices). On the contrary, the IAA proceeds with the evaluation of the effects where the creation or strengthening of a dominant position is found.

In the assessment process, the IAA first has to identify the relevant product and geographic market(s). Considering that this is an ex-ante evaluation, the IAA will try to provide the competition constraints to which the undertakings concerned would be subject after the implementation of the transaction. In this analysis, the IAA essentially follows the European Commission's practice.

Secondly, the IAA proceeds with the evaluation of the effects of the notified transaction on the previously defined market(s). It takes into account the possibilities of substitution available to suppliers and users, the market position of the parties, the access conditions to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to the entry of competing undertakings, and the evolution of supply and demand for the relevant goods or services.

4.2 Markets Affected by a Transaction

The Merger Instructions define the "affected" markets as the relevant product and geographic markets in which:

- two or more undertakings involved in the concentration are active and which, following the operation, will hold a combined market share of 15%;
- one of the undertakings involved in the concentration will have a market share of at least 25% after the operation, provided that at least one other participant is active in an upstream or downstream market (which will also be considered to be an affected market); and
- an undertaking being acquired or merged has a market share of at least 25%, and the other undertakings involved in the concentration do not operate in that same market, nor in a market upstream or downstream thereof.

Market shares represent a prominent element in the evaluation of the concentration. More specifically, if the operation determined a final market share below 25%, it shall be presumed that there are no effects on effective competition in the affected market. It is also clear that high market shares will determine a stringent assessment of the IAA.

4.3 Reliance on Case Law

Normally, the IAA relies on the case law of the European Commission and its own previous decisions, especially with reference to the definition of the relevant market.

4.4 Competition Concerns

In its assessment of transactions, the IAA abides by the general rule to adhere to the competition law principles elaborated by the EU legal order. In particular, the IAA has followed the EU principles on collective dominance, adapting them to the specific circumstances of the case. The IAA takes into account both horizontal and non-horizontal effects on competition.

With regard to horizontal operations, it has to be noted that the IAA considers the market share that the resulting entity will have in the relevant market involved in the operation and analyses such markets by comparing market shares of the main competitors. Even if it is not a mandatory rule, a dominant position is generally recognised by the IAA when the companies have a market share that exceeds 40%. Furthermore, special attention is given to the increase in market power that derives from the operation. The IAA generally also considers the presence of entry barriers, market transparency and market dynamism in its analysis, and the existence of buying power capable of countervailing a significant market power from the supply side.

The IAA usually makes a distinction between unilateral and co-ordinated effects; the former lead to the elimination of a direct competitor and, in general, occur when the resulting undertaking significantly increases its individual market share as a result of the operation, while the latter lead to a situation where there is a high risk of collusion between different competitors.

In assessing vertical operations (which are generally considered to be less problematic than horizontal ones), the IAA pays particular attention to three potential risks:

- the foreclosure effects on the market;
- a possible increase in entry barriers; and
- the probability of tacit collusion between vertically integrated competitors.

Sporadically, the IAA evaluates the so-called "portfolio effects" in conglomerate concentrations – ie, operations not involving competitors or undertakings that are active at different levels of the same supply chain. Such operations do not generally give rise to competition concerns, unless they occur in complementary markets.

Finally, it should be noted that the Law does not make any reference to the so-called "failing firm defence". However, in following the EU Commission's principles, the IAA has shown its willingness to accept this defence if the undertakings involved can demonstrate that:

- without the acquisition, the failing firm would have been forced to exit the market;
- even without the acquisition, the market share of the failing firm would have been obtained by the acquiring undertaking; and
- there are no less restrictive solutions.

4.5 Economic Efficiencies

Although the IAA does not usually take efficiencies into account in its assessment of merger control transactions, in some cases it has referred to efficiency gains such as cost savings (case C8699/2007-London Stock Exchange Group/Borsa Italiana).

4.6 Non-competition Issues

Non-competition issues such as industrial policy, national security, foreign investment, employment, or other public interest issues are generally not taken into account during the review process. Therefore, it is relevant to consider that, pursuant to Article 25 of the Law, it could be possible for the IAA to clear an operation that is otherwise forbidden, in an exceptional case of relevant national economic interest.

In the banking field, the IAA may derogate from the rules concerning merger control and, more specifically, may authorise a merger transaction that creates or strengthens a dominant position to grant stability for one or more of the parties involved.

As per foreign direct investments, please see **1.2 Legislation Relating to Particular Sectors**.

4.7 Special Consideration for Joint Ventures

A joint venture constitutes a concentration if the following cumulative conditions are met:

- two or more undertakings set up a new company;
- these parent companies acquire joint control over the new company;
- the new company will operate on the market as an autonomous economic entity (full-function joint venture); and
- the new company's main object or effect is not the co-ordination of the competitive behaviour of the parent companies.

Unlike EU rules, the joint acquisition of an existing company does not fall within the meaning of joint venture provided by the Law, and it will be treated as an acquisition of control.

To evaluate whether or not a joint venture is a full-function joint venture, the criteria set forth by the Commission Jurisdictional Notice apply.

Should a joint venture not operate as an autonomous economic entity, so that the co-ordination effects prevail over the structural effects, the transaction constituting a joint venture will be evaluated under the rules on restrictive agreements and practices (Article 2 of the Law).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The IAA has the power to adopt a prohibition decision if, following the second phase, it ascertains that a transaction creates or strengthens a dominant position on the domestic market, with the effect of eliminating or restricting competition appreciably and on a lasting basis.

The Authority may also clear the transaction, imposing the measures that it deems necessary to prevent the negative consequences referred to above.

Moreover, when opening a phase two investigation, the IAA may also interfere with the transaction by ordering the undertakings concerned to suspend it until the end of that investigation. In addition, when the transaction has already been implemented and the final decision finds it to be prohibited, the IAA has the power to impose all the necessary remedies to restore conditions of effective competition in the market.

5.2 Parties' Ability to Negotiate Remedies

The parties to a transaction that could give rise to competition concerns may propose both behavioural and structural remedies.

Structural remedies are generally preferred by the IAA and may include, for instance, the divestiture of intellectual property rights, the divestiture of assets or activities (eg, slots in the airline sector), and the divestiture of shareholdings.

Despite its preference for structural remedies, the IAA may also accept behavioural remedies, such as commitments to reducing the presence of the same individuals in the managing bodies of competing banks in the banking sector, or commitments aimed at granting competitors access to an essential resource/infrastructure, for instance in the telecommunications sector.

5.3 Legal Standard

According to the European framework, the European Commission may only impose remedies that are offered by the undertakings involved. On the contrary, pursuant to Article 6(2) of the Law, the IAA may unilaterally impose any further measures considered necessary.

Although the application of remedies is done on a case-by-case basis, it is useful to consider the Commission's notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), which defines the content and procedural aspects to propose and evaluate remedies.

5.4 Typical Remedies

In the case of horizontal mergers, remedies are generally intended to reduce the resulting market share through divestments, while the most frequently used remedies in vertical mergers are aimed at limiting foreclosure risks deriving from the operation.

As noted above, the IAA usually prefers structural measures such as the divestiture of intellectual property rights, the divestiture of assets or activities (eg, slots in the airline sector), and the divestiture of shareholdings.

5.5 Negotiating Remedies With Authorities

The parties to a transaction that could give rise to competition concerns may propose measures that are deemed appropriate to address such concerns, during the first phase of the merger control proceeding and even during the pre-notification discussion, if it has commenced. During the second phase of the merger control proceedings, and if the IAA considers that the proposed transaction could be prohibited, the parties may propose remedies deemed appropriate to eliminate those elements of the transaction that could distort competition. Likewise, during the pre-notification discussion or the first phase, with regard to transactions that could give rise to competition concerns, the IAA may propose certain measures, and may impose remedies if, during the second phase, it considers that the transaction could create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.

It must be noted that, after the imposition of remedies by the IAA, the parties may request the removal of one or more remedies if there are any changes in the market. In this regard, because such a decision must be taken by the IAA jointly with the parties to the concentration, the IAA must open a proceeding. For example, in the recent cases C11205B/2020 Elettronica Industriale/Digital Multimedia Technologies and C12207B/2022 SKY Italia/R2, the IAA revoked certain measures adopted with its decisions, no 23117/2011 and no 27784/2019 respectively, due to a change in the factual and legal situation, and also with reference to the configuration of the Italian market.

5.6 Conditions and Timing for Divestitures

Measures accepted by the IAA during the pre-notification discussion or the first phase are not binding. If the parties implement the transaction without the prescribed measures, the IAA cannot impose fines upon these parties, and it may only consider that the transaction has been implemented within a changed factual scenario.

On the contrary, remedies accepted by the IAA during the second phase are binding upon the parties, and the IAA may impose fines ranging from 1% to 10% of the turnover of the business forming the object of the transaction if the parties implement the transaction in the absence of the aforesaid remedies.

5.7 Issuance of Decisions

All decisions permitting or prohibiting a transaction are formally notified to the parties involved, and published on the IAA's website and Official Bulletin.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The IAA has not prohibited any transaction in 2020 or 2021.

In 2020 or 2021, among 15 investigations in phase 2 (on 146 concentrations notified), the IAA cleared 10 transactions with remedies (C12247B/2020 BDC Italia-Conad/Auchan; C12274/2020Emmeffe Libri/Centro Libri; C12279/2020 Diperdì/Rami Di Azienda Di Sma e Società Generale Distribuzione; C12294/2020 A2A/Ambiente Energia Brianza; C12287/2020

Intesa Sanpaolo/Ubi-Unione Di Banche Italiane; C12360/2021 2I Rete Gas/Infrastrutture Distribuzione Gas; C12358/2021 Cellnex Italia/Ck Hutchison Networks Italia; C12354/2021 Telecom Italia/Rami Di Azienda BT Italia; C12373/2021 NEXI/SIA; C12393/2021 Arnoldo Mondadori Editore/De Agostini Scuola).

As for the other six investigations initiated by the IAA, one case ended with the revocation of remedies previously imposed by the Authority (C11205B/2020 Elettronica Industriale/Digital Multimedia Technologies); in two cases, the failure to notify a transaction subject to the reporting obligation was ascertained (C12295B/2020 ACEA-Mediterranea-Alma CIS/Pescara Distribuzione Gas; C12352B/2021 Doreca-Abruzzo Distribuzione/Ad Beverage); in the remaining two cases, the IAA found that the merger rules were not violated (C12404/2021 ENEL X-VOLKSWAGEN FINANCE LUXEMBOURG/JVC) and that no infringement of remedies previously imposed took place (C12247C/2021 BDC ITALIA-CONAD/AUCHAN).

There is no recent case law on the imposition of remedies or prohibitions of concentrations in foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Due to the lack of provisions concerning ancillary restraints in Italian law, the IAA evaluates the restrictions – which have to be indicated by the undertakings in the specific section of the full-form notification – in light of the European Union principles.

The IAA must consider explanations of the parties as to why the ancillary restraints need to be considered as strictly necessary for the implementation of the operation, and the result of this assessment is indicated in the final decision of the Authority.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties may intervene in merger control proceedings if they are directly, immediately or presently damaged by the infringements under investigation or by the measures consequently adopted.

These third parties may intervene as follows:

- With regard to the first phase, IAA publishes a short advice of the transaction notified, inviting third parties to submit observations on the proposed concentration within the next five working days from the publication.
- With regard to the second phase, once the decision declaring the opening of the investigation has been published on the Official Bulletin, third parties may intervene with respect to all transactions, by submitting written representations, being heard by the case team, and also attending hearings, especially if this has been requested by the notifying parties. Third parties may submit the request to intervene within ten days of the publication on the Official Bulletin.

Third parties may also lodge complaints before the IAA against undertakings that failed to notify the transaction.

7.2 Contacting Third Parties

Third parties may always be contacted by the IAA to provide certain information or exhibit particular documents that could help the Authority to assess the operation. Normally, the IAA contacts the third parties in writing.

7.3 Confidentiality

All IAA decisions (prohibition/approval decisions and decisions to open an investigation) are published on its bulletin and website, with a notice that indicates the main features of the proposed concentrations. For major decisions, the IAA typically also issues press releases on its website.

Business secrets are removed from the IAA's decisions only if the parties make an express reasoned request to the IAA to this effect, and the IAA accepts it. Therefore, the decisions published by the Authority do not contain the information – which is included in the notification and the attached documents – that the parties expressly indicated as constituting business secrets.

7.4 Co-operation With Other Jurisdictions

Pursuant to Regulation 1/2003, the IAA is part of the European Competition Network (ECN) and co-operates closely with the European Commission and national competition authorities of all other EU member states.

Upon express authorisation given by the parties to the transaction, the IAA may also exchange information with foreign competent authorities, even those of third countries, provided that these authorities guarantee the same degree of confidentiality on the transaction as granted by the IAA.

The Italian Authority is also part of the EU Merger Working Group, whose aim is to increase convergence and co-operation among EU merger jurisdictions, and of the International Competition Network (ICN), with 136 other competition authorities in the world, whose main purposes are the exchange of information or documents in relation to ongoing investigative proceedings, as well as the evaluation of initiatives aimed at the dissemination of competition culture in the respective countries.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The IAA's decisions approving or prohibiting transactions may be appealed by the addressees or other interested third parties, before the Administrative Court of Lazio (TAR Lazio).

The TAR Lazio may annul the IAA's decision, totally or partially, on points of law, for lack of jurisdiction or competence, violation of laws or abuse of power.

8.2 Typical Timeline for Appeals

The term for filing an appeal before the TAR Lazio is 60 days from the notification of the IAA's decision. The TAR Lazio's judgment may subsequently be appealed before the Supreme Administrative Court (Consiglio di Stato) either within 30 days of the notification of the TAR Lazio's judgment, or within three months of the publication of the judgment in the TAR Lazio's registry.

The rulings of Consiglio di Stato can be challenged before the Court of Cassation only on jurisdictional grounds, within 60 calendar days from the notification or within six months from the publication of the judgment; the rulings may also be subject to revocation under specific and extraordinary conditions provided in Articles 395 et seq of the Italian Civil Procedural Code.

Each phase of the judicial review lasts around one year, so a complete judicial review of an IAA decision takes around two or three years.

Recently, also considering that the IAA did not prohibit any transaction, no appeals have been filed.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties, having a qualified interest, can bring an appeal before the TAR Lazio.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The IAA's decision No 30060 of 15 March 2022 modified the thresholds (see **2.5 Jurisdictional Thresholds**).

On 30 May 2022, Draft Law No 2469, Annual Market and Competition Law 2021, was approved and submitted to the Italian Chamber of Deputies.

Article 32 of the aforementioned Draft Law provides for the insertion of a new paragraph 1-bis to Article 16, which allows the IAA to require the undertakings concerned to notify a merger within 30 days, even if only one of the two turnover thresholds indicated above is exceeded, or if the total worldwide turnover achieved by all the undertakings concerned exceeds EUR5 billion, if there are real risks for competition in the national market, or in a substantial part thereof, also taking into account the detrimental effects on the development and diffusion of small undertakings characterised by innovative strategies, and no more than six months have elapsed since the completion of the transaction.

9.2 Recent Enforcement Record

In the last three years (2019-2022), the IAA imposed the following fines for failing to notify: EUR6,460.33 in the case C12430B/2022 – Dea capital alternative funds sgr/Calvi holding; a total of about EUR12,000 in the case C12352B/2021 – Doreca-Abruzzo distribuzione/ad beverage; and a total of about EUR154,000 in the case C12295B/2020 – ACEA-mediterranea-Alma CIS/ Pescara distribuzione gas.

Moreover, between 2019 and 2022 the IAA often authorised mergers by ordering the measures necessary to prevent the creation or strengthening of a dominant position on the national market within the meaning of Article 6(2) of the Law (see, for example, recently IAA's decision No 30037 of 22 February 2022 – C12410B – CINVEN CAPITAL MANAGEMENT-FRESSNAPF BETEILIGUNGS/AGRIFARMA – MAXI ZOO ITALIA; IAA's decision No 29839 of 12 October 2021 – C12373 – NEXI/SIA).

There are also cases in which the IAA subsequently revoked the measures imposed pursuant to Article 6(2) of the Law after assessing that the reasons in fact and in law which had motivated the imposition of the measures previously ordered no longer existed (see, for example, IAA's decision No 28431 of 27 October 2020 – C11205B – INDUSTRIAL ELECTRONICS/DIGITAL MULTIMEDIA TECHNOLOGIES-REVISION OF MEASURES).

9.3 Current Competition Concerns

Recently, the monitoring of below threshold transactions has been an area of concern for the authorities.

The reason of this concern is that, in the new market context, merger transactions involving companies that have a turnover below the relevant thresholds, but whose acquisition may have a significant impact on the market (eg, where the acquisition concerns a small innovative start-up with significant competitive potential), are becoming increasingly common.

Furthermore, in the context of the IAA's Annual Report for 2021, it was highlighted that given the growing importance of international cooperation on antitrust and merger cases, many competition authorities have entered into bilateral memorandums of understanding aimed at promoting greater cooperation in terms of mutual assistance in the enforcement, collaboration in the formulation of competition policies and exchange of experiences. In this context, in February 2020 the Italian and Brazilian competition authorities signed a memorandum of understanding aimed at strengthening their bilateral cooperation.

Rucellai & Raffaelli was founded in 1979 and is an independent law firm with offices in Milan, Rome and Bologna. The antitrust department, consisting of ten lawyers, has gained considerable expertise with antitrust issues in various sectors, including banking, pharmaceutical, healthcare, medical devices, chemical, cosmetics, the automotive industry, IT and telecommunications, air transport, mass retail and superstores. The antitrust department provides general assistance on pre-notifications and notifications of concentrations at EU and Italian level. The firm represents its clients in antitrust proceedings before national and EU competent authorities and courts. Self-assessment of agreements and practices, organisation of antitrust compliance programmes, training and audits are also covered by the firm, together with assistance on EU law-related matters and state aids. The firm also has wide experience in standalone and follow-on actions, representing several clients in lawsuits for damages pending before the three competent courts of Milan, Rome and Bologna.

AUTHORS

Elisa Teti is a partner at Rucellai & Raffaelli. She joined in 1999, acting at EU and national level in merger control proceedings, cartel investigations, abuse of dominance and abuse of economic dependence proceedings and lawsuits. She has extensive experience in advices, antitrust compliance programmes, audits and training activities across several economic sectors. She also acts in antitrust litigation, assisting several clients in standalone and follow-on actions. She also has a significant knowledge of unfair commercial practices, consumer protection law and advertising law. She frequently authors publications and speaks at antitrust conferences, as well as being a member of the Italian Antitrust Association Steering Committee.

Alessandro Raffaelli is a partner at Rucellai & Raffaelli and acts in competition law, both Italian and European, with significant experience in cartel investigations, proceedings for abuse of dominance and other restrictive practices. He advises clients before antitrust authorities and courts at national and EU level. He is a frequent lecturer in professional training courses at client companies and trade associations regarding competition themes, as well as a participant in the preparation and implementation of compliance programmes for clients of the law firm regarding antitrust matters.

Rucellai & Raffaelli

Via Monte Napoleone, 18
20121
Milan
Italy

Tel: +39 02 7645 771
Fax: +39 02 7835 24
Email: e.teti@rucellaieraffaelli.it
Web: www.rucellaieraffaelli.it

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Law and Practice

Contributed by:
Tsuyoshi Ikeda, Aya Yasui, Hiroko Fukushima and Shota Ogawa
Ikeda & Someya see p.366

CONTENTS

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No 54 of 1947 – the "Anti-Monopoly Act" or AMA) prohibits transactions that will substantially restrict competition in any relevant market.

The Japan Fair Trade Commission (JFTC) is a competent Japanese authority for the AMA, and prepares and publishes the Guidelines to Application of the AMA Concerning Review of Business Combination (established in May 2004 and most recently amended in December 2019) (the "Merger Guidelines") to clarify details of how it analyses a proposed merger. The Merger Guidelines are also applied to cases below the filing threshold.

The JFTC has also published the Policies Concerning Review of Business Combination (established in June 2011 and most recently amended in December 2019) (the "Merger Review Policies"), containing detailed merger control review procedures.

1.2 Legislation Relating to Particular Sectors

The Foreign Exchange and Foreign Trade Act (FEFTA) regulates foreign transactions or inward investments as foreign direct investments or specified acquisitions – for example, the FEFTA requires the filing of a notification prior to transactions in certain areas, such as weapons, aircraft, space, nuclear facilities, dual-use technologies (which could be used for military purposes), cybersecurity, electricity, gas, telecommunications, water supply, railways and oil.

In some industries, restrictions on inward investment under the industry-specific legislation will also apply, including under the following:

- the Civil Aeronautics Act;
- the Radio Act;
- the Broadcasting Act;
- the Mining Act;
- the Ships Act; and
- the Financial Instruments and Exchange Act.

1.3 Enforcement Authorities

Merger control rules under the AMA are enforced by the JFTC as the sole regulatory authority in Japan. The JFTC is an external agency of the Cabinet Office, and the AMA expressly provides that the JFTC must exercise its authority independently from any other governmental bodies.

2. JURISDICTION

2.1 Notification

Notification is compulsory if the transaction meets a certain threshold under Chapter 4 of the AMA and relevant regulations. A transaction within the same company group is generally exempt from the obligation of notification.

Meanwhile, the JFTC can review any merger below the notification threshold, either on its own initiative or through a voluntary consultation by the merging party or parties. Specifically, in the Merger Review Policies revised in 2019, the JFTC recommends parties whose domestic sales amounts fall under the thresholds of the notification to consult voluntarily prior to the notification process when the total consideration for the acquisition (transaction value) will exceed JPY40 billion, and the scheduled transaction is deemed to affect domestic consumers, such as by satisfying one of the following:

- the business base or research and development base of the acquired company is located in Japan;
- the acquired company conducts sales activities targeting domestic consumers, such as creating a Japanese website or using a brochure in Japanese; or
- the total domestic sales of the acquired company exceed JPY100 million.

In practice, the targeted parties conventionally consult with the JFTC voluntarily prior to filing a notification, as described in **3.9 Pre-notification Discussions With Authorities**. Without the voluntary consultation, the parties could be requested to provide further related information.

2.2 Failure to Notify

If a party obliged to notify fails to make/file a notification, it is subject to a criminal fine of up to JPY2 million. No such penalty has yet been imposed on any party, but in June 2016 the JFTC issued a warning on a "warehousing" case; please see **2.13 Penalties for the Implementation of a Transaction Before Clearance** for further details.

2.3 Types of Transactions

Please note that the thresholds for notification vary in accordance with the following types of transactions:

- share acquisitions;
- mergers;
- joint incorporation-type or absorption-type company splits (demergers);
- joint share transfers (as defined by the Companies Act); and
- acquisitions of businesses or assets.

Interlocking directorships (one type of business combination) are subject to merger review by the JFTC but are not subject to mandatory notification obligation.

In more detail, the above-mentioned acquisitions of businesses or assets include:

- accepting assignment of the whole or a substantial part of the business of another company;
- accepting assignment of the whole or a substantial part of the fixed assets used for the business of another company;
- taking on a lease of the whole or a substantial part of the business of another company;
- undertaking the management of the whole or a substantial part of the business of another company; and
- entering into a contract that provides for a joint profit and loss account for business with another company.

Internal restructurings or reorganisations within the same company group are not subject to notifications in general. The AMA does not technically require notification regarding operations that do not involve the transfer of shares or assets (eg, shareholders' agreements, changes to articles of association), although the JFTC does investigate such operations in some cases – for instance, if challenged by relevant parties as a violation of other provisions of the AMA.

2.4 Definition of "Control"

The AMA does not define or use the concept of "control". Even if they do not raise any issues of "control", transactions are subject to notifications once they meet the thresholds described in **2.5 Jurisdictional Thresholds**.

2.5 Jurisdictional Thresholds

The AMA determines different notification thresholds for each type of transaction described in **2.3 Types of Transactions**. It should be noted that the thresholds described in this section are the thresholds for a mandatory notification requirement. The JFTC has the authority to review any merger case below the notification thresholds.

The thresholds in a share acquisition are as follows:

- the total domestic sales amount of the acquiring company group (composed of the acquiring company, its subsidiaries, its ultimate parent company, and subsidiaries of the ultimate parent company) ("Total Domestic Sales Amount") exceeds JPY20 billion; and
- the total domestic sales amount of the target company and its subsidiaries exceeds JPY5 billion; and
- the voting rights in the target company held by the acquiring company group will exceed 20% or 50% as a result of the acquisition.

The thresholds in mergers and joint share transfers are as follows:

- the Total Domestic Sales Amount of any of the merging parties or the parties involved in the joint share transfer exceeds JPY20 billion; and
- the Total Domestic Sales Amount of any of the other parties exceeds JPY5 billion.

In the case of an absorption-type company split (demerger), a transferring company transfers its business to a succeeding company. If a part of the business of the transferred company (not its entirety) is acquired by a succeeding company, a notification is required when either of the following applies.

- Case 1:
  - (a) the Total Domestic Sales Amount of the transferred part of the business of the transferring company subject to the company split exceeds JPY10 billion; and
  - (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY5 billion.
- Case 2:
  - (a) the Total Domestic Sales Amount of the transferred part of the business of the transferring company exceeds JPY3 billion; and
  - (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY20 billion.

When the entire business of the transferring company is transferred to a succeeding company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

In the case of a joint incorporation-type company split (where two or more companies jointly establish a new company), when all the parties to the transaction transfer only a part of their business, a notification is required if:

- the Total Domestic Sales Amount of the transferred part of the business of one of the parties to the transaction exceeds JPY10 billion; and
- the Total Domestic Sales Amount of the transferred part of the business of another party to the transaction exceeds JPY5 billion.

When any of the parties to the transaction transfers its entire business to a new company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

The thresholds in acquisitions of businesses or assets are as follows:

- the Total Domestic Sales Amount of the acquiring company exceeds JPY20 billion; and
- the Total Domestic Sales Amount generated by the target business/assets exceeds JPY3 billion.

All sectors are necessarily subject to these jurisdictional thresholds. Nevertheless, it is worth noting that the AMA prohibits a bank and an insurance company from acquiring or possessing more than 5% or 10%, respectively, of voting rights in another domestic company (except for an acquisition of a bank by another bank or an acquisition of an insurance company by another insurance company), in principle. The acquisition or possession will be permitted when one of the exemptions under the AMA applies, or if the party obtains prior approval from the JFTC.

2.6 Calculations of Jurisdictional Thresholds

The total amount of the price of goods and services supplied in Japan during the latest fiscal year is regarded as domestic turnover, from which the thresholds are calculated. In addition to direct sales within and into the country, indirect sales in Japan will be included in domestic turnover if the party recognises that the goods and services will be shipped to Japan by the direct purchaser at the time of entering into the contract without changing their nature and characteristics. The intra-group company sales amount within the same group is to be excluded from the domestic sales.

Sales booked in a foreign currency should be converted into Japanese yen using the conversion rate applied for the account settlement. If such an exchange rate is not available, the average telegraphic transfer middle rate is used.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

In a share acquisition, the Total Domestic Sales Amount of the acquiring company for the purpose of the notification thresholds includes the domestic sales amount of the acquiring company, its subsidiaries, and its ultimate parent company and (direct and indirect) subsidiaries thereof. The ultimate parent company must be included in the relevant entities only if it is in the form of a "company".

On the other hand, the Total Domestic Sales Amount of the target company group includes the domestic sales amount of the target company and its subsidiaries, but does NOT include the sales amounts of the seller (ie, a parent company of the target company) and its affiliates.

It should be noted that not all the subsidiaries need to be in the form of a "company", which means a partnership can be considered as a subsidiary.

A company is deemed to be a subsidiary if another company holds the majority of the voting rights of that company. In addition, when 40–50% of the voting rights of a company are held directly or indirectly by another company, the former company can be considered as a subsidiary of the latter company, by taking into account various factors such as board representation and loans provided from the latter company.

The scope of the group companies (a parent company, ultimate parent company and subsidiaries) is defined at the time of the closing of the proposed transaction. Changes in the business during the reference period have to be reflected in general. For instance, for calculation of the Total Domestic Sales Amount of an acquiring company that consummated the separate share acquisition transaction that results in obtaining more than 50% of the voting rights in another company (Company A) after the settlement of the last fiscal year, the domestic sales of Company A for the last fiscal year must be included in the calculation of the Total Domestic Sales Amount of the acquiring company group.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to pre-notification and merger control examination under the AMA, as long as the thresholds – which apply equally to foreign-to-foreign transactions and domestic transactions – are met.

There is no local effect test; a local presence does not always trigger the notification requirement. However, any transaction that meets any of the notification thresholds is considered by the JFTC to have a local effect.

A party without any sales exceeding the thresholds within or into Japan is not required to file a notification. Nevertheless, the JFTC may recommend that a party to the transaction makes a consultation voluntarily prior to the notification process if the amount of the transaction exceeds JPY40 billion and the attempted business combination is found to affect domestic customers. That is to say, even without sales in Japan, according to the Merger Review Policies referred to in **2.1 Notification**, the business combination could affect domestic customers if the party has its business or research base in Japan, if the acquired company conducts sales activities targeting domestic consumers, or if the total domestic sales of the acquired company exceed JPY100 million.

2.9 Market Share Jurisdictional Threshold

The AMA does not define any market share jurisdictional thresholds.

2.10 Joint Ventures

Due to the absence of the concept of "joint control", the JFTC does not apply any special rules to joint ventures regarding filing requirements under the AMA; instead, joint ventures are regulated by the same principle as the jurisdictional thresholds mentioned in **2.5 Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction

The JFTC can investigate any transaction, even when it does not meet the notification thresholds. The authority is able to require the targets of the investigation to explain reasonably why the transaction in question would not substantially restrain competition in a relevant market, and can request further detailed information if competitors or customers of the parties raise concerns about the transaction. In fact, the JFTC is becoming more proactive in reviewing such business combinations that do not meet the thresholds.

There is no statute of limitations on the JFTC's authority to investigate.

2.12 Requirement for Clearance Before Implementation

The completion of transactions that are subject to a notification requirement must be suspended for 30 calendar days of the statutory waiting period (corresponding to the end of the "Phase I review period") from the date of acceptance of said notification. Nevertheless, the JFTC can shorten the waiting period in response to a paper-based request from the notifying party, if it is deemed appropriate to do so.

The related parties can theoretically implement transactions after the waiting period ends, even if the succeeding review process (the "Phase II review period") has been commenced by the JFTC. In practice, however, they tend not to complete transactions before the Phase II review is completed. If a transaction that has the possibility of restraining competition substantially is to be closed during the Phase II review period, the JFTC can request the Tokyo District Court to issue an urgent injunction order to restrain the related parties from completing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the related parties fail to meet the waiting period requirement noted in **2.12 Requirement for Clearance Before Implementation**, they will risk a criminal fine of up to JPY2 million, which can be imposed both on the notifying company(ies) and on any representative(s) or employee(s) responsible for the failure.

Although the JFTC has never imposed such penalties in practice, it did issue a warning in the case of Canon Inc.'s acquisition of Toshiba Medical Systems Corporation (TMSC) in 2016, for being possibly inconsistent with the notification system. To be more specific, before filing the notification to the JFTC, Canon acquired a share warrant of TMSC, paying an amount equal to the value of the underlying common shares to Toshiba Corporation, the parent company of TMSC. In addition, a third party other than Canon and Toshiba was designated to own voting shares of TMSC until Canon exercised the share warrant. The JFTC cautioned that a company that plans to acquire shares of a target company in this way is required to file a notification prior to implementation.

2.14 Exceptions to Suspensive Effect

There is no exception to the suspensive effect; it is not permitted to seek a waiver or derogate from the regulation. Meanwhile, because a notification can be filed before a definitive agreement is executed, the related company will be able to consummate a tender offer bid – for instance, by filing a notification 30 days prior to the consummation of the bidding process.

Furthermore, the JFTC can shorten the period of suspension effect in response to a paper-based request from the notifying party, when it is appropriate to do so.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Although the related parties can theoretically implement transactions after the statutory 30-day waiting period, they tend not to implement the transactions in practice before the subsequent review (if any) is completed.

Even under a pressing schedule in the case of foreign-to-foreign mergers, the JFTC would not permit an implementation of the transaction before a clearance by implying a possibility of filing an urgent injunction order. It seems to be possible technically for the parties to propose a carved-out agreement; nevertheless, as far as is known, there has been no case in which the JFTC agreed to such a proposal.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no deadline for notification. However, taking into account the 30-day statutory waiting period, a notification must be filed with the JFTC at least 30 days prior to the completion of the transaction (see **3.11 Accelerated Procedure**). The notification can be submitted even before a binding agreement between the parties is made.

3.2 Type of Agreement Required Prior to Notification

No definitive agreement binding the parties is required prior to the notification. The parties can notify the JFTC on the basis of an agreement at an earlier stage, such as by a letter of intent or memorandum of understanding. The JFTC even regularly accepts filings with less formal agreements, but, in such cases, it requests a notifying party to submit a draft or other documents indicating that the parties have a good-faith intention to consummate the transaction. In such cases, the notifying party needs to provide the JFTC with a signed binding agreement as soon as said agreement is executed.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

In share acquisitions and business/asset transfers, the acquiring party is responsible for filing. In other types of transactions, all the parties are obliged to jointly file a notification.

3.5 Information Included in a Filing

To file a notification with the JFTC, a company must comply with the prescribed format, which can be downloaded from the JFTC's website. It should be noted that different forms are set out for different types of transaction. The notification form and the required materials to be attached must be completed in Japanese, while summary translations are accepted in general regarding additional information requested from the JFTC on a voluntary basis.

The information to be included in the notification is as follows:

- a brief explanation of the purpose, background and method of the transaction;
- descriptions of the notifying company group, such as domestic sales, assets and the major business of each company involved;
- high-level market information, including types of products or services subject to horizontal overlap or vertical relationships between the parties; and
- the market ranking and market share of the major players with which the parties have a horizontal or vertical relationship.

Certain documents must be attached, depending on the type of transaction, such as a copy of the definitive agreement, financial statements and annual reports of the notifying party, a list of major shareholders, the minutes of the shareholder meeting or board meeting that approves the transaction, and powers of attorney.

In addition to the required information, the JFTC often requests – usually on a voluntary basis – additional materials to review the transactions substantially, such as definitions of the product and geographic markets, the degree of competition between the parties, competitive pressures including those from competitors, import products, new entries or customers, and efficiencies.

Furthermore, the parties' internal documents can be requested by the JFTC, including presentation materials and the minutes of meetings such as board of directors' meetings, materials used in analysis and decision-making processes, and emails of persons concerned, which may refer to synergies, effects or competitive concerns, typically at a later stage of the review.

Although the documents to be submitted are not required to be certified, notarised or apostilled, certifications by the company representative are required for copies of certain documents.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the JFTC will not accept the notification, in which case it may recommend the parties to withdraw and refile the notification if amended.

Nevertheless, prior to said formal notification, parties can engage in a pre-notification consultation, in which a draft notification is submitted to the JFTC for review (a so-called draft check). This draft check process usually takes between a few days and a couple of weeks. If a submitted draft notification is deemed incomplete, the JFTC can request the parties to amend the draft furthermore.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Filing inaccurate or misleading information is subject to a criminal penalty of up to JPY2 million, though no such penalty has yet been imposed, as far as is known.

In addition, the JFTC can issue a cease-and-desist order at any time if it finds significant false or misleading information in a notification, regardless of the time limit of its ability to issue an order. In other words, the JFTC can overturn its clearance decision at any time if there is significant false or misleading information in a notification.

3.8 Review Process

It should be noted that the parties concerned can consult voluntarily with the JFTC in advance through the pre-notification process. When the JFTC accepts a formal notification, the statutory waiting period will commence (Phase I review).

Phase I

The JFTC has 30 calendar days from the date of a formal acceptance to review the transaction. The party/parties can request the authority to shorten the waiting period on a discretionary basis; in practice, the period is shortened in a large number of cases. Please note that a request for information from the JFTC does not suspend or reset the 30-day review period.

If the JFTC comes to the conclusion that the transaction in question will not substantially restrain competition, the clearance will be granted through a written decision stating that the JFTC will not issue a cease-and-desist order (a "Clearance Letter").

If the JFTC determines that it is necessary to conduct a more detailed review, the Phase II review will be triggered by officially requiring the filing party/parties to submit the necessary information or materials, which is called a "Request for Report, etc".

Phase II

At the initiation of Phase II, the JFTC discloses the fact of its review and seeks public comments on its website. The authority must conclude the Phase II review within either 120 calendar days from the date of the JFTC's acceptance of the notification or 90 calendar days from the date of acceptance of all the responses to the Request for Report, etc, whichever is later. In practice, it usually takes several months or even more than a year for the JFTC to formally accept all the responses to the Request for Report, etc.

While the suspensive effect is not applicable for the Phase II review period, in practice the parties are recommended to refrain from completing the transaction until the clearance is granted.

If, following a Phase II review, the JFTC finds that the transaction will not substantially restrain competition, it will grant the clearance by issuing a confirmation letter which states that the JFTC will not issue a cease-and-desist order on the transaction. When finding that the transaction could substantially restrain competition, the JFTC will afford the filing party an opportunity to express their opinions (including a proposal of remedies) and submit evidence before the JFTC's final decision on whether to issue a cease-and-desist order. In any case, the results of the review will be made public.

3.9 Pre-notification Discussions With Authorities

Parties can discuss issues on a voluntary basis with the JFTC by means of a pre-notification consultation. During the consultation, the parties can submit written explanations concerning an overview of transactions and (potential) competitive issues, and discuss substantive issues including market definition and any other competitive concerns (such as high market shares or lack of strong competitive pressure from current or potential competitors).

The period of pre-notification depends mainly on the intention of the notifying parties. For instance, if the parties ask the JFTC just to review the draft of the formal notification, it will take only a few days, while in the case of complicated transactions, it is expected to take several months or more.

The JFTC and the notifying parties regularly communicate confidentially in this process. If the parties have already publicly disclosed the transaction, the JFTC may contact their competitors and customers in order to obtain their opinions about the transaction.

3.10 Requests for Information During the Review Process

The JFTC can request the parties to provide further information at any time during the review process. The amount and content of the information requested depend on the transaction in question.

It should be noted that the review process will not be suspended or restarted by requests for information. Regarding the Phase II review, the 90-day statutory review period will start to run only when the JFTC accepts all the necessary information requested in the forms of the Request for Reports, etc.

3.11 Accelerated Procedure

The AMA does not technically provide a short-form or fast-track procedure in terms of the review process. Although the party/parties can ask for the 30-day waiting period to be shortened, the JFTC has sole discretion on whether to agree to such a request.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The JFTC examines whether a business combination in question is likely to result in a “substantial restriction of competition in a certain market.” Substantially restricting competition means that competition itself is significantly reduced to such an extent that a particular business operator or group of business operators can control a market by determining prices, quality, quantity and other competitive parameter(s) at their own volition.

The Merger Guidelines, mentioned in **1.1 Merger Control Legislation**, classify business combinations into horizontal, vertical and conglomerate business combinations, and clarify the factors to be taken into account and the framework of determining whether they may substantially restrain competition for each type of business combination.

According to the Merger Guidelines, the JFTC takes the following factors into account in assessing the (pro-/anti-) competitive effect of the transaction:

- competition in the relevant market – number of competitors, market share, competitive landscape, supply capacity of competitors, competition in R&D, characteristics of the market (whether so-called direct or indirect network effects are at work, or multifaceted markets through platforms), etc;
- imports – barriers for importing, problems in distribution, substitutability with imports, etc;
- new entry to the market – barriers for entry, degree of entry possibility;

- competitive pressures from adjacent markets – competing products, geographically adjacent markets;
- competitive pressure from customers – competition among users, ease of switching suppliers;
- comprehensive business capabilities of the parties in question;
- economic efficiencies;
- financial conditions of the parties in question; and
- scale of the relevant market.

The Merger Guidelines set forth the safe harbour based on the Herfindahl-Hirschman Index (HHI). In principle, the JFTC does not conduct a substantive examination of a business combination that falls below the thresholds of the safe harbour.

4.2 Markets Affected by a Transaction

The JFTC defines relevant markets that are affected by the business combination from the perspective of the scope of the product and the geography by considering the substitutability for customers and, if necessary, suppliers.

The JFTC will use the factors described in the Merger Guidelines to define a relevant market.

The Merger Guidelines clearly state that the geographic market may extend beyond the borders of Japan, depending on the international nature of the relevant business. In fact, in some cases, the JFTC has defined the global market as the relevant market.

Another feature of the Merger Guidelines is that they establish safe harbours for three categories of business combinations: horizontal, vertical and conglomerate (each category is subject to a specific safe harbour). The JFTC believes that there is usually little or no likelihood of substantially restricting competition, and therefore no need to conduct a detailed examination of the business combination when it meets the requirements of a safe harbour. In such a case, the JFTC does not generally conduct the examination described in **4.1 Substantive Test**.

The safe harbour standards for horizontal business combinations are as follows:

- the HHI after the business combination is not more than 1,500;
- the HHI after the business combination is more than 1,500 but not more than 2,500, while the increment of HHI is not more than 250; or
- the HHI after the business combination is more than 2,500, while the increment of HHI is not more than 150.

If a horizontal business combination exceeds the safe harbour standards, the JFTC will examine whether it would substantially restrict competition in a relevant market through the test described in **4.1 Substantive Test**.

In addition, the Merger Guidelines clarify that, in light of past cases, if the HHI after the business combination is 2,500 or less and the market share of the business group after the business combination is 35% or less, the risk of substantially restricting competition is generally considered to be small.

The safe harbour standards for vertical or conglomerate business combinations are as follows:

- the market share of the parties after the combination is not more than 10% in all the relevant markets in which the parties are active; or
- the HHI is not more than 2,500 and the market share of the parties after the business combination is not more than 25% in all the

relevant markets in which the parties are active.

As with the horizontal business combination described above, even if a vertical or conglomerate business combination does not fall within the safe harbour standards described above, it does not immediately mean that said business combination would likely substantially restrain competition.

In addition, if the HHI after the business combination is 2,500 or less and the market share of the parties' group after the business combination is 35% or less, the possibility that a business combination may substantially restrain competition is generally considered to be small.

It should be noted that the latest version of the Merger Guidelines states that, even if the business combination satisfies the safe harbour standards, if one of the parties has a potentially strong competitive power due to its assets (including important data and intellectual property rights) or any other reason, the JFTC will conduct a further review on the matter.

4.3 Reliance on Case Law

As for the merger review, the JFTC basically defines the relevant market in accordance with its previous review cases, some of which are not disclosed to the public. However, if significant changes to the premise of the definition of the relevant market (such as innovation or development of an adjacent product market) exist, the JFTC may take them into consideration.

The JFTC basically does not depend on the decisions by competition authorities in other jurisdictions such as the EU Commission, US Federal Trade Commission or US Department of Justice. Nevertheless, if the JFTC has no previous case in the field of the transaction, it may use their decisions as references to define the relevant market.

4.4 Competition Concerns

The JFTC examines any kinds of competition concerns that may cause substantial restriction on competition in the relevant market, which include unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and the elimination of potential competition.

Traditionally, unilateral and co-ordinated conduct possibly arising from horizontal business combinations has occupied a large portion of the JFTC's concern, since horizontal business combination would basically reduce the number of competitors in the relevant market and thus potentially have a direct negative impact on competition.

However, this does not mean that the JFTC has competition concern only in horizontal business combinations. Actually, the JFTC has also conducted numerous investigations on other competition concern matters, and there are some cases in which it has conditionally approved vertical business combinations as long as the parties undertook remedies. Furthermore, in some cases, the JFTC has assessed conglomerate or portfolio effects and any other kind of anti-competitive effects.

4.5 Economic Efficiencies

In examining competition concerns, the JFTC takes economic efficiencies into consideration. However, as the Merger Guidelines state, the JFTC considers thatthe improvement of efficiency must be an inherent outcome of the business combination, and must be passed on to consumers through lower product prices, improved quality, and so on. Therefore, the JFTC tends to consider that the improvement of efficiency alone is not likely to justify the transaction.

4.6 Non-competition Issues

In principle, the JFTC considers only competition issues in the process of examination. Although it may consider non-competition issues in some cases, such as industrial policy and other issues of public interest, the JFTC is not bound by these kinds of concerns.

When a foreign investor (non-resident individual, corporation established under foreign laws and regulations, etc) makes inward direct investments, etc (eg, the acquisition of shares or voting rights of a domestic listed company as a result of which the investment ratio or voting right ratio is 1% or more), or specified acquisitions (ie, the acquisition by a foreign investor of shares or equity of a domestic unlisted company from another foreign investor), and the business operated by the investee falls within a designated industry involving national security, etc, in principle, prior notification must be submitted to the Minister of Finance, etc, via the Bank of Japan within the six months before the intended transaction or activity.

These rules are set forth in the FEFTA and are separate from the merger control rules.

4.7 Special Consideration for Joint Ventures

Generally speaking, there is no special consideration for joint ventures under the AMA and the Merger Guidelines. That said, the Merger Guidelines state that when joint venture partners establish a joint venture to integrate only a part of their business, the JFTC will analyse the co-ordinated effects between the remaining businesses of joint venture partners ("spillover effect").

With respect to a notification requirement, if the transaction involves multiple kinds of business combinations, each stage of the business combination may constitute a separate business combination subject to a pre-notification (for instance, in triangular merger cases, parties would likely have to file separate notifications for share acquisition and for merger). Likewise, if a joint venture transaction comprises multiple business combinations subject to pre-notifications, parties have to file notifications separately on the basis of each business combination.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Under the AMA, the JFTC can file a motion for an urgent injunction order (ie, an injunction against the consummation of the transaction prior to the completion of examination) and issue a cease-and-desist order (prohibition against the consummation of the transaction after the completion of examination).

Regarding an urgent injunction order, the JFTC must show that the business combination would likely substantially restrain competition, and that the consummation of a business combination would provoke irreversible damage to competition. The JFTC must file a petition for an urgent injunction order with the Tokyo District Court and prove the existence of a suspected violation of the AMA and the urgent need for such an order. The hearing will be held privately and expeditiously; if the court approves the JFTC's request, it will issue the order.

A cease-and-desist order is an administrative action to prohibit a business combination transaction or to order a party to take measures to eliminate the likelihood that the transaction would substantially restrict competition after the JFTC completes its review. The order includes business divestitures, stock transfers and business transfers to eliminate substantial restraints on competition. The JFTC can issue a cease-and-desist order on its own (without any prior review or approval by a court), either before or after the consummation of a planned business combination.

The recipient of a cease-and-desist order issued by the JFTC can file an action seeking a cancellation of said order with the Tokyo District Court within six months from the order.

In fact, the JFTC has not issued a cease-and-desist order for more than 40 years. In practice, if the JFTC informally indicates its competition concern to parties, the parties often propose a remedy, seeking the JFTC's clearance, or voluntarily withdraw their notifications. Therefore, the JFTC has not faced the need to issue a cease-and-desist order on business combinations.

5.2 Parties' Ability to Negotiate Remedies

The parties in question may discuss remedies with the JFTC at any stage, including pre-notification, the Phase I review process and the Phase II review process. If the parties propose a remedy, the JFTC will review the business combination on the premise that the proposed remedy will be implemented.

During the pre-notification stage, the JFTC and the parties basically discuss the form and content of notification and the competition issues of the proposed transaction, but there are a few cases in which the parties and the JFTC negotiate a remedy in response to the JFTC's competition concerns.

5.3 Legal Standard

The legal standard for a prohibition (ie, cease-and-desist order) is whether a planned business combination is likely to substantially restrict competition in a relevant market. Therefore, any remedy should alleviate a competition concern to the extent that substantial restraint of competition is eliminated so that the transaction can be approved by the JFTC. The Merger Guidelines supplement this point.

The Merger Guidelines also state that the JFTC considers and examines what measures are appropriate for solving the likelihood of substantially restraining competition on a case-by-case basis for each business combination. The Merger Guidelines also clearly state that a structural remedy is the most effective remedy and thus should be taken in principle, such as business transfers. However, in practice, a behavioural remedy could be acceptable in many cases, if it is appropriate to resolve the JFTC's competition concern.

5.4 Typical Remedies

The Merger Guidelines state that structural remedies are the most effective remedies, but behavioural remedies can also be accepted.

Structural remedies include the transfer of all or part of the business units of either party, the withdrawal of a certain relationship with a company belonging to the parties' group (eg, suspension of the holding of voting rights, reduction of the ratio of voting rights, or suspension of the concurrent holding of executive positions), and the withdrawal of the business alliance with a third party.

On the other hand, behavioural remedies include the elimination of discriminative terms and conditions or refusal of supply, cost-base trading, a Chinese wall on the exchange of secret information, etc.

The parties may discuss with the JFTC what remedies are appropriate to eliminate the JFTC's concerns. Upon the request of the party/parties after the consummation of the transaction, the JFTC may approve a change of content of the remedies or even a termination of the remedies as a result of assessing the necessity of continuing the remedies in light of changes in competitive conditions after the business combination.

5.5 Negotiating Remedies With Authorities

Please see **5.2 Parties' Ability to Negotiate Remedies**.

5.6 Conditions and Timing for Divestitures

The Merger Guidelines state that remedies should, in principle, be fully carried out prior to the implementation of the business combination. However, as an exception, remedies can be carried out after the clearance if the proposed remedy properly and clearly defines the deadline and the JFTC approves it.

If the parties fail to carry out the remedies, the JFTC may issues cease-and-desist orders to prohibit the parties from implementing the business combination, or it may take measures to eliminate the substantial restraint of competition caused by the business combination.

5.7 Issuance of Decisions

When the JFTC concludes that the business combination will not substantially restrict competition, it will issue a notice to the parties that it will not issue a cease-and-desist order. This notice itself is not available to the public.

Regarding confidentiality, please see **7.3 Confidentiality**.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The JFTC may issue a clearance subject to remedies for foreign-to-foreign transactions. It has issued conditional clearance for the following foreign-to-foreign transactions:

- Google LLC/Fitbit, Inc. (FY2020);
- JX Metals Deutschland GmbH/H.C. Starck Tantalum and Niobium GmbH (FY2018);
- Qualcomm/NXP Semiconductors (FY2017);
- Dow Chemical/Du Pont (FY2016); and
- Abbott Laboratories/St Jude Medical (FY2016).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Neither the AMA nor the Merger Guidelines give express guidance regarding ancillary restraints or related arrangements. However, the JFTC may carry out in-depth assessment regarding ancillary restraints in its substantive review.

If, in the course of the review process, the party reports ancillary restraints and the JFTC still issues clearance without raising any competition issue, it would be unlikely that the JFTC would challenge the transaction after the issuance of clearance in a practical sense. However, ancillary restraints are still subject to challenges by the JFTC in theory, even after the clearance.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

As a general rule, the AMA provides that any person who believes there is an act in violation of the AMA may make a report to the JFTC and ask for appropriate measures to be taken. While there is no formal or statutory procedure, any third party may informally submit any report or complaint to the JFTC at any time, including customers and competitors.

As a part of the formal procedure of a merger review, the Merger Review Policies provide that, at the beginning of a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction within 30 days of the announcement on the JFTC's website.

The JFTC is not obliged to respond to a third party's comment, but will normally take information provided by a third party into account in the substantive review. Furthermore, if the report made by any person under the AMA meets the requirements and qualifies as notice as provided in the AMA and the Rules on Investigations by the Fair Trade Commission (established in October 2005, and most recently amended in March 2021 – the "JFTC Investigations Rules"), the JFTC shall notify such a person about its decision as to whether it will take appropriate measures for the case reported in accordance with the AMA.

7.2 Contacting Third Parties

The JFTC typically contacts third parties such as competitors or customers by sending written questionnaires or requesting oral interviews as a part of its review process if the planned transaction is publicly announced or the investigation proceeds to the Phase II review. Also, as stated in **7.1 Third-Party Rights**, a third party will be invited to submit comments in writing at the beginning of a Phase II review.

The JFTC tends to make these inquiries proactively when it sees issues in the substantive review. In addition, the JFTC sometimes conducts a kind of "market test", in which it asks for the opinions of third parties for the purpose of assessing the feasibility of proposed remedies.

7.3 Confidentiality

During the Period of the JFTC's Review

The JFTC does not make the information available to the public until the initiation of the Phase II review. Therefore, in the course of a merger review, the existence of a fact of filing and any confidential information or business secrets that consist of filing documents, supporting documents or oral guidance to the JFTC will not be publicly disclosed if the case is cleared before going to a Phase II review.

If the case is subject to a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction, at the beginning of Phase II (see **7.1 Third-Party Rights**). The description of the transaction will be made public in such cases.

Disclosure for Statistical Purposes or as a Precedent Case

Aside from the slight chance of the JFTC issuing a cease-and-desist order, which will fully disclose the transaction, the JFTC announces the outcome of its review on cases subject to the Phase II review.

In addition, the JFTC annually publishes a report of the major business combination cases on its website around June, which provides a summary of merger review cases and serves as a useful reference. These cases are selected from those cleared in Phase I as well as Phase II, and the parties will be contacted by the JFTC before the publication, to confirm whether the publication contains any confidential information.

Since 2017, the JFTC also announces quarterly a list of the cases it has cleared. The list shows each filing date, the parties' name, the date of clearance and whether it was short-track (ie, whether the statutory waiting period was shortened).

7.4 Co-operation With Other Jurisdictions

The JFTC has entered into agreements for co-operation with various overseas authorities, including the European Commission and the DOJ and the FTC in the United States. Article 43-2 of the AMA expressly provides that the JFTC may exchange information with authorities in other jurisdictions for specific transactions if doing so is not against the national interest, and if the authorities of other jurisdictions can maintain the confidentiality of information.

In practice, if the JFTC wishes to disclose the information of a specific transaction to any foreign authority, it obtains the parties' written waiver in advance.

While the JFTC believes that co-operation with other jurisdictions will be beneficial in multi-jurisdiction filing cases, as a practical matter, whether the JFTC works closely with other jurisdictions depends on the specific case and regulators.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Pursuant to the provisions of the AMA, if a party is unsatisfied with the cease-and-desist order, it may bring an action seeking the cancellation of such order against the JFTC before the Tokyo District Court. That said, practically speaking, it is unlikely that a cease-and-desist order will be issued in merger cases, which results in the unavailability of judicial review in merger review cases.

8.2 Typical Timeline for Appeals

An action seeking cancellation of a cease-and-desist order must be filed with the Tokyo District Court within six months.

Since there is no precedent of appeal against a cease-and-desist order on a business combination after the amendment of the AMA that provides the current system, the timeline is difficult to predict. However, it could take several years if the non-prevailing party appeals the cease-and-desist order from the first instance until a court judgment is finalised. Considering this, a party that plans to bring an action needs to consider petitioning for a stay of execution of the order in accordance with the Administrative Case Litigation Act.

8.3 Ability of Third Parties to Appeal Clearance Decisions

There is no precedent in which a third party has successfully appealed against a clearance decision or a cease-and-desist order. However, any third party may bring an action against a cease-and-desist order as long as it has standing to sue.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

In December 2019, the JFTC revised the Merger Guidelines and the Merger Review Policies. This revision focuses on business combinations in digital markets, which can be outlined as follows.

- Definition of product and geographical market in a platform service: the JFTC may define a relevant market consisting of multiple segments of customers (eg, users and shops in the case of a credit card) as one or multiple markets. In doing so, the JFTC may take into account various elements, including the degree of scope of products or region for users' replacement in competition of quality of the service, and other elements specific to digital service, such as type of service or functions available.
- Substantial restraint of trade: in a horizontal business combination, the JFTC will take network effects into account where the network effects are significant, and the difficulty of switching due to network effects and/or a high switching cost, among other things. In vertical or conglomerate business combinations, the JFTC will consider, in a combination of upstream and downstream players that both deal with data, whether the transaction may lead to a refusal to supply data to other companies. In a purchase of start-ups, the transaction would hinder new entry to the market ("killer acquisition"). The JFTC has also explained how to assess the importance of data from the competition perspective.
- In a 2019 revision, the JFTC announced that it will proactively review cases that do not meet the threshold for notification, if the consideration for the acquisition is large and it is expected to have an impact on the Japanese market. Thus, the JFTC explains that voluntary consultation will be encouraged for such cases, as outlined in **2.1 Notification**.

9.2 Recent Enforcement Record

According to the JFTC's announcement in June 2022, in the most recent fiscal year of the JFTC (ie, from April 2021 to March 2022 – FY2021), the total number of notifications for merger control filed was 310 cases, out of which one case went to Phase II review. There has been no case for which the JFTC imposed a fine (for failing to file). There were three cases that were cleared with conditions. With respect to the number of foreign transactions, 33 transactions between foreign businesses were notified with the JFTC in FY2021.

9.3 Current Competition Concerns

Business combinations in digital markets remain an important issue for the JFTC (eg, the recent merger of Salesforce.com, Inc. and Slack Technologies, Inc., announced on 1 July 2021).

In an article issued in September 2021, the senior official in charge of business combinations at the JFTC stated that the JFTC will continue to focus on business combinations in digital markets that are expected to have a significant impact on competition in Japan's markets, even if they do not meet the criteria for notification, by actively contacting the companies concerned, business partners and competitors to gather information. He also stated that the JFTC will actively examine cases where there are concerns about "killer acquisitions", in which a digital platform acquires a potential competitor.

Ikeda & Someya was founded in Tokyo in October 2018 by two lawyers, Tsuyoshi Ikeda and Takaaki Someya. The founding partners previously worked at the Japan Fair Trade Commission (Tsuyoshi Ikeda) and the Consumer Affairs Agency (Takaaki Someya), and used this experience to form cutting-edge antitrust law practices, handling a number of large-scale cases involving business alliances, on-site inspections by the Japan Fair Trade Commission and consumer laws. Ikeda & Someya also has nine other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the Nikkei.

AUTHORS

Tsuyoshi Ikeda is a partner at Ikeda & Someya. He previously served as an investigator at the Japan Fair Trade Commission, where he participated in around 20 dawn raids, prepared the implementation of the leniency system, and investigated a case involving standard essential patents. He is noted for his success in the most cutting-edge cartel, merger review and other antitrust/competition cases. Tsuyoshi is registered as an attorney in New York and California.

Aya Yasui is experienced in general corporate matters, especially international transactions, with a particular focus on antitrust, personal information protection and privacy issues. She previously worked at a US law firm and a major Japanese law firm, and has also been seconded to major global companies and has legal experience as in-house counsel at an automobile manufacturer. Aya can provide advice on legal risks in cutting-edge fields by utilising her extensive business experience and language skills.

Hiroko Fukushima specialises in areas such as competition/antitrust, consumer protection and ESG. Prior to registering as an attorney, she was consistently involved in the field of news and public relations, such as making diplomatic speeches at the Ministry of Foreign Affairs and working for a news agency.

Shota Ogawa has represented clients in international cartel cases and domestic and international M&A at a major international law firm, and has also provided front-line advice on M&A and brand strategies through secondments to major domestic and foreign business companies. Based on his experience, he strives to provide not only legal knowledge but also practical business-oriented advice.

Ikeda & Someya

Yurakucho ITOCiA 14th floor
2-7-1, Yurakucho
Chiyoda-ku
Tokyo
Japan

Tel: +81 50 1745 4000
Fax: +81 3 6261 7700
Email: tsuyoshi.ikeda@ikedasomeya.com
Web: www.ikedasomeya.com

IKEDA & SOMEYA
COMPETITION AND CONSUMER LAW ATTORNEYS
www.ikedasomeya.com

Trends and Developments

Contributed by:
Tsuyoshi Ikeda, Aya Yasui, Shota Ogawa and Hiiro Hosokawa
Ikeda & Someya ***see p.373***

Merger Control in Japan: An Introduction

In Japan, the Anti-monopoly Act (AMA) governs merger control matters, including the merger review process conducted by the Japan Fair Trade Commission (JFTC), which is the competition authority in Japan. In addition, the JFTC publishes the Guidelines to Application of the Anti-monopoly Act Concerning Review of Business Combination (the "Merger Guidelines") and the Policies Concerning Review of Business Combination (the "Merger Review Policies").

To grasp the recent trends of the merger review process conducted by the JFTC, it is important to understand the latest versions of the Merger Guidelines and the Merger Review Polices, which reflect the JFTC's recent attitude regarding merger review. It is worth noting that the revised Merger Review Policies explicitly recommend a party to a merger to make a voluntary consultation with the JFTC, even if the proposed merger transaction does not meet the thresholds set out under the AMA, in cases where the total consideration for an acquisition exceeds a certain amount and would likely affect domestic consumers in Japan (please see **Google/Fitbit: Merger review process**, below). This revision indicates that the JFTC would likely examine a merger transaction that does not meet the jurisdictional threshold; the JFTC actually conducted merger reviews on at least two cases in 2019 and 2020 (please see **Google/Fitbit** and **M3/Nihon Ultmarc**, below).

Furthermore, in understanding the framework of merger review in Japan, it is important to understand the merger review flow in a practical sense, rather than the formal process stipulated under the law. Although the AMA literally stipulates a merger review process comprising two review steps (Phase I and Phase II), the JFTC has rarely initiated the Phase II review process. According to the JFTC's publication in June 2022, just three cases proceeded to Phase II review from 2019 to 2021 (fiscal year), while the JFTC received 913 notifications from parties during the same period (please see the official website of the JFTC for details: www.jftc.go.jp/houdou/pressrelease/2022, available in Japanese only).

There are two reasons why so few cases have proceeded to the Phase II process.

- First, a party to a merger has a right to withdraw a notification at its discretion, and thus can withdraw the notification and refile a notification later if it hopes not to proceed to the Phase II process.
- The second reason is that, in almost all cases, the parties and the JFTC discuss potential competitive concerns regarding the proposed transaction during the pre-notification consultation, and the parties file notifications as a mere formality after they resolve the JFTC's competition concerns. In some cases, the parties and the JFTC substantially discuss potential remedies proposed by the parties even during the pre-notification consultation period (please see **Z Holdings/Line**, below).

Google/Fitbit

Overview

The JFTC published the following facts on its official website:

- on 1 November 2019, Google LLC announced that it planned to acquire all shares in Fitbit, Inc., the manufacturer of a watch-type wearable device, by the method of triangular merger;
- although this transaction did not meet the thresholds under the AMA, the JFTC decided to conduct a merger review on the grounds that the transaction was significantly large and would likely affect consumers in Japan;
- the JFTC investigated this "below threshold" transaction in the same way as it reviews cases that meet notification thresholds – its review included interviews with the parties' competitors and information exchange with foreign authorities (including the European Commission); and
- on 14 January 2021, the JFTC cleared the transaction by concluding that it would not substantially restrain competition based on the behavioural remedy proposed by the parties.

Merger review process

Under the revised Merger Review Policies, a party to a merger that does not meet the relevant jurisdictional threshold under the AMA is "recommended" to have a voluntary consultation with the JFTC if the merger meets the following requirements:

- the total consideration for the acquisition (transactional value) will exceed JPY40 billion; and
- the scheduled transaction is deemed to affect domestic consumers, such as by satisfying one of the following:
  - (a) the business base or research and development base of the acquired company is located in Japan;
  - (b) the acquired company conducts sales activities targeting domestic consumers in Japan, such as creating a Japanese website or using Japanese brochures; or
  - (c) the total domestic sales of the acquired company exceed JPY100 million.

In this transaction, based on the information published by the JFTC, it is likely that the total consideration for the acquisition of Fitbit exceeds the threshold of JPY40 billion. However, according to the JFTC's announcement, it is not clear as to whether Google and/or Fitbit voluntarily contacted the JFTC prior to their announcement of this transaction.

One of the takeaways from this case is that a merger transaction that is not subject to notification thresholds would still likely be subject to a merger review by the JFTC, which could have an impact on the schedule of a global filing project. Therefore, it should be noted that a party to a merger needs to analyse whether its proposed transaction will meet the threshold for a recommended voluntary consultation in addition to the threshold for a formal notification.

Vertical relationship and conglomerate effect

As Google and Fitbit had no significant competitive issues in their horizontal relationship, the JFTC focused its examination on three types of vertical relationships, such as the relationship between the operation system for a smartphone provider (as an upstream service) and the watch-type wearable device manufacturer (as a downstream product). The JFTC also raised the issue of whether a health-related database to be possessed by the parties would substantially diminish competition in the digital advertising market as a conglomerate effect.

Google and Fitbit proposed behavioural remedies to address the JFTC's concerns regarding both the vertical and conglomerate effects. Regarding the vertical relationships, for instance, the parties promised not to refuse to provide an operation system for smartphones to watch-type wearable device manufacturers other than Fitbit for at least ten years. Concerning the conglomerate effect, the parties promised not to use the health-related database for digital advertising services for at least ten years.

Takeaways

This is the first public case in which the JFTC investigated a merger on a concentration that fell below the notification thresholds since the Merger Review Policies were amended in 2019. It would be sensible to assume that the JFTC will investigate future merger cases involving big tech companies, regardless of whether the transaction meets the notification thresholds. This case is a good example of the JFTC's active attitude towards enforcement in vertical and conglomerate mergers.

M3/Nihon Ultmarc

Overview

The JFTC published the following facts on its official website:

- on 1 April 2019, M3, Inc., which operates platforms that provide information on drugs, announced that it had closed a transaction to acquire all of the voting rights in Nihon Ultmarc Inc., which provides a medical information database;
- although this transaction did not meet the jurisdictional threshold under the AMA and was already consummated, the JFTC had a certain concern regarding restraint of competition, and therefore opened a merger review process on its own, including oral interviews with the parties' competitors; and
- finally, on 24 October 2019, the JFTC determined that this transaction would not substantially restrain competition based on the behavioural remedies proposed by the parties.

Merger review process

Despite the fact that this transaction did not meet the jurisdictional threshold and was not subject to a notification requirement, and that the parties had already consummated the transaction, the JFTC still started a merger review on whether it would likely substantially restrain competition in certain relevant markets.

The AMA does not literally prohibit the JFTC from conducting a merger review on a transaction that does not meet the threshold under the AMA but, in practice, there was no precedent in which the JFTC examined such a transaction before this case. In this context, this case would be considered the leading case ruling on the JFTC's power or authority (Google/Fitbit is considered to be consistent with this precedent). It is also worth noting that the JFTC started a merger review and imposed the behavioural remedy proposed by the parties even though the parties had already consummated the transaction several months previously.

Vertical relationship

In this case, the JFTC intensively examined whether the vertical relationship between the business conducted by M3 (as an upstream service) and the business conducted by Nihon Ultmarc (as a downstream service) might cause a substantial limitation on competition. Since M3 had a high share of 75% in the upstream market as of 2019, the JFTC determined that M3 had sufficient capacity to implement input foreclosure against Nihon Ultmarc's competitors, and thus this transaction would likely harm competition in the downstream market. The JFTC also examined the conglomerate effect of the bundling supply of the parties' services (please see the JFTC's official website for details).

To resolve these concerns, the parties proposed a behavioural remedy that included but was not limited to the following:

- the parties promised to continue providing drug information to competitors in the downstream market; and
- the parties promised not to discriminate against downstream competitors in the terms and conditions of the provision of drug information.

Takeaways

This was the first case in which the JFTC made it public that it challenged a consummated merger. It is worth noting that the JFTC opened an investigation for a consummated transaction just to investigate vertical and conglomerate concerns. In addition, this case shows the JFTC's interest in platform and data business even aside from the Big Tech companies.

It is also important to note that the proposed remedies are supposed to remain in place for an indefinite period of time. The lasting period of behavioural remedies will be an important issue on remedy discussion in future cases as well, because the JFTC cannot extend the remedy period after the clearance decision.

Z Holdings/Line

Overview

The JFTC published the following facts on its official website:

- on 18 November 2019, Z Holdings Corporation (ZHD), a subsidiary of Japanese IT giant SoftBank, announced that it planned to acquire all shares in Line Corporation, the most well-known messenger application provider in Japan;
- on the same date, ZHD and Line voluntarily submitted a written explanation stating that there was no competition issue on the share acquisition and other relevant materials to the JFTC, and started a pre-notification consultation;
- on 14 July 2020, ZHD and Line filed a notification with the JFTC; and
- on 4 August 2021, the JFTC granted a clearance conditional on behavioural remedies in certain markets.

Pre-notification consultation

ZHD and Line consulted with the JFTC between 18 November 2019 and 14 July 2020, with the purpose of resolving the JFTC's competition concerns. While the parties spent eight months in pre-notification consultation with the JFTC, the JFTC had just 21 calendar days (12 business days in Japan) to review the transaction in the Phase I process. Based on these facts, it is reasonable to state that the JFTC investigated the case substantially, including an evaluation of the proposed remedy, during the pre-notification phase. It would be fair to assume that the parties filed the notification with the reasonable forecast that the remaining procedure would be completed within 30 days.

In almost all cases, the JFTC addresses and resolves its competition concerns during the pre-notification consultation process, and therefore rarely opens a Phase II process.

Digital platform market

The JFTC's examination focused on news distribution services, advertisement-related businesses and code-based payment businesses due to the competitive pressure of competitors, customers or new entries, while there are many other markets in which the parties have overlaps or vertical relationships.

It is worth noting that the JFTC evaluated the magnitude of competitive pressure from competitors in the code-based payment business by taking the "indirect network effect" into consideration, since said business was considered one of the multiple digital platform businesses in which the parties and competitors operated.

Although the aggregate market shares of the parties in the code-based payment business was approximately 60%, the JFTC concluded that this transaction would not substantially restrain competition in the code-based payment business, based on the following behavioural remedy proposed by the parties:

- the parties promised to annually report the competition situation of the code-based payment business to the JFTC; and
- the parties promised to remove exclusive dealing conditions in the code-based payment business.

Takeaways

This case is an excellent example of a horizontal merger with a significant combined market share that was cleared by the JFTC without any condition (for free news supply business) or with relatively lenient behavioural remedies (for code-based payment business). Even though the parties' consumers are general smartphone users, the JFTC did not have an opportunity to collect comments from the general public as the parties successfully kept away from the Phase II review.

Significant Developments

2021 saw the following significant developments in the merger review process in Japan.

Economic Analysis Office

On 1 April 2021, the JFTC established a new division of the Economic Analysis Office.

This new division is expected to actively introduce economic appraisal techniques in evaluating anti-competition concerns arising from business combinations.

Introduction of the EU-type Monitoring Trustee

According to an unofficial statement from the JFTC, some JFTC officials intend to introduce a "Monitoring Trustee" system, which has been well received in the EU, and plans to enhance the effectiveness of remedies.

As explained above, in Google/Fitbit and M3/Nihon Ultmarc, the parties proposed behavioural remedies, based on which the JFTC issued conditional remedies. It is worth noting that, in Google/Fitbit, the parties promised not to refuse to provide an operation system for smartphones to watch-type wearable device manufacturers other than Fitbit for at least ten years. Furthermore, concerning the conglomerate effect, the parties promised not to use the health-related database for digital advertising services for the long-term period such as at least ten years.

It would be reasonable to expect that these kinds of cases would be subject to the trustee's monitoring.

Ikeda & Someya was founded in Tokyo in October 2018 by two lawyers, Tsuyoshi Ikeda and Takaaki Someya. The founding partners previously worked at the Japan Fair Trade Commission (Tsuyoshi Ikeda) and the Consumer Affairs Agency (Takaaki Someya), and used this experience to form cutting-edge antitrust law practices, handling a number of large-scale cases involving business alliances, on-site inspections by the Japan Fair Trade Commission and consumer laws. Ikeda & Someya also has nine other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the Nikkei.

AUTHORS

Tsuyoshi Ikeda is a partner at Ikeda & Someya. He previously served as an investigator at the Japan Fair Trade Commission, where he participated in around 20 dawn raids, prepared the implementation of the leniency system, and investigated a case involving standard essential patents. He is noted for his success in the most cutting-edge cartel, merger review and other antitrust/competition cases. Tsuyoshi is registered as an attorney in New York and California.

Aya Yasui is experienced in general corporate matters, especially international transactions, with a particular focus on antitrust, personal information protection and privacy issues. She previously worked at a US law firm and a major Japanese law firm, and has also been seconded to major global companies and has legal experience as in-house counsel at an automobile manufacturer. Aya can provide advice on legal risks in cutting-edge fields by utilising her extensive business experience and language skills.

Shota Ogawa has represented clients in international cartel cases and domestic and international M&A at a major international law firm, and has also provided front-line advice on M&A and brand strategies through secondments to major domestic and foreign business companies. Based on his experience, he strives to provide not only legal knowledge but also practical business-oriented advice.

Hiiro Hosokawa has been involved with domestic/international antitrust law matters, litigation and dispute resolution, international transactions, etc. Before joining Ikeda & Someya, he worked at a prominent antitrust boutique law firm in Japan and, during his tenure, he was seconded to a financial institution, where he provided legal advice on financial regulatory laws, personal data/information and advertising/marketing legal matters.

Ikeda & Someya

Yurakucho ITOCiA 14th floor
2-7-1, Yurakucho
Chiyoda-ku
Tokyo
Japan

Tel: +81 50 1745 4000
Fax: +81 3 6261 7700
Email: tsuyoshi.ikeda@ikedasomeya.com
Web: www.ikedasomeya.com

IKEDA & SOMEYA
COMPETITION AND CONSUMER LAW ATTORNEYS
www.ikedasomeya.com

KUWAIT

Law and Practice

Contributed by:
Ahmad Saleh, Alex Saleh, Yousef Al Amly and Asad Ahmad
Nader Al Awadhi in Association with GLA & Company see p.388

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Contributed by: *Ahmad Saleh, Alex Saleh, Yousef Al Amly and Asad Ahmad,*
Nader Al Awadhi in Association with GLA & Company

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

In Kuwait, issues of merger control are governed by Law No 72 of 2020, which came into force on 1 November 2020, and its regulations, ratified by the Kuwait Competition Protection Agency ("Kuwait CPA") under Resolutions No 14 of 2021 and No 26 of 2021 (Law No 72 of 2020 and its regulations are together referred to as the "Kuwait Competition Law").

The Kuwait Competition Law repealed its predecessor, Law No 10 of 2007, expanding on the governing rules that impact competition in the State of Kuwait. The Kuwait Competition Law is without prejudice to the international treaties and agreements in force in the State of Kuwait, meaning that such treaties and agreements with the Kuwaiti government supersede any provisions that would otherwise apply pursuant to the Kuwait Competition Law.

1.2 Legislation Relating to Particular Sectors

Other than the Kuwait Competition Law, the following apply:

- The executive by-laws of the Kuwait Capital Markets Authority ("Kuwait CMA") include certain disclosure requirements and other restrictions impacting transactions that are also subject to the Kuwait Competition Law. The Kuwait CMA governs companies that (i) are listed on the Kuwait stock exchange, the Boursa, or (ii) carry licences, such as investing, governed by the Kuwait CMA.
- The Central Bank of Kuwait (CBK) governs certain activities of financial institutions in Kuwait and carries its own set of regulations that must be complied with where the transaction concerns a bank or other financial institution governed by the CBK.

1.3 Enforcement Authorities

The Kuwait CPA is an independent body established pursuant to the Kuwait Competition Law and is supervised by the Kuwait Minister of Commerce and Industry. The Kuwait CPA is the sole body charged with reviewing and determining applications to approve economic concentrations or some anti-competitive practices, and with enforcing the Kuwait Competition Law.

2. JURISDICTION

2.1 Notification

The Kuwait Competition Law requires submission of an application to the Kuwait CPA by persons involved in economic concentrations within at least 60 days from the date, or drafting, of the contract or agreement regarding the transaction, where the economic concentration meets certain thresholds established by the Kuwait CPA. The application must be submitted to the Kuwait CPA in accordance with the required form and the requirements under the Kuwait Competition Law, and must be approved by the Kuwait CPA before the economic concentration may be lawfully implemented. The Kuwait Competition Law provides relatively conservative thresholds for determining whether an application is required, as follows:

- where the parties to the concentration achieve annual sales in Kuwait exceeding KWD500,000, according to the audited financial statements of the last fiscal year before the concentration;
- where the parties to the concentration collectively achieve aggregate annual sales exceeding KWD750,000, according to the audited financial statements of the last fiscal year before the concentration;
- where the value of the registered assets of the parties to the concentration in

Kuwait exceeds the value of KWD2.25 million, according to the audited financial statements of the last fiscal year before the concentration.

The Kuwait Competition Law exempts certain activities from being deemed economic concentrations, as follows:

- banks, insurance companies and financial institutions whose activities include trading in securities are exempt, provided they do not exercise the substantive voting rights conferred by such securities – in order to be exempt, the security must generally be disposed of within one year from the date of acquisition;
- acquisitions resulting from insolvencies, defaults, debt restructuring, compositions with creditors or similar transactions are exempt;
- restructurings within the same group of companies are exempt.

It is important to note that the persons desiring to perform an economic concentration, where an application is required, are forbidden under the Kuwait Competition Law from performing any actions or procedures to complete the concentration operations prior to the issuance of the Kuwait CPA's determination.

2.2 Failure to Notify

Any person may report any agreements, acts or actions that violate the Kuwait Competition Law.

The Kuwait Competition Law established a Disciplinary Board, tasked with deciding on disciplinary actions referred to it by the Kuwait CPA in relation to violations of the Kuwait Competition Law, and complaints filed by various stakeholders. The Disciplinary Board may impose financial penalties of no more than 10% of the total revenues earned by the parties to the economic concentration during the previous fiscal year in the event of failure to submit the application for concentration, or for providing misleading or incorrect information on an application.

2.3 Types of Transactions

The following types of transaction are deemed an economic concentration subject to the Kuwait Competition Law:

- the merger of two or more persons by amalgamation or by combination, or merger of parts of persons, resulting in acquiring control or acquiring more control (see **2.4 Definition of "Control"**);
- the acquisition, by one or more persons, or direct or indirect control over entire or parts of another person or persons, whether by acquisition of any assets, property rights or usufructs, by purchase of shares or liabilities, or by any other means; or
- the joint venture of two or more persons, resulting in performing, on a lasting basis, an autonomous economic or commercial activity, regardless of its legal form or the activity to be practised.

2.4 Definition of "Control"

Article 1 of the Kuwait Competition Law defines "control" as "the legal or contractual relationship which, either separately or in combination, results in exercising decisive influence."

2.5 Jurisdictional Thresholds

The Kuwait Competition Law, pursuant to Article 3 thereof, applies to acts committed inside or outside the State of Kuwait whenever such acts prevent, restrict, or distort free competition in the State of Kuwait.

The current jurisdictional thresholds are as follows, in accordance with Resolution No 26 of 2021:

- where the parties to the concentration achieve annual sales in Kuwait exceeding KWD500,000, according to the audited financial statements of the last fiscal year before the concentration;
- where the parties to the concentration collectively achieve aggregate annual sales exceeding KWD750,000, according to the audited financial statements of the last fiscal year before the concentration,

where the value of the registered assets of the parties to the concentration in Kuwait exceeds the value of KWD2.25 million, according to the audited financial statements of the last fiscal year before the concentration.

2.6 Calculations of Jurisdictional Thresholds

The calculation of the thresholds appears to be based on the audited financial statements of the persons involved in the economic concentration, which would generally be the transacting participants of the transaction. The Kuwait Competition Law does not specifically address the issue of currency conversion, or whether to rely on the book or fair market value of the assets being appraised. In the authors' experience, clients have provided the value of assets as presented in the audited financial statements submitted to the Kuwait CPA.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Unfortunately, many of these issues are not entirely clear in the Kuwait Competition Law. In the authors' experience, the Kuwait CPA has requested the audited financial statements of the local Kuwaiti entity(ies) involved in a transaction, but has not committed to stating whether it relies only on the audited financial statements of the Kuwaiti entities involved (often indirectly) in an economic concentration. Thus, the authors' advice to clients has been to err on the side of caution when determining whether the thresholds issued by the Kuwait CPA prompt a filing requirement.

2.8 Foreign-to-Foreign Transactions

In short, foreign-to-foreign transactions are subject to merger control and other measures – as previously mentioned, the Kuwait Competition Law applies to acts committed inside or outside the State of Kuwait whenever such acts prevent, restrict, or distort free competition in the State of Kuwait.

2.9 Market Share Jurisdictional Threshold

The Kuwait Competition Law does not have a market share threshold; however, disclosure of estimated market share is part of the notice application to the Kuwait CPA.

2.10 Joint Ventures

Joint ventures are subject to merger control. A joint venture of two or more persons, resulting in performing, on a lasting basis, an autonomous economic or commercial activity, regardless of its legal form or the activity to be practised, is considered an economic concentration. There are no other special rules provided for in the Kuwait Competition Law pertaining to joint ventures.

2.11 Power of Authorities to Investigate a Transaction

The Kuwait Competition Law confers the capacity of law enforcement officers upon the Kuwait CPA's employees. These officers are entitled to enter persons' premises and workplaces to investigate violations of the Kuwait Competition Law. They are entitled to access records, books and documents, to obtain information, data, documents, access to files (physical or electronic) held by a government or non-governmental body, and may seek the assistance of police officers when needed.

2.12 Requirement for Clearance Before Implementation

Implementation may not lawfully proceed before an approval is issued by the Kuwait CPA.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Kuwait CPA is entitled to take corrective action for violations of the Kuwait Competition Law. Unfortunately, specific consequences for implementing a concentration before an approval from the Kuwait CPA, where an application is required, are not provided for in the Kuwait Competition Law. It is possible that the Kuwait CPA would order the unwinding of a transaction for failing to comply with the procedures stipulated in the Kuwait Competition Law.

2.14 Exceptions to Suspensive Effect

Unfortunately, there is no reliable source of publicly available information on this issue.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

While possible, these circumstances are not specifically provided for in the Kuwait Competition Law.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

An application must be filed at least 60 days from the date or drafting of the contract or agreement regarding the transaction.

3.2 Type of Agreement Required Prior to Notification

No binding agreement is required prior to notification; it is sufficient for parties to file on the basis of a less formal agreement such as a letter of intent, memorandum of understanding, or good faith intent by the parties to reach an agreement.

3.3 Filing Fees

There are filing fees. Applications must be accompanied by receipt for payment of a fee of one tenth (0.1%) of the paid-up capital, or of the combined assets of the relevant persons in the State of Kuwait, whichever is less, provided that it is not more than KWD100,000.

3.4 Parties Responsible for Filing

Persons directly involved in the economic concentration are required to submit the application to the Kuwait CPA; typically, these are the parties to the agreement.

3.5 Information Included in a Filing

The application requires a considerable amount of information and detail on the entities involved in the transaction and the economics resulting therefrom. An application requires the following to be included to the extent available and appropriate:

- Asset appraiser report by an auditor approved by the Kuwait CMA.
- Memorandum of association, articles of association, commercial register and commercial licences of the parties to the economic concentration.
- Names of the board members of each of the parties to the concentration or their legal representatives.
- Financial statements for the last two fiscal years for all relevant persons in the economic concentration's operation and their branches.

- Copy of the contract executed or in draft form, and any other documents of a public or private offering, and information on the number of shares or assets that will be acquired.
- A report containing the economic aspects of the proposed transaction, which must include the following.
  - (a) Information about the concentration parties:
    - (i) names of the parties of the concentration operation, memoranda of association, articles of association (if any), commercial licences and the commercial register;
    - (ii) activity of the parties of the concentration operation;
    - (iii) addresses, phone numbers and email addresses of the parties of the concentration operation;
    - (iv) name, title, copy of ID, phone number and email address of the liaison officer at the parties of the concentration;
    - (v) capital;
    - (vi) the most important customers and their percentages in the market;
    - (vii) volume, value and percentage of sales in the market;
    - (viii) a description of competitors and their shares in the market.
  - (b) Data of the concentration operation:
    - (i) type of transaction (ie, merger, acquisition, or joint venture);
    - (ii) description of whether the transaction relates to all or some parties of the economic concentration;
    - (iii) a brief explanation for the economic and financial structure of the economic concentration;
    - (iv) the dates, proposed or estimated, of any important procedures aimed at the completion of the concentration operation;
    - (v) the proposed ownership structure and the decisive influence post-completion;
    - (vi) relevant products of the economic concentration, its volume and percentage of sale;
    - (vii) relevant market and its volume;
    - (viii) products in which the applicants deal;
    - (ix) positive impacts of the transaction on the economy;
    - (x) negative impacts of the transaction and the proposed procedures to mitigate such impacts;
    - (xi) markets affected by the transaction;
    - (xii) factors influencing access to the market;
    - (xiii) nature of the distribution channels;
    - (xiv) factors affecting price fixation during the past five years;
    - (xv) volume of available productive capacity and percentage of usage;
    - (xvi) volume of demand for products and its structure;
    - (xvii) alternative products;
    - (xviii) concentration value in Kuwaiti dinars, provided that it shall include the purchase rate and the value of all relevant assets.
  - (c) Ownership and decisive influence:
    - (i) all persons who have a decisive influence on participants in the economic concentration, whether directly or indirectly, shall be determined and the nature of such influence and its methods shall be described;
    - (ii) all persons dealing in any affected market where participants in the concentration operation or any other person enjoy a decisive influence on that market, whether directly or indirectly – the nature and methods

of such influence shall be described.

3.6 Penalties/Consequences of Incomplete Notification

Typically, the Kuwait CPA will notify the applicants of additional information requested. Otherwise, failure to provide a complete application may result in a denial by the Kuwait CPA, or other corrective action the Kuwait CPA deems appropriate.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Disciplinary Board may impose financial penalties of no more than 10% of the total revenues earned by the parties to the concentration during the previous fiscal year in the event that the application contains misleading or incorrect information.

There is no readily available reliable source of information to provide statistics on the application of penalties by the Kuwait CPA.

3.8 Review Process

Once an application is submitted, the chairman of the Kuwait CPA must refer the application to the executive director of the Kuwait CPA within five days, plus any additional time in the event additional information is requested from the applicants.

The executive director then has 90 days to study the application and prepare a report to the board of the Kuwait CPA. The board of the Kuwait CPA may extend this 90-day limitation upon request from the executive director of the Kuwait CPA. During this phase, the executive director:

- ensures that the fees paid are consistent with the requirements;
- may require additional documents, information or data deemed necessary for studying the application;
- notifies persons the executive director considers to be affected by the approval of the economic concentration application in order for them to submit any objections or documents they may have;
- publishes a summary of the economic concentration application on the website of the Kuwait CPA, and in the Official Gazette or two local daily Arabic newspapers;
- holds hearings with the applicants or others as appropriate; and
- seeks the help of any expert, local or international companies that are specialised in examination of the application, or obtains any information from third parties as appropriate.

In the event of any objection by a third party, the time to consider and decide on this does not count towards the 90-day limitation otherwise imposed on the executive director of the Kuwait CPA during his phase of review.

Following completion of the executive director's review, a report will be issued to the chairman of the Kuwait CPA containing details of the application, a description of all facts and procedures taken with respect to the application, an evaluation of the application from both a legal and economic standpoint, and a recommendation. The chairman of the Kuwait CPA presents the application to the agency's board, who will in turn decide on the application within 30 days from the date of the chairman's presentation. The board's decision will be as follows:

- approving the economic concentration application; or
- conditionally approving the economic concentration application; or
- rejecting the economic concentration application, provided that such a decision is justified.

Once a decision is rendered, the executive director must inform the stakeholder within 15 days of the date of the board's decision.

The total timeline for a decision to be rendered from the time an application is properly submitted is an estimated four months. The actual time, however, may vary depending on follow-up requests for additional information, requests for additional time by the executive director, or objections raised by third parties.

3.9 Pre-notification Discussions With Authorities

Pre-notification discussions with authorities can be engaged in. Any person who desires to engage in an economic concentration may apply for a meeting prior to submission of an application. There is no particular obligation of confidentiality provided for in the Kuwait Competition Law.

3.10 Requests for Information During the Review Process

Requests for information are common and expected, depending on the extent of the application submitted. Requests will effectively suspend the time otherwise imposed on the Kuwait CPA to process an application.

3.11 Accelerated Procedure

There is no formal method for expediting or accelerating the procedure of review of an economic concentration application.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

When considering an application, the Kuwait CPA considers the following standards:

- maintaining and encouraging effective competition amongst competitors in the market;
- enhancing the interests of consumers with respect to quality and price of the relevant products;
- encouraging through competition the reduction of costs, developing new products and facilitating the access of new competitors to the market.

The executive director, during his review, takes the following elements into consideration:

- Studying the products according to the following:
  - (a) comparing the products subject to the transaction with other similar products in the market;
  - (b) the availability of substitute products to consumers.
- Determining the possibility of competition within a relevant geographic area with the following standards in mind:
  - (a) the ability of the consumer to move from one geographic area to another;
  - (b) the ability of vendors to make changes based on the moving of purchasers between various geographic areas due to the relative change in the prices or other competitive factors;
  - (c) barriers to entering the relevant market;
  - (d) costs of moving between geographic areas;
  - (e) customs and administrative restrictions at the local and foreign levels.
- The market share of the relevant persons.
- Revenues and assets of relevant persons.
- Actual or possible competitiveness in the relevant market.
- The extent of ease of entry into the relevant market.
- The possible influence on prices of relevant commodities or services.

- The barriers to entry affecting new or potential competitors.
- The possibility that a dominant position in the relevant market is created.
- The possible influence on creativity, innovation and technological efficiency.
- The extent of the impact on investment or export encouragement.
- The impact on consumers' interests.

4.2 Markets Affected by a Transaction

Unfortunately, at this stage the regulations do not provide much guidance on this issue. The Kuwait Competition Law provides that the relevant geographic area is the area where the products regarded as interchangeable are substituted. It further provides that the relevant products are all the products which are regarded as interchangeable or substitutable in terms of meeting the needs of the recipient of the service or the commodity.

4.3 Reliance on Case Law

Unfortunately, at this stage the regulations do not provide guidance on this issue. However, it is likely that case law would play a relatively small role in influencing the enforcement of the Kuwait Competition Law.

4.4 Competition Concerns

Please see the factors taken into consideration by the executive director detailed in **4.1 Substantive Test**.

4.5 Economic Efficiencies

The Kuwait CPA considers the possible influence on economic efficiencies; however, the extent of such consideration is not apparent.

4.6 Non-competition Issues

There are no formally approved additional considerations that the Kuwait CPA may take into account where such considerations fall outside the scope of application of the Kuwait Competition Law.

4.7 Special Consideration for Joint Ventures

There are no other special rules provided for in the Kuwait Competition Law pertaining to joint ventures in particular.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Kuwait CPA has the authority to take corrective actions for violations of the Kuwait Competition Law. At this time, the Kuwait Competition Law provides limited guidance on this issue.

5.2 Parties' Ability to Negotiate Remedies

The Kuwait CPA may, at any stage of the procedures taken against the violator and until a decision is issued by the Disciplinary Board or a final judgment, offer settlement or accept it according to the template prepared for this purpose with any person who committed one of the violations stipulated in the law for the payment of an amount that is not less than the dedicated minimum fine and shall not exceed the maximum fine.

The Kuwait CPA would determine the period during which the violator should fulfil the settlement conditions. Where the settlement is completed, the procedures taken against the violator expire.

A settlement request may also be submitted by the violator or his legal representative to the Kuwait CPA. The Kuwait CPA would examine the request and assess its value without affecting the rights of the one who is affected by the violation.

5.3 Legal Standard

In order to offer or accept a settlement, the following conditions must be met:

- no decision must have been issued for the violation, unless a final judgment is issued for the violation where the violator appeals (in a timely manner) the decision of the Disciplinary Board; and
- the value of the settlement must not be less than half of, or greater than, the maximum penalty.

5.4 Typical Remedies

Unfortunately, there is no reliable source of publicly available information on this issue.

5.5 Negotiating Remedies With Authorities

There is no formal initiation point for when parties may begin negotiating remedies with the authorities. As previously mentioned, the Kuwait CPA may propose its own remedy, but may impose remedies not agreed between the parties that it otherwise has the authority to impose.

5.6 Conditions and Timing for Divestitures

Unfortunately, there is no reliable source of publicly available information on this issue.

5.7 Issuance of Decisions

Formal decisions permitting or prohibiting transactions are made publicly available – the decisions of the Kuwait CPA are generally published on the authority's website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Unfortunately, there is no reliable source of publicly available information on this issue.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Unfortunately, there is no reliable source of publicly available information on this issue. The Kuwait CPA, in the event it issues a conditional approval, will outline the conditions regarding this.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

During the process of review by the Kuwait CPA, a summary of the application is published on the website of the Kuwait CPA, and in the Official Gazette or two local daily Arabic newspapers.

Every stakeholder is entitled to submit a justified objection to the Kuwait CPA against the economic concentration application within 15 days from the date of notice or publication. If an objection is filed, the applicant has 15 days from the date of notice of the objection to provide its statements and documents in reply to the objection. The review process, and timeline, is effectively paused from the time an objection is filed to the time a decision is reached by the Kuwait CPA on the matter.

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Nader Al Awadhi in Association with GLA & Company

7.2 Contacting Third Parties

During the process of review by the Kuwait CPA, a summary of the application is published on the website of the Kuwait CPA, and in the Official Gazette or two local daily Arabic newspapers.

The Kuwait CPA is also permitted to notify persons it considers to be affected by the approval of the economic concentration application. Those persons will have 15 days from the date of being notified, or the date of publication of the summary of the application, whichever is earlier, to lodge any objections they may have.

7.3 Confidentiality

The applicant for economic concentration desiring that data included in the application and the attached documents be treated as confidential may mark the application as "Confidential", and attach a statement in support of holding the application or its contents confidential. In these circumstances, the applicant should provide non-confidential summaries that provide a sufficient understanding of the content of the confidential data, provided that these are marked as "Not Confidential".

The Kuwait CPA ultimately determines whether or to what extent to hold information contained in an application confidential in accordance with controls set by its board of directors.

7.4 Co-operation With Other Jurisdictions

There is no clear indication of the level or extent of co-operation between the Kuwait CPA and other jurisdictions; however, as mentioned in **1.1 Merger Control Legislation,** the Kuwait Competition Law is subject to international treaties or agreements entered into by the State of Kuwait. Thus, to the extent a treaty provides for the co-operation by the State of Kuwait with other jurisdictions and to the extent relevant to the Kuwait Competition Law, those conditions will apply.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

A final decision by the Kuwait CPA may be appealed to the judicial system in Kuwait by way of a formal writ of summons against the authority. There is a dedicated department within the judicial court system dedicated to complaints filed involving governmental authorities.

8.2 Typical Timeline for Appeals

The timeline of a case filed against a governmental authority varies on a case-by-case basis, and may last over one year in the court system.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Assuming that a third party made a proper objection during the reviewing phase of an application, the decision made by the Kuwait CPA to such an objection may be appealed by that third party. However, it is highly unlikely that such an appeal would pause the review process.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

Law No 72 of 2020, Resolution No 14 of 2021, and Resolution No 26 of 2021, which make up the Kuwait Competition Law, have all been enacted in the last couple of years. The authors expect the Kuwait CPA to issue additional amendments and regulations as it continues to grow and develop.

9.2 Recent Enforcement Record

The Kuwait CPA does not regularly publish statistics of its enforcement activities. Unfortunately, there is no reliable source of readily available data on the statistics following the enactment of the Kuwait Competition Law in 2020. That being said, it is important to understand the level of authority granted to the Kuwait CPA, which includes the ability to unwind transactions or issue fines for violation of the Kuwait Competition Law.

9.3 Current Competition Concerns

The Kuwait CPA has historically remained dormant and relatively inactive in the market compared with some of its sister jurisdictions in the GCC. However, the enactment of the recent Kuwait Competition Law demonstrates Kuwait's dedication to the enforcement of the principle of freedom of competition in the State.

Given the age of the Kuwait Competition Law, it is unclear what the level of involvement of the Kuwait CPA will be; however, its conservative thresholds, published in 2021, in determining when an application is required for approval of an economic concentration – which is broadly defined to include any merger, any acquisition resulting in direct or indirect control of another, and any joint venture resulting in a lasting co-operation of an economic or commercial activity – result in a requirement for many cross-border deals to pay attention to the Kuwait CPA's requirements and comply with the Kuwait Competition Law, regardless of whether or not the directly transacting entities are based outside the State.

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Nader Al Awadhi in Association with GLA & Company

Nader Al Awadhi in Association with GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. GLA & Company's practice encompasses all of the legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE), the firm offers unique insights for companies seeking to establish or expand business operations in these nations. Its job on deals is to get the same cleared with the local Competition Authority. GLA & Company has deep relationships with regulators in the GCC and has become successful in securing no objections from these bodies to clear these deals. Its lawyers are intimately familiar with the governing sources of authority and it routinely works with the relevant agencies, departments and committees on behalf of its clients.

AUTHORS

Ahmad Saleh is a senior associate with the Corporate Department at GLA & Company and licensed in the State of Ohio, US, and the Federal District for the Southern District of Ohio, US. His practice focuses primarily on M&A, other local and cross-border transactions, and complex construction disputes. Since joining GLA & Company, Ahmad has successfully advised multinational clients across various industries, including construction and manufacturing, government contracting, finance, food and retail. Ahmad is regularly involved in acquisitions and other matters, and recently has been focusing on complex contractual disputes for major construction projects in the State of Kuwait.

Alex Saleh is a founder and managing partner of GLA & Company and takes a leading regional role within the firm with respect to its M&A and Private Equity practice. With over 25 years of experience in both the GCC markets as well as the USA, he has accumulated sizeable expertise in the areas of banking and finance, M&A, capital market deals and infrastructure projects. His experience garners praise from the leading legal directories, such as Band One by Chambers and Partners.

Yousef Al Amly is a partner at GLA & Company and advises clients on complex corporate and commercial structures and transactions in relation to joint ventures, corporate restructuring, M&A, equity capital markets and commercial transactions (including franchise, distributorship and agency). This includes negotiating and drafting the terms and conditions of agreements and documentation related to any of the said transactions both in English and Arabic, such as commercial contracts, due diligence reports, shareholders' arrangements, sale and purchase agreements, acquisition finance, IPO prospectuses and other legal documents necessary to carry out corporate/commercial transactions.

Asad Ahmad is a relentless advocate for his clients. He has been involved in a number of transactional and advisory works in various industries, including logistics, construction, finance, healthcare and education. Asad's scope of practice has involved comprehensive representation with respect to mergers and acquisitions, conducting extensive due diligence exercises in relation to complex transactions, as well as distribution and agency arrangements. Asad has extensive background in advising on marketing of securities, corporate governance issues, policies and regulatory compliance. Due to increased need, Asad has expanded his expertise in advising on the framework of data protection and regulation.

Nader Al Awadhi in Association with GLA & Company

Suad Commercial Complex
Third Floor
Fahad Al Salem Street
P.O. Box 15500
Al Daiya 35455
Kuwait

Tel: +965 2291 5800
Email: info@glaco.com
Web: www.glaco.com

MEXICO

Trends and Developments

Contributed by:
Christian Lippert, Carlos Chavez, Juan Carlos Burgos and Gerardo Rodriguez
Galicia Abogados, S.C. ***see p.398***

The Fight for the Digital Economy: Jurisdiction Conflicts Between the Antitrust Authorities in Mexico

Introductory note

A new Federal Competition Act (FCA) was enacted in Mexico on 23 May 2014. The FCA vested the newly formed Federal Economic Competition Commission (COFECE or "the Commission") with strong enforcement and regulatory powers.

Interestingly, COFECE has had to share these powers for the first time since its predecessor, the Federal Competition Commission, was formed in 1992. Its recently formed rival, the Federal Telecommunications Institute (IFT or "the Institute"), is a regulator and antitrust enforcer in the telecommunications and broadcasting industries.

There were hardly any jurisdictional conflicts between the two agencies in the first few years following the enactment of the FCA. However, the development of new technologies and the growth of over-the-top (OTT) platforms has led the Commission and the Institute to come face to face. Both seek to be recognised as the competent authority to perform merger review processes and investigate potential anti-competitive conduct in these fascinating emerging markets.

COFECE and IFT have increasingly been at odds, as they have both asserted jurisdiction in these areas during the past eight years. The merger review process faced by applicants in Mexico has become longer and less predictable as the battle intensified in recent years.

This article considers the agencies' jurisdictional decisions, as well as those of the federal courts when jurisdictional disputes were submitted for their review. It also provides a chronological overview of the precedents that have resulted from the stand-off between these two authorities and some key takeaways for those engaged in the aforementioned markets.

Applicable regulation

The Commission was the only antitrust enforcer across all markets and industries when Mexico's first competition law was enacted in 1992. This remained true for almost 20 years until the Mexican constitution was overhauled to introduce major telecommunications and antitrust changes.

One of the main features of 2013's so-called telecommunications reform was the creation of a robust telecommunications and broadcasting regulator (IFT). The telecommunications industry was seen as a highly litigious sector, constituting a considerable portion of COFECE's antitrust work, so the Institute was also empowered as an antitrust enforcer in said area.

For the first time two agencies had jurisdiction on antitrust matters and, as such, there was potential for jurisdictional conflict between them. The FCA of 2014 outlined the following procedure to adjudicate any such conflict.

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- As soon as one of the agencies believes the other is hearing a matter that falls within its jurisdiction, it shall request the other agency to turn over the respective file.
- If the requested agency agrees that the requesting agency is competent, it shall turn the matter over within five days of receiving the request.
- Conversely, if the requested agency believes that it – rather than the requesting agency – has jurisdiction, it shall inform the requesting agency within the same timeframe. The requested agency shall suspend proceedings and refer the matter to a federal circuit court specialising in competition, telecommunications and broadcasting. This court will then determine which agency has jurisdiction.
- The relevant merger review process or investigation will remain suspended until the federal court makes a decision and adjudicates jurisdiction in favour of an agency.

The whole process takes from three to seven months to go through in practice. It is worth noting that there is not time to dispute jurisdiction, as the process only begins when the disputing agency learns that the other agency is hearing a case that may fall within its jurisdiction.

The first circuit court specialising in competition, telecommunications and broadcasting ruled that, in the absence of a term in the law to dispute jurisdiction over a case under review by the other agency, it is not appropriate to make any further decision on the matter (see Conflict 2, CCA 1/2021, p24).

Early cases

Public records reveal the first case filed before both authorities was a merger control application following the acquisition of Metro Net by SixSigma Networks Mexico.

The parties involved in the transaction filed applications with both agencies, separating markets into the jurisdiction of each authority. The Institute reviewed and cleared managed services, hosting and cloud computing markets, whereas the Commission reviewed and cleared the IT consulting and outsourcing services. Neither authority challenged the competition of the other.

Nokia–Alcatel (Case No CCA 2/2015)

One year later, however, the second circuit court specialising in competition, telecommunications and broadcasting decided in Case No CCA 2/2015 (Nokia–Alcatel) that jurisdiction over a case should not be divided and the competent authority must study all markets involved in said transaction.

The court concluded, in summary, that:

- the analysis of economic competition matters must not be carried out in a segmented manner; and
- the Institute was the competent agency to hear the case and decide across all markets affected by the transaction, pursuant to the principle of specialisation.

The court was keen to state that its decision was based on the particular facts of the case and noted that in the absence of any compelling evidence submitted by the Commission, as disputing agency, it deferred to the Institute on the principle of specialisation. The court also made clear that its decision should not be understood as a general principle applicable to all future transactions.

Merger in the audiovisual content for entertainment industry (Case No CCA 1/2017)

The same second circuit court acted on this conclusion in Case No CCA 1/2017 two years later. The conflict arose when the Institute argued that it was competent to review the entire concentration and that a segmentation of jurisdiction was not possible (based on the Nokia–Alcatel precedent).

The court concluded that the Institute was not competent to review and analyse the effects of the transaction in all markets and consequently affirmed the Commission's jurisdiction to review the effects of the transaction in certain markets. Mexico's two competition authorities reviewed and cleared the same transaction as a result of this decision, but each focused on different markets.

The court also noted that the determination of the relevant markets and related markets, as well as the actual effects that the transaction could have on other competitors and consumers of the relevant goods or services, should be taken into account when considering the special characteristics of each market.

The agencies' different specialties led the court to conclude that not all audiovisual content falls within the jurisdiction of the Institute, which is limited to content delivered through broadcasted channels or paid audio and video platforms.

The court similarly noted that the products or services sold or rendered in a particular market using telecommunications or broadcasting as input (or, conversely, being used as input in such industries) would not in itself be sufficient to guarantee the Institute jurisdiction.

Recent cases

The debate between the Institute and the Commission has escalated in the past few years and become more complex. This is, to a certain extent, because early court decisions were more general in nature and did not shed a lot of light on the actual markets in which each authority is competent. But it is, to an even greater extent, down to the additional questions the rapid technological evolution of OTT platform services has brought to the discussion.

It is important to mention that, pursuant to applicable regulation, telecommunications carriers and broadcasters require a licence from IFT, whereas firms that provide services through OTT platforms do not require any such licence or authorisation.

Federal courts have issued three recent decisions addressing jurisdiction over OTT markets. The courts' criteria have changed in such decisions, somehow swinging between the two agencies.

The first decisions (Case Nos CCA 4/2019 and CCA 1/2021) favoured COFECE and largely held that jurisdiction over the services provided through OTT platforms is vested in the Commission. However, the court concluded in its most recent decision (Case No 3/2022) that IFT had jurisdiction if the disputed markets featured services that required the internet and also somehow fell under the asymmetric regulation imposed on the preponderant economic agents.

IFT had a constitutional mandate to set forth asymmetric regulation for entities in the broadcasting and telecommunications sectors with a national participation greater than 50%. The areas in which regulation was imposed were:

- interconnection, access and shared use of passive infrastructure;
- user and competition protection;
- accounting separation;
- fixed services;
- mobile services;
- content; and
- unbundling of the local loop.

The following three subsections briefly summarise the holdings of each case.

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Galicia Abogados, S.C.

Uber–Cornershop merger application (Case No CCA 4/2019)

Uber communicated its intention in October 2019 to acquire a majority stake in Cornershop, subject to regulatory approvals in Mexico. The main services rendered by Uber in Mexico at that time were mobile applications for:

- connecting users with drivers;
- an on-demand food distribution platform;
- electric bicycles and scooters; and
- freight transportation services.

Cornershop's business consisted of an on-demand delivery platform that allowed users to order and purchase groceries and goods from local supermarkets and retail stores.

The conflict arose when Uber–Cornershop filed the merger application with COFECE, which prompted IFT to dispute jurisdiction. The matter was subsequently submitted to the first circuit court, as both agencies claimed jurisdiction.

The court held that the Commission was competent to review the complete transaction because "the services provided through digital platforms such as Uber and Cornershop do not pertain to the telecommunications sector".

The court decided this was because Uber and Cornershop "are a space or marketplace, such as a call centre or shopping mall, through which transactions of various economic activities are carried out". Thus, it concluded, "the underlying economic activity remains the same, regardless of the channel used to market the good or service in question".

IFT claimed that it had jurisdiction over the services provided for the following reasons, which were dismissed by the court.

- The services constitute novel modalities of electronic communications, which are part of the telecommunications sector.
- Digital platforms have technical and functional characteristics of electronic communications that make them a part of the internet ecosystem and therefore part of the larger telecommunications sector.

The court believed these statements fail to demonstrate that the economic consequences of a possible concentration between such digital platforms do not fall within the competence of the Commission, mainly owing to the economic effects that could impact the markets after the concentration.

Finally, after seven months with the circuit court, the merger review process continued before the Commission. The transaction was approved within an additional period of nine months.

Investigation into online search services, social networks, mobile operating systems, cloud computing services and related services (Case No CCA 1/2021)

IFT launched an investigation during the last quarter of 2020 into the markets of online search services, social networks, mobile operating systems, cloud computing services and related services. Its purpose was to establish whether there are any potential barriers to competition and/or essential facilities that could generate anti-competitive effects.

COFECE challenged the IFT's jurisdiction to investigate the aforementioned markets as soon as the Commission became aware that such an investigation had been launched. This was the first time that a jurisdictional conflict concerning an investigation (rather than a merger control process) had been submitted to a circuit court.

The first circuit court could not establish whether online search services, social networks and cloud computing services had any kind of relationship, impact or incidence in the telecommunications and broadcasting sectors, at least in terms of competition. The court cited the following reasons for arriving at this conclusion.

- The investigated services do not per se require the use of spectrum or telecommunications networks, as these markets are clearly differentiated from the broadcasting and telecommunications sectors.
- The main players in online search services, social networks and cloud computing services do not participate in the broadcasting and telecommunications sectors and can provide their services without any concession or authorisation from the Institute.
- Although the investigated services are rendered through the internet, the latter is used only as an input. However, this alone does not mean that such services necessarily affect the telecommunications and broadcasting sectors.
- None of the preponderant economic agents in the telecommunications and broadcasting sectors participate in the markets under investigation. None of these markets are related to the asymmetric measures imposed on such agents by IFT.

Conversely, with respect to mobile operating systems, the court found that IFT is the competent antitrust enforcer because it is, "from a regulatory standpoint, empowered to issue technical guidelines regarding infrastructure and mobile terminal equipment that make use of the radioelectric spectrum or that connect to telecommunications networks".

The court also considered mobile operating systems "closely linked to the telecommunications and broadcasting sectors as, in order for users to access such services, they require a mobile device that connects to telecommunications networks and/or to the radio spectrum to access voice, video, audio and data services".

The court ultimately split jurisdiction between both agencies and held that the Commission may conduct antitrust investigations in the online search services, social networks and cloud computing services markets, whereas the Institute may only so do in the mobile operating systems market.

The process before the circuit court to settle the jurisdiction question in this case lasted six months. The Commission then decided not to pursue the investigation in the markets where it had jurisdiction. The Institute's investigation into mobile operating systems, on the other hand, is still pending at the time of writing.

Merger in the OTT industry (Case No CCA 3/2022)

This case involves merger control applications filed by the parties (the names of which have not been disclosed) for a transaction before both the Commission and the Institute, noting that each authority was competent in specific and different markets.

The Institute challenged the competence of the Commission to review some markets initially proposed by the parties and thus the matter made its way to the second circuit court.

The disputed markets were:

- production, acquisition, provision, licensing and distribution of audiovisual content for OTT platforms; and

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- sale of advertising time and space in OTT platforms for audiovisual content.

The court held, after five months of proceedings, that the Institute had exclusive jurisdiction to review the aforementioned markets, which are solely related to OTT services. This showed how heavily the court weighed the essence of OTT platforms. What sets OTT platforms apart from other content commercialisation mechanisms is their remote distribution through the internet, which in turn runs on telecommunications networks.

The court went on to note that, although the distribution of audiovisual content through internet platforms does not require a broadcasting or telecommunications services licence, the distribution of audiovisual content requires either broadcasted channels or telecommunications networks – without them, such platforms cannot deliver content to end users.

This shows that, in the court's opinion, the autonomy of the market under analysis vis-à-vis the internet telecommunications networks is questionable because, without them, the operation of OTT platforms would be limited.

The court finally introduced a new test to allocate jurisdiction between the two agencies, stating that jurisdiction would be vested in IFT where preponderant economic agents in the telecommunications or broadcasting sectors participate in the analysed activity, or where these are activities regulated asymmetrically by the Institute.

This last decision departs from the rulings in Case Nos CCA 1/2021 and CCA 4/2019 by making internet usage the key requisite to settle the jurisdiction in favour of the Institute and hinting that IFT will likely be competent whenever preponderant agents and/or asymmetric regulation are involved.

This decision also appears to overlook the fact that traditional markets are migrating towards digital services, which require the internet as a critical input to connect suppliers, intermediaries and customers. Nowadays, the disappearance of brick-and-mortar outlets – or at least the reduction of these spaces – is commonplace, as goods or services are ordered through online stores instead.

It is of paramount importance to establish if this change in the preferred means of conducting business is enough to redetermine whether a transaction or activity pertains to the telecommunications or broadcasting sector. Depending on the opinion of the Mexican federal courts going forward, antitrust jurisdiction could gradually shift from COFECE to IFT.

An ongoing case

Another jurisdictional dispute in the OTT services space is pending before the Supreme Court at the time of writing, even though the transaction was cleared by both agencies. Grupo Televisa and Univision Holdings, Inc reached a deal to combine the content and media assets of both companies in 2021.

The parties filed for merger control clearance before the two agencies. The Institute and the Commission entered their correspondent judgments, but both considered themselves competent in the market of audiovisual content commercialised through OTT platforms.

This time, though, the Institute challenged the Commission's decision before the Supreme Court as both agencies had already resolved the matter (ie, there was no jurisdiction to settle as the matter was no longer pending). Even so, the Institute challenged a decision that had cleared

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a transaction, for the first time in the history of these conflicts.

Guidance collected from competition conflicts

Mexico's two antitrust enforcers keep disagreeing about who gets jurisdiction over OTT services. These platforms are a critical component of the digital economy, so IFT and COFECE must strive to assert their jurisdiction and ensure they remain relevant in the future marketspace. Both agencies are devoting precious time and resources in doing so, perhaps to the detriment of other ongoing matters.

For instance, IFT thought that there was potential anti-competitive conduct in the online search services, social networks and cloud computing services. COFECE obtained jurisdiction over such markets after one of the aforementioned arguments. Ironically, it decided not to pursue such an investigation, which makes one question why IFT launched an investigation in the first place and whether COFECE had access to the evidence that motivated the Institute to so do.

Similarly, cross-border transactions have experienced significant delay in areas that are potentially subject to the jurisdiction of both agencies. Proceedings before federal courts to settle jurisdiction conflicts can last up to seven months, which in turn adds to the time the competent agency (or agencies) takes to clear the matter. This can lead to a several-month clearance process in practice.

The following guidelines, which are based on the federal courts' more recent decisions, may help define which agency has jurisdiction over OTT-related markets.

- If the underlying activity can exist without use of the internet, the Commission is likely the competent authority, even when OTTs or related markets are involved.
- If the concerned services are performed by any of the preponderant economic agents, or related to the asymmetric regulation imposed on them by the Institute, IFT would be competent.
- A question mark would be placed on such markets that do not fall under these clear segmentations. (This was the case for online search services, social networks and cloud computing services, which – in terms of the decision of the first circuit court in Case No CCA 1/2021 – fall under the jurisdiction of the Commission.)

These conflicts cause noticeable confusion among market participants, particularly those engaged in activities related to OTTs and their services, because the agencies do not seem able to resolve their differences without resorting to the courts.

It is worth remembering that the FCA regulations issued by both agencies allow consultation between them for the purpose of settling competition disputes. Considering all the difficulties involved in going to court, it would be desirable to see closer co-operation between the agencies for the sake of helping applicants avoid the high costs associated with jurisdictional proceedings before federal courts.

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Galicia Abogados, S.C.

Galicia Abogados, S.C. has more than 27 years of experience and a legal team of 175 lawyers, including 34 partners and five counsels. The business and administrative teams bring the total headcount to around 230 employees, working across 25 practice areas at offices in Mexico City and Monterrey. The firm is renowned for its impeccable reputation and knowledge in strategic sectors: financial, energy and infrastructure, private equity, regulated industries, real estate, hospitality and life sciences. The distinguishing feature that marks Galicia out as a leading firm in the Mexican legal market is its ability to provide a unique legal service offering strong transactional and regulatory advice coupled with strategic capabilities in litigation and environmental, social and governance matters.

AUTHORS

Christian Lippert became Galicia's co-managing partner on 1 January 2022, following more than 20 years' experience in strategic M&A, competition and antitrust matters, and private wealth management. He is a member of the Executive and Compensations Committee and represents clients in complex merger proceedings, particularly in regulated sectors and industries, as well as cartel investigations and abuse of market power. Christian is an enthusiastic reader who is convinced of the importance of childhood education in Mexico. He therefore collaborates closely with civil society organisations dedicated to improving educational quality, acting as their pro bono legal counsel and occasionally in leadership positions.

Carlos Chavez pioneered competition and antitrust law in Mexico, where he was one of the first lawyers to specialise in regulated industries. He brings enormous technical expertise and more than 15 years' experience to his partnership at Galicia. Clients benefit from Carlos' advice as he taps into his invaluable experience of the most complex transactions and proceedings before Mexican regulators and competition agencies. Carlos frequently represents railway operators and telecommunications carriers in regulatory and antitrust proceedings. He also represents financial institutions before banking and securities regulators and competition agencies, as well as helping various big pharma players secure antitrust clearance.

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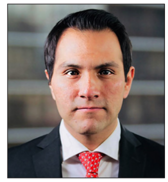
Juan Carlos Burgos is a compliance and competition partner at Galicia, who is passionate about antitrust and regulatory issues. He has experience in challenging pre-merger filing proceedings, as well as cartel and dominance investigations. Juan Carlos frequently advises and represents telecommunications, financial and pharmaceutical companies, in addition to working with Galicia's energy team on competition issues in the electricity and hydrocarbons markets. He also works with the administrative litigation team in amparo proceedings and offers specialised compliance and integrity advice. Juan Carlos actively participates in several forums of attorney Bars and associations, as well as the academic sector, where he has published on competition and regulatory matters.



Gerardo Rodriguez is an expert in antitrust and competition matters, with more than 15 years' experience in market investigations and in more than 60% of recent procedures carried out by COFECE. He is well regarded among clients and peers, but also by officers of the competition authorities, which makes him a trustworthy counsel for complex merger applications and anti-competitive investigations. Gerardo has experience in telecommunications, broadcasting, railroad transportation and oil and gas, in addition to other regulated sectors such as healthcare and life sciences, financial services and air transportation. He has provided legal advice to indigenous communities in south-east Mexico for obtaining broadcasting concessions.

Galicia Abogados, S.C.

Torre Del Bosque
Blvd. Manuel Avila Camacho
No 24
7th Floor
Lomas de Chapultepec
1100 Mexico City
Mexico

Tel: +52 5555 409 200
Email: apoyoprofesional@galicia.com.mx
Web: www.galicia.com.mx

Galicia

NORWAY

Law and Practice

Contributed by:
Jan Magne Langseth, Karin Fløistad, Erik Martinius Klevmo and Olav Endresen Haukeli
Advokatfirmaet Simonsen Vogt Wiig** **see p.417

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Contributed by: *Jan Magne Langseth, Karin Fløistad, Erik Martinius Klevmo and Olav Endresen Haukeli,*
Advokatfirmaet Simonsen Vogt Wiig

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Norwegian merger control rules are laid down in chapter 4 of the Norwegian Competition Act (LOV-2004-03-05-12), the Norwegian Merger Control Regulation (FOR-2013-12-11-1466) and the Fining Regulation (FOR-2013-12-11-1465).

The Norwegian Competition Authority (NCA) publishes guidance and factsheets on merger control and procedural requirements (content requirements, timelines, etc) in Norwegian and English on its web page. Furthermore, the NCA refers extensively to the European Commission's Consolidated Jurisdictional Notice.

The competition rules in the EEA agreement are also applicable for transactions affecting trade between EEA countries. The enforcement of the EEA competition rules is regulated in the Norwegian EEA Competition Act (LOV-2004-03-05-11). The European Commission is competent in cases falling under the Merger Regulation (ECMR), also with regard to rendering decisions with effect in Norway.

1.2 Legislation Relating to Particular Sectors

There is no specific legislation regarding foreign transactions or investments, nor relating to particular sectors. However, the NCA has imposed an information duty (ie, not a merger-filing duty, but a duty to inform the NCA about all concentrations, regardless of turnover thresholds) upon specific undertakings active within the following (concentrated) sectors in Norway:

- fuels;
- energy;
- groceries;
- waste;
- locksmiths;
- laundry;
- garden centres;
- newspaper; and
- broadband.

1.3 Enforcement Authorities

The NCA enforces the aforementioned acts and regulations. Complaints concerning merger control decisions by the NCA (prohibitions and conditional clearance decisions) can be made to the Competition Appeals Board (CAB). The CAB's decisions may be appealed to the ordinary courts.

Pursuant to Section 8 of the Competition Act, the King in Council (in practice, the Norwegian government) may order the NCA to handle a specific case; however, the government cannot instruct the NCA on the merits/assessment in any case.

The EFTA Surveillance Authority (ESA) and the European Commission investigate mergers that have a so-called "EFTA dimension" or a community dimension when certain turnover thresholds are met. So far, no merger with an EFTA dimension has been notified to the ESA. Thus, in practice, all merger cases are handled by the NCA or by the European Commission when the thresholds in the ECMR are met.

2. JURISDICTION

2.1 Notification

Notification is compulsory for all mergers and acquisitions (concentrations) that bring a "change of control" and exceed the national turnover thresholds. The creation of a joint venture must also be notified (see **2.10 Joint Ventures**).

In mergers and acquisitions that do not meet the turnover thresholds, a voluntary notification may be filed. This is typically done when the parties are in doubt as to whether the NCA will intervene in the transaction. The NCA may intervene up to three months after signing/closing, even if the turnover thresholds have not been met, and it has previously prohibited mergers below the thresholds.

2.2 Failure to Notify

Undertakings failing to notify a notifiable concentration may be sanctioned with administrative fines, under Section 29 of the Competition Act (ie, fines for infringing the standstill obligation). Several administrative fines have been rendered, normally between NOK200,000 and NOK300,000 (approximately EUR20,000–30,000), but also up to NOK25 million (approximately EUR2.4 million).

Sanctions against individuals, such as key employees involved, have never been used in merger cases, but negligent and intentional violations may lead to penal sanctions, normally criminal fines. Perpetrators may also be sentenced to up to three years' imprisonment, or even up to six years in aggravating circumstances.

All decisions sanctioning violations of the Competition Act are made public.

2.3 Types of Transactions

All transactions that involve a concentration come under the purview of the Competition Act. Pursuant to Section 17 of the Competition Act, a concentration is deemed to arise where two or more previously independent undertakings or parts of undertakings merge, or where one or more persons already controlling one or more undertakings acquires direct or indirect control – on a lasting basis – of the whole or parts of one or more other undertakings. The creation of a "full-function" joint venture and asset deals may also come within the purview of merger control.

For asset deals to come within the notion of merger control, the assets must constitute a business with a market presence to which a market turnover can be clearly attributed (examples include, eg, rental/lease agreements, customer base).

Purely internal restructurings or reorganisations within a single economic entity are not considered to constitute a concentration under the Competition Act.

Operations such as shareholders' agreements come under the purview of the merger control regime in the Competition Act, insofar as they lead to direct or indirect control on a lasting basis (see **2.4 Definition of "Control"**).

2.4 Definition of "Control"

Control may be obtained through any form of rights, contracts or any other means that, either separately or in combination, confer the possibility of exercising decisive influence on strategic decisions of an undertaking – with consideration of both the relevant fact and/or law being taken into account – in particular by:

- ownership or right to use all or some of the assets of an undertaking; or
- the acquisition of rights or contracts conferring decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by persons or undertakings that are the holders of rights or that are entitled to rights under the contracts concerned or, while not being the holders of such rights or entitled to rights under such contracts, that have the power to exercise the rights deriving therefrom. In essence, control is defined along the lines in the European Commission's Consolidated Jurisdictional Notice.

All transactions bringing about a change of control are, in principle, caught, including changes in "quality of control" (eg, from joint control to sole control).

Negative control falls within the notion of control (eg, the power to block strategic decisions, such as veto rights beyond "standard minority protection").

In principle, a notification is not required for the acquisition of minority interests, but the NCA may also require a notification for any such minority acquisitions, which may be prohibited if they could lead to, or strengthen, a significant impediment to effective competition (a SIEC test). Exact levels have not been specified in this regard, however. In 2019, the NCA intervened, for the first time since 2004, in Sector Alarm's minority acquisition of Nokas through a conditional clearance decision.

2.5 Jurisdictional Thresholds

Notification is required and mandatory if the following two thresholds are met:

- the combined annual turnover in Norway of all the undertakings concerned exceeds NOK1 billion (approximately EUR98.2 million); and
- the annual turnover in Norway of each of at least two of the undertakings concerned exceeds NOK100 million (approximately EUR9.82 million).

There are no special jurisdictional thresholds applicable to particular sectors. However, it should be noted that some specific undertakings are obliged to inform the NCA of all of their concentrations, even those that do not meet these thresholds (see **1.2 Legislation Relating to Particular Sectors**). Such obligations are a consequence of specific orders imposed by the NCA upon individual undertakings, and do not apply to other companies in the same sector.

2.6 Calculations of Jurisdictional Thresholds

The annual turnover in the preceding fiscal year is decisive for the assessment of the turnover thresholds. The annual turnover from the year of the latest available (finalised) accounts shall be used. Even if it is clear that the current turnover of the "undertakings concerned" (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**) will be higher or lower compared to the preceding fiscal year, the accounts for the preceding fiscal year should still be used, according to the guidelines of the NCA. However, turnover must be adjusted for any new acquisitions or divestments not reflected in the accounts of the preceding fiscal year (as opposed to "organic" growth). Temporary accounts for the current fiscal year may in any event be included for information purposes, in order to ensure that the NCA's assessment is based on more accurate figures.

The NCA follows the European Commission's Consolidated Jurisdictional Notice when deciding the geographic allocation of the turnover. The turnover must therefore normally be allocated to the country where the service is actually provided or where the product is actually delivered. When products and services are delivered or provided in Norway, the turnover generated must be allocated to Norway, even if the headquarters or offices of the seller and/or the buyer are located in another country. Jurisdictional thresholds are not asset-based.

Sales in a foreign currency should be converted to NOK to determine the thresholds, by using the average rates from Norges Bank (Norway's central bank).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The thresholds relate to the turnover of the "undertakings concerned" – ie, the turnover of the merging parties and their subsidiary companies in merger cases, and the turnover of the acquiring company and the acquired company in acquisitions. Also, the turnover of all subsidiary companies of the undertakings concerned should be included when calculating whether the turnover meets the thresholds. In acquisitions, the turnover of all companies belonging to the same corporate group as the acquiring company (including associated companies, parent companies and subsidiaries) should also be included in the turnover calculation. In other words, the turnover of all companies forming a "single economic entity" with the acquiring company should be included in the buyer's turnover calculation. The concept of a single economic entity is developed in EU case law and is enforced in the same manner by the NCA. The turnover of the selling company should not, however, be included in the turnover calculation.

As previously mentioned, it should be noted that the turnover by recent acquisitions or divestments by the acquirer, which are not reflected in the latest available accounts, must be added or subtracted (see **2.6 Calculations of Jurisdictional Thresholds**).

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control rules insofar as the thresholds are met, although the NCA has not intervened in any such transactions.

There is no local effects test, but the parties to a foreign-to-foreign transaction may, in the same manner as parties to other types of transactions, make use of the simplified notification procedure when certain conditions are fulfilled. Moreover, the merger filing duty does not depend on a local presence (eg, office facilities).

As the turnover thresholds will never be met when a target (including its subsidiaries) has no sales in Norway, a filing is not required in such situations.

2.9 Market Share Jurisdictional Threshold

The only thresholds relate to turnover in Norway. The thresholds do not relate to market shares, but market share information must be included in the notification.

2.10 Joint Ventures

The creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis ("full-function" joint venture) is considered to constitute a concentration within the meaning of the Competition Act, and is thus subject to merger control. The same applies to changes of control in an existing full-function joint venture (eg, a new co-owner replaces a former co-owner).

However, joint ventures that are not full-function fall outside the merger control regulations. Such arrangements are assessed under the behavioural rules.

No special rules apply to determining whether the turnover thresholds have been met for joint ventures, but the NCA will generally follow the principles set out in the European Commission's Consolidated Jurisdictional Notice on what are the "undertakings concerned" and their turnover in joint-venture transactions.

2.11 Power of Authorities to Investigate a Transaction

In order to investigate a transaction below the turnover thresholds, the NCA must first instruct the parties to notify the transaction in question. Such orders may be issued up to three months after signing/closing if the NCA has reason to believe that competition will be undermined, or if aspects require further investigation.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, some specific undertakings have received general orders from the NCA to supply information about all their transactions. This is not equivalent to a merger filing duty, but will enable the NCA to instruct and impose such a duty below the thresholds.

Finally, as mentioned in **2.4 Definition of "Control"**, the parties may be instructed to notify even where control is not acquired (minority shareholdings).

2.12 Requirement for Clearance Before Implementation

A "standstill obligation" applies to all mergers and acquisitions that meet the turnover threshold, and entails that such transactions may not be implemented prior to clearance from the NCA; see Section 19 of the Competition Act.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Violations of the standstill obligation may be sanctioned with administrative fines, which have been imposed in multiple cases.

Several administrative fines have been rendered, normally between NOK200,000 and 300,000 (approximately EUR20,000–30,000), but also up to NOK25 million (approximately EUR2.4 million). On a related note, in 2020, Norgesgruppen received a fine of NOK20 million (approximately EUR1.9 million) for breaching its information duty (see **1.2 Legislation Relating to Particular Sectors**) towards the NCA in the groceries sector; however, the fine was later withdrawn.

All decisions sanctioning violations of the Competition Act are made public.

Fines have never been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

The only general exception to the suspensive effect is the implementation of a public bid or a series of transactions in securities, where the NCA is immediately notified about the concentration and where the acquirer does not exercise voting rights according to the securities, or does so solely to preserve the full value of their investment and according to a special exemption granted by the NCA.

In other cases, the NCA may make an exception from the standstill obligation when this is requested by the notifying party, eg, in the case of a failing firm. A recent example of the failing-firm exception granted by the NCA is Gjelsten Holding's takeover of Gresvig in 2020 (exception granted on several conditions).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Closing before clearance is normally prohibited, and is reserved for exceptional circumstances, such as, eg, a failing firm (see **2.14 Exceptions to Suspensive Effect**). A transaction may be deemed legal if a global closing can be implemented without contravening the standstill obligation vis-à-vis the NCA in Norway, by carving out the businesses in Norway. Whether or not a concentration pursuant to the Competition Act has arisen is decisive for the legality of the business (see **2.3 Types of Transactions** and **2.10 Joint Ventures**). There are no specific exemption rules regarding such transactions in the current merger control regime.

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3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no time limit for notification of a concentrations, provided that the parties have not started implementing it in breach of the standstill obligation.

3.2 Type of Agreement Required Prior to Notification

No specific document is required prior to notification. The NCA may be notified as soon as the parties are able to provide enough information to give an adequate and concrete description of the agreement. In practice, the merger filing is normally sent on the signing date (or shortly thereafter). However, if all material aspects of the agreement at issue are finalised, filing may take place before signing.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

Both parties to a merger are jointly responsible for the filing. In acquisitions, the acquiring party is responsible for filing the notification. In the creation of full-function joint ventures, the parents of the joint venture are jointly responsible.

3.5 Information Included in a Filing

A mandatory notification should include the following:

- contact information of the parties to a merger or, in an acquisition, of the party or parties who gain control, including names and addresses;
- a description of the nature and rationale of the concentration;
- descriptions of undertakings concerned and in the same corporate group;
- the names of the five most important competitors, customers and suppliers in markets in Norway, or in markets of which Norway is a part, in which the undertakings concerned and undertakings in the same corporate group have overlapping activities (applies to horizontal and/or vertical overlaps);
- descriptions of horizontally related markets if the undertakings concerned are active on the same market with a combined market share above 20% of the market (affected market), and descriptions of vertically related markets where the parties' market share exceeds 30% on each of the respective markets; the description should include information on the structure of the relevant markets, as well as information on potential barriers to entry, etc;
- a description of efficiency gains (if any);
- information on whether the concentration is subject to the jurisdiction of (and has simultaneously been filed to) any other competition authorities;
- a copy of the latest version of the agreement, including appendices; and
- annual reports and annual accounts of the undertakings concerned.

In addition, the parties are required to submit a proposed non-confidential version of the filing by clearly marking information to be redacted in the documents. At the same time, the basis of the confidentiality must be provided (ie, brief reasoning for redaction), including proposals for public versions of the documents.

The filing must normally be submitted in Norwegian, although supporting documents in English and other Scandinavian languages are usually accepted. Exceptions have been granted for filings in English, for simplified notifications.

Note that the level of detail (requirements as previously stated) will be somewhat more relaxed if the concentrations qualify for a simplified notification procedure, eg, concentrations where there are no overlaps or concentrations involving a change only in the "quality of control" (see **3.11 Accelerated Procedure**).

3.6 Penalties/Consequences of Incomplete Notification

If the notification is incomplete, the missing information must be provided before the NCA can consider the transaction. The NCA's time limits do not start running until a complete notification is filed, and the time limits may also be stopped ("stop the clock") during the NCA's case-handling if any further information requests from the NCA are not complied with by the notifying parties in due time.

An incomplete notification is not considered to be a violation as such and penalties thus do not apply, unless the parties breach the standstill obligation.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notification is incomplete, the missing information must be provided before the NCA will consider the notification as having been received. In practice, submitting an incomplete notification will therefore extend the NCA's time limits for intervening or clearing the concentration. This has implications for the possibility of closing the transaction, due to the standstill obligation. Submitting information that is misleading may also lead to penalties in the form of fines. One recent example of the latter is the NCA's administrative fine of NOK7.5 million (approximately EUR740,000) imposed upon Vygruppen in 2020 for allegedly having submitted incomplete/misleading information in the filing to the NCA; however, the CAB recently annulled the decision and sent it back to the NCA.

3.8 Review Process

Prior to the notification, the parties concerned may request guidance from the NCA. However, the NCA will never "pre-clear" any concentration at this stage.

A two-stage procedure starts running when the notification is filed. The procedure is somewhat analogous to the one followed by the European Commission in the EU, with "Phase I" and "Phase II" proceedings, but the time limits are different.

Phase I starts when a complete notification is filed, and normally lasts for up to 25 business days. This first stage is extended by ten business days – ie, to a total of 35 business days – when remedies are already offered in the filing, or if remedies are submitted, at the latest, 20 business days after the filing. This means that Phase I normally extends to 35 working days if remedies are proposed in Phase I. The reason for this is that the NCA may issue a conditional clearance decision at this stage, within 35 business days. If no remedies are offered in Phase I, the NCA will end this stage, either by clearing the transaction or by issuing a preliminary notice of possible intervention, in which case the second stage (Phase II) starts.

In Phase II, the NCA will normally either clear the transaction or issue a statement of objections, no later than 70 business days after the filing was submitted. If the transaction is not cleared, the parties will be given 15 business days to submit their comments to the NCA's statement of objections, and the NCA then has a further 15 business days to issue a final decision in the case (which may be extended by another 15 business days if so agreed). The final decision of the NCA will be either a full clearance, a conditional clearance or a prohibition decision.

Information requests are relatively common, particularly in Phase II. The extent and nature of the requests will depend on the case. As long as the information is provided within the deadlines decided by the NCA, the clock will not be stopped.

Concentrations using the simplified procedure (see **3.11 Accelerated Procedure**) will normally be cleared in the first stage, within 25 business days. In more complex and potentially problematic concentrations, the procedure may take significantly longer, often between 100 and 115 business days (ie, five months).

3.9 Pre-notification Discussions With Authorities

Parties may engage in pre-notification discussions with the NCA. Such pre-notification discussions are relatively common in complex concentrations, eg, where the parties are aware beforehand that there might be potential issues or where the case concerns complex markets in which it is important to supplement the information in the filing with oral presentations or talks with the case team.

The process and information exchanged at this stage is, similarly to post-filing, treated confidentially to the extent that any of the information exchanged constitutes business secrets, defined by the Norwegian Public Administration Act.

It is common for a notifying party to give the NCA a heads-up before the filing is submitted, so that the NCA can prepare for the filing and assemble its case team.

3.10 Requests for Information During the Review Process

Requests from the NCA vary from simple clarifications to extensive requests for highly detailed information, which may necessitate the involvement of an external economic consultancy. Requests for information are sent in writing (typically by email) from the NCA, and the NCA will normally provide a reasonable deadline by which the request must be answered. Non-compliance with such deadlines does not automatically stop the clock, but the NCA may decide to inform the parties in writing that it reserves a right to stop the clock until the request is answered.

3.11 Accelerated Procedure

Under the "fast-track" procedure, the parties may already offer remedies in the notification, or within 20 business days after the notification was submitted to the NCA. The transaction may then be cleared on conditions in Phase I. The deadline for such clearance in Phase I will be extended from 25 to 35 business days.

In addition, it should be noted that a simplified notification procedure may be used in so far as certain criteria are fulfilled. According to the Norwegian Merger Control Regulation, a number of concentrations may benefit from a simplified procedure.

The creation of joint ventures may benefit from a simplified procedure insofar as the joint venture's sales and/or sales of business areas transferred to the joint venture are less than NOK100 million in Norway, and when assets transferred to the joint venture have a total value of less than NOK100 million in Norway.

The simplified procedure may also be used for changes in the "quality of control" (eg, a change from joint control to sole control over a pre-existing undertaking).

The simplified procedure may also be used for mergers and acquisitions, ie, transactions where one or more undertakings merge, or one or more undertakings or persons acquires sole or joint control of another, and where:

- none of the parties is active in the same product and geographical market (ie, there is no horizontal overlap) or in a prior or subsequent part of a product market in which another party operates (ie, there is no vertical overlap); or
- two or more parties are active in the same product and geographical market (horizontal overlap), but where the parties' combined market share does not exceed 20% on the market where there is horizontal overlap; or
- one or more of the parties is operating in an upstream or downstream product market in which another party operates (vertical overlap), but where the parties either individually or together have a market share not exceeding 30% on both of the "upstream" and "downstream" markets.

Even if the criteria for filing a simplified notification are fulfilled and the notifying party has filed such a notification, it should be noted that the NCA may still order the filing of a standard notification within 15 business days after the receipt of the simplified notification. As far as is known, the fastest clearances granted under the simplified process have been two to three business days after notification, but the parties should prepare for a case-handling time of at least two weeks, and usually more.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Due to a further harmonisation with EU law in 2016, the substantive test is now, as under the ECMR, a SIEC test (Substantial Impediment to Effective Competition).

The NCA therefore interferes in mergers and acquisitions that would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. A causal link between the transaction and the negative effects on the competition must, however, be established.

Whether or not the impediment of competition in the market can be regarded as "significant" will depend on a case-specific assessment of the relevant market affected by the proposed transaction. Relevant factors that must be assessed include entry barriers, potential competition and several other market parameters. It is also necessary to assess whether efficiency gains (if any) from the concentration outweigh the restriction of competition in the relevant market.

4.2 Markets Affected by a Transaction

All competition concerns will be subject to investigation, since there is, as such, no de minimis threshold below which competitive concerns are deemed unlikely. Among the key issues are whether the parties have high market shares, the level of market concentration, entry barriers, countervailing buyer power, etc, and whether the parties are deemed to be close competitors. In line with the case law of the European Commission, the NCA will attribute more weight to closeness of competition than to concentration levels where the relevant market at issue is characterised by differentiated products or services. Market structure and concentration, entry barriers, co-ordinated effects, etc, are key factors in the assessment. The relevant geographical and product market definitions will always be the starting point for the analysis if market shares indicate that a transaction may lead to the impediment of competition; however, the competitive analysis will take into account the factors mentioned above in order to determine whether the SIEC test is met by unilateral effects, co-ordinated effects, vertical effects, etc.

4.3 Reliance on Case Law

The NCA defines markets in a manner similar to the European Commission, and thus, similarly to many other European authorities. Case law from the Court of Justice of the European Union (CJEU) and the European Commission, as well as from other EU member states, is often referred to by the NCA. While cases from similar markets are often taken into account, local factual differences in market structures sometimes lead to different market definitions.

4.4 Competition Concerns

All competition concerns are taken into consideration in an investigation, eg, unilateral, co-ordinated, vertical and conglomerate effects. Vertical and conglomerate concerns are seldom an issue, however, unless foreclosure effects are deemed likely, or if the parties have a high market share in markets upstream or downstream (or in adjacent markets) that may negatively affect competition.

4.5 Economic Efficiencies

If a transaction implies gains in economic efficiency, compensating for the disadvantage of reduced competition, the transaction will – in theory – be approved, despite the negative effects for competition. The economic efficiencies must, however, be merger-specific and passed on to consumers/customers. According to the European Commission's Horizontal Merger Guidelines, efficiencies are merger-specific when they are a direct consequence of the merger and cannot be achieved to a similar extent by less anti-competitive alternatives.

4.6 Non-competition Issues

Non-competition issues cannot be taken into account in the review process.

However, there are rules for foreign direct investment separate from the merger control rules. Filings are required for foreign direct investments falling under the scope of the Security Act. The King in Council (government) is competent to block or set conditions for the acquisition of a qualified share in a business that is subject to the Security Act if there is a "not insignificant" risk of national security interests being threatened (see Section 10-3 of the Security Act). This also applies if an agreement has already been entered into for the acquisition and even if the relevant Ministry within its area of responsibility for the sector in question has not received notification of the acquisition as intended. A decision must be within the purpose of the Security Act and must also be proportionate so that the specific risk of adverse effects on national security interests is balanced against the potential negative economic consequences for the parties.

4.7 Special Consideration for Joint Ventures

According to Section 16(5) of the Competition Act, the NCA is required to examine co-ordination issues between joint-venture parents. If the creation of the joint venture has the co-ordination of independent joint-venture parents as its object or effect, the NCA must consider whether the co-ordination is contrary to Section 10, which prohibits all agreements between undertakings, decisions by association of undertakings, and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Norway. If the co-ordination is deemed contrary to Section 10, the NCA must intervene in the transaction.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

If the SIEC test is met, the NCA will intervene in the transaction. The transaction may either be prohibited, or accepted with remedies proposed by the parties.

5.2 Parties' Ability to Negotiate Remedies

Remedies may be accepted if they are considered sufficient to avert the negative effects on competition. Both divestitures and behavioural remedies will be considered, but the NCA clearly prefers structural over behavioural remedies. The NCA has accepted behavioural remedies in many cases, however, often as "fix-it-first" solutions. A Phase II statement of objections by the NCA will often indicate what competition concerns need to be addressed by possible remedies.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable. The key issue remains, with or without remedies, the SIEC test.

5.4 Typical Remedies

The NCA has expressed a clear preference for structural remedies (divestments) in many recent cases, but it approaches this issue in a case-specific manner, and often looks to relevant European Commission practice on remedies in the sector concerned. Remedies for addressing non-competition issues are never required.

5.5 Negotiating Remedies With Authorities

The parties may suggest remedies at any time in the process, even in Phase I (ie, at the time of filing). The NCA may discuss and indicate remedies, but will not formally propose them. It is for the parties to propose remedies, and the NCA may not clear a transaction subject to remedies not proposed by the parties. Remedies are proposed as binding commitments. In practice, remedies may be negotiated and tested before they are formally proposed. If the remedies are found to be insufficient, the NCA must notify the parties that a prohibition decision may be rendered. The parties may then propose new or revised remedies, which will extend the deadline by which the NCA must render its final decision.

5.6 Conditions and Timing for Divestitures

The standard approach requires compliance with the remedies put forward before the transaction may be completed ("fix-it-first"). However, time-limits for divestitures has also been accepted in some cases, but "fix-it-first" is normally applied. By their nature, behavioural remedies are generally applied over time, ie, also after the transaction. Violations of remedies are subject to administrative fines.

5.7 Issuance of Decisions

A short-form formal notice is issued to the parties (typically by email) when a transaction is cleared. Prohibition decisions are longer and far more detailed.

A public (non-confidential) version of decisions (prohibition and conditional clearance decisions) is made available on the NCA's website, typically sometime after the decision has been rendered. The NCA must ensure that business secrets are redacted and not revealed when documents are disclosed to any third party. The NCA decides what constitutes a "business secret", but the parties involved have the opportunity to comment before access to third parties is granted.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

No foreign-to-foreign transactions have recently been considered by the NCA.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

A clearance decision does not cover related arrangements. Consequently, the parties involved are responsible for avoiding any conflict with the prohibitions in Sections 10 (anti-competitive agreements, decisions and concerted practices) and 11 (abuse of dominant position) of the Competition Act. However, ancillary restraints directly related to a merger and necessary for the implementation of a transaction will be accepted under Section 10, and will thus be deemed legal according to the practice of the CJEU; see also the European Commission's Notice on Ancillary Restraints.

Since the NCA does not explicitly approve ancillary restraints, separate notifications are neither required nor possible. Nevertheless, informal guidance may be given when the NCA finds (potential) conflicts with Sections 10 and/or 11. Since clearance decisions are usually not reasoned, it is important for all ancillary restrictions to be described in the notification to avoid competition law risk.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are notified by public notice (on the NCA's website) and may contact the NCA to express their opinions and concerns, which will normally be taken into account if they are considered relevant. Third parties such as competitors, customers and suppliers may also express their opinions, either through their own initiative or after being requested to comment by the NCA ("market testing" is common in more complex transactions). Although third parties may always submit comments to the NCA, third parties do not have any formal procedural rights.

7.2 Contacting Third Parties

The NCA will typically market test remedies offered in more complex cases. Written questionnaires and telephone interviews with third parties are frequently used, both during the NCA's review process and for market-testing remedies.

7.3 Confidentiality

The fact of the notification as such is published on the NCA's website. All decisions will be public, including relevant facts from the notification. "Business secrets", as determined by the NCA (see **5.7 Issuance of Decisions**), will be kept confidential.

7.4 Co-operation With Other Jurisdictions

The competition authorities in Denmark, Iceland, Sweden and Norway may exchange information with each other through a Nordic co-operation agreement. This includes non-confidential information, confidential information that is necessary for an ongoing investigation, and notifications on general changes to a country's law. The authorities do not need to seek permission from the parties involved to share such information. Furthermore, the NCA may also participate in horizontal discussions in the European Competition Network (ECN) and contribute to the ECN Brief, but only regarding non-case-specific issues.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The NCA's decisions in merger control cases can be appealed to the CAB within 15 working days of the decision being handed down. The NCA must then pass the complaint on to the CAB within 15 working days, and the CAB must issue a final decision within 60 working days from receipt of the complaint. The parties may file a civil lawsuit against the CAB's decision before the Gulating Court of Appeal.

8.2 Typical Timeline for Appeals

An appeal to the CAB must be lodged within 15 working days of the NCA rendering the decision. The NCA then has 15 working days to forward the appeal to the CAB, which must render its decision within 60 working days. No appeals have been lodged to date and the CAB has therefore not yet rendered any decisions in merger cases. Only two appeals in merger cases have been lodged since the inception of the CAB in 2017. The 2020 Schibsted/Nettbil appeal is still pending a decision. The 2019 Prosafe/Floatel appeal was later withdrawn by the parties.

8.3 Ability of Third Parties to Appeal Clearance Decisions

It is not possible for third parties to appeal a clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There is a proposal on the table (NOU 2020:11) to replace the CAB as a "court of first instance" in competition matters with the ordinary City Court. Under the current regulatory regime, the CAB acts similarly to a "court of first instance" in competition matters, replacing the ordinary City Court. Should the proposal be implemented, appeals of CAB decisions must be lodged before the City Court, as opposed to the Gulating Court of Appeal (court of appeal at the instance below the Supreme Court). The NCA has a negative view of the proposal, which is still pending.

9.2 Recent Enforcement Record

The NCA has prohibited the Schibsted's acquisition of Nettbil (online markets for used cars). The decision was appealed to the CAB, which upheld the NCA's blocking decision. However, the Gulating Court of Appeal ruled that the NCA failed to demonstrate that Schibsted's acquisition of Nettbil would significantly impede competition in the market for online sales of secondhand cars. This is the first time an appellate court in Norway has revoked a merger prohibition. The case is now pending before the Supreme Court after an appeal by the NCA. It is the first time that a merger blocking decision will be tried by the country's highest court.

The NCA issued a conditional clearance decision in the Altia/Arcus merger (sale of spirits to Vinmonopolet, the Norwegian monopoly for wine and spirits). Among the remedies was a commitment for the parties to divest several of their brands and assets for spirits, imposed as a "fix-it-first" divestment where the NCA must approve the buyers of the brands/assets before the standstill obligation is lifted.

***Contributed by:** Jan Magne Langseth, Karin Fløistad, Erik Martinius Klevmo and Olav Endresen Haukeli,*
Advokatfirmaet Simonsen Vogt Wiig

The NCA has prolonged the behavioural remedies imposed in the 2018 Vipps/BankID merger. After a consultation, the NCA decided to continue for another three years Vipps' obligation to provide BankAxept and BankID (authentication and e-signature solutions) to third-party payment solutions on non-discriminatory terms.

The CAB overturned a decision by the NCA to block DNB's EUR1 billion acquisition of rival bank Sbanken – marking the first time it has set aside a merger ban. The NCA blocked DNB's purchase of online banking rival Sbanken in November 2021, after the Phase II review found that the agreement would take out a key competitor from the mutual fund market.

However, on appeal, the CAB concluded that the acquisition is unlikely to significantly harm competition in the mutual fund distribution market.

Norgesgruppen (groceries) and St1 (fuels) have received fines of respectively NOK20 million (approximately EUR1.9 million) and NOK15 million (approximately EUR1.4 million) for breaching its information duty (see **1.2 Legislation Relating to Particular Sectors**). The fine against Norgesgruppen was later withdrawn by the NCA, while the fine against St1 was reduced to NOK3 million after the SO was issued.

Vygruppen received a fine of NOK7.5 million (approximately EUR740 000) for allegedly having submitted incomplete/misleading information in the filing to the NCA; however, the CAB recently annulled the decision and sent it back to the NCA.

9.3 Current Competition Concerns

The NCA received 156 merger notifications in 2021. This is a clear increase from the previous year, where 93 notifications were received.

Last year, 94 per cent of all notifications submitted were cleared within 25 working days (phase I). Two interventions took place: DNB's acquisition of Sbanken, and the merger between Altia and Arcus. About 60 per cent of the notifications submitted to the NCA are so-called simplified notices.

Due to the reversal of two merger blocking decisions issued by the NCA on appeal, it is going to be interesting to see how this may (or may not) influence the decisional practice and whether the CAB will continue to operate as an administrative appeal body. In a recent public consultation, the government expressed doubts as to whether the CAB, which was established in 2017, shall continue or be dissolved.

Advokatfirmaet Simonsen Vogt Wiig has a merger control and competition law team consisting of ten partners and lawyers in Oslo. The team has assisted in merger control investigations and filings in many different economic sectors, for instance, in telecoms, the airline industry, retail, software, aquaculture, petrol stations, etc, and has been involved in every phase, ie, in Phase I, Phase II and appeal cases. In 2018, SVW's team assisted in some of the largest merger cases in Norway, including the merger of Telia and Get/TDC and St1's acquisition of Statoil Fuel & Retail Marine.

AUTHORS

Jan Magne Langseth is a partner and head of SVW's Competition Law team. He was previously head of department at Schjødt and a lawyer for the EFTA Surveillance Authority's legal service in Brussels. Langseth has more than 20 years of experience in EU and Norwegian competition law, dealing with all types of competition law, including merger control, antitrust and litigation, and cartels.

Erik Martinius Klevmo is a specialist counsel with extensive experience in merger control work. He has assisted buyers and sellers in a number of mergers and acquisitions, both with the Norwegian Competition Authority, most recently in securing clearance of Telia's acquisition of Get and St1's acquisition of Statoil Fuel & Retail Marine, and in merger cases with the European Commission.

Karin Fløistad is a partner in SVW and currently chair of the Norwegian Competition Appeals Tribunal. She is a doctor in law from the EUI (European University Institute) in Florence and the Norwegian judge in the AECLJ (Association of the European Competition Law Judges). Fløistad previously worked as a lawyer at the EU/EEA department of the State Attorney General's office for civil affairs and litigated in the CJEU and in the EFTA Court.

Olav Endresen Haukeli is a senior associate, experienced in EU law, competition law, public procurement and marketing law. He specialised in EU law and EU competition law at Eberhard-Karls University in Tübingen, Germany, and his work experience includes merger control, cartel and antitrust cases.

Advokatfirmaet Simonsen Vogt Wiig

Filipstad Brygge 1
0252 Oslo
Norway

Tel: +47 21 95 55 00
Fax: +47 21 95 55 01
Email: post.oslo@svw.no
Web: www.svw.no

simonsen vogtwiig

Trends and Developments

Contributed by:
Siri Teigum, Eivind Vesterkjær, Heidi Jorkjend and Eivind Sæveraas
Advokatfirmaet Thommessen AS** **see p.422

Introduction

Norwegian merger control regulation, enshrined in Chapter 4 of the Norwegian Competition Act, is modelled on, and largely influenced by, EU law. The primary enforcer is the Norwegian Competition Authority (NCA). Beyond the turnover thresholds triggering a mandatory notification of a transaction, the NCA is equipped with several instruments to help it fulfil its role. This includes the power to order the notification of transactions that do not trigger the mandatory filing obligation, including concentrations falling below the turnover thresholds and minority acquisitions. The NCA also has imposed disclosure requirements on named undertakings in certain concentrated markets to enable it to detect non-notifiable transactions that may warrant closer scrutiny.

The NCA exercises an active merger control. An article published by the NCA in late 2021 showed that the NCA intervenes against a high number of concentrations compared with other European competition authorities. Since the introduction of the Competition Act in 2004, the authority has intervened in approximately 53 transactions, resulting in 15 prohibitions and 38 conditional clearances.

Decisional practice in recent years indicates a tendency by the NCA to place more emphasis on quantitative analysis and closeness of competition and to pay less attention to traditional parameters such as market definitions and concentration ratios. This may result in a more tailored merger control but also less predictability for market participants.

In late 2021 the government published a public consultation discussing potential amendments to the rules of enforcement and procedure in the Competition Act, including the removal of the Competition Appeals Tribunal as appellate body for decisions of the NCA. The consultation has not yet resulted in a concrete proposal for legislative changes.

Increasing number of notified transactions

The number of transactions notified to the NCA has remained stable over the past five years, with an average number of 103 each year. Due to the COVID-19 pandemic, the NCA received only 93 notifications in 2020, somewhat lower than the average number over the past five years and significantly lower than predicted. The number of transactions picked up significantly again the following year, with 156 notifications being submitted in 2021, of which 94 were cleared in phase 1.

Approximately 60% of the notifications submitted to the NCA are in the form of so-called “simplified notifications”, which can be used when there are no, or modest, overlaps between the undertakings concerned. The vast majority of the simplified notifications are cleared well within the phase 1 deadline of 25 working days.

Continued focus on digital markets

The NCA has continued to intensify its focus on digital markets. In 2020, the NCA established a digitalisation strategy and allocated resources to promote competition in digital markets. This is part of a larger European trend and has also been the subject of a collaboration between Nordic competition authorities, resulting in a report on digital platforms. In the report, the Nordic competition authorities stress that the concerns related to digital markets and especially to the development of European competition policy are inherently cross-border in nature and therefore dependent on international co-operation.

In addition, the NCA has publicly voiced concerns relating to the use of algorithms and technology giants.

Increased attention on concentrations below the notification thresholds and minority acquisitions

Another notable trend in Norwegian merger control is an increased attention on concentrations below the notification thresholds and the acquisition of non-controlling minority shareholdings. The NCA has the power to order a notification to be submitted with respect to such transactions on a case-by-case basis, and actively uses this power. This can typically occur where a large market player in a concentrated market acquires a smaller competitor or where the acquisition can be viewed as a killer acquisition. An order to notify must be issued within three months after a final agreement has been concluded or control has been acquired.

The NCA appears more inclined to call in transactions if the parties are active in markets that the NCA is particularly interested in, in particular those markets where certain undertakings are subject to special disclosure obligations with respect to all transactions they are involved in. Such disclosure obligations are currently in force for selected companies operating within fuels, energy, waste, groceries, newspapers, broadband, residential alarms, washery, garden centres, concrete, accounting systems, certain online marketplaces, and electric car charging. These disclosure obligations give the NCA a comprehensive overview of the transactional activity in these markets and thus the opportunity to initiate investigations of mergers and acquisitions in appropriate cases also below the jurisdictional thresholds.

In total, the NCA has issued orders to notify eight transactions between 2004 and 2021. A notable example is the 2020 acquisition by media conglomerate Schibsted of a majority shareholding in the C2B secondhand car marketplace Nettbil. At the time of the acquisition, Nettbil had a turnover well below the notification thresholds. Schibsted was, however, covered by a special disclosure obligation, resulting in an order to notify and ultimately a prohibition decision. The Schibsted/Nettbil case is further described below.

Greater willingness to initiate Phase II investigations

Another development in the decisional practice of the NCA over the past few years has been a greater willingness to initiate Phase II investigations, with several notable examples resulting in both straightforward prohibitions (eg, Decision V-2019-22 Prosafe SE/Floatel International Limited) and clearances, including unconditional clearances in Phase II (eg, Decision A-2020-2 (Sport1/Gresvig)).

Remedies in Phase I do not seem to be the new norm, but scope for behavioural remedies in Phase II where appropriate

Decision V-2019-23 Tieto Oyj/EVRY is the first (and so far only) example of the NCA having cleared a concentration with remedies in Phase I. While the NCA generally prefers structural measures (and this is likely to be the only acceptable form of remedy in Phase I), behavioural measures may be acceptable to the NCA in appropriate cases. An example of this is the merger between Vipps and BankID, where a vertical merger was approved in Phase II on condition that the parties provide competitive payment solutions access to BankID and BankAxept on non-discriminatory terms. The original decision from 2018 was valid for three years and was renewed for three more years in 2021.

Willingness to challenge the NCA's decisions in merger cases

Until recently the NCA's conditional clearances and prohibition decisions in merger cases have not been brought before the bodies empowered to review them (ie the Competition Appeals Tribunal and the ordinary courts). However, in early 2022 two high-profile prohibition decisions were repealed by appellate bodies. The decisions from the Gulating Court of Appeal and the Competition Tribunal, respectively, may provide guidance for future prohibition decisions.

Schibsted/Nettbil

In 2020, the NCA blocked the acquisition by media conglomerate Schibsted of a majority shareholding in Nettbil, a start-up offering a digital C2B marketplace for second-hand cars. Schibsted is also the owner of Finn, a digital market place for a variety of products, including cars. While the NCA recognised that the services of the two market participants to some extent are differentiated, it argued that their services could still be substitutable in the market for online sales of used cars. Even though the acquired company was small at the time of the acquisition, the NCA feared that the combination of Finn and Nettbil could weaken competition and argued that the transaction would remove the increasing competitive pressure that Nettbil exerts on Finn.

Following a Phase II investigation, the NCA prohibited the transaction and ordered Schibsted to sell its shares in Nettbil to an independent buyer approved by the NCA. Interestingly, due to Nettbil's modest size the transaction was well below the turnover thresholds for mandatory filing, and at the time that the NCA ordered Schibsted to divest Nettbil, the transaction had already been completed and some operational integration had been implemented between Nettbil and into Finn.

The NCA's prohibition decision was appealed to the Norwegian Competition Appeals Tribunal, which upheld the decision of the NCA. The decision was then appealed to the Gulating Court of Appeal, which repealed the decision of the Competition Appeals Tribunal on 23 March 2022.

The Court of Appeal held that the competition authorities had not substantiated that the acquisition would harm competition. Firstly, the court held that the competition authorities had not sufficiently proven that the services provided by Finn and Nettbil form part of the same product market. Secondly, the Court emphasised the lack of adequate evidence in support of the NCA's theories of harm of increased prices/reduced quality and dampened innovation. On the contrary, the court held that the most probable counterfactual was that Nettbil would have remained a niche player with constant need of capital contributions. The Court of Appeal also placed less emphasis on internal documents than the competition authorities, noting that such documents should be read in context.

The Nettbil case is interesting in several aspects. Firstly, it is the first time a prohibition decision in a merger case has been brought before Norwegian courts. Secondly, the concentration did not meet the filing thresholds and thus represents a notable example of the NCA's interest in concentrations below the thresholds. Thirdly, the Schibsted/Nettbil case confirms the trend that the NCA pays more attention to closeness of competition than to traditional parameters such as market definitions. Finally, the court's assessment of internal documents is in line with what is often argued by parties before the NCA, so the court's statement that such documents must be read in context is likely to be invoked by the parties in future merger cases.

The state filed an appeal to the Supreme Court on 4 May 2022. Appeal is subject to the Supreme Court granting leave to appeal, so the final outcome of the Schibsted/Nettbil case remains to be seen.

DNB/Sbanken

DNB's acquisition of Sbanken was notified to the NCA in May 2021. Both parties are active within retail banking services, but when Phase II was opened in June 2021 the NCA's concerns were solely related to the market for distribution of mutual funds. Neither the subsequent administrative procedure nor remedies proposed by the parties were considered sufficient to remove the NCA's concerns, and in its decision of 16 November 2021 the NCA prohibited the transaction on the grounds that it would significantly impede effective competition with respect to distribution of mutual funds.

DNB appealed the NCA's decision to the Competition Appeals Tribunal. During the appeals proceedings the NCA stated that Sbanken represented an important competitive force in market, in particular due to low prices, innovation capabilities, digital solutions and high standing with its customers.

The Competition Appeals Tribunal concluded, in contrast to the NCA, that the acquisition would not lead to significant weakening of competition in the market for mutual funds. The Competition Appeals Tribunal performed a qualitative analysis and concluded that the competitive pressure exerted by other market players would replace the competitive pressure previously exerted by Sbanken and thus sufficiently constrain the merged entity. Furthermore, the Competition Appeals Tribunal emphasised that while Sbanken offered low prices for index funds, it was not the sole price leader in the market as a whole. Furthermore, pursuant to the Competition Appeals Tribunal, several market players have innovation capabilities similar to those of Sbanken.

The decision of the Competition Appeals Tribunal is final and the transaction has since been completed.

***Contributed by:** Siri Teigum, Eivind Vesterkjær, Heidi Jorkjend and Eivind Sæveraas,*
Advokatfirmaet Thommessen AS

Advokatfirmaet Thommessen AS is a leading firm within the field of EU/EEA and competition law in Norway. It assists Norwegian and foreign companies with merger control processes, investigations, appeals and litigation proceedings as well as advice related to all aspects of competition law, state aid law and other EEA law. Since the EEA Agreement was signed in 1992, the firm has played an active role in the development of both EU/EEA law and Norwegian competition law. It has been involved in legislative processes in the EEA and competition law field, and has assisted Norwegian and foreign clients in an impressive range of major and landmark cases – including as counsel before Norwegian courts, the Competition Appeals Board, the EFTA Court and the European Court of Justice. The firm has been involved in most major cases within this area of law in Norway, from complex merger cases to possible violations of competition rules.

AUTHORS

Siri Teigum heads Thommessen's EU/EEA and competition law practice group. She is a seasoned competition expert advising on investigations and compliance, as well as representing clients in cartel litigation. Key areas of expertise include competition law, public procurements, state aid, investigations and compliance and litigation. Siri assists clients with cartel investigations and dispute resolution. She has handled different types of EEA and competition cases before the EFTA, the CJEU and Norwegian courts, with good outcomes for clients. She also acts as an arbitrator.

Eivind Vesterkjær is a partner in Thommessen's EU/EEA and competition law practice group and has extensive experience advising clients on competition law (including merger control), competition compliance and commercial agreements in a variety of sectors, including telecommunications, finance, shipping and life sciences. Eivind has worked on matters within EU/EEA and competition law since the EEA Agreement came into force in 1993. Since Norway stepped up its FDI enforcement a few years back, Eivind has also taken on mandates in this area of law.

Heidi Jorkjend is a partner in Thommessen's EU/EEA and competition law practice group. Heidi has extensive experience in advising on all aspects of competition law, primarily focusing on investigations and litigation (including cartel cases), general compliance and merger control. She has worked in a variety of sectors, including shipping, telecommunications, publishing, foodstuffs and finance.

Eivind Sæveraas is an associated partner in Thommessen's EU/EEA and competition law practice group. Eivind is primarily recognised for his work on several high-profile merger cases, as well as other competition law matters, including cartel cases and litigation. Eivind assists clients in a wide range of industries, including construction, energy, telecommunications, publishing, media, insurance and transportation. He is co-editor and co-writer of the commentary to the Norwegian Competition Act, published in 2009.

Advokatfirmaet Thommessen AS

Ruseløkkveien 38
0251 Oslo
Postboks 1484 Vika
NO-0116 Oslo
Norway

Tel: +47 23 11 11 11
Fax: +47 23 11 10 10
Email: firmapost@thommessen.no
Web: www.thommessen.no

THOMMESSEN

PERU

Law and Practice

Contributed by:
Alejandro Falla, Eduardo Quintana, Lucia Villaran and Andrea Cadenas
Bullard Falla Ezcurra+ see p.444

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Peruvian merger control regime is established in Law No 31112 (Merger Control Law) and its Regulations, approved by Supreme Decree No 039-2021-PCM. This regime, of general scope and applicable to all sectors of the economy, entered into force in June 2021.

Specific threshold calculation rules are set in the Thresholds Calculation Guidelines. There are also two notification forms approved: the Ordinary Notification Form and the Simplified Notification Form.

The Electricity Sector

Prior to the enactment of the Law No 31112 in June 2021, merger control legislation was only applied to the electricity sector. The relevant regulations in the said sector were Law No 26876 (Antitrust and Antioligopoly Act for the Electricity Sector), enacted on 19 November 1997, and Supreme Decree No 017-98-ITINCI, enacted on 16 October 1998. Moreover, Supreme Decree No 087-2002-EF contained supplementary provisions to Law No 26876 that established a special procedure for the evaluation of merger transactions resulting from public bidding within the framework of private investment promotion over assets of prior state-owned enterprises.

The entry into force of Law No 31112 replaced and repealed all these provisions.

1.2 Legislation Relating to Particular Sectors

Although not a merger control procedure per se, in the telecommunications sector, transfers of concessions and radio spectrum require prior approval from the Ministry of Transport and Communications. Among the aspects that are evaluated to approve these transfers is the possible impact on competition, for which an opinion is requested from the telecommunications sector regulatory agency, OSIPTEL, which also acts as a competition agency exclusively for this sector. With the entry into force of the Merger Control Law, competition concerns were excluded from the scope of analysis carried out by the Ministry in its evaluation of the effects of these transfers.

1.3 Enforcement Authorities

The authority in charge of the procedure according to the Merger Control Law is INDECOPI (the National Institute for the Defence of Competition and the Protection of Intellectual Property), an administrative entity independent from the executive branch. Its Competition Commission is also the competent body to decide merger control cases in the first administrative instance. The National Direction of Competition, Investigation and Promotion (previously named the Competition Commission's Technical Secretariat, now the Competition Direction) is in charge of co-ordinating and instructing the merger control procedure.

Appeals against the Commission's decisions are known by the Competition Tribunal, whose final administrative decision ends the administrative proceeding. The Competition Tribunal's decisions are subject to judicial review.

Other Authorities Involved in the Review Process

Under the Merger Control Law, if the economic concentration involves companies that operate in markets under specific regulation, the Competition Commission is authorised to request non-binding reports from the appropriate Public Services Regulatory Agencies (in charge of issuing the regulations regarding telecommunication, energy, sanitation and public infrastructure) about the degree of concentration in the specific market and their technical opinion on the possible effects on the market resulting from the transaction under evaluation.

Concentrations Concerning the Financial Market and Agents Participating in the Stock Market

In the case of the financial market, the Superintendency of Banks, Insurance and Private Pension Funds Management Companies (SBS), sectoral regulatory authority, maintains its competence to carry out a prior control through a prudential evaluation and a financial stability analysis, while INDECOPI conducts its analysis on competition issues. Authorisation by both entities, each within their areas of competence, is required.

If the transaction involves companies that receive deposits from the public or insurance companies that pose relevant and imminent risks, compromising the strength or stability of the companies or the systems they are part of, only the prior authorisation of the SBS in its field of competence is required.

When the transaction involves economic agents authorised by the Superintendency of the Securities Market (SMV) to act in the stock market, INDECOPI conducts the merger control procedure, while the SMV carries out its prudential evaluation on the matters under its competence. Authorisation by both entities, each within their areas of competence, is required.

2. JURISDICTION

2.1 Notification

The notification of the merger transaction is compulsory, providing that the transaction meets the relevant thresholds. There is no exception to compulsory notification if the requirements are met.

Notwithstanding this, the Merger Control Law allows the parties to conduct voluntary notifications of concentrations falling below the jurisdictional thresholds. It also grants INDECOPI the power to investigate concluded operations on an ex-officio basis. For further information, see **2.11 Power of Authorities to Investigate a Transaction**.

2.2 Failure to Notify

Under the Merger Control Law, executing a merger transaction before it has been submitted to the merger review procedure is considered a serious infringement subject to a fine of up to 1,000 tax units (approximately USD1.2 million for 2022) provided that such fine does not exceed the 10% of sales or gross income earned by the offender, or its economic group. See **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

Given that the Merger Control Law has only recently come into effect, there are no records of any fines imposed.

2.3 Types of Transactions

Types of Transactions

Concentration Acts

The Merger Control Law and its complementary regulations state that concentrations within the scope of the law can arise as a result of:

- a merger;
- the formation of a joint venture, which is intended to be permanent and fully functional;
- the direct or indirect acquisition of control over other companies through different means, such as the acquisition of shares, participations, or through any other contract or legal figure that confers direct or indirect control of a company; and
- the acquisition of productive assets operative in the past 12 months with the following characteristics:

(a) to which a defined income volume is attributable;
(b) that can reinforce or increase the market share of the acquirer; and
(c) that have generated income during the year prior to notification.

Transfer or change of permanent control
The Merger Control Law defines concentration operations as any act or operation that involves a transfer or change in control of a company or part of it. The term "permanent" has not been expressly included in the definition of a concentration act in the Merger Control Law. Nonetheless, considering the regulations, the change of control should be intended to be permanent for an operation to qualify as a concentration.

Transactions not considered concentration operations
The Merger Control Law contains a list of the types of transactions that will not be considered concentration operations subject to notification, which comprise the following situations:

- the corporate growth of an economic agent as a result of operations carried out exclusively within the same economic group;
- the internal corporate growth of an economic agent, regardless of whether it takes place through own investment or with resources of third parties that do not participate in the market;
- the corporate growth of an economic agent that does not produce effects in the markets within the domestic territory, either in whole or in part;
- control acquired over an economic agent as a result of a temporary mandate conferred by law relating to the forfeiture or denunciation of a concession, asset restructuring, insolvency, creditors' agreement or other similar procedure; and
- the temporary holding by credit, financial, insurance or capital market institutions of stocks or shares acquired for the purpose of resale, provided that no voting rights are exercised to determine the competitive behaviour of that undertaking.

Internal Restructurings or Reorganisations
According to the Merger Control Law, restructurings or reorganisations do not fall within their scope of application given that they do not entail a transfer or change of control.

Operations Not Involving the Transfer of Shares or Assets
According to the Merger Control Law, the transfer or change of permanent control in a company or part of it is considered as a decisive factor. Therefore, shareholders agreements or any other type of contract that involves a change of control will be caught by the law.

2.4 Definition of "Control"
According to the Merger Control Law, the term "control" is defined as the possibility of exerting a decisive and continuous influence over an economic agent through rights of ownership or use of all or part of a company's assets, or rights or contracts that allow a decisive and continuous influence on the structure, deliberations or decisions of a company's bodies, determining, either directly or indirectly, the competitive strategy of a firm.

Acquisitions of Minority or Other Interests Less Than Control
Under the Merger Control Law, acquisitions of minority interests are subject to notification, provided they involve the transfer or change of control of a company.

Contributed by: *Alejandro Falla, Eduardo Quintana, Lucia Villaran and Andrea Cadenas,*
Bullard Falla Ezcurra+

2.5 Jurisdictional Thresholds

Thresholds

In the Merger Control Law, there are two thresholds to be met concurrently for a transaction to be mandatorily notified to the Authority:

- the total sum of the value of annual sales or gross income or asset book value in Peru of the companies involved in the concentration has reached during the fiscal year prior to that in which the concentration is notified a value equal to or greater than 118,000 UIT, approximately USD132.3 million in 2022; and
- the value of the annual sales or gross income or asset book value in Peru of at least two of the companies involved in the concentration have each reached during the fiscal year prior to that in which the concentration is notified a value equal to or greater than 18,000 UIT, approximately USD20.2 million in 2022.

There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The Regulations of the Merger Control Law state that the authority should consider the annual sales or gross income, or asset value, generated in Peru by the concentrating parties during the previous fiscal year. For these purposes, the authority must consider either the gross income or the asset value involved, and not both at the same time, as established by the Thresholds Calculation Guidelines.

Some of the main rules included in the Thresholds Calculation Guidelines for jurisdictional thresholds calculation by income or assets value are the following.

Income

The calculations shall include income coming from the operations carried out by the concentrating parties during their ordinary course of business. Only the sale of products to clients located in Peru and services provided to clients located in Peru are to be considered.

Threshold calculation excludes income from transactions outside the usual course of business, taxes and sales within the same economic group.

Assets

The calculations shall consider the book value of all assets (tangible and intangible) located in Peru, except those that were not located in the country during the previous year.

Threshold calculation excludes assets located in Peru for which more than 50% of the income generated corresponds to sales to foreign customers.

It must be considered that, according to the Thresholds Calculation Guidelines, the relevant exchange rate to be used for threshold calculations must be the average exchange rate of the last 12 months prior to the notification, as determined by the Central Bank.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

According to the Merger Control Law, the jurisdictional thresholds shall be calculated considering "the companies involved in the concentration operation", in the local market. The Regulations of the law establish which entities are relevant for the calculation of jurisdictional thresholds:

- merger and constitution of a joint venture – annual sales or gross income or asset value of all the parties involved and their economic group;

- acquisition of an economic agent – annual sales or gross income or asset value of the acquirer, its economic group; and the target (economic agent) and the agents it controls; and
- acquisition of operative assets – annual sales or gross income or asset value of the acquirer, its economic group and the sales or income generated by the target (the productive asset).

Turnovers of Target and Its Economic Group

The Merger Control Law considers the sales volume or asset value of the economic agents involved in the transaction. According to the type of transaction, the income or asset values considered should include those of the agent involved and its economic group. The Thresholds Calculation Guidelines state that to identify an economic group the definitions of the law and previous case law should be considered. Therefore, if an economic agent holds sole or joint control over another company all the income or asset value of the controlled company should be counted, regardless of the number of shares such economic agent could have over the company.

Group-Wide Calculations

In the Merger Control Law, an "economic group" is defined as the set of economic agents, local or foreign, comprised of at least two members, when any of them of them exerts control over the others, or when the control over economic agents belongs to one or more individuals that act as a decision unit.

Changes in the Business During the Reference Period

The regulations of the Merger Control Law establish that companies' information must reflect their status at the time of notification. No particular mechanism has been pointed out to report changes that may occur during the analysis period, but if these were relevant, they are likely to form part of the additional information that INDECOPI will require at different stages. Companies guarantee, by means of affidavits, that the information they present is reliable and there are sanctions for submitting false information.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions qualifying as concentrations are subject to notification if they have any actual or potential effects in Peru. This can result as a consequence of the companies' having a direct participation in the Peruvian market through subsidiaries or assets located in Peru; or as a result of the parties having commercial activities and generating income from the country through independent distributors. For further information, see **2.6 Calculations of Jurisdictional Thresholds**.

2.9 Market Share Jurisdictional Threshold

The Merger Control Law does not provide a market share jurisdictional threshold.

2.10 Joint Ventures

According to the Merger Control Law, joint ventures are subject to merger control if they result in the acquisition of joint control over one or more economic agents. Particularly the law refers to the establishment by two or more independent economic agents of a joint undertaking, joint venture or any other similar contractual arrangement that entails the acquisition of joint control over one or more economic agents, in such a way to permanently perform the functions of an autonomous economic entity.

The regulations' Statement of Reasons further established that transactions as joint ventures and similar arrangements must be notified only when they are intended to be permanent and fully functional as an independent economic agent.

2.11 Power of Authorities to Investigate a Transaction

INDECOPI has the power to investigate non-notified concentrations that met the jurisdictional thresholds within a limitation period of four years starting from the last act of execution of the concentration.

Investigations Under the Merger Control Law

Under the Merger Control Law, INDECOPI has the power to investigate transactions that did not meet the jurisdictional thresholds within a year from their completion on an ex officio basis if the concentration is considered as one that can create a dominant position or that has the potential to restrict competition.

The regulations of the Merger Control Law refer to the following examples situations in which INDECOPI could investigate a closed transaction:

- transactions in concentrated markets;
- horizontal concentrations that involve the acquisition of an economic agent with a small market share and growth potential;
- horizontal concentrations that involve acquisitions of innovative economic agents that have recently entered the market;
- successive acquisition of competitors in the market; and
- other operations with similar effects.

INDECOPI can only investigate these concentrations when they have effects in the Peruvian market. This requirement is met if the agents involved, or their economic groups, have developed economic activities in Peru or have generated income in the country during the 12 months prior to the formal closing of the operation.

As of May 2022, there are no public records of ex officio investigations under the new Merger Control Law.

Remedies and Exceptions

INDECOPI may force the sale of the acquired shares/assets, among other remedies, if it determines that the concentration might potentially restrict competition.

Concentrations within the financial sector that pose relevant and imminent risks, compromising the strength or stability of the companies or the systems they are part of, which have already been approved by the SBS cannot be reviewed by INDECOPI through this process. For further information, see **1.3 Enforcement Authorities**.

2.12 Requirement for Clearance Before Implementation

The Merger Control Law provides that the implementation or execution of the transaction must be suspended until there is clearance from the authorities. Such transactions will not have any legal effect if executed without authorisation.

It must be noted that, in order to register transactions in the public registry before a notary, the parties must present an affidavit declaring either that:

- the transaction is not subject to the merger control regime; or
- an express or tacit authorisation has been granted by the corresponding authorities within the merger control procedure.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Under the Merger Control Law, execution of a concentration before the authority's decision qualifies as a serious infringement, punishable with up to 1,000 UIT (approximately USD1.2 million for 2022), provided such amount does not exceed the 10% of sales or gross income earned by the offender, or its economic group. INDECOPI is also entitled to order the divestment or dissolution of the concentration operation until the conditions existing prior to the transaction are restored.

Applicable Penalties

Under the previous regulation, applicable only to the electricity sector, in 1999 INDECOPI imposed a sanction for the implementation of a transaction before clearance. The penalty was imposed by the Commission in 1999 to the subsidiaries of the companies Endesa Spain and Enersis, in the process of consecutive acquisition of shares of the first company in the second and the increase of the participation of the second company in its subsidiary, Endesa Chile.

In that case, the Commission imposed a solidarity fine of 150 UIT (approximately USD111,000 for 2022) for failing to notify the transaction prior to the launch of the takeover bid of shares by Enersis subsidiaries up until the date of its general board agreement to increase the shareholding limit one month later, after which the operation occurred almost immediately without the compliance of the notification duty by the subsidiaries. The sanction was appealed before the Competition Tribunal, which rejected the appellant's arguments and ratified the amount of the sanction imposed in the first instance. Also, in the decision 0794-2011/SC1-INDECOPI, the Competition Tribunal ruled that Enel violated the provisions of the previous electricity merger control law, upon having executed the transaction after notification of the operation, but before the Commission issued a decision on the matter and imposed a 100 UIT penalty (approximately USD74,000 for 2022).

As the Merger Control Law entered into force in 2021, there is no case law referring to the implementation of a transaction before clearance. Nonetheless, according to the Merger Control Law, a sanction for implementing a transaction before clearance would be made public since the decisions issued by the Commission are public and available on its web page. Penalties can be imposed for implementing a transaction involving two foreign economic agents prior to obtaining clearance, such as the cases presented above.

2.14 Exceptions to Suspensive Effect

The Merger Control Law provides no exceptions for the suspension of the implementation of the transaction until clearance is obtained.

The Regulations of the Merger Control Law establish that INDECOPI shall issue an opinion within the procedures for the constitution of public-private partnerships if the entity in charge of such procedure determines that competition plays a role in the design of the project and that potential competition risks may arise from it. For the purposes of this procedure, INDECOPI has the power to require the parties provide all the relevant information necessary for the analysis.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under the Merger Control Law, there are no provisions that allow the implementation of the transaction before clearance.

However, under the previous merger control regime applicable only to the electricity sector, in 2017, ISQ Fund I and ISQ Fund II requested clearance for the acquisition of Inkia Americas Ltd, indirect owner of two electricity generation companies. The transaction had already been closed abroad, but the applicants specified that Inkia had handed over its political rights to a trust managed by an independent third party in an act prior to the closure. This way, the transfer of the said trust (under the control of Inkia and its subsidiaries) to ISQ would be effectively finalised once the authority granted clearance to the operation, which happened later through Resolution 027-2018/CLC.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Under the Merger Control Law, transactions falling within the scope of the law must be notified prior to their execution. There are no specific terms or deadlines for notification.

Regarding penalties for failing to notify the transaction before execution and penalties effectively applied for failing to notify the transaction before execution: see **2.2 Failure to Notify**. Under the current regulations, a sanction imposed for failure to notify would be public since the decisions issued by the Competition Commission are public and available on its web page.

3.2 Type of Agreement Required Prior to Notification

Under the Merger Control Law, a copy of the most recent agreement signed for the transaction must be submitted. If such agreement has not been signed, documents that reflect the real and serious intention of the parties to carry out the operation, such as Memorandums of Understanding or Letters of Intent, should be presented to the authority.

3.3 Filing Fees

According to the Merger Control Law, a fee should be paid to submit the notice. Said fee amounts to the sum of PEN91,629.40 (approximately USD24,033 for May 2022). The fee must be paid when the request for clearance is submitted, in order to start the procedure.

It should be noted that, according to the general rules applicable to administrative proceedings, administrative fees should only cover the costs or expenses related to the activities required to carry out the proceeding.

3.4 Parties Responsible for Filing

The Merger Control Law provides two scenarios:

- in the case of mergers or joint control acquisitions, all the economic agents involved must submit the notification jointly; and
- in the other cases, the economic agent that will take control over another agent or asset is responsible for submitting the notification.

3.5 Information Included in a Filing

As mentioned above, there are two notification forms: the Ordinary Notification Form applicable to all transactions and the Simplified Notification Form applicable in two specific cases (conglomerate transactions without overlaps and operations that involve a change from joint to sole control). For further information, see **3.11 Accelerated Procedure**.

The minimum information to be submitted according to the Ordinary Notification Form is the following:

- Description and purpose of the transaction: type of transaction and why it qualifies as a concentration; transaction value and type of financing mechanism; transaction schedule; minutes of corporate bodies regarding the transaction, etc. Internal or external reports, studies, presentations and/or reports on the transaction.
- Ownership and control structure of participants: control structure before and after the operation; kinship, management or ownership links with companies operating in the country.

- Market identification and description: description of relevant markets involved in the transaction. In addition, detailed market information (sales for the last three years, supply structure, demand structure, product differentiation, market entry and exit conditions, market revenues and exits in the last five years, total entry costs for a viable competitor, etc) is required for "identified involved markets", defined as those in which:
  - (a) there is horizontal overlap and a combined market share of at least 20% is identified;
  - (b) there are vertical relations and the individual or combined market shares are at least 30%;
  - (c) any of the agents has a market share of more than 30% and the other party is a potential competitor;
  - (d) any of the agents has a share of more than 30% and another agent has significant intellectual or industrial property rights in the same market.
- Description of efficiencies: type of scope, reason why it cannot be achieved by means other than concentration, quantification and efficiency transfer mechanism.
- Identification of the countries in which the operation has been notified and resolutions, if available.

On the other hand, the most relevant information of the Simplified Notification Form includes:

- Description and purpose of the transaction: type of transaction and why it qualifies as a transaction; transaction value and type of financing; transaction schedule; minutes of corporate bodies regarding the transaction, etc.
- Ownership and control structure of participants: control structure before and after the concentration; kinship, management or ownership links with companies that carry out activities in the country.
- Economic activities carried out by the companies involved: list of economic activities developed by the involved economic agents, main characteristics of the supply and demand of such activities, supporting information that the operation qualifies as a simplified form assumption (operations without horizontal overlapping or operations that imply a change from joint control to exclusive control).
- Identification of the countries in which the operation has been notified and resolutions, if available.

The Authority has the power to request further information in case a Notification is presented with the Simplified Form.

3.6 Penalties/Consequences of Incomplete Notification

The notification is deemed not to have been submitted if the documentation is incomplete. INDECOPI receives the notification and evaluates whether the necessary information has been provided. If this is not the case, the economic agents are requested to rectify the situation.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

According to the Merger Control Law, submitting incomplete, incorrect, false, fraudulent or misleading information at any stage of the procedure qualifies as a very serious infringement of the law punishable with a fine greater than 1,000 UIT (approximately USD1.2 million for 2022), provided that such fine does not exceed 12% of the turnover of the parties in the preceding fiscal year.

3.8 Review Process

According to the Merger Control Law, the first stage is the notification phase: after the submission, the Competition Direction assesses the information filed by the parties to determine whether all the requirements have been met in a period of ten working days. If any of them is missing, a ten-working-day period is granted to the parties for rectification, after which the Competition Direction declares the application admissible or inadmissible within a period of five working days.

Phase I

Once the notification is admitted, Phase I involves the Commission's evaluation as to whether the concentration falls within the scope of the law, as well as whether it raises serious competition concerns. This stage lasts a maximum period of 30 working days. If the Commission does not find any serious competition concerns or finds that the transaction does not fall within the scope of the law, the transaction is approved. However, if there are serious competition concerns raised in the Commission's evaluation, the assessment moves on to Phase II. Both decisions must be notified to the parties.

If the Commission does not issue a decision within the provided period, the concentration is automatically authorised in application of positive administrative silence.

Phase II

Phase II lasts a maximum of 90 working days, after notifying the parties that the transaction has moved on to the next stage of evaluation and publishing a brief summary of the concentration in order to allow third parties to present relevant information. This period may be extended for an additional period of 30 working days, with due justification by the authority for such extension.

Both in Phase I and Phase II, the Commission is allowed to suspend the course of the period if the parties have proposed commitments in order to analyse them.

After the issuance of the clearance decision, authorising with conditions or denying the request, only the party requesting the clearance may appeal such decision within 15 working days, after which the Competition Tribunal has a maximum of 90 working days to decide.

Timeline for Clearance

Under the Merger Control Law, the approximate term of the procedure considering Phase I and Phase II is 190 working days at first instance and 115 working days on appeal.

As of May 2022, six decisions regarding concentration operations have been made public. These decisions concerned concentrations with no significant effects on competition that were decided in Phase I within less than 30 working days as from the date of admission of the filling.

3.9 Pre-notification Discussions With Authorities

According to the Merger Control Law, prior to the filing of the application, the economic agents involved in the transaction may contact the Competition Direction, either jointly or separately, in order to consult whether their merger transaction falls within the scope of the law, in which information must be submitted with their application and other related aspects. The Competition Direction's opinion is not binding on the Commission.

Information provided by the parties, including prior consultation with the authority, are confidential.

3.10 Requests for Information During the Review Process

Under the Merger Control Law, once a notification is presented, the Competition Direction can provide a ten-working-day term to complete the notification form. Additional requests for information during the review process are not expressly considered in the law.

For further information, see **3.8 Review Process**.

3.11 Accelerated Procedure

Under the Merger Control Law, there is a simplified notification form for concentrations deemed to be less likely to produce any significant restrictions to competition. It must be noted that this is not a fast-track procedure, as it only requires a less burdensome notification form with no changes in the terms for the review of the concentrations.

According to the Regulations of the law, an economic agent may submit a simplified notification in the following situations:

- non-overlap concentrations – the economic agents involved in the transaction or their economic groups do not carry out economic activities in the same product market and in the same geographic market; or, they do not participate in the same production or value chain; or
- change from joint to sole control – the concentration transaction generates that an economic agent acquires exclusive control of another economic agent over which it already has control.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

In the Merger Control Law, the substantive evaluation made by the authority seeks to identify if the transaction creates a significant restriction to competition on the involved markets.

4.2 Markets Affected by a Transaction

According to the Merger Control Law, it is likely that INDECOPI will conduct its assessments of markets affected by the transaction considering the definition of relevant market included in Legislative Decree 1034 (Competition Law). This regulation indicates that the relevant market is composed of the product market, understood as the good or service subject of conduct and its substitutes, and the geographic market, understood as the set of geographical areas where the alternative sources of supply of the relevant product are located. There is no set de minimis level below which competitive concerns are deemed unlikely.

4.3 Reliance on Case Law

So far, in the decisions made public, INDECOPI has relied on international criteria. For instance, when analysing a transaction in the construction sector, INDECOPI took into consideration cases decided by the European Commission for the definition of the relevant markets involved. In this same case, to assess the possible competition effects of the transaction, INDECOPI used guidelines and case law from the European Commission, the Chilean Competition Authority and the US Justice Department. Additionally, in a case involving a transaction in the payments market, the Commission expressly followed the methodology set out in the non-horizontal mergers guidelines of the European Commission.

4.4 Competition Concerns
According to the Merger Control Law, the procedure is intended to analyse whether or not the transaction causes a significant restriction to competition in the markets involved. The law does not set out specific competition concerns that will be assessed. However, it expressly states that the mere creation or strengthening of a dominant position is not enough to prohibit the operation.

4.5 Economic Efficiencies
According to the Merger Control Law, the authority considers the creation of efficiencies when deciding whether or not to authorise a merger transaction. The burden of proving the positive and supplementary impact of the efficiencies falls on the economic agents that notify the transaction. The analysis considers productive, allocation or innovative efficiencies that meet the following requirements:

- they must be proven by the applicant economic operators;
- they must be inherent in the concentration;
- they must be aimed at outweighing identified restrictive effects on competition and improving consumer welfare;
- they must be transferable to the consumer; and
- they must be verifiable by the authority.

4.6 Non-competition Issues
Under the Merger Control Law, the authority is forbidden from considering non-competition issues in the assessment of a concentration. In this sense, the law expressly states that INDECOPI does not consider in its evaluation issues different to the set goal of the regime, which is related to economic efficiency and consumer welfare.

Foreign Direct Investment
In Peru there is no ex-ante foreign direct investment regime. However, in some cases it will be necessary for the foreign investor to comply with the registration of its investment before PROINVERSION (the Peruvian Private Investment Promotion Agency). Such cases are those in which the investor seeks to transfer capital and dividends from its investment abroad, enter into legal stability agreements or obtain a more favourable exchange rate.

The legal framework applicable to investments in Peru consists of the Constitution, the Legislative Decree No 757, the Legislative Decree No 662 and the Supreme Decree No 162-92-EF, all of which are separate from the merger control rules. Filings are only necessary for those investors seeking to register their investment in order to obtain the benefits outlined above. In that sense, it is completely voluntary.

4.7 Special Consideration for Joint Ventures
There are no special provisions for the evaluation of joint ventures, as they are governed by the general rules of the Merger Control Law.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions
Under the current regulations, INDECOPI is empowered to block the transaction or approve the transaction with conditions to prevent damages to competition.

Furthermore, according to the Merger Control Law, the authority can declare null and without effects all acts and contracts entered into by parties executing a blocked transaction or without compliance of the conditions. Also, the law prohibits the registration of blocked transactions into the public registry.

5.2 Parties' Ability to Negotiate Remedies

The Merger Control Law establishes that economic agents may at any time present a proposal of commitments aimed at mitigating or avoiding the possible negative effects derived from a transaction. The procedure is stayed until the authority has given its opinion on these commitments. Subsequently, INDECOPI may authorise the transaction under such conditions or under other types of conditions it deems appropriate. The type of commitments that can be submitted or the conditions that can be imposed has not been limited.

5.3 Legal Standard

According to the Merger Control Law, the proposed commitments must be suitable for mitigating or avoiding the possible negative effects derived from the transaction.

5.4 Typical Remedies

The Merger Control Law, applicable to all economic sectors, is relatively new. In that sense, to date four filings on concentration operations have been approved without any conditions imposed by the authority. Therefore, there is no case law on typical remedies imposed by the Commission.

Under the previous merger control law applicable only to the electricity sector, there have only been three cases in which the Commission has imposed conditions on the approval of a transaction.

Edelnor (1998)

In a case involving the distribution company Edelnor (now ENEL Distribution Peru) the conditions imposed were intended to balance the companies' voting rights in the decision-making process of the Economic Operation Committee of the National Grid (COES) after the transaction, which is in charge of planning and managing the operation of the electric power generation and transmission system. COES' highest governing body is the Assembly, which is made up of the National Grid (SEIN) agents, grouped into four subcommittees, including generators, distributors, transmitters and free users. The Commission considered that the new entity as a result of the transaction could gain decisive influence over its corresponding subcommittee.

In this case, the Commission also imposed Edelnor (ENEL Distribution Peru) the obligation to bid for its energy acquisition among all the existing generators, in order to avoid any preference to its related generators (Edegel, Etevensa and Eepsa).

Consorcio Transmantaro (2006)

In another case the Commission imposed a remedy by prohibiting the transmission companies controlled by Interconexión Eléctrica S.A. E.S.P. (ISA) to participate in the second call for bidding for BOOT Contracts for Guaranteed Transmission Network Systems, in order to ensure that they present their best offer in the first call for bidding.

Luz del Sur (2020)

In a decision taken on 10 April 2020, INDECOPI cleared a major transaction within the distribution and power generation segments (China Yangtze Power Co, a subsidiary of China Three Gorges Corporation acquired Luz del Sur). As part of its decision, INDECOPI imposed as a condition to clear the transaction that Luz del Sur should bid for its energy acquisition among all the existing generators in order to avoid any preference to its related generators. The bid shall be co-ordinated either by Osinergmin (electricity supervisory body) or through a competitive and transparent process that shall be informed to INDECOPI. This condition intents to assure competition among generation power companies for serving the regulated market.

5.5 Negotiating Remedies With Authorities

According to the Merger Control Law, as explained above, the parties may propose conditions to the authority at any time during the procedure before the final decision is issued. In that sense, the parties can propose commitments to mitigate or reduce potential negative impacts on competition, and the authority can accept them and authorise the transaction under those conditions.

5.6 Conditions and Timing for Divestitures

As mentioned above, the Merger Control Law entered into force in June 2021; therefore, there is no case law on conditions and timing for divestitures imposed by the Commission. No structural conditions have been imposed under the previous regulation, applicable only to the electricity sector.

5.7 Issuance of Decisions

According to the Merger Control Law, if the decision is not issued within the prescribed term then the “positive administrative silence” operates, which means that the authorisation for the transaction is considered to be granted.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Due to the short time the Merger Control Law has been in force, there is no case law on prohibitions or remedies applied in foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Under the Merger Control Law and its regulations, no special provisions for related arrangements have been considered.

Nonetheless, both the Ordinary Notification Form and the Simplified Notification Form require the involved agents to identify any clause or provision related to the transaction that may restrict competition, such as non-competition clauses or exclusivity agreements on the concentration’s relevant contracts.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Under the Merger Control Law, third parties with legitimate interest can participate in the procedure, have the right to access to the file of the case, and can obtain copies of information that is not classified as confidential by the Commission. Further, they can submit relevant information about the transaction without being considered parties to the procedure.

Third parties can ask for their intervention in the procedure only within a term of ten days after the Commission publishes a brief summary of the reasons justifying the transition to the second phase of the procedure. In the case of the ex officio review, the limit is ten days from the publication of the Admission Resolution.

7.2 Contacting Third Parties

The Merger Control Law establishes the duty of public entities to provide information to the Authority, at its request.

Also, according to the law, the Commission must publish a brief summary of the reasons justifying the transition at the beginning of Phase II of the procedure, so that third parties can contribute with relevant information to the analysis of the transaction. It also provides the possibility of the Authority to inform third parties of the commitments proposed by the notifying parties, as long as it is deemed necessary for their assessment. However, the law makes no further reference to the Authority's power to contact private third parties for other purposes within the framework of the procedure.

7.3 Confidentiality

The Merger Control Law states that the confidentiality of information may be obtained subject to the filing of a special request, a procedure regulated in Legislative Decree 1034 (Competition Law). To this end, the Confidentiality Guidelines of the Competition Commission apply. These guidelines set forth the specific cases in which certain types of information call for confidential treatment.

According to the law, only the parties and third parties with legitimate interest incorporated in the procedure can access the file of the case. The Merger Control Law provides that the authority shall keep reserve of all the information received during the merger control review process, avoiding any risk that could affect the legitimate interest of the companies involved. They are forbidden to disclose any business secrets or to make an undue use of the information.

7.4 Co-operation With Other Jurisdictions

Related to competition matters, the Third Final Complementary Provision of Legislative Decree 1034 (Competition Law) establishes that the Competition Direction may exchange information, including information deemed confidential, with the competition agencies of the countries that are parties to an international co-operation agreement. For that purpose, INDECOPI has subscribed many co-operation agreements with competition agencies, such as Chile, Mexico, France and the USA.

The agreements that INDECOPI has signed refer to co-operation in matters of promotion of competition and other matters of its specialty.

The Merger Control Law establishes that INDECOPI may sign memorandums of understanding or other inter-institutional agreements with other national or foreign entities to seek for inter-institutional co-operation.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Under the Merger Control Law and its regulations, the first administrative instance decision can be appealed to the Competition Tribunal within 15 working days, counted from the notification of such decision.

The merger approval procedure is administrative in nature. In this connection, all decisions by INDECOPI's last administrative instance can be appealed by the parties to the judiciary through a contentious-administrative action, as established in the Contentious-Administrative Proceeding Act, approved by Supreme Decree No 011-2019-JUS. In this case, the decision issued by INDECOPI's Tribunal ends the administrative instance.

8.2 Typical Timeline for Appeals

See **8.1 Access to Appeal and Judicial Review**.

Under the sole system of administrative acts appeals, the term to file an appeal before the judiciary is three months counted as from taking cognisance of or being served with the contested action.

Under the previous regulations applicable to the electricity sector, only one administrative appeal has been known to exist. This appeal was filed by Enel against the imposition of a fine of 1000 UIT (approximately USD1.2 million for 2022), for executing the transaction before clearance. In the second instance, the Competition Tribunal reduced the fine to 100 UIT (approximately USD121,050 for 2022).

Notwithstanding the foregoing, in 2013, the economic group formed by Interconexión Eléctrica S.A. E.S.P. (ISA) obtained the reversal of the conditions imposed by the Commission to mitigate the possible anticompetitive effects of the transactions entailed by the acquisition of Consorcio Transmantaro by said economic group. Even though this was not an appeal, it resulted in the review and lifting of the conditions imposed, given that the Competition Tribunal found that there had indeed been changes in circumstances that diluted the concern that had initially given rise to the conditions.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The Merger Control Law does not give legal standing for third parties to appeal any type of INDECOPI's decisions within merger control procedures.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

As indicated in **1.1 Merger Control Legislation**, the New Merger Control Law was enacted in January 2021 and came into force on 14 June 2021. This law overturned Law No 26876 (Antitrust and Antioligopoly Act for the Electricity Sector), enacted on 19 November 1997. This law entailed a major change to the Peruvian competition policy, since it implemented a merger control regime of general scope applicable to all economic activities. Since its entry into force, no amendments have been made to the Merger Control Law.

9.2 Recent Enforcement Record

As indicated in **3.8 Review Process** and **5.4 Typical Remedies**, up to May 2022, the Commission has publicly issued six decisions approving concentrations in Phase 1.

These decisions concerned concentrations where there was no overlap between the parties or their combined market share was relatively low, thus no posing any harm for competition in the affected markets.

On 12 April 2022, the Commission announced for the first time the start of a Phase 2 review. According to the Commission, the concentration, involving two pharmaceutical companies, required a deeper analysis, as it could imply restrictive effects on competition in various markets, including antiseptics and disinfectants, aminoglycosides and systemic nasal preparations.

9.3 Current Competition Concerns

To date, the main concerns of the authority are focused on the implementation of the Merger Control Law regime. The possibility set out in the law to make consultations to INDECOPI particularly referred to the qualification of a notifiable transaction, the scope of application of the law or the information to be submitted with a filing as a key tool in this early stage of implementation of the law.

Contributed by: Alejandro Falla, Eduardo Quintana, Lucia Villaran and Andrea Cadenas, Bullard Falla Ezcurra+

Bullard Falla Ezcurra+ is a leading Peruvian boutique firm in antitrust/competition law and regulatory matters, bringing its clients the benefit of more than 20 years of experience. The team – comprised of more than ten professionals with extensive expertise in law and economics – has advised clients on the major antitrust cases in Peru. As a leading firm in all aspects of competition law, Bullard Falla Ezcurra+ stands out for its experience in cases of abuse of dominant position and cartel investigations, having advised several clients on the implementation of competition compliance programmes. The firm has a wealth of experience in merger control procedures within the electricity sector, having provided legal and economic advice to several clients for integrating electric distribution and transmission activities. Many of these transactions were cleared without conditions. Among its strengths is a hands-on experience of regulation of network industries, including energy, transport infrastructure, telecommunications and other regulated activities.

AUTHORS

Alejandro Falla is a partner at Bullard Falla Ezcurra+. His key practice areas are antitrust/competition law, economic regulation, telecommunications, energy, transport infrastructure, torts, contracts and arbitration. He was a member of the Antitrust Commission and head of the Antitrust Division of the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI), Peru's competition agency. He also served in several management positions at regulatory agencies and was a member of the Advisory Board to the Ministry of Economy and Finance. Alejandro holds a master's degree in regulation from the London School of Economics and Political Science and a law degree from Pontificia Universidad Católica del Perú.

Eduardo Quintana is a partner at Bullard Falla Ezcurra+. His key practice areas are antitrust/competition law, economic regulation, network industries (energy, transport infrastructure, and telecommunications), and concessions. He was an alternate member of the Antitrust Commission and legal co-ordinator of the Economic Analysis Division at INDECOPI. He also served as technical secretary of the Dispute Resolution Tribunal of OSIPTEL, the antitrust and regulatory agency in the telecommunications sector in Peru. Eduardo has a master's degree in regulation from the London School of Economics and Political Science and a law degree from Pontificia Universidad Católica del Perú.

Lucia Villaran is a partner at Bullard Falla Ezcurra+. She has notable experience in competition law/antitrust, economic regulation and administrative law. Prior to joining BFE+, she was a competition specialist in the Competition Policy Team of the World Bank Group in Washington, DC. In Peru, she has served as an officer at OSIPTEL. Lucia has a master's degree in law (LLM) from Michigan University, USA, and a law degree from Pontificia Universidad Católica del Perú.

Andrea Cadenas is a partner at Bullard Falla Ezcurra+. She has notable experience in competition law/antitrust, economic regulation, administrative law, civil law and arbitration. Andrea holds a master's degree in law (LLM) from the University of Chicago, USA, and a law degree from Pontificia Universidad Católica del Peru.

Bullard Falla Ezcurra+

Las Palmeras 310
San Isidro
Lima
Peru

Tel: +51 162 115 15
Email: informes@bullardfallaezcurra.com
Web: www.bullardfallaezcurra.com

Bullard Falla Ezcurra +

Trends and Developments

Contributed by:
Carlos A. Patrón and David Kuroiwa
Payet, Rey, Cauvi, Pérez Abogados ***see p.448***

Merger Control Law

The new merger control regime (Merger Control Law – "MCL") came into force on 14 June 2021, following the issuance of its complementary regulations.

Pursuant to the MCL, the Phase 1 review period is 30 business days. Said period commences only after a notification is deemed complete. The Competition Commission has up to 25 business days to determine the completeness of the notification (including, if information is requested, a ten business days period for the filing party to provide such data, otherwise their application will be deemed not filed). If the Commission concludes that the transaction may potentially raise "serious concerns" in generating restrictive effects on the competition, it can initiate a Phase 2 review that may last up to a maximum of 120 business days (90 business days and an extension of 30 business days).

INDECOPI Decisions

As of late May 2022, nearly a year after the regime came into force, the National Institute of the Defence of Competition and Intellectual Property Protection (INDECOPI) had issued and published nine decisions. Eight of these were clearance decisions issued after a Phase 1 review. The ninth decision was to initiate a Phase 2 review in a pharmaceutical concentration. Four of these cases originated with the filing of a simplified notification form (which requires less information than the ordinary long form notification).

In addition, while not explicitly regulated in the MCL, INDECOPI has established a pre-filing procedure, where it will review draft notifications before they are formally submitted. The Peruvian authority has limited stoppage powers once a notification is filed, so this informal procedure seeks to afford the possibility to coordinate information required for review without triggering completeness deadlines. Also, during these preliminary discussions, the authority may provide information concerning complementarity request for information that it deems will be required once formal clearance procedures commence. While pre-filing is not mandatory nor binding, the authority is actively promoting the use of these mechanisms to prevent any potential delay or risk of the filing being dismissed. On average, these preliminary procedures have approximately taken one or two weeks.

To date, all Phase 1 clearance decisions have been issued, on average, between 40 to 50 business days from the date of the notification was filed. However, in cases where a pre-filing was prepared, clearance decisions were issued in approximately 36 business days.

Additionally, all Phase 1 clearance decision have been issued without conditions. The markets involved in these cases included warehouse facilities, electronic payment, mining, industrial solutions to mining companies, medical laboratories, services to electric companies, telecommunications, informatic solutions and processed foods.

As previously mentioned, as of late May 2022, the only Phase 2 review initiated by the Peruvian authority involves a concentration related to the pharmaceutical sector, an operation in which one Peruvian laboratory pursued the acquisition of another laboratory that participates in the same market (particularly in five specific categories of medicines). According to INDECOPI, said concentration raised concerns regarding restrictions that could result in those specific markets. INDECOPI is expected to issue a final decision on this matter in the second half of 2022.

Sensitive Markets

The aforementioned Phase 2 case may reveal that the Peruvian authority will tend to be cautious when issuing clearance decision related to particularly "sensitive" markets, such as the health and pharmaceutical markets, which are prioritised in their enforcement agenda. Other markets that are commonly viewed as "sensitive" by the Peruvian authority include products that conform the basic consumption basket, fuels and COVID-related products and services. INDECOPI may require more time to conduct a detailed analysis about the effects of concentrations occurring in these markets.

Considering that almost all the cases have been solved in the first phase without conditions and have demonstrated that none of those operations could generate any anticompetitive effect on the market, it is worth discussing if the current thresholds are low and should be raised. If there is an increase in the thresholds, it is more likely that INDECOPI would probably focus on operations that may possibly generate any anticompetitive effect on the market. According to the MCL, the thresholds may only be changed by law after any suggestion or recommendation from INDECOPI. To date INDECOPI has not suggested any increase to the thresholds.

On the other hand, INDECOPI is entitled to act ex officio in cases where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. This power allows the authority to review a concentration regardless of whether mandatory notification thresholds have been met or not. To date, no ex-officio investigation has been initiated.

Thresholds

Finally, regarding the thresholds, the MCL has two concurrent financial thresholds that are determined by the value of a Peruvian Tax Unit (UIT). It is important to note that in the case of the thresholds, the applicable UIT is the one corresponding to the fiscal year prior to the year of notification (even though the MCL and its regulations are not clear regarding this matter, this has been clarified in the Thresholds Guidelines issued by INDECOPI). Hence, if an operation is notified in 2022, the UIT from 2021 would be applicable (equivalent to PEN4,400 or USD1,189 using an exchange rate of PEN3.70 per US dollar). The value of the UIT is updated each year. Likewise, if an operation is notified in 2023, the UIT from 2022 would be applicable (equivalent to PEN4,600 or USD1,243 using an exchange rate of PEN3.70 per US dollar). The value of the UIT is updated each year.

The filing fee has been set at PEN91,629.40 (approximately USD24,764.70 using an exchange rate of PEN3.70 per US dollar). This fee is applicable to any concentration regardless of the value of the operation or the income or assents of the parties involved.

Payet, Rey, Cauvi, Pérez Abogados is a leading full-service firm with extensive experience in both the analytical and regulatory aspects related to competition and consumer law, covering a wide variety of industries such as energy, oil and gas, telecommunications, financial services, healthcare, pharma, construction, transportation, new technologies, retail, education, automotive, airline, shipping, food and beverages, and personal care, among others. Regularly ranked as the top competition and antitrust practice in Peru, Payet, Rey, Cauvi, Pérez Abogados prides itself on its unmatched credentials, having successfully represented clients in leading antitrust lawsuits and leniency procedures before local authorities, in matters involving domestic and cross-border price-fixing and other restrictive practices, refusals to deal, exploitative practices, strategic barriers to entry and exclusive dealing agreements. The firm has advised a wide variety of national and international companies on principal pre-authorisation merger control procedures, both under the current general regime as well as the prior electricity sector regime.

AUTHORS

Carlos A. Patrón is a partner of Payet, Rey, Cauvi, Pérez Abogados, specialising in antitrust, regulatory law, telecommunications, energy, corporate law and civil law. He has extensive experience in both the analytical and regulatory issues related to Peruvian competition law, covering a wide variety of industries. He has participated in leading antitrust cases, including the most emblematic price-fixing investigations carried out in Peru (ie, tissue paper, shipping conferences, PCC, LPG, drugstores).

David Kuroiwa is a principal associate of Payet, Rey, Cauvi, Pérez Abogados, specialising in antitrust law, intellectual property, administrative law and corporate law. He has extensive experience in both the analytical and regulatory issues related to Peruvian competition law, covering a wide variety of industries. He has participated in leading antitrust cases, including the most emblematic price-fixing investigations carried out in Peru (ie, tissue paper, shipping conferences, drugstores).

Payet, Rey, Cauvi, Pérez Abogados

Av. Victor A. Belaúnde 147
Torre 3, Piso 12
San Isidro, Lima 15073
Peru

Tel: +51 1 612 3202
Email: lexmail@prcp.com.pe
Web: prcp.com.pe

Payet
Rey
Cauvi
Pérez

PHILIPPINES

Law and Practice

Contributed by:
Raoul R Angangco, Sylvette Y Tankiang, Franchette M Acosta and Pauline Marie R Gairanod
***Villaraza & Angangco** see p.468*

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Contributed by: *Raoul R Angangco, Sylvette Y Tankiang, Franchette M Acosta and Pauline Marie R Gairanod,* ***Villaraza & Angangco***

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The primary merger control legislation is the Philippine Competition Act (Republic Act No 10667 or PCA), its implementing rules and regulations, and other rules and guidelines issued by the Philippine Competition Commission (PCC).

The Revised Corporation Code (Republic Act No 11232), as well as various issuances by the Securities and Exchange Commission (SEC), may also be applicable.

Merger control provisions may also be provided for in special laws that apply to specific industries. The Electric Power Industry Reform Act (EPIRA), for example, provides restrictions as to the percentage of the installed generating capacity of a grid and/or national installed generating capacity that an entity, singly or in combination with others, may own, operate or control.

1.2 Legislation Relating to Particular Sectors

The Guidelines on the Computation of Merger Notification Thresholds (the "Merger Rules") provides the rules in determining whether a merger, acquisition of shares or assets, or joint venture has met the merger notification thresholds set by law and is, thus, subject to compulsory notification.

The Foreign Investments Act (Republic Act No 7042), as amended, and its implementing rules and regulations provide the general framework for foreign investments in the Philippines. Foreign equity investments in certain industries may be subject to restrictions as provided in the 1987 Constitution and various pieces of legislation. Notably, on 2 March 2022, Republic Act No 11647, further amending Republic Act No 7042, was passed into law, lowering the minimum paid-in capital required for foreign nationals to own micro, small and medium-sized enterprises, subject to certain conditions.

The Foreign Investment Negative List (FINL) identifies the industries that are subject to nationality restrictions and indicates the allowed foreign equity. It compiles the foreign ownership restrictions found in various laws and regulations and is amended from time to time to reflect changes in the legislation. Notably, on 21 March 2022, the Philippines amended the Public Service Act (Commonwealth Act No 146) to allow full foreign ownership of entities providing services that qualify as public services.

1.3 Enforcement Authorities

Various government agencies regulate foreign investments in the Philippines. However, the primary agency concerned with ensuring compliance with the rules and regulations on foreign investment in the Philippines are the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Republic Act No 11647 introduced the new Inter-Agency Investment Promotion Coordination Committee (IIPCC), which is intended to integrate all the promotion and facilitation efforts to encourage foreign investments in the Philippines. The IIPCC has representatives from various government agencies, including the Department of Trade and Industry (DTI), the Department of Finance (DOF), the Board of Investments (BOI), the Philippine Economic Zone Authority (PEZA), the National Economic Development Authority (NEDA) and the Department of Information and Communications Technology (DICT).

Meanwhile, the Philippine Competition Commission (PCC) has original and primary jurisdiction to review proposed mergers, acquisitions and joint ventures. Other government authorities may assist in enforcing and reviewing compliance with the relevant regulation on foreign investment, depending on the industry where the entity operates, and the incentives availed of.

2. JURISDICTION

2.1 Notification

Notification is compulsory if the transaction breaches the mandatory notification thresholds: the aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity (UPE) of at least one of the acquiring or acquired entities, including that of all entities that the UPE controls, directly or indirectly, exceeds PHP6 billion (size of the party test); and the value of the transaction exceeds PHP2.4 billion (size of the transaction test).

Computing the value of the transaction depends on the type of the transaction.

On 15 September 2020, the Bayanihan to Recover as One Act (Republic Act No 11494 or BARO) took effect and increased the notification threshold to PHP50 billion. Mergers or acquisitions entered into within two years from its effectivity with transaction values of below PHP50 billion are exempted from the PCC compulsory notification requirements.

Notably, parties to a merger or acquisition with transaction values falling below the above-discussed thresholds may nonetheless voluntarily notify the PCC, and the PCC may, in its discretion, give due course to the same. Voluntary notification to the PCC may be made on the basis of an executed binding preliminary agreement or a definitive agreement.

Mergers and Acquisitions

For mergers or acquisition of assets in the Philippines, in determining whether the size of transaction test is met, the amount is computed based on the value of the assets subject of the transaction or the gross revenues generated in the Philippines of such assets.

Acquisitions of Voting Shares

For acquisition of voting shares of a corporation or of an interest in a non-corporate entity, the amount is computed based on the aggregate value of the assets of the acquired entity (other than assets that are shares of said entity and entities it controls) or gross revenues from sales in, into or from the Philippines. Further, as a result of the proposed acquisition, the entity acquiring the shares, together with their affiliates, should own voting shares or interests of:

- more than 35%; or
- more than 50%, if the entity or entities already own more than 35%.

Joint Ventures

For joint ventures, the amount is computed based on the aggregate value of the assets that will be contributed into the proposed joint venture or the gross revenues generated by such assets, including any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee.

Creeping Transactions

A merger or acquisition consisting of successive transactions, which shall take place within a one-year period between the same parties or entities under common control, shall be treated as one transaction, ie, a creeping transaction.

Parties that breach the thresholds are required to notify the PCC within 30 days from the execution of the definitive agreement.

For creeping transactions, if a binding preliminary agreement provides for such successive transactions, the entities shall provide notification on the basis of such preliminary agreement. If there is no binding preliminary agreement, notification shall be made when the parties execute the agreement relating to the last transaction which, when taken together with the preceding transactions, satisfies the thresholds.

2.2 Failure to Notify

A transaction that meets the notification threshold, but was not notified to the PCC and consummated prior to the expiration of the waiting period, is considered void and will subject the parties and their ultimate parent entities to fines and penalties to an administrative fine of 1% to 5% of the value of the transaction.

Pursuant to Memorandum Circular No 21-001, which implemented adjustments for the imposable fines under the PCA, parties that fail to notify the PCC within the period for notification but have yet to consummate the transaction will be fined in the amount of 5% of 1% of the value of transaction for the first 30 days of delay or fraction thereof. The fine shall be increased by 1% of 1% of the value of the transaction for every additional 30 days of delay or fraction thereof, provided that the total amount of fine to be imposed shall not exceed PHP2.2 million.

The decisions imposing the penalties are made public.

2.3 Types of Transactions

Joint Ventures

Joint ventures, mergers and acquisitions of shares and assets, and issuance of new company shares have been found by the PCC to have failed to comply with the compulsory notification requirements.

Joint ventures refer to a business arrangement where two or more entities or group(s) of entities contribute capital, services, assets, or a combination of the foregoing to undertake an investment activity or a specific project where each entity shall have the right to direct and govern the policies of the joint venture with the intention to share in both profits and risks. An acquisition of shares may be considered as a joint venture if joint control will exist between or among the new existing joint venture partners after the acquisition.

Other Agreements

Other definitive agreements, which grant parties the option to acquire the share or other conversion agreements allowing other entities to gain or obtain control over an entity, may be potentially covered by the notification requirement.

The following transactions are exempt from the rules on compulsory notification:

- internal restructuring within a group of companies wherein the acquired and acquiring entity have the same ultimate parent entity;
- consolidation of ownership wherein the merger or acquisition involves several entities controlled by the same natural person and there is no change in control over the entity post-transaction;
- land acquisition not for the purpose of obtaining control; and
- joint ventures formed by winning bidder(s) in solicited public-private partnership (PPP) projects under the Build Operate Transfer Law, upon application by the procuring government agency.

2.4 Definition of “Control”

“Control” refers to the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise. Control is presumed to exist when the parent owns directly or indirectly, through subsidiaries, more than half of the voting power of an entity, unless in exceptional circumstances, it can clearly be demonstrated that such ownership does not constitute control.

Control may also exist even when an entity owns 50% or less of the voting power of another entity when:

- there is power over more than half of the voting rights by virtue of an agreement with investors;
- there is power to direct or govern the financial and operating policies of the entity under a statute or agreement;
- there is power to appoint or remove the majority of the members of the board of directors or equivalent governing body;
- there is power to cast the majority votes at meetings of the board of directors or equivalent governing body;
- there exists ownership over or the right to use all or a significant part of the assets of the entity; or
- there exist rights or contracts that confer decisive influence on the decisions of the entity.

With respect to joint ventures, the grant of veto powers may also be deemed to vest control if the veto rights relate to strategic decisions in the business policy or activities of the corporation, such as the appointment of corporate officers or key management personnel, determination of the budget, adoption of and amendments to the business plan and other similar aspects of business management. The existence of any of such right, depending upon the content of the veto right and the importance of this right in the context of the specific business of the corporation, may be sufficient to grant control.

2.5 Jurisdictional Thresholds

See **2.1 Notification**. There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The Size of the Party Test is computed based on the value of the assets and revenues in the Philippines of the UPE, including all the entities it controls.

The Size of the Transaction Test is computed based on the value of the assets being acquired and/or gross revenues generated by the assets being acquired, or of the acquired entity and entities it controls, depending on the type of transaction.

In determining the value of the assets being contributed for joint venture transactions, the following shall be included:

- all assets that the JV partners agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time; and
- any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture.

The aggregate value of assets or revenues in the Philippines shall be that as stated on the most recent audited financial statements, or if the entity is not required to prepare audited financial statements, the last regularly prepared balance sheet in which those assets are accounted for.

The value of the assets or revenues in the Philippines of an entity shall be expressed in Philippine peso. If the financial statements were presented in a foreign currency, value of the assets shall be converted to Philippine peso according to the average, over the 12 months of that financial year, of the foreign exchange rate quoted by the BSP.

However, as noted in **2.1 Notification**, mergers or acquisitions entered into within two years from 15 September 2020 and with transaction values of below PHP50 billion are exempted from the PCC compulsory notification requirements.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

To satisfy the Size of Party Test at least one of the notifying UPEs, including all entities it controls, directly or indirectly (the UPE and all entities it controls, directly or indirectly, collectively comprise the "Notifying Group"), must have either aggregate annual gross revenues "in", "into" or "from" the Philippines or have assets "in" the Philippines exceeding PHP6 billion.

The annual gross revenues from sales "in", "into" or "from" the Philippines of the Notifying Group shall be that as stated in the UPE's consolidated financial statements, in accordance with the general principles discussed above. If based on the accounting principles adopted by the UPE, it does not prepare consolidated financial statements, the annual gross revenues shall be determined by aggregating the gross revenues from sales "in", "into" or "from" the Philippines of the entities within the Notifying Group, as booked or reflected in their separate statements of income and expenses.

Note that the gross revenues from sales "in", "into", or "from" the Philippines of an entity within the Notifying Group that is jointly controlled with a different entity shall be proportionate to its ownership interest. Changes in the business are reflected in the financial statements in accordance with accounting principles.

2.8 Foreign-to-Foreign Transactions

The PCA covers entities engaged in trade or industry in the Philippines or international transactions that have direct, substantial and reasonably foreseeable effects in trade in the Philippines. Thus, even if the transaction occurs offshore or involves an entity not based in the Philippines, the transaction may be subject to notification to and review by the PCC if the notification thresholds are met. For the purposes of computing the notification thresholds, the assets or revenues generated by the acquired or acquiring entity in the Philippines, including the entities they control, are material.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold. Notably, however, restrictions on market share may be imposed by special laws. As discussed above, the EPIRA, for example, provides restrictions as to the percentage of the installed generating capacity of a grid and/or national installed generating capacity that an entity, singly or in combination with others, may own, operate or control.

2.10 Joint Ventures

Joint ventures may be formed by:

- incorporating a joint venture company;
- entering into a contractual joint venture; or
- acquiring shares in an existing company (if joint control will exist between or among the existing joint venture partners).

Joint ventures are subject to compulsory notification if the notification thresholds for size of the party and size of the transaction are met. For the purposes of computing the size of the party, the contributing entities shall be deemed the acquiring entity and the joint venture shall be deemed the acquired entity.

The size of the transaction is based on the aggregate value of the assets that will be combined in the Philippines or contributed into the joint venture, or the gross revenues generated in the Philippines by such assets exceeding PHP2.4 billion. However, as discussed above, mergers or acquisitions entered into within two years from 15 September 2020 and with transaction values of below PHP50 billion are exempted from the PCC compulsory notification requirements.

Calculating Asset Value

For purposes of calculating the aggregate value of the assets to determine the size of the transaction, the following shall be included:

- the value of all assets that are not owned by any of the joint venture parties for which agreements have been secured by any of the joint venture parties for the joint venture to obtain at any time, whether or not such entity is subject to the requirements of the act;
- any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture, at any time; and
- the value of the assets owned by any of the joint venture parties that will be combined in the Philippines or contributed into the proposed joint venture.

In the case of a formation of a joint venture through acquisition of shares in an existing corporation, the assets to be combined through such acquisition will include the assets or revenues generated by the assets of the existing corporation.

2.11 Power of Authorities to Investigate a Transaction

The PCC, on its own or upon notification, has the power to review mergers and acquisitions having a direct, substantial and reasonably foreseeable effect on trade or industry in the Philippines.

The statute of limitation for any action arising from a violation of any provision of the PCA and its implementing rules and regulations is five years, calculated from:

- the time the violation is discovered for criminal violations; and
- the time the cause of action accrues for administrative and civil actions.

2.12 Requirement for Clearance Before Implementation

The parties to transactions that are subject to compulsory notification are not allowed to consummate the transaction before either the approval of the transaction or the expiration of the relevant periods of review.

2.13 Penalties for the Implementation of a Transaction Before Clearance

A transaction that meets the thresholds and does not comply with the waiting periods prior to consummation shall be considered void and will subject the parties to an administrative fine of 1% to 5% of the value of the transaction. The PCC has not yet published a decision penalising parties for this indiscretion.

2.14 Exceptions to Suspensive Effect

Transactions that meet the notification threshold are required to comply with the mandatory notification to the PCC, except those transactions that are expressly exempted from the notification requirements as provided in **2.3 Types of Transactions**. There are no exceptions to the waiting periods for transactions subject to compulsory notification.

Even if the transaction is not included among the exempt transactions, parties may consider applying for a Letter of Non-Coverage to confirm that the transaction is not subject to compulsory notification, such as when the notification thresholds are not met or the transaction does not involve any change in control over the entity. Further, as discussed above, voluntary notification may likewise be resorted to, if the parties intend to get an assessment from the PCC as to whether the transaction poses competition concerns. The PCC Merger Rules do not expressly provide a specific period for voluntary notification.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Parties can only consummate a notified transaction without the clearance of the PCC if the PCC fails to issue a decision within the periods provided in the law. The PCA provides that the PCC has 30 days from commencement of the Phase 1 review to review the transaction. Within those 30 days, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the transaction under a Phase 2 review, and request other information and/or documents that are relevant to its review.

The issuance of the request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days. The additional 60-day period shall begin on the day after the request for information is received by the parties. The parties shall provide the requested information within 15 days from receipt of the said request, otherwise the notification shall be deemed expired and the parties must refile their notification.

In case the PCC does not issue a decision within the period provided by law, the transaction is deemed approved.

Notably, where notification is voluntary, parties are prohibited from consummating the transaction as well pending clearance from the PCC. In the case of voluntary notification, the review periods are 45 days for Phase I and 90 days for Phase II review.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Parties that breach the thresholds are required to notify the PCC within 30 days from the execution of the definitive agreement. See **2.2 Failure to Notify**.

3.2 Type of Agreement Required Prior to Notification

Notification may be made based on a binding preliminary agreement upon its execution even if the complete and final terms and conditions of the merger or acquisition are yet to be agreed upon. A binding preliminary agreement refers to such terms and conditions on which parties to a planned merger or acquisition have reached a consensus and on the basis of which the parties intend to complete the transaction in good faith. The agreement may be in any form, such as a memorandum of agreement, term sheet or letter of intent.

If there is no binding preliminary agreement or parties do not wish to notify at that stage, notification to the PCC may be made prior to the execution of the definitive agreement(s) relating to the merger or acquisition. The terms and conditions of the most recent draft of the definitive agreement or agreements shall be the basis of the notification, provided that the parties issue an undertaking that they intend to sign the agreement in good faith and to send to the PCC a copy of the executed version. However, if the parties amended or made changes to the agreement, the parties will be required to re-notify the PCC.

3.3 Filing Fees

Notification filing and Phase 1 review are subject to a fee of PHP250,000.

Phase 2 review is subject to a fee of 1% of 1% of the value of the transaction, which shall not be less than PHP1 million or exceed PHP5 million.

The fees are payable within ten days from receipt of an Order of Payment from the PCC.

3.4 Parties Responsible for Filing

If notice to the PCC is required for a merger or acquisition, then all acquiring and acquired pre-acquisition UPEs, or any entity authorised by a UPE to file notification on its behalf, must notify.

3.5 Information Included in a Filing

The notifying parties shall accomplish the Notification Form of the PCC. This includes information on the parties to the transaction, value of the transaction and the assets and shares, operations of the parties in the Philippines, horizontal and vertical relationships and other relevant information. Documents to be submitted include:

- the definitive agreement or binding preliminary agreement;
- corporate documents;
- secretary's certificates that the transaction was approved by the shareholders;
- studies, surveys, analyses and reports that were prepared in relation to the transaction;
- confidential information memoranda;
- ordinary course documents; and
- financial statements and annual reports.

The submission must be in English. Certifications must be notarised, and consularised or apostilled if executed abroad.

3.6 Penalties/Consequences of Incomplete Notification

Incomplete notifications shall not be deemed filed and shall not stop the running of the 30-day period after execution of the definitive agreement within which the parties are required to file. Failure to complete the notification shall deem it unfiled and subject the parties to the penalties for a failure to notify.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Notification Form has a certification that the information and all appendices and attachments are complete, true and correct to the best of the ability of the authorised representative filing the notification. If the party is deemed to have supplied incorrect or misleading information, the PCC may, after due notice and hearing, impose upon the party fines of up to PHP1.1 million. The party may also be liable for perjury.

Supply of incorrect or misleading information has been defined to mean:

- providing information that is false, inaccurate, or erroneous; or
- omitting, concealing, or failing to make known information reasonably likely to be relied upon by the PCC in the performance of its official functions, provided that such omission, concealment, or failure may mislead, tend to mislead, or otherwise create a false impression on the PCC.

Where the incorrect or misleading information is supplied in written or printed form, supply of such information in any single document shall constitute one violation.

The PCC has yet to issue a decision fining a party as having supplied inaccurate or misleading information. If the information is unclear or incomplete, the PCC usually requests the parties to provide clarifications.

3.8 Review Process

Upon submission of the notification, the PCC will conduct a sufficiency check over a 15-day period (Sufficiency Period) to determine if they have sufficient information to conduct a Phase 1 review. If the PCC requests further information about the transaction, the parties will have 15 days to provide this information. The PCC will assess the compliance with the request for further information within the period remaining from the Sufficiency Period (which remaining period is reckoned from the issuance of the request for further information), which in no case shall be less than five days. If the PCC determines that the information is sufficient, the parties will be directed to pay a filing fee.

Phase 1

The Phase 1 review period will commence on the first business day following the date of payment of the filing fee and will last for a maximum period of 30 days. The Phase 1 review involves an initial assessment by the PCC to determine if the transaction raises any competition concerns under the PCA that would warrant a more detailed review. If no competition concerns are raised at this stage, the transaction will be approved by the PCC within the Phase 1 review period.

However, if, for any reason, the PCC identifies competition concerns during the Phase 1 review or determines that it has insufficient information to form a conclusion as to the potential impact of the transaction on competition in the market, the PCC will refer the transaction for a Phase 2 review.

Phase 2

The Phase 2 review shall commence on the day after service by the PCC of a Phase 2 notice. The PCC will then have a period of 60 days to conduct the Phase 2 review, during which period the transaction cannot complete. In practice, the Phase 2 review period may last longer than 60 days if the PCC requires more time to determine if further information is required to conduct the Phase 2 review, and if so, for the parties to provide such further information.

In light of the COVID-19 pandemic, the PCC implemented the Interim Guidelines on the Operations of the Mergers and Acquisitions Office during Periods of Community Quarantine (MAO Interim Guidelines), which allow for the notification process to be undertaken online. The MAO Interim Guidelines continue to be in effect.

3.9 Pre-notification Discussions With Authorities

Prior to filing a notification, parties that are required to notify may inform the PCC of their proposed transaction and request a pre-notification consultation. During consultations, the parties may seek non-binding advice on the specific information needed for the notification and the process for the same. The PCC encourages pre-notification consultations and this process is treated confidentially.

3.10 Requests for Information During the Review Process

Requests for information are common. The PCC is allowed to issue a Notice of Deficiency if the party's notification is insufficient before commencing Phase 1 review. In addition, the PCC Rules on Merger Procedure provide that the PCC may contact third parties, such as customers, suppliers or competitors, to obtain relevant information regarding the market, their views on the merger and any other competition issues. Accordingly, the PCC may likewise coordinate with the parties through conference calls or meetings to discuss theories of harm, relevant market, voluntary commitments and timing of the review, among others.

3.11 Accelerated Procedure

The PCC may conduct an expedited review of the transaction for a shortened review period of 15 days for Phase 1 review of the following qualified transactions:

- transaction with no-overlaps – the parties to the transaction and their notifying group do not have actual or potential horizontal, vertical or complementary relationship;
- global transaction with subsidiaries in the Philippines that act merely as assemblers or export manufacturers – the transaction is global where the acquiring and acquired entities are foreign and the Philippine subsidiaries export 95% of the production, while the 5% is minimal in relation to the entirety of such Philippine product market;
- global transaction with limited presence in the Philippines – the candidate relevant geographic market of the transaction is global, and the parties have negligible or limited Philippine presence; or
- joint ventures solely for construction and development of a real estate development project.

The MAO Interim Guidelines, however, have temporarily suspended acceptance of Expedited Review Notification Forms.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

In reviewing transactions, the PCC assess whether the transaction is likely to result in substantially preventing, restricting or lessening competition in the relevant market.

4.2 Markets Affected by a Transaction

Market definition focuses on the extent to which customers would likely switch from one product to another ("Relevant Product Market"), or from a supplier in one geographic area to a supplier in another area ("Relevant Geographic Market"), in response to changes in prices, quality, availability, or other features. The Merger Review Guidelines define relevant market as one that could be subject to an exercise of market power that would likely result in significant harm to competition, rather than anticompetitive effects that are insignificant or transient in nature.

The PCC assesses market definition within the context of the particular facts and circumstances of the merger under review. In determining the relevant market, the PCC considers the following factors, among others:

- the possibilities of substituting the goods or services;
- the cost of distribution of the good or service, its raw materials, its supplements and substitutes from other areas and abroad, and the time required to supply the market from those areas;
- the cost and probability of users or consumers seeking other markets; and
- national, local or international restrictions that limit the access by users or to alternate sources of supply or the access of suppliers to alternate consumers.

Once a market is defined, the PCC will, where circumstances require, consider market shares and concentration as part of the evaluation of competitive effects.

Determining Overlap

To determine whether there are overlaps in the parties' activities, the PCC looks at horizontal and vertical relationships between the parties in the relevant market. There is a horizontal relationship when the parties and/or entities within their respective Notifying Groups (which include subsidiaries, affiliates and other entities controlled by the Ultimate Parent Entity) provide products or services that directly compete in the same market. There is a vertical relationship when the parties and/or entities within their respective Notifying Groups operate at different levels of a production or supply chain (such as a when an entity from a party's Notifying Group produces goods that use raw materials processed by an entity in the other Notifying Group).

An "overlap" in the form of a vertical or horizontal relationship does not necessarily void the transaction unless it is shown that the transaction is anti-competitive.

4.3 Reliance on Case Law

The PCC assesses market definition within the context of particular facts and circumstances of the transaction under review. Relevant markets identified in past investigations in the same industry or investigations conducted in other jurisdictions may be informative but are not necessarily applicable to PCC's assessment of transactions.

4.4 Competition Concerns

The PCC looks at unilateral effects and co-ordinated effects. In analysing the potential of a horizontal merger to result in anti-competitive unilateral effects, the PCC assesses whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently. In analysing the potential for co-ordinated effects, the PCC assesses whether the merger increases the likelihood that firms in the market will successfully co-ordinate their behaviour or strengthen existing co-ordination in a manner that harms competition.

4.5 Economic Efficiencies

Anti-competitive mergers may be exempted from prohibition by the PCC when the parties establish that the merger has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that will likely result from the transaction. Efficiencies that increase competition in the market may also be considered.

In order to be taken into account by the PCC, the efficiencies must be demonstrable, with detailed and verifiable evidence of anticipated price reductions or other benefits. Moreover, the efficiency gains must be merger-specific and consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

4.6 Non-competition Issues

There is no explicit authority for the PCC to consider "non-competition" issues when reviewing transactions. However, as discussed above, the Merger Review Guidelines provide that the PCC assesses market definition within the context of the particular facts and circumstances of the merger under review.

Rules governing foreign direct investment (specifically, the limitations to the same) are not governed by the PCA or other rules or issuances of the PCC. The PCC does not require special filings for foreign direct investment.

4.7 Special Consideration for Joint Ventures

An acquisition of shares in a corporation will be deemed as a joint venture transaction if joint control will exist between or among the new and existing joint venture partners post-transaction.

In the context of joint ventures, joint control refers to the ability of the joint venture partners to substantially influence or direct the actions or decisions of the joint venture, whether by contract, agency or otherwise. Joint control exists when an entity has the ability to determine the strategic commercial decisions of the joint venture (positive joint control), or to veto such strategic decisions (negative joint control).

As discussed, for purposes of calculating the aggregate value of the assets to determine the size of the transaction, any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture at any time shall be included.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The PCC may prohibit or interfere with a transaction if it will likely result in substantially lessening, restricting or preventing competition in the relevant market. The PCC may prohibit the implementation of the agreement or require modification or amendments to address competition concerns. It may also impose penalties on the parties and nullify transactions that were consummated in violation of the compulsory notification requirements.

Decisions shall be in writing and the merger parties shall be furnished with a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate and published on the PCC website for public information.

5.2 Parties' Ability to Negotiate Remedies

Should there be a finding that a merger is likely to substantially prevent, restrict, or lessen competition, the parties are allowed to negotiate remedies to address the competition concerns. At any stage of the review, the parties may propose to amend or modify the agreements or undertake commitments that will remedy, mitigate, or prevent the competition concerns identified by the PCC as arising from the merger.

Before accepting any commitments, the PCC must be of reasonable belief that these are sufficient to clearly address the competition concerns and are proportionate to them. In instances where the PCC considers the commitments proposed by the merger parties as a suitable remedy, the PCC may decide to consult the concerned stakeholders or the public and issue an invitation to comment on its website. Third parties may also be approached on an individual basis for their views.

Changes and Alternative Remedies

Should the PCC decide that changes need to be made to the commitments in light of responses to the consultation, it will discuss the material changes with the parties.

The PCC may consider and impose alternative remedies, notwithstanding the merger parties' proposals. The PCC will adopt a Commitment Decision once it decides to accept the commitments of the merger parties. Where the PCC has rendered a Commitment Decision, the party who provided the commitment may apply to PCC to vary, substitute or release such commitment.

5.3 Legal Standard

There is no strict legal standard. However, in determining the remedy or set of remedies that would be appropriate, reasonable and practicable to address the adverse effects of the merger on competition, the PCC shall take into account the adequacy and effectiveness of the action in preventing, remedying or mitigating the anti-competitive effects of the merger.

5.4 Typical Remedies

The PCC considers two types of remedies to address competition concerns: structural remedies and behavioural remedies.

Structural remedies are measures that directly alter market structure and address issues that give rise to competition problems. They include divestitures (forced sale of business units or assets, either in full or partial), licensing (compulsory licensing of legal rights, usually intellectual property rights), rescission (undoing a completed transaction) and dissolution (ending a legal entity).

Behavioural remedies, meanwhile, are measures that directly alter the behaviour of an entity. The PCC may impose both structural and behavioural remedies simultaneously.

5.5 Negotiating Remedies With Authorities

At any stage of the review, merger parties may propose commitments that will remedy, mitigate, or prevent the competition concerns identified by the PCC as arising from the merger.

Upon submission of a proposed commitment, the review periods shall be suspended for a period of 60 days. However, PCC may shorten such period, or extend for a maximum of 30 days ("Commitment Review Period") by submitting a model request and waiver together with its proposed commitment. Once the Commitment Review Period expires without PCC's acceptance of the proposed commitments, Phase 1 or 2 review shall resume.

The PCC will confer with the parties to discuss their proposed commitments. Should the PCC decide that changes need to be made to the commitments in light of responses to the consultation, it will discuss the material changes with the parties.

Alternative Remedies and Applications to the PCC

The PCC may consider and impose alternative remedies, notwithstanding the merger parties' proposals. The PCC will adopt a Commitment Decision once it decides to accept the commitments of the merger parties. Where PCC has rendered a Commitment Decision, the party who provided the commitment may apply to PCC to vary, substitute or release such commitment. The written application shall contain the following:

- description of the terms of the proposed varied or substitute commitment;
- an explanation as to the impact that the variation or substitution of the commitment will have on the competition concerns;
- for applications for release, an explanation as to whether the competition concerns sought to be addressed by the commitment which the party is seeking release from still exist; and
- full contact details of the main competitors, customers and clients of the party subject to the commitment.

All explanations should be accompanied by relevant supporting documents and certified under oath by an authorised representative of the party. Before varying, substituting or releasing a commitment, PCC will consult with such persons as it deems appropriate.

5.6 Conditions and Timing for Divestitures

There is no PCC standard approach regarding the conditions and timing for remedies, as they are imposed or agreed upon on a case-to-case basis.

This timing for the enforcement of the remedies will depend on the nature of the remedy – specifically, whether or not it is intended to take place prior to consummation (such as a simple divestment of particular assets) or after consummation (such as submission of monitoring reports, etc).

The penalties for failure to comply with the commitments or conditions imposed by the PCC are usually indicated in the decision issued by the PCC for approval of the transaction. In addition to these penalties, the failure by the parties to comply with a ruling, order, or decision of the PCC after due notice and hearing, may be imposed a penalty of not less than PPHP50,000 up to PHP2 million for each violation. In addition, a similar amount of penalty shall accrue for each day of non-compliance beginning 45 days from the time that the said ruling, order, or decision was served until the party fully complies.

5.7 Issuance of Decisions

Decisions shall be in writing and the merger parties shall be furnished with a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate and published on the PCC website for public information.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, there have been no published decisions where the PCC required remedies or prohibited foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

There is no requirement for separate notification of ancillary restraints. The assessment of the PCC of a transaction is holistic and, therefore, looks at all the provisions of and mechanisms in the agreement embodying the transaction, including ancillary restraints, if any. The PCC is not prohibited from reviewing or including in its decision any related arrangements or agreements imposing ancillary restraints if these will likely substantially prevent, restrict or lessen competition in the relevant market.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

In relation to a review, the PCC has the power to require production of documents or information from the third parties and consult them in the process of reviewing commitments. The PCC may contact third parties, such as customers, suppliers or competitors, by means of market calls or inquiry letters in order to obtain relevant information regarding the market, their views on the merger, any competition issues it may raise and how they will be affected. Third parties may also include other governmental entities, sectoral regulators, industry associations, consumer bodies, think-tanks, market research firms or centres for information, among others.

7.2 Contacting Third Parties

Since the PCC was recently established, it often contacts third parties in reviewing transactions to gather information about the relevant market and the possible effects of the transaction.

7.3 Confidentiality

The decision of the PCC on a transaction subject to compulsory notification is made public. When publishing a decision, the PCC provides a summary of the transaction, subject to the parties' claims of confidentiality.

Commercial information may be subject to claims of confidentiality. Such claims must be substantiated, such that it must be accompanied by a detailed explanation why particular parts of their submissions should not be disclosed. Additionally, a non-confidential version should be provided at the same time as the original submission.

The PCC may share the non-confidential versions of submissions with the merger parties or third parties. Unless there is a claim of confidentiality, it will be presumed that none of the information contained in a party's submission is confidential. The following classes of information, however, are not generally considered to be confidential by PCC:

- the fact of the merger itself;
- information that relates to the business of any of the merger parties but is not commercially sensitive in the sense that disclosure would cause harm to the business;
- information that reflects the merger parties' views of how the competitive effects of the merger could be analysed; and
- information that is general knowledge within the industry, or is likely to be verified by any diligent market participant or trade, finance or economic expert.

7.4 Co-operation With Other Jurisdictions

At any time before the case is submitted for decision, the PCC may consult a sector regulator or other relevant government agencies from foreign jurisdictions, if appropriate.

Information, including documents, shall not be communicated or made accessible by the PCC, in so far as it contains trade secrets or other confidential information, the disclosure of which is not considered necessary by the PCC for the purpose of the review. If a transaction is under review in multiple jurisdictions, parties to the transaction may waive the confidentiality protections contained to allow the PCC to exchange otherwise protected information with competition authorities in other countries.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Parties to the merger may file a motion for reconsideration of a decision, order, or resolution of the PCC within 15 days from receipt thereof. A motion for reconsideration shall be based on any of the following grounds:

- the evidence on record is insufficient to justify the decision, order, or ruling; or
- the decision, order, or ruling is contrary to law.

Final orders or decisions of the PCC shall be appealable to the Court of Appeals within 15 days from the notice of the judgment in accordance with the Rules of Court. The appeal shall not stay the final order or decision sought to be reviewed, unless the Court of Appeals shall direct otherwise upon such terms and conditions it may deem just. In the appeal, the PCC shall be included as a party respondent to the case.

8.2 Typical Timeline for Appeals

See **8.1 Access to Appeal and Judicial Review**. There have been successful appeals of decisions of the PCC. The Court of Appeals reversed the decision of the PCC and upheld the legality of the co-acquisition by PLDT Inc and Globe Telecom Inc, two of the biggest telecommunication providers in the Philippines, of the telecommunications assets of San Miguel Corp.

8.3 Ability of Third Parties to Appeal Clearance Decisions

As a general rule, third parties cannot appeal a decision clearing a transaction. The PCC may also initiate and conduct a fact-finding or preliminary inquiry for the enforcement of the PCA upon a verified complaint filed by an interested party.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There have been no significant changes to the PCA, except (i) the adjustment to the notification threshold, which has been increased to PHP50 billion under the BARO, as well as the increase in fines and penalties for violations of the PCA; and (ii) adjustment to the schedule of fines for violations of the PCA.

9.2 Recent Enforcement Record

In its 2021 year-end report, the PCC disclosed that the Competition Enforcement Office (CEO) has addressed a total of 869 enforcement inquiries and complaints, including informal complaints on possible cartels and abuses of dominance, as well as clarifications of the law and the PCC's jurisdiction. It opened ten full administrative investigations concerning complaints involving firms in the telecommunications, water, energy and health sectors. It likewise filed two Statements of Objections or formal complaints with the PCC, which will proceed to adjudication. Accordingly, one is in the tourism industry and the other is in the healthcare industry, with both involving price-fixing cartels.

In the same report, the PCC disclosed that since it launched its Internet Service Provider (ISP) Task Force in March 2021, the CEO has received and processed over a hundred ISP-related complaints. Most of these complaints have been addressed through voluntary compliance upon issuance of enforcement advisory letters from the CEO. A few remaining cases are currently under evaluation. As a result of efforts of the ISP Task Force, the CEO issued three show cause orders in May 2021 to a major real property developer and its property manager. This was in response to complaints by homeowners that only one ISP is allowed to operate inside the subdivisions of the property developer, thus limiting competition and consumer choice.

To build its capacity to handle bid-rigging cases, the PCC has coordinated with the Commission on Audit (COA), the Government Procurement and Policy Board (GPPB), and the Governance Commission for GOCCs (GCG) to develop and test a bid-rigging screening tool. As it processes bid data, the screening tool will enable the PCC and its partner agencies to detect big-rigging cartels, identify red flags in public procurement, and facilitate the processing of bid data to assist in prioritising investigations and optimising use of resources. Moving forward, the CEO looks to further developing the screening tool by testing it with procurement data from partner agencies.

On 20 October 2021, the President of the Philippines signed Administrative Order (AO) No 44. This AO directs national government agencies, government-owned or -controlled corporations (GOCCs) and local government units (LGUs) to adopt and implement the National Competition

Policy (NCP) contained in the NEDA-PCC Joint Memorandum Circular No 01-2020.

To recall, the NCP rests on three pillars: (1) procompetitive policies and government interventions; (2) competitive neutrality; and (3) enforcement of competition-related laws and issuances. Among other directives, the NCP will ensure that government agencies design and implement their policies in accordance with sound competition principles, including competitive neutrality, and assist and cooperate with the PCC in enforcing the competition law. Under the AO, compliance with the NCP will be included in the good governance conditions criteria for the grant of Performance-Based Bonus (PBB) to government personnel, and in the conferment of the Seal of Good Local Governance (SGLG) on LGUs. In 2021, the PCC conducted 32 advocacy and capacity-building activities for its external stakeholders, including government agencies, businesses, the academe and the general public.

In 2020, the PCC received 26 notifications with an aggregate transaction value of PHP 909 billion. The sectors with the most number of notifications in 2020 were electricity and gas, transportation and storage, finance and insurance activities, real estate activities and manufacturing. From 2016-2020, the PCC received notification for a total of 221 M&A transactions, with a cumulative transaction value of PHP4.070 trillion. As of the release of the 2020 Annual Report of the PCC, it had approved 208 of said transactions and prohibited one.

9.3 Current Competition Concerns

The PCC recently decided on its first abuse of dominance case. It involved a property developer that imposed a sole internet service provider on its residents. This prevented them from availing themselves of alternative and cheaper internet services.

Among its corrective measures, the PCC ordered the property developer to pay a fine of PHP27 million and invited other internet service providers to offer their services to residents. Such was the impact of this decision that other property developers with similar conduct initiated remedial actions on their own practices – a clear example of deterrence and voluntary compliance as a result of effective enforcement.

The PCC also blocked a major food manufacturer's proposed acquisition of a sugarcane milling entity, as it decided that the acquisition would substantially lessen competition in the market for sugarcane milling services in Southern Luzon. The prohibition of the transaction supposedly prevented the creation of a monopoly that could significantly harm the welfare of sugarcane farmers. Supposedly, this demonstrates the PCC's growing focus on stakeholders who belong to priority sectors. Notably, a year after, a similar transaction involving the same acquiring entity, though in a different locale, was approved by the PCC, as accordingly, the acquisition did not pose similar merger-to-monopoly concerns.

An Overview of 2021

As discussed in **9.2 Recent Enforcement Record**, in its 2021 year-end report, the PCC disclosed that the CEO has addressed a total of 869 enforcement inquiries and complaints, including informal complaints on possible cartels and abuses of dominance, as well as clarifications of the law and the PCC's jurisdiction. It opened 10 full administrative investigations concerning complaints involving firms in the telecommunications, water, energy and health sectors. It likewise filed two Statements of Objections or formal complaints with the PCC, which will proceed to adjudication. Accordingly, one is in the tourism industry and the other is in the healthcare industry, with both involving price-fixing cartels.

Contributed by: *Raoul R Angangco, Sylvette Y Tankiang, Franchette M Acosta and Pauline Marie R Gairanod,* ***Villaraza & Angangco***

Villaraza & Angangco is a full-service law firm that has been at the forefront of the Philippine legal landscape since 1980. With its lawyers adept at handling the most intricate problems to provide comprehensive solutions, highly trained legal staff and decades of experience in serving a full spectrum of clients' interests, the firm offers professional services of the highest calibre. The firm's corporate and commercial law department is composed of five partners and 19 highly qualified lawyers. The firm is involved in M&A in industries throughout the Philippines, including banking and finance, telecommunications, transportation, real estate, manufacturing, food retail, business process outsourcing, insurance, entertainment and pharmaceuticals.

AUTHORS

Raoul R Angangco is a senior partner at Villaraza & Angangco with special expertise in M&A, insurance, infrastructure, mining, real estate and construction. His almost 40 years of practice have been marked with distinction, having been recognised as a leading individual by various international legal review publications. Raoul served as one of the youngest presidents of the Integrated Bar of the Philippines, the mandatory Bar association of all lawyers in the country, from 1995 to 1997. He currently serves as a director in several Philippine public and private corporations engaged in insurance, manufacturing, mining, real estate development, and education.

Sylvette Y Tankiang is a senior partner at Villaraza & Angangco with special expertise in the fields of taxation, M&A, banking and finance, securities, real estate, mining, natural resources and power and energy. Sylvette has consistently been recognised in legal rankings. She is sought after for her creative solutions in corporate, contract and transaction structuring. Among her key clients are Jolliville Holdings Corporation, ZhongXing TianTong Technology Co, Ltd, Lalamove Philippines, Inc, China Telecommunications Corporation, Shopee Philippines, Inc, and Mitsubishi Estate Co, Ltd.

Franchette M Acosta is a senior partner at Villaraza & Angangco with expertise in foreign direct investments, M&A, finance and project development (and government contracts) in various industries, such as telecommunications, financial services, real estate and manufacturing. Among her key clients are China Telecommunications Corporation, DITO Telecommunity Corporation, Swiss Re, Globe Telecom, Innove Communications, Inc, National Instruments Singapore (Pte) Ltd, Foodpanda, Ninja Van, Infinitus Group, Ayala Land, ISOC Group of companies and Alternergy Mini Hydro Holdings Corporation.

Pauline Marie R Gairanod is a senior associate at Villaraza & Angangco with special expertise in M&A, competition/antitrust, project finance and data privacy. Among her key clients are Ayala Logistics, Fruitas Holdings, Globe Telecom, China Telecommunications Corporation, Access Healthcare, Alternergy Mini Hydro Holdings Corporation and key entities in e-commerce and social media.

Villaraza & Angangco

11th Avenue corner 39th Street
Bonifacio Triangle
Bonifacio Global City 1634
Metro Manila
Philippines

Tel: +63 2898 860 88
Fax: +63 2898 860 00
Email: info@thefirmva.com
Web: www.thefirmva.com

POLAND

Trends and Developments

Contributed by:
Krzysztof Kanton, Damian Kopera, Szymon Murek and Maciej Żelewski
Sołtysiński Kawecki & Szlęzak see p.476

Introduction

2021 was a record year in terms of the number of merger decisions issued by the President of the Office of Competition and Consumer Protection (OCCP) in Poland, which totalled 300. However, the majority of merger decisions pertained to straightforward transactions that were not accompanied by a detailed justification from the authority.

The OCCP issued only one prohibition decision (when it prohibited the acquisition of Eurozet by Agora at the beginning of the year), four conditional decisions (imposing remedies) and no gun-jumping decisions imposing the fines, which made selecting several interesting cases from 2021 a challenge. Nonetheless, the following cases summarised here provide valuable insight into the current merger control enforcement policies of the OCCP.

Agora/Eurozet

Although the OCCP's decision was described in the previous edition of this guide, it is worth mentioning again owing to the events that occurred a few weeks before this article was due to be published.

The OCCP conducted the second phase review of the case in January 2021 and concluded that the proposed transaction could lead to distortions of competition in national and regional markets for radio broadcasting and advertisement. Allegedly, the quasi-duopoly – composed of the merged entity and its biggest competitor (Poland's first commercial radio station, RMF FM) – would be significantly stronger than the remaining competitors, which would foster co-ordination between the merged entity and RMF.

Agora appealed and on 12 May 2022 the OCCP's prohibition decision was changed by the Polish competition and consumer protection court to clear the acquisition of Eurozet by Agora. Supposedly, when orally explaining the grounds for the judgment, the court admitted that the theory of harm used by the OCCP was too speculative and noted the OCCP's failure to provide credible evidence that the risk of co-ordinated effects was more than hypothetical. The judgment is not binding yet, as the OCCP has the right to lodge an appeal and publicly announced an intent to do so on its website. Written justification of the court's judgment is not available yet either.

Kaufland/E.Leclerc

The OCCP has extensive experience in dealing with mergers in the fast-moving consumer goods (FMCG) retail sector. Several cases were subject to the OCCP's scrutiny in 2021, following further consolidation in the sector.

One such case took place in Kielce, where the OCCP raised objections to the acquisition by Kaufland of assets used in operating a local branch of hypermarket chain competitors E.Leclerc. The OCCP took the view that this transaction could eventually restrict competition in the local market for retail sales of FMCG products in the HSD (hypermarkets, supermarkets and discount stores) channel.

Kaufland's market shares in local markets are usually elevated due to the presence of Lidl, which is a prominent discount store operator in Poland. Although technically belonging to the same capital group as Kaufland, Lidl maintains its organisational autonomy; therefore, both companies regard each other as competitors.

Kaufland presumably realised that a negative decision from the OCCP was inevitable, so the company chose to withdraw the merger notification. (It is possible that the OCCP was not willing to accept remedies proposed by the notifying party.)

Ultimately E.Leclerc closed its retail shop in Kielce, which raised the question of whether consumers would have been better off with another Kaufland hypermarket in Kielce (as notified and intended by the company), as opposed to no store at all.

Eventually Kaufland announced its continued interest in acquiring the retail space previously occupied by E.Leclerc in Kielce, which is entirely possible on legal grounds because no prohibition decision was formally issued.

Carrefour/Tesco

The Tesco Group has been gradually reducing its operations in Poland for several years. Its competitors have acquired a number of locations where Tesco shops operated in the past. For this reason, acquisitions of property where Tesco stores were/are sited have been regularly reported to the OCCP.

One such case in March 2021 concerned Carrefour's purchase of part of a retail space used for a Tesco hypermarket in Wrocław, which is one of Poland's biggest cities.

The OCCP's proceedings revealed that the concentration might have reduced local market competition for retail sales of FMCG products in hypermarkets within a 20–25-minute drive from the acquired hypermarket.

Eventually the OCCP agreed to Carrefour's proposed remedy of reducing the sales area in one of Carrefour's Wroclaw stores by 1,500 m². This made it possible to reduce Carrefour's market share in the local market, as the use of the sales area criterion is a key measure in determining market share, and therefore prevents negative effects resulting from the transaction.

This case clearly illustrates that the OCCP has maintained the hitherto practice of defining a separate market for shops with a sales area of more than 2,500 m². The OCCP's position is surprising, especially in light of the increasing market position of discount shops, which usually have a significantly smaller sales area but fiercely compete with shops with bigger sales areas. Therefore, the authority seems to be more and more detached from market reality and consumers' shopping preferences.

The Salling Group (Netto)/Tesco Polska

Another interesting case in the FMCG sector also related to the exit of the Tesco Group from Poland. The transaction contemplated by the Salling Group (which operates a retail chain of shops in Poland under the Netto brand) had a Community dimension but it was referred to the OCCP by the EC under Article 9(2)(b) of Regulation 139/2004.

This case is interesting on several grounds. Procedurally, the notifying party is obliged to submit an application for a planned concentration on a WID form (the Polish equivalent of form CO) when a case is referred by the EC to the OCCP.

Another aspect worth noting is that the OCCP issued two decisions in this case. A decision in February 2021 pertained to the acquisition of eight Tesco shops by the Salling Group (in Gliwice, Szczecin, Kraków, Gdynia, Kielce, Katowice, Ostrowiec Świętokrzyski and Warsaw). The Salling Group only planned to acquire only the shop in Warsaw permanently. The remaining shops were acquired temporarily and will have to be sold to other undertaking(s) in the future. The Salling Group has also committed to operate these shops under the Tesco brand until 31 August 2021.

The OCCP granted consents pertaining to the acquisition of control over the Tesco Polska company in a second decision, issued in March 2021. As part of the proceedings, the OCCP conducted a market investigation by sending questionnaires to all the Salling Group and Tesco Polska's competitors active in the local markets for retail sales of FMCG products in the HSD channel, where the parties' pre-determined combined market share exceeded 20%.

This is another decision issued in 2021 that confirms the OCCP's hitherto practice in defining markets for the retail sales of FMCG products in the HSD channel remains fully valid.

Polish Merger Control and Regulated Markets

The OCCP also issued three noteworthy decisions in the pharmacy market and healthcare services sector. These decisions showcase a potentially inconsistent approach by the OCCP to reviewing mergers in strongly regulated and sensitive markets. A varied set of structural and behavioural remedies was applied across these Phase II cases, each of which was ultimately conditionally approved.

DOZ/Euroapteka

A proposed acquisition of a smaller pharmacy chain (Euroapteka) by one of Poland's largest pharmacy chains (DOZ) was assessed by the OCCP. The transaction was significant because it concerned a heavily regulated market. Competition has been statutorily limited, with new entries to the market heavily restricted (territorial quotas and ownership restricted to pharmacists only), price competition eliminated on all reimbursed products (which account for about 30% of general pharmacy sales and are a general traffic booster for pharmacies) and a blanket ban on all forms of advertising imposed. The market also showed a general consolidation trend, with the number of pharmacies across Poland falling.

One passage in the public communication of the decision was of particular note. The OCCP claimed it reviews only competition law matters in its assessment and does not incorporate or rule on regulatory matters. This was crucial given the remedy proposed, as well as the appraisal process itself.

The OCCP adopted a literal approach to defining and identifying dominance in the market, without taking into account the competitive specifics of the pharmacy market that result from the regulatory landscape. The final decision meant DOZ was obliged to divest a pharmacy on one local market, which is a complicated task for regulatory reasons (both in terms of legally performing the sale and finding an appropriate buyer).

This demonstrates a reluctance on the OCCP's part to incorporate into its assessment the regulatory characteristics of the relevant market and their impact on competitiveness. Furthermore, it shows a preference for traditional competition law doctrines and practices, instead of adopting a more economics-based approach.

Air Liquide/Betamed

The OCCP assessed a proposed acquisition of a healthcare services provider by French multinational industrial gas supplier Air Liquide.

Contributed by: *Krzysztof Kanton, Damian Kopera, Szymon Murek and Maciej Żelewski,*
Sołtysiński Kawecki & Szlęzak

Interestingly, in adopting a relevant market definition, the OCCP concluded that the relevant market should be delimited to specific services financed by public funds. This probably justified the OCCP in requesting the opinion of the National Health Fund, which runs Poland's public healthcare system. This is a curious development, given that such interactions between public bodies are scarce and not statutorily required in merger appraisal cases.

The enquiry concerned the National Health Fund's views on the anticipated effects of the case. This question appeared slightly out of tune, considering the National Health Fund is not competent to review competition law matters. The OCCP fined the National Health Fund for abuse of dominance in the 2000s following its unfair contracting practices in awarding public financing to private healthcare providers.

The case ultimately involved a series of behavioural remedies, as well as one structural divestment remedy concerning the business of the parties in two regions in Poland. All remedies required a status quo with regards to participation in the public healthcare system and participation in new tendering procedures.

LUX MED/Lecznice Citomed

The third relevant case concerns leading private healthcare provider LUX MED's proposed acquisition of a local private healthcare provider in Toruń.

The OCCP adopted a more consumer-centric approach to market definition, potentially omitting the particular geographic nature of the Toruń region, which arguably covers a wider area given the proximity of another large urban centre within a 50 km radius.

The decision included a host of various price-control and service standard remedies, mainly to ensure the market for diagnostic services remains competitive and is not ripe for abuse post transaction. Again, the proposed remedies placed a strong emphasis on ensuring a competitive status quo and ample competition for publicly financed healthcare services.

These latter two decisions, in contrast to DOZ/Euroapteka, demonstrate the OCCP's willingness to address public health and regulatory concerns in the appraisal and proposal of remedies. The OCCP appears willing to consider a wider (and potentially less predictable) market approach if the appraised transaction has a strong public element to it, whereas purely commercial transactions will be assessed using more traditional and less flexible competitive tests and standards.

PKN Orlen/Polska Press

The previous year's edition of the guide described the Polish government's tendency to support the idea of the "national champions" – ie, large state-owned companies active in a variety of fields.

PKN Orlen is the most prominent example. Perhaps the most unusual transaction involving the oil giant was the expansion of its portfolio into a completely unrelated sector – that is, the acquisition of one of the biggest local and regional press publishers in Poland.

Despite some political concerns about the lack of overlaps and mainly conglomerate dimensions of the merger, it was unconditionally cleared by the OCCP in relatively smooth Phase I proceedings. Surprisingly, the decision was challenged by the Polish Commissioner for Human Rights (Ombudsman), who argued that the OCCP failed to assess larger issues such as the freedom of speech and plurality of media.

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Sołtysiński Kawecki & Szlęzak

The Ombudsman formally appealed for an injunction to stop the execution of the transaction. The Court of Competition and Consumer Protection made the unprecedented decision to suspend the transaction until a final judgment is reached.

PKN Orlen proceeded with the acquisition of shares in Polska Press despite the court's ruling and exercised its rights by appointing new members of the management board. The changes have been formally registered in the Polish National Court Register (trade register), which created an unheard-of legal duality when different divisions of the same court – the District Court of Warsaw – effectively reached two contradictory rulings. The outcome of the proceedings and their impact on the legal system largely remains to be seen.

PKN Orlen/PGNiG

Another step in the implementation of the Polish government's "national champion" strategy involved the consolidation of two energy giants – PKN Orlen and PGNiG (an oil and gas company with a significant overseas presence).

The transaction was subject to notification to the EC, owing to its magnitude. However, the notifying party used its power and requested a referral of the case to the national authority. PKN Orlen argued that, although both companies are active in a number of markets beyond the territory of Poland, the most significant impact of the consolidation will be domestic and therefore the OCCP is best fitted to examine the potential anti-competitive effects of the transaction.

The EC consented to the request. The OCCP almost instantly initiated Phase II proceedings following the referral, owing to the amount of overlaps and potential vertical relations in the markets on which both companies are active. The proceedings concluded after 10 months with a conditional consent.

The remedy in question pertained to divestiture of one of PGNiG's subsidiaries – Gas Storage Poland. The company is involved in operating PGNiG's gas storage facilities and, in the opinion of the OCCP, the merged entity would have an economic incentive to refuse other market players access to its gas storage facilities. The OCCP therefore requested that the transaction is implemented on the condition of Gas Storage Poland's divestiture to an independent third-party undertaking.

The decision – and arguably not very demanding remedy imposed by the OCCP – once again sparked some controversy, owing to the allegedly lenient approach of the OCCP to concentrations involving state-owned companies.

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Sołtysiński Kawecki & Szlęzak

Sołtysiński Kawecki & Szlęzak (SK&S) is an independent Polish law firm with a team of more than 160 lawyers offering legal services to businesses from Poland and abroad. SK&S has 30 years of experience in providing comprehensive advisory services in all aspects of Polish and EU competition law, as well as representing domestic and international clients before the OCCP, the EC and the courts. SK&S obtains EC or OCCP approvals for concentrations, in addition to assisting in cases concerned with payment backlogs and securing contractual advantages. The firm represents entrepreneurs seeking compensation for damage resulting from the breach of competition rules. SK&S has one of the largest competition law teams in Poland, meaning the firm can successfully handle complex cases that require a number of lawyers.

AUTHORS

Krzysztof Kanton is a partner who has led Sołtysiński Kawecki & Szlęzak's competition law practice since 2008. He specialises in competition law, with extensive experience in handling merger control notifications and representing clients in antitrust matters before competition authorities and courts. He also regularly advises on competition compliance issues. The numerous antitrust proceedings in which he has represented clients before the Office for Competition and Consumer Protection (OCCP) and the competition and appellate courts include high-profile cartel and dominance investigations. In competition litigation, he represents clients in private enforcement cases before the civil courts and has secured several precedent-setting decisions from the OCCP.

Damian Kopera is a senior associate at Sołtysiński Kawecki & Szlęzak, with extensive experience in advising Polish and international clients on competition and consumer law. He represents clients in proceedings before the Office for Competition and Consumer Protection (OCCP) and before common courts in cases concerning merger control, agreements restricting competition, abuses of dominant positions, practices violating collective consumer interests, and unfair exploitation of a contractual advantage in the trade of agricultural and food products. Damian also has experience of assessing horizontal and vertical agreements, conducting competition law compliance audits and trainings, and advising during OCCP dawn raids. He is a member of the Warsaw Bar Association and Competition Law Association.

***Contributed by:** Krzysztof Kanton, Damian Kopera, Szymon Murek and Maciej Żelewski,*
Sołtysiński Kawecki & Szlęzak

Szymon Murek is an associate at Sołtysiński Kawecki & Szlęzak who advises on Polish and EU competition law in matters related to merger control, abuses of dominant positions, and assessing horizontal and vertical agreements, as well as cases involving unfair exploitation of a contractual advantage in the trade of agricultural and food products. He has practical experience of assisting during dawn raids and providing training sessions. Szymon represents clients before the Office for Competition and Consumer Protection, including some who are active in multiple fields, such as fast-moving consumer goods, the automotive industry and e-commerce. He is a member of the Warsaw Bar Association and the Competition Law Association.

Maciej Żelewski is a senior associate at Sołtysiński Kawecki & Szlęzak, where he advises on matters of competition law, pharmaceutical law, and compliance projects in various sectors, including pharmaceuticals, fast-moving consumer goods, infrastructure and technology. He represents clients in merger and anti-monopoly proceedings in front of the Office of Competition and Consumer Protection. Maciej has acted as a non-governmental adviser to the EC's Directorate-General for Competition at the International Competition Network. He is a member of the Warsaw Bar Association and Competition Law Association.

Sołtysiński Kawecki & Szlęzak

Jasna 26
00-054 Warsaw
Poland

Tel: +48 22 608 70 00
Fax: +48 22 608 70 70
Email: office@skslegal.pl
Web: www.skslegal.pl

SOŁTYSIŃSKI KAWECKI SZLĘZAK

PORTUGAL

Trends and Developments

Contributed by:
Ricardo Oliveira and Martim Valente
PLMJ ***see p.484***

Introduction

Competition authorities around the world are enforcing their merger control powers with increasing vigilance. Cases where authorities have sanctioned companies for gun-jumping constitute clear evidence of this.

"Gun-jumping" refers to a broad range of actions engaged in by parties to a transaction prior to the approval of a merger required from a competition authority. This occurs, in its simplest form, when the buyer controls a target before getting the green light from whichever competition authority or authorities have the power to review the transaction in question. A good example would be a prospective buyer exercising control over the target's commercial conduct. The most extreme form of gun-jumping is completing a transaction without seeking the applicable merger control approvals.

The Portuguese Competition Authority (PCA) is going through the most active phase of enforcing its powers since it was established in 2003. Although this has been demonstrated most visibly in the antitrust space, there are signs that the PCA could become equally active in enforcing its merger control powers.

This article offers an overview of:

- Portuguese merger control jurisdictional thresholds;
- how companies should apply these thresholds;
- the PCA's gun-jumping enforcement record; and
- recent trends in the PCA's review of non-complex mergers.

Jurisdiction

As is the rule throughout the EU, Portuguese merger control law requires transactions that fall within the PCA's jurisdiction to receive PCA approval before completion. This is generally known as the "standstill obligation" and is common in jurisdictions that operate mandatory merger control laws.

However, determining whether a transaction falls under the jurisdiction of the PCA is not always a straightforward exercise. This is because, in addition to turnover tests that are simple to apply, the prior notification of a transaction to the PCA can depend on the parties' market shares in Portugal.

Filing Thresholds Under Portuguese Merger Control Law

The following are three alternative thresholds under the Portuguese merger control rules. If one of these is met, the transaction must be notified to the PCA for prior approval.

- Turnover threshold – the parties' aggregate turnover in the preceding financial year exceeded EUR100 million in Portugal, with each party having EUR5 million turnover during that period.
- Hybrid market share and turnover threshold – the transaction creates or reinforces a market

share of more than 30% in a potentially relevant market (or markets) and each party's group had an aggregate turnover of at least EUR5 million in Portugal in the preceding financial year.
- Market share threshold – the transaction creates or reinforces a market share of more than 50% in a potentially relevant market (or markets).

Each of these thresholds assumes that the transaction is a "concentration", which means that the transaction either:

- is a merger between two previously independent undertakings;
- involves one or more undertakings acquiring control over another undertaking (or others, including only part or parts thereof) with a clear market turnover; or
- results in the lasting establishment of a fully functioning joint venture (ie, an independent, market-facing business).

How to Apply the Market Share Thresholds

The first step in applying the market share thresholds is to identify which "relevant markets" the parties' are present in Portugal. A "relevant market" is a term of art in competition law that seeks to capture competition both on a product and/or service level and geographically.

A relevant market will include all the products and/or services that are considered interchangeable or substitutable by the consumer in terms of characteristics, prices and intended use. The PCA will carry out an assessment of demand-side substitutability (ie, of customers) and supply-side substitutability (ie, of suppliers).

The geographic scope of a relevant market for the purposes of establishing the PCA's jurisdiction is national – even if actual market dynamics mean that competition for those products and/or services takes place on a regional or worldwide basis.

It can be challenging for parties to a transaction to conduct detailed analyses of this type, especially if they operate in small markets or in sectors for which there is no third-party market data to help define markets and assess market shares.

Parties also often find that the way they run their businesses or view the markets they operate in may not necessarily match the concept of a "relevant market" for the purposes of merger control.

Nevertheless, companies looking to do business in Portugal are advised to undertake a careful analysis of whether either market share threshold is met through a transaction.

As mentioned, the PCA is more active than it has ever been and, while this is most noticeable in the field of antitrust, there are signs that the PCA could become equally active in the enforcement of its merger control powers.

Sanctioning companies that fail to notify a transaction that meets one of the filing thresholds is an area where the PCA has become more active in the past two years.

Recent Enforcement of the Gun-Jumping Rules

The PCA's enforcement record

The PCA first sanctioned parties that "jumped the gun" and completed a transaction prior to obtaining approval under the Portuguese merger control rules in 2014. Since then, it has adopted four further gun-jumping decisions. Three of the PCA's five gun-jumping fines were in the past two years.

The parties that have been fined for gun-jumping in Portugal since 2014 are:

- Associação Nacional das Farmácias (fined EUR118,000 in 2014);
- Vallis-Capital Partners SCR, SA (fined EUR38,500 in 2017);
- Hospital Particular do Algarve, SA (fined EUR155,000 in 2020);
- Fidelidade (fined EUR300,000 in 2021); and
- AOC Health GmbH (fined EUR35,000 in 2021).

The above-mentioned fines are not as eye-catching as those imposed by the PCA for antitrust infringements. Fines totalling over EUR1 billion have been imposed in this area since 2016.

However, while clearly unafraid to use the full weight of its fining powers, the PCA is constrained by certain limits when setting the level of a fine for gun-jumping.

The first is a statutory cap of 10% of turnover, which is common across the EU. This means that no fine imposed by the PCA can exceed 10% of the infringing company's previous year's annual turnover.

Furthermore, as is the case with the EC and competition authorities in other member states, the PCA considers certain factors when determining the level of a fine, namely:

- the seriousness of the infringement;
- its impact on the relevant market(s);
- the duration of the infringement;
- the benefits accrued from the infringement;
- the economic position of the infringing parties;
- whether the parties involved in the infringement are recidivists; and
- the degree to which the parties co-operate with the PCA during its investigation.

The lower absolute level for gun-jumping fines can be largely explained by applying these criteria. The economic benefit of gun-jumping, for example, is far less likely to be materially significant than the economic benefit that a cartel brings to its participants. Likewise, the duration of gun-jumping infringements is generally shorter than antitrust infringements.

These key "drivers" of a potential fine are more likely to be limited in the context of gun-jumping infringements than antitrust infringements. Nonetheless, the PCA has publicly stated that it considers gun-jumping a serious infringement, so it would not be surprising if – in the short-to-medium term – companies found to have committed such an infringement get sanctioned more severely than in past cases.

What can companies do to reduce the risk of being investigated by the PCA for gun-jumping?

As noted, companies do not usually keep records or view their commercial activities within the prism of "relevant markets".

Additionally, many multinational companies active in Portugal manage their operations regionally by combining their Portuguese and Spanish operations. This is often for perfectly good reasons: competition for the relevant products and services subject to a potential merger notification may take place across the Iberian peninsula and EU – or, in the case of certain products, at a worldwide level.

There are, however, a number of steps companies can take when determining whether the market share thresholds are met in Portugal that could mitigate the risk of a gun-jumping investigation and potential fine.

Should the PCA then request that parties involved in a transaction explain why a filing was not made, which it can and often does in practice, companies will be able to demonstrate that they seriously investigated whether a filing was required.

As long as this is based on reliable data, companies will be in a better position to avoid gun-jumping investigations and/or any fines if they undertake the steps outlined here.

Identify PCA/EC decision-making practice concerning the markets affected by the potential transaction

Defining the relevant product market is, obviously, much more straightforward when there is clear decision-making practice from either the PCA or the EC. This is the fastest and most effective way to determine relevant markets and the merging parties' market share in Portugal when assessing whether the market share thresholds are met.

Calculate national market shares based on all credible market segments

Where there is no or limited decision-making practice, or where such decisions no longer reflect market dynamics, parties should take a prudent approach. Calculating their shares in Portugal for all credible market segments is one possible way companies can determine whether any of the applicable thresholds are met.

Engage with the PCA

Parties can engage in confidential discussions with the PCA in situations where market information is limited or the precise scope of the relevant market is unclear.

One benefit of such discussions is that the parties stand to gain a clearer view of whether the PCA considers the market thresholds met and other aspects of the transaction that could lead to greater deal certainty, such as:

- whether the transaction is notifiable;
- whether the PCA has any concerns; and
- the types of information the PCA will require to consider the notification complete.

Review of Non-complex Cases

Any summary of current merger control trends in Portugal would be lacking without a reference to the fact that the PCA has a good recent track record of clearing non-complex cases quickly.

Merger reviews in Portugal have the following deadlines.

- Phase I – 30 working days from a complete notification.
- Phase II – 60 additional working days.
- In the event commitments are offered – up to an additional 20 workings days at Phase I or II.

The PCA often clears transactions in three to four weeks in non-complex cases, such as where:

- the overlap between parties is marginal;
- the parties' combined shares are low;
- the filing is triggered by the acquisition of a market share of 50% or more in the absence of any overlap; or
- there are no competition issues raised by the transaction.

In addition to the fact that pre-notification in Portugal is relatively rare, companies should take the speed at which the PCA clears non-problematic transactions into account when assessing deal execution and certainty for mergers with a Portuguese nexus.

Conclusion

The PCA is an experienced and active competition authority. Its merger control unit reviews between 45 and 60 transactions each year and is staffed by competent and experienced staff.

The market share thresholds can be difficult to apply and can create deal uncertainty and execution risk, particularly in cases where there is limited or no data regarding parties' market shares in Portugal.

However, the closing a deal prior to PCA approval of transactions that meet the applicable thresholds is considered a serious infringement by the PCA. Moreover, although the PCA's fines for gun-jumping have been far more limited in the past two years than the fines it has imposed for antitrust infringements, enforcement of the merger notification rules are expected to remain one of the PCA's priorities for the foreseeable future.

It is also fairly likely that the amount parties are fined for gun-jumping infringements will increase in the coming years – perhaps significantly. Therefore, companies entering into transactions that are either Portugal-based or connected to Portugal should undertake a careful assessment of whether their transaction meets the Portuguese notification criteria.

PLMJ combines a full service with bespoke legal craftsmanship. The firm has defended the interests of its clients effectively for more than 50 years by taking an innovative and creative approach to produce tailor-made solutions. PLMJ supports its clients in all areas of the law, often with multidisciplinary teams, and always acting as a business partner in strategic decision-making processes. The firm created PLMJ Colab, a network of law firms spread across Portugal and other countries with which it has cultural ties, with the aim of being close to its clients. The network collaborates internationally with firms specialising in the legal systems and local cultures of Angola, China/Macau, Guinea-Bissau, Mozambique, São Tome and Príncipe and Timor-Leste. PLMJ's EU and competition team is undoubtedly one of the leading teams of its kind in Portugal, based on its track record and the seniority, qualifications and breadth of practice of its nine lawyers.

AUTHORS

Ricardo Oliveira is head of PLMJ's EU and competition law practice. He has 25 years' experience in European law and competition, with a focus on defending companies in cartel cases and cases of abuse of a dominant position. Ricardo also specialises in competition litigation, merger control, state aid and implementation of compliance programmes, in addition to EU law and litigation. His particular expertise lies in the areas of insurance, transport, energy, media, pharmaceuticals, consumer goods and financial services, where he counts some of the leading international companies in each industry among his clients. Ricardo has a law degree from the Faculty of Law of the University of Lisbon and an LLM in European Law from the College of Europe in Bruges. Ricardo worked in the office of the President of the General Court of the European Union in Luxembourg and at the EC in Brussels prior to joining PLMJ.

Martim Valente is a senior counsel in the EU and competition law practice. He has more than 15 years' experience in all aspects of anti-cartel and abuse of dominance proceedings, merger control and the implementation of compliance programmes, with particular expertise in the TMT, financial services, retail and consumer goods and pharmaceutical sectors. Martim obtained his primary law degree from the Universidade Nova de Lisboa and LLM degrees from the College of Europe in Bruges and the University of Chicago. He was Legal Director at the UK's Competition and Markets Authority prior to joining PLMJ.

PLMJ

Avenida Fontes Pereira de Melo 43
1050-119 Lisbon
Portugal

Tel: +351 213 197 300
Web: www.plmj.com/en/

QATAR

Law and Practice

Contributed by:
Asad Ahmad, Alex Saleh, Yousef Al Amly and Ahmad Saleh
Nader Al Awadhi In Association with GLA & Company see p.497

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Law No 19 of 2006 Concerning the Protection of Competition and the Prevention of Monopoly Practices ("Competition Law").

Ministry Resolution No 61 of 2008 implements Executive Regulations of Law No 19 of 2006 Concerning the Protection of Competition and the Prevention of Monopoly Practices ("Executive Regulations").

1.2 Legislation Relating to Particular Sectors

Relevant legislation includes:

- Law No 13 of 2000 and its amendments – Qatar's investment law regulating the investment of non-Qatari capital in economic activities;
- Qatar Law No 1 of 2019 now allows complete foreign ownership of a Qatari entity in any economic sector subject to the approval of the competent department. Qatar Law No 13 of 2000, by contrast, allowed for complete foreign ownership only in specific sectors and subject to approval from the Minister of Economy and Commerce; and
- Qatar Financial Market Authority Regulations and the Qatar Central Bank may include certain requirements (depending on the transaction activity) that must be complied with.

1.3 Enforcement Authorities

Protect Competition and Prevent Monopolistic Practices' Committee (the "Committee"). The Committee includes the following members:

- a private sector representative who is nominated as president by the Minister of Economy and Commerce;
- two representatives of the Ministry of Economy and Commerce, among whom one is named as vice president;
- a representative of the Energy and Industry Ministry;
- a representative of the Finance Ministry;
- a representative of the Ministry of Justice;
- a representative of Qatar Central Bank;
- a representative of the General Authority of Customs and Ports; and
- two experts nominated by the Minister of Economy and Commerce.

2. JURISDICTION

2.1 Notification

Notification is compulsory for all transactions within the Scope of the Competition Law and Executive Regulations.

2.2 Failure to Notify

Any violation of the Competition Law will be penalised by a fine of no less than QAR100,000 and no more than QAR5,000,000.

2.3 Types of Transactions

The Competition Law applies to the following transactions:

- persons intending to possess assets, ownership rights or usufructs;
- persons intending to buy stocks; and
- persons intending to create consortiums or mergers or combine the management of two – or more – corporate persons in a way that leads to domination in the market.

The Competition Law exempts state actions and institutions under the supervision of the state. The Minister has the right to exempt agreements that promote consumers' welfare.

The Committee has the right to exclude any mergers or acquisitions deemed by it to contribute to economic development in a way that may compensate for the prejudice to competition.

2.4 Definition of "Control"

"Domination" is used synonymously with Control, which is defined as "the ability of a person or group of persons working together to control the market of products in order to affect prices or quantities without competitors having the ability to limit such effect".

2.5 Jurisdictional Thresholds

The Competition Law and Executive Regulations apply to all violations that influence the local Qatar market, including violations committed by institutions based outside Qatar. Further, the Competition Law and Executive Regulations apply to all activities (undertaken by factories, institutions and companies) across all economic sectors (industrial, commercial, agricultural or services) in violation of the same and which influence the Qatar market.

As of today, there are no exact jurisdictional thresholds identified by the Competition Law, the Executive Regulations, or any Committee decisions.

2.6 Calculations of Jurisdictional Thresholds

Since there are no established jurisdictional thresholds, there are no methods for calculating said jurisdictional thresholds. The jurisdictional thresholds are based on the Committee's subjective analysis of how a specific transaction can affect the Qatar market on a case-by-case basis. The Executive Regulations identify four elements for the Committee to take into consideration in its threshold analysis:

- the effect of such agreement or contract on free competition in the market;
- the benefits derived by the consumer from such agreement or contract;
- the considerations of maintaining the quality of the product and the security and safety requirements so as not to adversely affect competition; and
- the extent of compatibility between the conditions of such agreement or contract and the established commercial practices of the activity, the subject matter of such test.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Unfortunately, many of these issues are not entirely clear in the Competition Law or Executive Regulations. Our understanding of the Competition Law and Executive Regulations is that the Committee has very wide discretion in its analysis. The Executive Regulations provide elements for the Committee to consider but do not limit the Committee to those elements.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if they influence the Qatar market – as previously mentioned under **2.5 Jurisdictional Thresholds**.

2.9 Market Share Jurisdictional Threshold

Foreign-to-foreign transactions are subject to merger control if they have an influence on the Qatar market – as previously mentioned under **2.5 Jurisdictional Thresholds**.

2.10 Joint Ventures

Joint ventures are captured within the transactions subject to the Competition Law. Joint ventures are not expressly listed as a type of transaction; however, the creation of "consortiums or mergers or to combine the management of two or more corporate persons" are listed. As such, we can comfortably say that joint ventures are subject to the Competition Law and Executive regulations. With that being said, there are no special rules for determining whether joint ventures meet the jurisdictional threshold.

2.11 Power of Authorities to Investigate a Transaction

Since there are no clear jurisdictional thresholds for the implementation of the Competition Law and Executive Regulations, the Committee has wide discretion in investigating transactions that appear on its radar. Initially, any person can file a notice to the Committee identifying a specific transaction as potentially problematic. The Committee then has 90 days from the date of receipt of the notice to conduct its investigation and issue a resolution with its decision.

The Committee, as well as the employees of the Ministry of Economy and Commerce, authorised to act in the capacity of judicial officers by a resolution issued by the Public Prosecutor, shall have the right to detect and confirm the crimes committed in violation of the provisions of the Competition Law. For such purpose, they shall have the right to enter places, shops and establishments where the violator practices the activity, inspect such locations and review the documents and registers thereof.

2.12 Requirement for Clearance Before Implementation

Implementation may not lawfully proceed before an approval is issued through a Committee resolution or the lapse of 90 days from receipt of the notice without the issuance of a Committee resolution.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Implementation of a transaction prior to receiving clearance from the Committee results in a violation of the Competition Law and the Executive Regulations. The violation can lead to a penalty of anywhere between QAR100,000 to QAR5,000,000. Further, the person in charge of the actual management of the violating corporate person shall be penalised by the same penalties prescribed for the actions committed in violation of the provisions of the Competition Law and Executive Regulations if it is proven that he had knowledge of said violation and if the prejudice thereby to such obligations imposed on him by such management has contributed to the occurrence of such crime.

In all cases, the court deciding on the violation shall confiscate all profits resulting from activities if it finds a violation of the provisions of the Competition Law.

2.14 Exceptions to Suspensive Effect

Besides a special resolution from the Minister of Economy and Commerce, in response to a formal request, excluding a transaction from the scope of the Competition Law and Executive Regulations, there are no other exceptions to the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

With the exception of our responses to **2.14 Exceptions to Suspensive Effect**, there are no express circumstances that would allow a corporate person to implement a transaction prior to clearance received from the Committee.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Technically, there is no express deadline for notification to be made to the committee under the Competition Law or Executive Regulations. However, a transaction may not be implemented without clearance from the Committee as it would result in a violation of the Competition Law and Executive Regulations.

3.2 Type of Agreement Required Prior to Notification

The Competition Law does not require a binding agreement to be in place prior to notification. There is no standard as to when notification can be made, and we encourage parties who feel that their transaction may fall within the scope of the Competition Law to provide notice of the same at the earliest to receive clearance and avoid delays in the transaction.

3.3 Filing Fees

There are no filing fees associated with the notice made to the Committee.

3.4 Parties Responsible for Filing

Neither party is expressly responsible for filing the notice with the Committee. Any party may report to the Committee any violation of the provisions of the Competition Law or Executive Regulations.

3.5 Information Included in a Filing

The requirements are as follows:

- the name, address, job and capacity of the reporter and their interest in providing such report;
- the name, address and nature of business of the reported person;
- the type of the violation and the evidence proving its occurrence; and
- a statement of the damage, if any, incurred by the reporter.

The report shall be accompanied by the supporting documents, if any. The Committee may ignore the investigation of any report not meeting the above particulars.

There is no indication that the above report must be made in a specific language. Nonetheless, we recommend submitting an Arabic translation and any accompanying document in the event that the report is submitted in a non-Arabic language.

3.6 Penalties/Consequences of Incomplete Notification

In the event that the notice is considered incomplete, the Committee has the option of disregarding the notice and not taking any action.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

At a minimum, the Committee would disregard the notice if the notifying party were deemed to have supplied inaccurate or misleading information. The Committee has wide discretion regarding imposing penalties or referring a matter to the judiciary.

3.8 Review Process

The process is initiated by an application made to the Minister of Economy and Commerce to exclude a certain transaction from the Competition Law and Executive regulations. The Minister may refer the application to the Committee for consideration and preparation of a report.

The Committee would then have 30 days from receiving the Minister's referral to prepare a report about such application, which can be extended for similar periods. The Committee would then present the final report to the Minister for a decision.

The entire process may not exceed 90 days, or it would be deemed an implied clearance.

3.9 Pre-notification Discussions With Authorities

The Competition Law does not allow for pre-notification discussions with the authorities. The Committee encourages any institution planning to acquire assets or intellectual property rights or shares or undergo mergers and acquisitions that result in a dominant market position to inform the committee of their decision in writing.

3.10 Requests for Information During the Review Process

There is no limitation on what the Committee may request during its investigation. However, there is no indication that such requests will stop the clock for the 90-day timetable.

3.11 Accelerated Procedure

There is no short-form, fast-track or other types of accelerated procedure for review by the Committee.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test is worded as follows: Does the contemplated transaction influence the Qatar market in a way that causes prevention, hindrance or damage to competition?

4.2 Markets Affected by a Transaction

Relevant markets are determined by the relevant products and the geographical area.

The expression "relevant products" shall mean all such products, each of which is considered as a substitute or can replace the other product from the point of view of the recipient of the service or product, including such products provided by the competitors in other markets in the vicinity of the consumer.

The expression "geographical area" shall mean such market that includes the geographical area where the competition circumstances are identical and where the sellers and the purchasers deal in products to determine the prices.

Where parties' activities overlap, there is no de minimis level below which the competitive concerns are deemed unlikely. This decision would go back to the Committee's subjective analysis on a case-by-case basis.

4.3 Reliance on Case Law

Unfortunately, at this stage, the Competition Law and Executive Regulations do not provide guidance on this issue. However, it is likely that case law would play a relatively small role in influencing the enforcement of the Competition Law.

4.4 Competition Concerns

The authorities will investigate the following competition concerns.

- Effects on the prices of products may be viewed through the following elements:
  - (a) the share of such person in the Relevant Market and his position compared with the other competitors;
  - (b) the acts of such person in the Relevant Market during the previous period;
  - (c) the number of the Competing Persons in the Relevant Market and their relative effect on the structure of the market;
  - (d) the extent of the ability of such person and its competitors to reach the required production materials; and
  - (e) the presence of obstacles preventing the entry of other Persons to the Relevant Market.
- Co-ordination or agreement among the competing persons.
- Vertical concerns and elimination of competition – it may not be agreed or contracted between a person and any of its suppliers or clients to the extent such agreement or contract may limit competition. Such issue is evaluated on the basis of the test made by the Committee for each case individually in the light of the following elements:

(a) the effect of such agreement or contract on free competition in the market;
(b) the benefits derived by the consumer from such agreement or contract;
(c) the considerations of maintaining the quality of the product and the security and safety requirements so as not to adversely affect competition; and
(d) the extent of compatibility between the conditions of such agreement or contract and the established commercial practices of the activity, the subject matter of such test.

4.5 Economic Efficiencies

The authorities do not expressly consider economic efficiencies. The Competition Law does, however, refer to economic benefit wherein it allows for a complete exemption in the cases of mergers and acquisitions deemed by the Committee to contribute to economic development in a way which may compensate for the prejudice to competition.

4.6 Non-competition Issues

There are no formally approved additional considerations that the Committee may take into account where such considerations fall outside the scope of application of the Competition Law.

4.7 Special Consideration for Joint Ventures

There are no special considerations in the substantive review of joint ventures. Co-ordination issues between joint venture parents may be investigated if such issues influence the Qatar market competition.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

When a violation is proven, the Committee shall issue a warning via registered letter to the person responsible for committing the violation, requiring him to comply with the Competition Law immediately or within a certain deadline.

If the person responsible for committing the violation fails to comply within the appointed deadline, the Committee refers the case to the Minister of the Economy and Commerce, who, in turn, refers the case to the judiciary.

The judiciary will then implement a financial penalty (QAR100,000–QAR5,000,000) and confiscate the profits accrued from the violating activity and other amounts the violator has collected by illegal competition.

The person in charge of the actual management of the violating corporate person shall be penalised by the same penalties prescribed for the actions committed in violation of the provisions of the Competition Law and Executive Regulations if it is proven that he had knowledge of said violation and if the prejudice thereby to such obligations imposed on him by such management has contributed in the occurrence of such crime.

5.2 Parties' Ability to Negotiate Remedies

There is no indication that the parties cannot negotiate with the Committee or provide alternative remedies to rectify a violation of the Competition Law. However, it is within the Committee's scope of authority to accept or decline such alternative remedies.

5.3 Legal Standard

There is no legal standard that remedies must meet to be deemed acceptable. They do, however, need to comply with the Committee's instructions to remedy the violation.

5.4 Typical Remedies

Unfortunately, there is no reliable source of publicly available information on this issue.

5.5 Negotiating Remedies With Authorities

Once a violation is confirmed by the Committee, the Committee will issue a letter to the violator with its instructions to remedy the violation. There is no indication of when the parties may negotiate remedies with the Committee.

5.6 Conditions and Timing for Divestitures

Unfortunately, there is no reliable source of publicly available information on this issue.

5.7 Issuance of Decisions

A resolution may be issued by the Committee as a formal decision permitting or prohibiting a transaction. There is no evidence that indicates any decision made by the Committee has been made public.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Unfortunately, there is no reliable source of publicly available information on this issue.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Unfortunately, there is no reliable source of publicly available information on this issue. In the event it issues a conditional approval, the Committee will outline the conditions.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

There are no express third-party rights under the Competition Law or the Executive Regulations. However, any party may report a potential violation with supporting documents to the Committee. There is no prohibition on a third party doing so and providing documents establishing the violation and impact of the violation on the Qatar market competition.

7.2 Contacting Third Parties

There is no public information that the Committee contacts third parties as part of its review process, however, there is no prohibition on the Committee seeking such information as it has wide discretion under the Competition Law and Executive regulations to investigate a violation of the same.

7.3 Confidentiality

Members of the committee, employees and ministry delegates are prohibited from disclosing any information or data related to the work of the committee or sources of information in previous cases and cases under review. It is prohibited to use any information or data or sources of information for a purpose other than the intended submission purpose.

7.4 Co-operation With Other Jurisdictions

Part of the Committee's express objectives is to liaise with counterpart committees in other countries to discuss issues of common interest. The information or data gathered as part of the

Committee's investigations may only be used for the intended purpose of the submission, and as such, the Committee may not disclose said information to counter committees in other countries.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Violations of the Competition Law and Executive Regulation, if unremedied in compliance with the Committee's directives, would ultimately be referred to the judiciary. A decision will be issued by the Court of First Instance in the matter. A party may choose to appeal the decision to the Court of Appeals and ultimately to the Court of Cassation.

8.2 Typical Timeline for Appeals

An appeal must be made within 30 days of the Court of First Instance's decision.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Unfortunately, there is no reliable source of publicly available information on this issue.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There have not been any recent changes to the legislation or implementing regulations. We anticipate some changes in the near future as the overwhelming trend in the region has become an active merger control department.

9.2 Recent Enforcement Record

Unfortunately, there is no reliable source of publicly available information on this issue.

9.3 Current Competition Concerns

Pursuant to the Committee website, the Committee should issue a regular newsletter that outlines all decisions, recommendations and measures that it has taken. The Committee reportedly prepares an annual report about its activities, future plans and recommendations to be submitted to the Minister of Economy and Commerce and referred to the Council of Ministers. However, we are unaware of any Committee newsletters or reports that have been made public.

Nader Al Awadhi In Association with GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. GLA & Company's practice encompasses all of the legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE), the firm offers unique insights for companies seeking to establish or expand business operations in these nations. Its job on deals is to get the same cleared with the local Competition Authority. GLA & Company has deep relationships with regulators in the GCC and has become successful in securing no objections from these bodies to clear these deals. Its lawyers are intimately familiar with the governing sources of authority and it routinely works with the relevant agencies, departments and committees on behalf of its clients.

AUTHORS

Asad Ahmad is a senior associate at GLA & Company and a relentless advocate for his clients. He has been involved in a number of transactional and advisory works in various industries, including logistics, construction, finance, healthcare, and education. Asad's scope of practice has involved comprehensive representation with respect to M&A, conducting extensive due diligence exercises in relation to complex transactions, as well as distribution and agency arrangements. He has an extensive background in advising on the marketing of securities, corporate governance issues, policies, and regulatory compliance. Due to the increased need, Asad has expanded his expertise in advising on the framework of data protection and regulation.

Alex Saleh is a founder and managing partner of GLA & Company and takes a leading regional role in the firm concerning its M&A and Private Equity practice. With over 25 years of experience in both the GCC and the US, he has accumulated sizable expertise in the areas of banking and finance, M&A, capital market deals and infrastructure projects. His experience garners praise from the leading legal directories, and his transactions regularly win Deals of the Year from the same institutions and organisations.

Contributed by: *Asad Ahmad, Alex Saleh, Yousef Al Amly and Ahmad Saleh,*
Nader Al Awadhi In Association with GLA & Company

Yousef Al Amly is a partner at GLA & Company and advises clients on complex corporate and commercial structures and transactions in relation to joint ventures, corporate restructuring, M&A, equity capital markets and commercial transactions (including franchise, distributorship and agency). This includes negotiating and drafting the terms and conditions of agreements and documentation related to any of the said transactions both in English and Arabic, such as commercial contracts, due diligence reports, shareholders' arrangements, sale and purchase agreements, acquisition finance, IPO prospectuses and other legal documents necessary to carry out corporate/commercial transactions.

Ahmad Saleh is a senior associate with the Corporate Department at GLA & Company and licensed in the State of Ohio, US, and the Federal District for the Southern District of Ohio, US. His practice focuses primarily on M&A, other local and cross-border transactions, and complex construction disputes. Since joining GLA & Company, Ahmad has successfully advised multinational clients across various industries, including construction and manufacturing, government contracting, finance, food and retail. Ahmad is regularly involved in acquisitions and other matters, and recently has been focusing on complex contractual disputes for major construction projects in the State of Kuwait.

GLA & Company

Tel: +971 4 553 9448
Fax: +965 2291 5800
Email: info@glaco.com
Web: www.glaco.com

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SAUDI ARABIA

Law and Practice

Contributed by:
Asad Ahmad, Alex Saleh, Yousef Al Amly and Ahmad Saleh
Nader Al Awadhi In Association with GLA & Company ***see p.519***

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Contributed by: *Asad Ahmad, Alex Saleh, Yousef Al Amly and Ahmad Saleh,*
Nader Al Awadhi In Association with GLA & Company

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Cabinet Resolution No 372 of 1440H Promulgating the KSA Competition Law (Royal Decree No (M75) of 1440H) (the "KSA Competition Law").

The KSA Competition Law is supplemented by the implementing regulations pursuant to Resolution No 337 of 25/1/1441H concerning the Executive Regulations of the KSA Competition Law ("Executive Regulations").

1.2 Legislation Relating to Particular Sectors

Merger Review Guidelines issued by GAC (defined in **1.3 Enforcement Authorities**) in July 2021 ("Guidelines").

1.3 Enforcement Authorities

The KSA General Authority For Competition (GAC) enforces the relevant legislation.

2. JURISDICTION

2.1 Notification

Notification is compulsory with respect to any entity that is encompassed within the scope of the KSA Competition Law. Exceptions:

- transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group); and
- public institutions and state-owned companies if they are solely authorised by the government to supply goods or services in a certain field.

2.2 Failure to Notify

The KSA Competition Law provides for the following penalties upon breach:

- In respect of Articles 5, 6, 7 and 11 (Anti-competitive Practices, Abuse of a Dominant Position, and Unlawful Economic Concentrations), a fine not exceeding an amount equal to 10% of the total annual sales the subject matter of the violation, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR10 million. The Settlement Committee (GAC committee charged with reviewing any alleged breaches of the KSA Competition Law and Executive Regulations, excluding articles 12 and 24, and imposing penalties appropriately) may, at its discretion, elect instead to impose a fine not exceeding three times the profit generated by the offence. The quantum of fine may be doubled in the case of repeat offence.
- In respect of Article 16 (impeding investigation), a fine not exceeding an amount equal to 5% of total annual sales, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR5 million. The quantum of fine may be doubled in the case of repeat offence.
- In respect of other breaches, a fine not exceeding SAR2 million.

When the Settlement Committee imposes any of the aforementioned penalties, the following shall be taken into consideration:

- If the Establishment is engaged in several activities where each activity differs from the other, any fine shall be assessed according to the nature of the activity the subject matter of the violation, taking into account the activities targeted by the violation.
- The conditions and circumstances of the violation.

- The gravity of the violation.
- The effects of the violation.

With respect to penalties implemented, GAC publishes the statistics surrounding the same annually. The latest report provided on GAC's website is for the year 2020. The report detailed that GAC received 64 complaints in regard to violations of the KSA Competition Law. Forty-one of those cases were dismissed based on case-specific grounds (such as lack of jurisdiction, lack of reliance on actual evidence, or lack of evidence on violations of the KSA Competition Law). Ultimately GAC proceeded with 22 cases in total and decided to initiate investigation, research and evidence-gathering. In 2020, 10 final judgments were issued for GAC and endorsed by the Riyadh Administrative Court of Appeal, compared to 12 in 2019. Pursuant to Article 19 of the KSA Competition Law, the final judgments implemented against the violators shall be published at the expense of the violators. As such, GAC published in its 2020 annual report the 10 final judgments issued in its favour, along with the name of the violator, the fine amount, the status of collection, the violation type and the sector the violator is doing business in. The top three violation types involved "Public Security bid-rigging" and the fine amount for each was SAR5,000,000. The total cumulative fines imposed (collected and outstanding) for the year 2020 were SAR45,630,000.

2.3 Types of Transactions

The KSA Competition Law uses a principle of economic concentration to identify merger control issues. Economic concentration is defined as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of a firm to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of an entity, including influencing its decision, the organisation of its administrative structure, or its voting system. This definition captures asset and share purchases, joint ventures, mergers and takeovers.

Exceptions:

- The Guidelines confirm that if a transaction does not lead to a change of control over the target entity, then no GAC filing would be required.
- Public institutions and state-owned companies if they are solely authorised by the government to supply goods or services in certain a field.

2.4 Definition of "Control"

While prior to the issuance of the Guidelines it remained unclear how GAC would analyse the elements of control, the Guidelines now clarify this by defining "control" as "the ability to exercise decisive influence" over the "strategic or operational decisions" of the target entity, including the appointment of senior management and approval of budgets, business plans and major investments.

It is now clear that transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group) are within the scope of the KSA Competition Law and notice to GAC is not required.

2.5 Jurisdictional Thresholds

Article 7 of the KSA Competition Law provides that the entities involved in the economic concentration must notify the concentration to GAC if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Regulations.

Article 12(1) of the Executive Regulations specifies that the concentration must be notified to GAC if the total annual sales value of all entities intending to participate in the economic concentration exceeds SAR100,000,000.

Article 12(2) of the Executive Regulations also provides that where it is impossible to estimate the annual sales value of the entities, or where the entities' business activities do not extend for a full fiscal year, then the annual sales value for the whole year shall be estimated based on the firms' activity, as the case may be.

2.6 Calculations of Jurisdictional Thresholds

Threshold and Calculation

The KSA Competition Law bases the notification threshold on "the total annual sales value of the entities seeking to participate in the economic concentration".

Total Annual Sales Value

- In most cases, the "total annual sales value" will be the total gross revenues of the relevant entity. These are the amounts obtained by the entity from the sale of products and services falling within the entities' ordinary business and related activities. For most entities that have financial statements prepared under the standards of the Saudi Organisation for Certified Public Accountants ("SOCPA") or the equivalent prevailing accounting standards in the relevant entity's place of incorporation, the annual sales will be the entity's revenue appearing in the entity's Income Statement, as reflected in the entity's most recent audited financial statement. Where the entity is not required to produce audited financial statements, the annual sales will be the entity's revenue appearing in its most recent annual statement of income and expense regularly prepared in accordance with the SOCPA standards or the equivalent accounting principles adopted by the entity, as the case may be.
- In the event the relevant undertaking is an individual or a natural person, GAC will in general apply the same general principles to determining the relevant "annual sales" of the individual. The individual's "annual sales" will generally be their annual revenue amounts obtained from their ordinary business activities. GAC will determine this on a case-by-case basis within the context of these general principles.
- However, where the entity's total sales incorporate sales rebates subsequently provided to its customers, the value of the sales rebates may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- In addition, where the entity's total sales revenues incorporate the value of value added taxes and other taxes directly related to sales, the value of such taxes may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- Lastly the KSA Competition Law does not distinguish between sales taking place within KSA and those taking place outside KSA. Accordingly, GAC will consider the relevant annual sales figures to be the combined aggregate group-wide and worldwide sales figures of all the relevant entities.

Currency

If the entity's financial statements are presented in a foreign (other than KSA) currency, then the annual gross revenues should be converted to values in Saudi Arabian Riyals according to the average over the relevant financial year of the foreign exchange rate quoted by the Saudi Central Bank.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Please see **2.8 Foreign-to Foreign Transactions**.

The KSA Competition Law specifies that "all the entities participating in the concentration" and does not distinguish between acquiring and selling entity or between mergers and acquisitions. The KSA Competition Law therefore requires that the notification threshold consider the total sales of all entities participating in the concentration without distinction or exclusion.

GAC considers that the entities "participating" in the concentration are all those that form part of the newly concentrated entity after the economic concentration transaction has been completed. This means that:

- Where two or more entities merge, the relevant entities are the merging entities in their entirety.
- Where one entity acquires another entity, the relevant concentrated entities are the entire entity that is acquiring the other entity, and the entity being acquired, but not the entity that is selling the entity being acquired.
- Where one entity acquires a part of another entity's operations, for example through purchasing a subsidiary or operational division, the relevant entities are: (1) the entire entity which is acquiring the operations or division, (2) the operations or division it is acquiring, but not the entity which is selling the operations or division. This is because the acquiring entity and the target operations or division generally form part of (and are therefore participating in) the economic concentration, but the selling entity generally does not form part of the economic concentration.
- Where two or more entities together participate in a full-function joint venture, the relevant entities for the notification threshold are all the entities acquiring joint control of the joint venture in addition to the joint venture itself. This principle applies both to newly formed joint ventures and to the acquisition of joint control of pre-existing entities.

Group of Companies

- Two or more legal entities will be considered to form part of the same economic entity if they constitute a "single economic entity". The primary criterion in determining whether different legal entities form part of a single economic entity is "control". If one legal entity controls other legal entities (such as subsidiaries), either directly or indirectly, then for the purposes of determining the total annual sales values of the entity, the relevant single economic entity will include the controlling entity and all of the entities it controls. If a single economic entity consists of two or more legal entities, and each of those legal entities prepares accounts, then the total sales of the single economic entity for the purposes of calculating the notification thresholds are the total combined gross sales revenues of all of the entities. A group will therefore include all companies that have direct or indirect control-based links with the entity concerned, including its subsidiaries, but also including its parent company(ies) and any other companies within the parent company's group.
- Exception: The single economic entity's revenues will exclude revenues resulting from transactions between the different legal entities within the group. Such intra-group transactions are not considered to be sales of the single economic entity.

2.8 Foreign-to-Foreign Transactions

The KSA Competition Law applies to all undertakings inside KSA. It also applies to undertakings outside KSA where those undertakings' activities, including an Economic Concentration, may have an effect on a market in KSA. Article 3 of the Executive Regulations further provides that GAC may assess the effect, actual or potential, of such conduct outside KSA on a market inside the Kingdom.

Nexus Test

- GAC will require economic concentrations taking place outside KSA to be notified where there is a sufficient nexus between the economic concentration and a market inside KSA. Pursuant to the KSA Competition Law and the Executive Regulations, this nexus is established where the foreign conduct (including economic concentrations among foreign undertakings) may have an effect on a market inside KSA.
- GAC will consider that there is sufficient effect on a market in the KSA where that potential effect is direct, substantial and reasonably foreseeable.
- Such economic concentrations among foreign undertakings are subject to the Article 7 of the KSA Competition Law and must therefore in general be notified if the other relevant criteria for required notification are also fulfilled.
- GAC will in general not consider there to be sufficient effect on the KSA market where the foreign conduct (including economic concentrations) does not meet these criteria. For clarity, a direct effect is not limited to direct sales and may take place by way of indirect sales (eg, sales by way of a distributor).
- GAC will also look to whether the actual or potential effect on competition is substantial. This requires that the effect take place on a market in KSA. GAC considers that this test will generally mean that jurisdiction is established where the actual or potential effect of the conduct on a market inside KSA is more than trivial.
- GAC will also look to whether the potential effects on a market are reasonably foreseeable. In the general case, this will mean that the effect of the foreign conduct (including an economic concentration) can be reasonably foreseen and is more than merely speculative.
- In general, GAC will consider it to be sufficient to establish a nexus if one or more of the foreign undertakings has sales in KSA. However, sales in KSA are not necessary to establish a sufficient nexus to a market in KSA.

2.9 Market Share Jurisdictional Threshold

GAC will consider market shares and market concentration in the context of the other relevant factors that it may consider in order to conclude if a market concentration will take place. GAC typically measures market concentration using market shares, market concentration ratios and the Herfindahl-Hirschman Index (HHI). The HHI is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the relevant market, thereby giving greater weight to the market shares of the larger firms. The HHI therefore requires the market shares, or estimates of them, for all the participants in the relevant market.

GAC will generally use the following HHI thresholds to undertake a preliminary assessment of the potential competition effects of an economic concentration:

- GAC is unlikely to identify horizontal competition concerns in an economic concentration in a market with a post-concentration HHI below 1,000. Such an economic concentration generally does not require extensive further analysis.
- GAC is unlikely to identify horizontal competition concerns in an economic

concentration with a post-concentration HHI between 1,000 and 2,000 and an HHI delta below 250, or an economic concentration with a post-concentration HHI above 2,000 and an HHI delta below 150, except where special circumstances that require additional competition analysis are present.

2.10 Joint Ventures

The KSA Competition Law uses the principle of economic concentration to assess merger control issues. A joint venture will constitute an "Economic Concentration" when "the joint venture forms an autonomous economic undertaking, or performs the economic functions of an autonomous economic undertaking, on a lasting basis". This would be considered a "full-function" joint venture. GAC will decide whether a joint venture would be considered a "full-function" joint venture on a case-by-case basis. Attributes of a "full-function" joint venture include:

- the joint venture must operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market;
- the joint venture must ordinarily have a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible), in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement;
- must be intended to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned (the joint venture resource would be indicative on this point); and
- will ordinarily have sufficient autonomy from its parent undertakings in terms of its operational decision-making to be considered a full-function joint venture.

A joint venture may begin its life as a non-full function joint venture and subsequently becomes a full-function joint venture, it will at that time be considered as a new Economic Concentration requiring notification. Such a change in the nature of the joint venture can include:

- the joint venture's activities are enlarged during its lifetime, such as commencement of commercial sales to third parties in an open market;
- enlargement of the joint venture, such as through acquisition by the joint venture of the whole or part of another undertaking from the parent undertakings;
- the parent undertakings transfer significant additional assets, contracts, know-how, or other rights to the joint venture, where this transfer would constitute or enable an extension of the joint venture's activities, products, or geographic markets that were not the object of the original joint venture; and
- a change in the organisational structure of the joint venture.

Changes in the nature of the joint venture are considered to have taken place upon the shareholder or the joint venture's management taking the relevant decision that lead to the joint venture becomes a full-function joint venture, or the relevant activity commences.

2.11 Power of Authorities to Investigate a Transaction

GAC has no authority to investigate a transaction that does not meet the jurisdictional thresholds expressed under the KSA Competition Law and Executive Regulations.

2.12 Requirement for Clearance Before Implementation

The Competition Law provides that the undertakings participating in the economic concentration (or transaction) may not complete the transaction unless notified by GAC of GAC's approval in writing, or if 90 days have elapsed since the review period by GAC has commenced and GAC has not provided an approval or rejection.

The 90-day regulatory review period will begin on the date on which GAC notifies the applicant that the applicant's notification submission is complete. If the last day of this regulatory review period corresponds to an official holiday, the next working day thereafter shall be considered the last day of this regulatory review period.

The regulatory review period may be suspended under certain circumstances:

- When GAC requests any information or documents from the applicants, GAC may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to GAC within the prescribed period.

Where the regulatory review period is suspended, the days during which it is suspended are not counted as part of the 90-day regulatory review period.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Where an economic concentration must be notified to GAC, it is a violation of the KSA Competition Law for the transaction to be completed unless the participating parties have received GAC's approval in writing. Please refer to **2.12 Requirement for Clearance Before Implementation**.

Please also refer to **2.2 Failure to Notify** with respect to the penalties implemented and their publication. GAC's 2020 annual report (most recent report here) does not indicate that any of the penalties imposed were with respect to parties who have implemented the transaction prior to GAC's clearance.

2.14 Exceptions to Suspensive Effect

Exemption

- GAC's board of directors has the authority pursuant to Article 8 of the KSA Competition Law and Chapter 7 of the Executive Regulations to provide a party or parties with an exemption that would exclude the KSA Competition Law from being applied to a specific transaction or economic concentration. The exemption will be granted if it would lead to improved market performance or improve the performance of undertakings in terms of the quality of the product or technological development or creative efficiency or both. The benefit of such exemption to the consumer should outweigh the effects of restricting the freedom of competition.
- An application for exemption under this mechanism must be made and will be considered by GAC if the application: (1) is made in the format and on the forms specified under the Executive Regulations; provides adequate justification for the application; (2) includes sufficient evidence of the positive results envisaged from the economic concentration; and (3) provides supporting documents and any other information that GAC requires to review the application.
- The board may, upon the recommendation of the technical committee, approve the application if the exemption would (1) lead to improving the market or undertakings' performance in terms of quality, diversification, technological development,

or innovative efficiency; and (2) benefit consumers to a degree that outweighs the negative effects from the restriction of competition; and (3) does not enable the undertaking(s) benefiting from the exemptions to exclude competition or competitors from any market. All three conditions must be met for an exemption application to be approved. In addition to these conditions, the board may also consider any other factor relevant to assessing the degree of restriction of competition resulting from the exemption and the benefits resulting from the exemption.

Failing Firm

- While GAC does not provide for a waiver or exemption for a failing firm under the KSA Competition Law, it does take this aspect into consideration in its assessment. Where one of the economic concentration parties is a failing firm, GAC may decide that an economic concentration which would otherwise cause competition problems may nonetheless be approved if the failing firm would be likely to exit the market even if the economic concentration does not take place.
- The basic requirement for a "failing firm defence" is that the deterioration of the competitive structure that follows the economic concentration would take place with or without the economic concentration and therefore cannot be said to be caused by economic concentration.
- GAC will generally only consider a "failing firm defence" to be appropriate if the economic concentration parties can demonstrate all three of the following criteria.
  - (a) that it is highly likely or inevitable that the allegedly failing undertaking would in the near future be forced to exit the market because of financial difficulties if it is not taken over by another undertaking;
  - (b) that the assets of the failing firm would also be highly likely or inevitable to exit the market if they do not participate in an economic concentration; and
  - (c) that there is no less anti-competitive alternative purchase or other alternative to the notified economic concentration.
- The onus is on the relevant parties to provide GAC, in due time, with the "failing firm defence", with all the relevant information necessary to demonstrate.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the authorities will permit closing before clearance or an exemption. It may be possible to carve out the businesses or assets in KSA and implement global closing to the extent the closing does not have a sufficient effect (see **2.8 Foreign-to-Foreign Transactions**) on the KSA market. GAC approval may be required.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

With respect to the required notification in the event the KSA Competition Law and Executive Regulations are applicable to a specific economic concentration, the relevant participants must notify GAC 90 days before completion of the economic concentration.

Please refer to **2.2 Failure to Notify** with respect to penalties and their imposition.

3.2 Type of Agreement Required Prior to Notification

As part of the initial application for notification to GAC, the applicant must also provide a finalised, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the share, equity, assets, rights or obligations to be purchased or transferred, or managements to be joined, between the relevant entities. GAC requires these documents for valid notification. If notification is made without all the requisite documents being provided, GAC reserves the right to close the notification file.

3.3 Filing Fees

The fee to be paid for examining the Economic Concentration (the "Notification Fee") is 0.0002 times (0.02% of) the total annual sales value of undertakings intending to participate in the Economic Concentration, with an upper limit of SAR400,000. The parties must pay the Notification Fee before submission of the notification and must submit proof of payment of the Notification Fee along with the other notification documents and information. GAC will require this proof of payment before the notification will be considered to be complete.

3.4 Parties Responsible for Filing

The parties intending to participate in the Economic Concentration transaction must notify GAC of the transaction. Notice of the transaction may be provided by the parties' legal representative on behalf of the parties. A failure by the concentration parties to submit a notification does not preclude GAC from initiating a review and assessment of economic concentration either prior to or after the completion of the transaction.

3.5 Information Included in a Filing

The notification should in general be completed in the Arabic language. Notifying parties may choose to complete the forms in the English language but this must be accompanied by a translation into Arabic.

When submitting the notification, the applicant should submit the following information and documents:

- the duly completed notification form, including the declaration as to the validity and accuracy of the information contained in the notification;
- relevant identification documents of the person submitting the notification;
- attach the required parties' documents (explained below);
- proof of payment of the prescribed fees for examining the economic concentration;
- the finalised, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the share, equity, assets, rights or obligations to be purchased or transferred, or managements are to be joined, between the relevant entities;
- a report that describes the economic impact of the transaction on the relevant markets ("Economic Report"), where this report should include a detailed description of the following items: (a) the economic concentration transaction and the participating parties, (b) the relevant sectors and markets on which the economic concentration may have an effect, (c) the key customers of the participating parties in those sectors and markets, (d) the key competitors of the participating parties in those sectors and markets, and (e) the potential impact of the economic concentration transaction on competition in those sectors and markets; GAC can discuss with the notifying parties the contents of such an Economic Report, and provide a brief template, upon request; plus any other data, information, or documents required by GAC to review the economic concentration; and
- a full explanation of the above submitted documents.

For the acquiring entity/merging entity/first partner in the JV:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate;
- articles of association;
- commercial register; and
- financial statements for LFY.

For the target entity/merged entity/second partner in the JV:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate;
- articles of association;
- commercial register; and
- financial statements for LFY.

For the seller:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate;
- commercial register;
- the official contact persons for the economic concentration parties and any relevant third parties are specified in the submission.

3.6 Penalties/Consequences of Incomplete Notification

If notification is made without all the requisite documents being provided, GAC reserves the right to close the notification file. Pursuant to GAC's 2020, 2019, and 2019 Annual Reports, zero applications were rejected for an incomplete notification application.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Pursuant to Article 49 of the Executive Regulations, if the notifying party is found to have withheld information, provided misleading information, or concealed or destroyed documents that are useful in GAC's investigation, they would be punished by a fine not exceeding (5%) of the total annual sales turnover or not exceeding SAR5 million when it is impossible to estimate the annual sales.

3.8 Review Process

The Economic Concentration must be notified to GAC at least 90 days prior to the completion of the Economic Concentration. The applicant's notification submission will be considered to be complete when the applicant has satisfied the required conditions for notification including providing the required information and documents required for complete notification. The 90-day regulatory review period will begin on the date on which GAC notifies the applicant that the applicant's notification submission is complete.

The regulatory review period may be suspended when:

- GAC requests any information or documents from the applicants, GAC may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents;
- GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to GAC within the prescribed period.

A case team will be appointed to conduct its review and investigation into the economic concentration, within the 90 days. Once the case team has completed its review, it will submit a detailed note outlining its opinion for GAC board of directors. The board will evaluate the case team's opinion, taking into account all relevant factors and its objectives under the KSA Competition Law and Executive Regulations. The board will issue a decision in one of the following three ways:

- approval of the economic concentration application;
- refusal of the economic concentration application, where such decision will be accompanied by a statement of reasons; or
- approval of the economic concentration subject to conditions determined by the board, where such decision will be accompanied by a statement of reasons.

3.9 Pre-notification Discussions With Authorities

GAC is generally available for discussions with parties or their representatives prior to the formal notification of an economic concentration transaction.

Pre-notification discussions are entirely voluntary and at the parties' discretion. GAC will not conduct pre-notification discussions on a hypothetical basis or without knowing the identities of the parties and markets at issue. To request a pre-notification discussion, the parties or their representatives should provide the following information to GAC: (i) the names and contact information of the economic concentration parties and their representatives (if any); (ii) the type of transaction; (iii) the markets or goods and services affected by the proposed transaction; and (iv) the possible impact of the transaction on competition in general terms.

It is generally recommended that this information be provided in the form of a brief confidential memorandum to GAC as this will assist the efficiency of the pre-notification process.

Pre-notification discussions are encouraged by GAC and treated as strictly confidential.

3.10 Requests for Information During the Review Process

The information requested during the review process includes:

- documents, records, data, files, specific written information and other information that GAC considers relevant for its review of the transaction;
- such information from other parties, including from competitors, other stakeholders and the general public;
- GAC may similarly accept information that has been offered voluntarily by other parties; and
- GAC may require any of the economic concentration parties or other parties to provide it with market information to evaluate the effects of economic concentration on competition.

Written Requests

- A request for information will ordinarily take place by way of a written request for information addressed to the relevant parties or their nominated representatives. The written request for information will state the purpose of the request, specify what information is required, and specify the time limit within which the information is to be provided.
- A written request for information may cover all types of information helpful to the case team in assessing the transaction, including but not limited to written responses to specific questions, data and statistics, economic studies and market surveys, the parties' internal documents such as strategic plans, strategic analyses of corporate markets, pricing policies, business plans, marketing plans, long- and short-term forecasts, a list of major customers, information about competitors, marketing and sales reports, sales and bidding data, excess capacities data, production costs, and any other documents and data that GAC deems to be necessary for its assessment of the intended economic concentration.

Meetings and Interviews

GAC may also gather information by holding meetings and direct interviews with the concentration parties or third parties. GAC may communicate by phone with any of the representatives or affiliates of the concentration parties for discussion and request any information required for the review of economic concentrations at any stage of the review process, when necessary.

Information that may be sought by way of phone communications or meetings may include the following:

- basic or summary information that is required without delay;
- verification of specific claims submitted by one of the concentration parties or third parties;
- identification of specific individuals people who can provide evidence; and
- any other information that may appropriately be sought in this way.

The 90-day regulatory review period may be suspended under certain circumstances:

- when GAC requests any information or documents from the applicants, GAC may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents;
- when GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to GAC within the prescribed period.

3.11 Accelerated Procedure

There is no indication that there is an option for an accelerated procedure under the applicable law or GAC regulations.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test employed by GAC pursuant to the KSA Competition Law and Executive regulations is whether there is an economic concentration (as defined under the KSA Competition Law) that cause a sufficient impact on the KSA market and lessens competition. Further, GAC considers change of control to be directly correlated with an economic concentration taking place.

4.2 Markets Affected by a Transaction

In assessing whether an economic concentration substantially lessens competition, GAC will examine the competitive impact of the transaction in the context of the markets relevant to the economic concentration.

In defining markets in their product and geographic dimensions, GAC focuses on two key dimensions of substitution:

- the product dimension – substitution between products is a central concept in defining the product dimension of markets. GAC notes that "product" in this context includes goods, services and other equivalent economic outputs;
- the geographic dimension – substitution between different locations of the relevant goods or services is a central concept in defining the geographic dimension of markets. GAC notes that the "geographic dimension" in this context may be local, regional, national, or wider, including worldwide.

When defining markets, GAC will in most cases follow a general approach:

- First, the products and geographic regions actually or potentially supplied by the eco-

nomic concentration parties will be identified. This is the first step in identifying the markets that may be relevant in the analysis of the economic concentration. In this way, GAC begins by considering those areas of activity where competitive harm may occur, by considering in each case the products and geographic regions where there may be an overlap between the activity of the economic concentration parties, or some other meaningful economic relationship such as an actual or potential vertical relationship. This is done on a case-by-case basis. In many cases, more than one potential market may be identified.
- GAC then considers the boundaries of those potential markets in their product and geographic dimensions. A properly defined relevant market includes all those products and geographic regions that are sufficiently close substitutes of the products and geographic regions first considered.

Further to the above, there are specific factors enumerated in the Executive Regulations that GAC may pass within its overall objectives of protecting and promoting competition within a market. These are as follows:

- Structures of relevant markets and the level of actual or potential competition between undertakings inside KSA or abroad, in cases where it has an impact on local markets.
- Financial positions of the parties to an economic concentration.
- Commodity alternatives that are available to consumers, vendors and clients, and how accessible such alternatives are.
- Level of product differentiation.
- Consumer interests and welfare.
- Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market.
- Actual or potential harm or benefits to competition from the economic concentration transaction.
- Supply and demand growth and trends in the relevant market and commodities.
- Barriers to entry or exit of new undertakings into a relevant market, their continuation therein, or expansion, including regulatory barriers.
- The extent to which an economic concentration may create or strengthen a significant market power or a dominant position of an undertaking – or group of undertakings – in any relevant market.
- The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the undertakings influential in such market.
- Views of the public, economic concentration-related parties, and sector regulators.

Dominance in a relevant market can be demonstrated if one or both of the following criteria are achieved:

- A market share of 40% or more of the relevant market; whether it is the share of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.
- Ability to influence a relevant market such as controlling prices, production, or demand; whether it is the ability of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.

4.3 Reliance on Case Law

There is no indication of GAC relying on case law with respect to issues such as market definitions from other jurisdictions.

4.4 Competition Concerns

GAC will broadly consider the following three categories of economic concentration:

- horizontal concentrations – these involve concentrations of (actual or potential) suppliers of substitutable goods or services, typically operating on the same or a comparable functional level of the supply chain, and therefore commonly a concentration of competitors in the same market;
- vertical concentrations – these involve undertakings operating (or potentially operating) at different functional levels of the same vertical supply chain, commonly where the output in one market is an input into production in the other market, and are therefore commonly not in direct competition with each other in any market;
- conglomerate concentrations – these involve undertakings that operate (or potentially operate) in different markets and without being in the same vertical supply chain, but supplying goods or services that are in some way related to each other, for example products that are complements for consumers or in production.

4.5 Economic Efficiencies

GAC assesses the effect of economic concentrations on competition, competitive constraints and the efficiency of markets, rather than on the efficiency of individual entities.

The consideration of efficiencies is relevant to the competition assessment if, and only if, the efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services – in which case the conclusion may be that the economic concentration may not substantially lessen competition.

For GAC to take account of efficiency claims in its assessment of an economic concentration and to be in a position to reach the conclusion that, as a consequence of efficiencies, the economic concentration is unlikely to substantially lessen competition, the efficiencies have to benefit consumers; be specific to the economic concentration; and be verifiable. All of these conditions must be satisfied for GAC to consider efficiencies in the context of its competitive assessment of economic concentrations.

4.6 Non-competition Issues

There is no express limitation or permission on what GAC can take into account to achieve the KSA Competition Law and Executive Regulation objectives.

KSA has a standalone law with respect to foreign investments that seems to be separate from the KSA Competition Law.

4.7 Special Consideration for Joint Ventures

See **2.10 Joint Ventures**.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

To the extent the transaction creates an economic concentration that sufficiently impacts the KSA market, the GAC board has the authority to reject the notification filing and block the transaction from taking place or require conditions for the transaction to proceed. GAC has this authority pursuant to the KSA Competition Law and Executive Regulations.

5.2 Parties' Ability to Negotiate Remedies

The parties may propose structural or behavioural remedies.

In most cases, remedies are proposed by the economic concentration parties, at their discretion, as a means of permitting a transaction to be approved subject to conditions rather than the transaction being blocked altogether. In principle, the structure and content of the remedies offered to GAC will therefore be a matter for the party offering the remedies. However, GAC will only accept remedies as conditions if it is satisfied that they address GAC's competition concerns to a degree sufficient to allow GAC to approve the transaction subject to those conditions. GAC will generally provide detailed feedback on the form and content of remedies proposed by the parties, including regarding whether GAC would be satisfied that they would alleviate the competition concerns sufficiently, and if not, what amendments to the proposed remedies would be required for GAC to accept them.

Economic concentration parties therefore have strong incentives to propose effective and enforceable remedies to GAC alleviate the identified competition concerns.

5.3 Legal Standard

There is no specifically expressed legal standard for remedies. An acceptable remedy must adequately address and alleviate the potential competition harm created by the specific economic concentration.

5.4 Typical Remedies

The most common form of structural remedy likely to be accepted by GAC is divestiture.

We are not aware of GAC requiring remedies to address non-competition issues.

5.5 Negotiating Remedies With Authorities

Economic concentration parties are free to propose remedies to GAC at any time throughout the transaction review process, including at the outset of the review, the prenotification phase, the moment of first notification, and after the economic concentration parties have been advised of potential competition concerns during a review. In general, economic concentration parties are encouraged to begin discussions with GAC as early in the process as possible.

When an economic concentration raises competition issues at the outset or during a review, the economic concentration parties may decide to offer remedies to GAC. If GAC accepts that the remedies are sufficient to address the competition concerns in that case, GAC may decide to approve the economic concentration subject to the conditions that the remedies be implemented, rather than blocking the economic concentration.

5.6 Conditions and Timing for Divestitures

A divestiture remedy will normally specify the following key elements:

- the scope of the divestiture package, such as the assets or businesses (or parts of businesses) to be disposed;
- the process for selecting a purchaser; and
- the process for the disposal, including the required timeline for the disposal.

Parties may not complete a transaction before remedies are complied with.

GAC maintains a role in relation to remedies and conditions accepted in relation to economic concentration, including:

- monitoring parties' compliance with commitments; and
- investigating suspected breaches and enforcing remedies and conditions, including by legal action where appropriate.

Non-compliance or breach of an agreed remedy is a violation of the KSA Competition Law.

- Where the economic concentration parties commit a breach of an obligation under the conditions, GAC may revoke its approval decision. In some cases, such as where a required divestiture is not made within the required timeframe, GAC's decision to approve the economic concentration subject to the conditions may lapse on the basis that the required condition was not fulfilled. This, and comparable breaches of the conditions, may subject the economic concentration parties to fines under Article 19 of the KSA Competition Law.
- The economic concentration parties may also be subject to fines under Article 20 of the KSA Competition Law, and other measures under Article 21 of the KSA Competition Law, where such measures may include requiring the economic concentration parties to unwind the economic concentration. Furthermore, GAC will also take into account all other relevant provisions of the KSA Competition Law and the Executive Regulations in setting fines and other measures, including but not limited to Article 22 of the KSA Competition Law and Chapter 7 of the Executive Regulations.

5.7 Issuance of Decisions

A formal decision permitting or prohibiting a transaction maybe issued to the party by GAC. In the event the investigation period of 90 days' lapses without the issuance of a decision by GAC, then it would be considered an approval pursuant to the KSA Competition Law. The application decisions are made public (as a statistic in GAC annual report); however, the party names are not mentioned unless they are penalised.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

We are not aware of GAC having required remedies or prohibited foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Clearance decisions will only cover competition issues.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Relevant third parties could be involved in the review process by the applicant including them in the application submission, or by GAC requiring their input. The third parties have a right to request an interview or make a claim as part of a specific investigation for economic concentration. GAC may elicit information from third parties by conducting a survey.

The case team may discuss its interim assessment with third parties in order to identify and to seek to resolve any unresolved issues of any kind. The case team may present its interim assessment or part thereof to third parties for their opinions, while taking account of the need to obtain objective, impartial and substantiated opinions.

The third parties' interests in confidentiality will be preserved throughout the assessment and investigation process. No documents of the third parties will be shared with others, except pursuant to the procedures outlined in the guidelines. Where a GAC document to be released during interim consultations contains information that is confidential to a third party, GAC will prepare a public version of that document which redacts any such confidential information. The parties whose confidential information is to be redacted will be given an opportunity to comment on this redaction.

7.2 Contacting Third Parties

Please see **7.1 Third-Party Rights**.

7.3 Confidentiality

The KSA Competition Law provides that the members of the board of directors and the employees of GAC must maintain the confidentiality of information, records, data, files and documents (together, "information") obtained from the economic concentration parties or other entities in the course of collecting evidence or investigations. Such information may not be passed to other parties except with the approval of the board, where the board's approval has been recorded in the meeting minutes, or with the approval of the Governor in the following cases:

- with the consent of the party providing the information;
- for submission of the information to judicial and quasi-judicial bodies; or
- for the purposes of the exchange of views and opinions with international competition authorities concerned with the review process, where the Economic Concentration Parties have been notified of GAC's intention to disclose the information, and provided that the international competition authority receiving the information shall take the necessary legal measures for the protection of the confidentiality of the information.

7.4 Co-operation With Other Jurisdictions

Where an economic concentration is also being reviewed by competition authorities in other countries, including in cases where the possibility of remedies has also been raised in those other countries, GAC will seek where possible and reasonable to consult and coordinate with those foreign competition authorities. This consultation and coordination is for the purpose of seeking consistency where this is feasible and appropriate, including in relation to remedies.

Where appropriate, GAC will seek confidentiality waivers from economic concentration parties that allow GAC to exchange confidential information relating to the economic concentration with the relevant overseas competition authorities. GAC expects economic concentration parties to give GAC the same notice of economic concentrations and any potential remedies offered as the parties give to the overseas competition authorities, and normally requires simultaneous lodgement of submissions with GAC and overseas competition authorities.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The parties have 30 days from the date of notification or from the date specified for delivering the decision to the parties to the case, even if they failed to appear, to appeal GAC's decision to the Riyadh Administrative Court of Appeal, otherwise it will become final.

If one of the parties appeals GAC's decision before the Riyadh Administrative Court of

Appeal, that party must notify GAC within three working days from the date of appeal, by means of a letter containing GAC's decision number and date and the number and date of the appeal filed with the Riyadh Administrative Court of Appeal and a copy thereof.

8.2 Typical Timeline for Appeals

There are no release statistics with respect to successful or unsuccessful appeals against GAC.

8.3 Ability of Third Parties to Appeal Clearance Decisions

We are not aware of any third-party appeals of GAC decisions as of yet.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There are no recent changes, as the KSA Competition Law and Executive Regulations are fairly new.

9.2 Recent Enforcement Record

See **2.2 Failure to Notify**.

9.3 Current Competition Concerns

The latest GAC annual report is from 2020 and they have yet to publish the 2021 report as of now. As such, there is no current information from GAC in this regard.

Nader Al Awadhi In Association with GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. GLA & Company's practice encompasses all of the legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE), the firm offers unique insights for companies seeking to establish or expand business operations in these nations. Its job on deals is to get the same cleared with the local Competition Authority. GLA & Company has deep relationships with regulators in the GCC and has become successful in securing no objections from these bodies to clear these deals. Its lawyers are intimately familiar with the governing sources of authority and it routinely works with the relevant agencies, departments and committees on behalf of its clients.

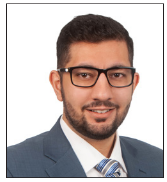
AUTHORS

Asad Ahmad is a relentless advocate for his clients. He has been involved in a number of transactional and advisory works in various industries, including logistics, construction, finance, healthcare and education. Asad's scope of practice has involved comprehensive representation with respect to mergers and acquisitions, conducting extensive due diligence exercises in relation to complex transactions, as well as distribution and agency arrangements. Asad has extensive background in advising on marketing of securities, corporate governance issues, policies and regulatory compliance. Due to increased need, Asad has expanded his expertise in advising on the framework of data protection and regulation.

Alex Saleh is a founder and managing partner of GLA & Company and takes a leading regional role in the firm concerning its M&A and Private Equity practice. With over 25 years of experience in both the GCC and the US, he has accumulated sizable expertise in the areas of banking and finance, M&A, capital market deals and infrastructure projects. His experience garners praise from the leading legal directories, and his transactions regularly win Deals of the Year from the same institutions and organisations.

Contributed by: Asad Ahmad, Alex Saleh, Yousef Al Amly and Ahmad Saleh, Nader Al Awadhi In Association with GLA & Company

Yousef Al Amly is a partner at GLA & Company and advises clients on complex corporate and commercial structures and transactions in relation to joint ventures, corporate restructuring, M&A, equity capital markets and commercial transactions (including franchise, distributorship and agency). This includes negotiating and drafting the terms and conditions of agreements and documentation related to any of the said transactions both in English and Arabic, such as commercial contracts, due diligence reports, shareholders' arrangements, sale and purchase agreements, acquisition finance, IPO prospectuses and other legal documents necessary to carry out corporate/commercial transactions.



Ahmad Saleh is a senior associate with the Corporate Department at GLA & Company and licensed in the State of Ohio, US, and the Federal District for the Southern District of Ohio, US. His practice focuses primarily on M&A, other local and cross-border transactions, and complex construction disputes. Since joining GLA & Company, Ahmad has successfully advised multinational clients across various industries, including construction and manufacturing, government contracting, finance, food and retail. Ahmad is regularly involved in acquisitions and other matters, and recently has been focusing on complex contractual disputes for major construction projects in the State of Kuwait.

GLA & Company

Tel: +971 4 553 9448
Fax: +965 2291 5800
Email: info@glaco.com
Web: www.glaco.com

SINGAPORE

Law and Practice

Contributed by:
Lim Chong Kin and Corinne Chew
Drew & Napier LLC ***see p.542***

CONTENTS

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The merger control legislation in Singapore is set out in the Competition Act 2004, which is the primary competition legislation in Singapore. In particular, Section 54 of the Competition Act prohibits mergers and acquisitions that have resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market in Singapore (the Section 54 Prohibition).

The Competition Act was enacted on 19 October 2004 and implemented in phases, with the merger provisions coming into force on 1 July 2007. The Act is enforced by the Competition and Consumer Commission of Singapore (the Commission).

The Commission has issued the following guidelines on how it will interpret and give effect to the merger control provisions in the Competition Act:

- Guidelines on Merger Procedures (revised on 1 February 2022); and
- Guidelines on the Substantive Assessment of Mergers (revised on 1 February 2022).

1.2 Legislation Relating to Particular Sectors

While Singapore does not have any general legislation prohibiting or requiring consent for foreign transactions or investments, certain sectors (eg, media and telecommunications) may have laws on foreign ownership.

Certain industry sectors, such as telecommunications, media, post, gas and electricity, are regulated by industry-specific statutes containing merger control provisions, which are in turn enforced by industry-specific regulators. In particular, the Section 54 Prohibition does not apply to the following mergers specified in the Fourth Schedule of the Competition Act:

- mergers approved by any minister or any regulatory authority (other than the Commission), including the Monetary Authority of Singapore, pursuant to any requirement imposed by or under any written law;
- mergers under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition;
- mergers relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations; or
- mergers with economic efficiencies that outweigh the adverse effects of the SLC within a market in Singapore.

1.3 Enforcement Authorities

The Commission is the statutory body responsible for administering and enforcing the Competition Act. With effect from 1 April 2018, the Commission also assumed responsibility for administering and enforcing the Consumer Protection (Fair Trading) Act 2003, which provides for the protection of consumers against unfair practices and related matters.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, sectoral regulators have purview over merger control in their respective sectors.

In cross-sectoral competition matters, the Commission will work with the relevant industry-specific regulator(s) to determine which regulator is best placed to handle the matter in accordance with statutory powers. The lead will be taken by the agency that is best placed in terms of its ability to investigate the alleged anti-competitive conduct and impose any necessary remedies.

2. JURISDICTION

2.1 Notification

Notification in respect of a merger, or an anticipated merger, is voluntary. Merger parties may notify a merger before, during or after the merger comes into effect. However, there are risks attached to proceeding with a merger before or during notification, as the Commission may commence investigations on its own initiative and issue directions or impose financial penalties if any infringement is found.

2.2 Failure to Notify

As notification is voluntary, there are no sanctions for failing to notify the Commission of a merger. Merger parties should undertake a self-assessment to determine if notification is appropriate – eg, if they think that the merger may result in an SLC within any market in Singapore.

Even if no notification is made, the Commission may nonetheless initiate an investigation if it has reasonable grounds for suspecting that the Section 54 Prohibition has been or will be infringed. If the Commission decides that there is or will be an infringement, it may decide on actions to remedy, mitigate or prevent any adverse effects to competition caused by the merger. These actions may include a direction to divest all or part of the business or to unwind the merger (see **5.4 Typical Remedies**).

If the Commission finds that the infringement was committed intentionally or negligently, a financial penalty may be imposed on any of the merger parties, which may not exceed 10% of each party's business turnover in Singapore for each year of infringement, up to a maximum of three years.

2.3 Types of Transactions

In general, mergers and anticipated mergers that have resulted, or may be expected to result, in an SLC within any market in Singapore will be caught. A merger occurs if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part of the business in which that undertaking was engaged immediately before the acquisition.

While an undertaking's acquisition of a majority stake in another undertaking is one of the more obvious examples of a merger, the creation of a joint venture through the transfer or pooling of assets may also be subject to the merger provisions.

Certain transactions do not constitute a merger for the purposes of the Competition Act, if:

- the person acquiring control is a receiver or liquidator acting as such, or is an underwriter acting as such;
- all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or

- control is acquired by an undertaking, the normal activities of which include carrying out transactions and dealings in securities for its own account or for the account of others under the circumstances specified in Section 54(9) of the Competition Act.

The determination of whether a merger exists is based on qualitative rather than quantitative criteria, focusing on the concept of control, which may occur on either a legal or de facto basis.

2.4 Definition of "Control"

Control is the ability to exercise "decisive influence" in relation to the activities of an undertaking. This requires consideration of all relevant circumstances of the case and not only the legal effect of any instrument, deed, transfer, assignment or other act.

Control of an undertaking is seen to exist if decisive influence is capable of being exercised, particularly by:

- ownership of, or the right to use all or part of, the assets of an undertaking; or
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

The Commission considers that decisive influence is deemed to exist if there is ownership of more than 50% of the undertaking's voting rights. Where ownership is between 30% and 50% of the undertaking's voting rights, there is a rebuttable presumption that decisive influence exists. "Voting rights" refers to all the voting rights linked to the share capital of an undertaking and currently exercisable at a general meeting. That said, control could potentially be established at levels below these indicative thresholds if other relevant factors (eg, other forms of voting rights) provide strong evidence of control.

The Commission may also assess, on a case-by-case approach, whether a party has de facto control over an undertaking. For example, decisive control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, the appointment of senior management or market-specific rights. The acquisition of a minority shareholding that confers decisive influence over an undertaking could amount to a merger that is considered reviewable by the Commission.

2.5 Jurisdictional Thresholds

As merger notification is voluntary, the market share thresholds set out by the Commission are indicative thresholds, and mergers that fall below these thresholds may still be investigated in appropriate circumstances.

The Commission is unlikely to investigate a merger involving only small companies where the following applies in the financial year preceding the merger:

- each party's turnover in Singapore was below SGD5 million; and
- the combined worldwide turnover of all the parties was below SGD50 million.

The Commission generally takes the view that competition concerns are unlikely to arise in a merger situation unless the market share of the merged entity will be:

- 40% or more; or
- between 20% and 40%, and the post-merger market share of the three largest firms is 70% or more.

Conversely, mergers that meet or exceed the above thresholds are not necessarily prohibited under Section 54 of the Competition Act. Merger parties are encouraged to carry out self-assessments as to whether their transaction is likely to lead to an SLC in any market in Singapore and if notification to the Commission is recommended.

There are also prescribed notification thresholds in the merger control regimes of some sectors regulated by industry-specific statutes.

2.6 Calculations of Jurisdictional Thresholds

The indicative thresholds are calculated on the basis of market shares.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Market share thresholds are based on how the market is defined and this, in turn, is dependent on the specific facts and circumstances of the particular merger under assessment or investigation.

2.8 Foreign-to-Foreign Transactions

Save for the exceptions set out in the Fourth Schedule to the Competition Act, the Section 54 Prohibition applies to any merger or anticipated merger that has resulted, or may be expected to result, in an SLC within any market in Singapore, regardless of whether the parties to the merger have a local presence within Singapore.

2.9 Market Share Jurisdictional Threshold

While, theoretically, one party may meet the indicative market share thresholds in the absence of a substantive overlap, notification of the merger to the Commission is recommended only where there are concerns that the merger will lead to an SLC in any market in Singapore.

2.10 Joint Ventures

The merger provisions apply to joint ventures that constitute a merger – ie, if they:

- are subject to joint control;
- operate in the market and perform all the functions of an autonomous economic entity operating in that market; and
- are intended to operate on a lasting basis.

There is joint control where two or more parties are able to exercise decisive influence over the undertaking, which includes the power to block actions that determine the strategic commercial behaviour of the undertaking. Joint control is characterised by the possibility of a deadlock arising from the power of two or more parent companies to reject proposed strategic decisions; hence, there is a requirement that the shareholders must reach a consensus in determining the commercial activities of the joint venture.

A joint venture is subject to the Section 54 Prohibition only if it operates in the market and performs all the functions of an autonomous economic entity. A joint venture that only takes over one specific function within the parent companies' business activities without access to the market will not come under the purview of the Section 54 Prohibition – for example, if the joint venture is limited to research and development, or production only, or the distribution or sales of its parent companies' products. However, a joint venture that makes use of one or more of its parent companies' distribution networks or outlets, or relies almost entirely on sales to or purchases from its parent companies for an initial start-up period, is not precluded from being regarded as performing all the functions of an autonomous economic entity, if it is geared to play an active role in the market.

A joint venture that constitutes a merger must be intended to operate on a lasting basis, which may normally be demonstrated by the commitment of resources by its parent companies. For joint ventures established with a specified duration, the agreement should provide for a sufficiently long time period in order to bring about a lasting change in the structure of the undertakings concerned, or otherwise for the possible continuation of the joint venture beyond this period. Conversely, a joint venture established for a short, finite duration will not be considered to be operating on a lasting basis.

2.11 Power of Authorities to Investigate a Transaction

The Commission may conduct an own-initiative investigation into mergers that were not notified if there are reasonable grounds to suspect that the Section 54 Prohibition is, or will be, infringed. The Commission may also investigate a merger based on information from complaints by third parties or its market intelligence function. There is no statute of limitations on the Commission's ability to investigate a merger or apply sanctions.

2.12 Requirement for Clearance Before Implementation

There is no requirement for parties to suspend the implementation of a merger, or anticipated merger, prior to clearance. While merger parties may implement an anticipated merger or further integrate a completed merger before or during notification to the Commission, these actions are done at the parties' own risk if there is a likelihood that the merger may lead to an SLC; see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Commission may issue directions imposing any interim measures it considers appropriate for mergers under investigation. Interim directions are issued for the purposes of preventing merger parties from taking any action that may prejudice the Commission's investigations or its ability to impose the appropriate remedies, or as a matter of urgency to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. These measures may include suspending the merger, prohibiting the transfer of staff, or setting limits on the exchange of commercially sensitive information.

If the parties concerned do not comply with the Commission's direction, the Commission may apply to register the direction with a district court, following which any person who fails to comply with the registered direction without reasonable excuse may be found to be in contempt of court. Sanctions for contempt of court include the imposition of a fine or imprisonment. The court may also issue orders to secure compliance with the direction, or to require any person to remedy, mitigate or eliminate any effects arising from non-compliance.

As a matter of practice, the Commission is unlikely to use these powers unless it believes there is a real possibility of the merger raising serious competition concerns. As of 11 May 2022, the Commission has only exercised its power to issue interim directions once, in the case of Grab's acquisition of Uber's Southeast Asian business and Uber's acquisition of a 27.5% stake in Grab (Grab-Uber case); see **9.2 Recent Enforcement Record** for a brief discussion of the case.

Where the Commission finds that there has been an infringement of the Section 54 Prohibition, it will decide on the appropriate action to remedy, mitigate or prevent the adverse effects resulting from the merger, and to prevent the recurrence of such infringements. Such actions may involve directions requiring the unwinding of the merger or the divesting of one of the overlapping businesses that led to the competition concerns, as well as the imposition of financial penalties; see **5.4 Typical Remedies**.

2.14 Exceptions to Suspensive Effect

The notification of a merger under the Competition Act does not itself have a suspensive effect on the transaction. However, where the Commission issues interim directions to the parties, there are no prescribed general exceptions to the suspensive effect of such interim directions. Prior to the issuance of interim directions (ie, to suspend a merger), the Commission will provide parties with the proposed interim directions and an opportunity to make written representations. The Commission will consider the written representations before making a decision on whether or not to issue the interim directions.

If issued, the interim directions take effect immediately from the date of issuance and shall be in effect until the completion of the Commission's investigations, or unless otherwise varied by the Commission.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As notification is voluntary, merger parties may choose to implement an anticipated merger or further integrate a completed merger while it is being considered by the Commission, or before notifying the Commission. However, see **2.12 Requirement for Clearance Before Implementation** and **2.13 Penalties for the Implementation of a Transaction Before Clearance** on the risks of proceeding with a merger before clearance.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

As notification is voluntary, the Competition Act does not stipulate any deadlines for notification. Instead, merger parties are strongly encouraged to conduct a self-assessment of the merger and consider whether to notify the Commission. Parties may choose to notify their merger to the Commission for a decision at any time before, during or after the merger.

Anticipated mergers may only be notified if they are no longer confidential and may be made known to the public, preferably prior to the completion of the merger. For completed mergers, an application may be made at any time, although parties are encouraged to do so as soon as possible after completion.

3.2 Type of Agreement Required Prior to Notification

For anticipated mergers, an application can only be made once the parties have a bona fide intention to proceed with the transaction and the merger has been made public, or if the parties have no objections to the Commission publicising their merger for the purpose of seeking third party views. In practice, the Commission is likely to require a memorandum of understanding or draft agreement to evidence such an intention. For completed mergers, the Commission would require a binding agreement for the filing to be made.

3.3 Filing Fees

The filing fees for mergers or anticipated mergers are as follows:

- where the turnover of the target undertaking or asset is equal to or less than SGD200 million, the fee is SGD15,000;

- where the turnover of the target undertaking or asset is between SGD200 million and SGD600 million, the fee is SGD50,000; and
- where the turnover of the target undertaking or asset is above SGD600 million, the fee is SGD100,000.

If the merger parties are small or medium-sized enterprises (SMEs) or if the acquiring party is an SME, and direct or indirect control in the SME will not be (or has not been) acquired, the filing fee will be SGD5,000. SMEs are defined in the Competition (Fees) Regulations 2007 as undertakings with an annual sales turnover of not more than SGD100 million or having no more than 200 employees.

3.4 Parties Responsible for Filing

Any party to a merger or anticipated merger may apply to the Commission for a decision. Joint filings are encouraged by the Commission.

3.5 Information Included in a Filing

The Commission will review a merger in either one or two phases. A Phase 1 review, which begins with the submission of a completed Form M1, entails a quick assessment and allows the Commission to give a favourable decision with regard to a merger situation that clearly does not raise any competition concerns. If the Commission is unable to clear a merger situation after a Phase 1 review, it will provide the applicant(s) with a summary of its key concerns and conduct a more detailed assessment in a Phase 2 review, upon receiving a completed Form M2 and response to the Phase 2 information request from the applicant(s).

Applicants should include all relevant documents to support statements and explanations made in Form M1, including transaction documents, annual reports and accounts, and business plans, among others.

Form M2 lists the further information and supporting documents that may be required by the Commission in a Phase 2 review. If the applicants consider that the merger is likely to go into a Phase 2 review, they may also voluntarily submit the information required in Form M2 at the outset, together with Form M1.

Even where Forms M1 and/or M2 have been completed and submitted, the Commission may require additional information from the applicant(s) for the purposes of assessing the merger situation.

3.6 Penalties/Consequences of Incomplete Notification

The Commission may refuse to accept an application if it is not:

- complete;
- accompanied by relevant supporting documents;
- substantially in the prescribed form;
- accompanied by the appropriate fee; or
- in compliance with any requirement prescribed under the Competition Act or accompanying regulations.

To avoid any unnecessary delay, merger parties should therefore ensure that the application is complete and all filing requirements are met upon submission.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the Commission has issued a favourable decision based on information that was incomplete, false or misleading, it may review and revoke the decision.

Persons who recklessly or intentionally provide false or misleading information to the Commission may also be charged and convicted of a criminal offence under the Competition Act.

Upon conviction, such persons may face a fine of up to SGD10,000 or imprisonment for up to 12 months, or both. As of 11 May 2022, based on publicly available information, no cases have been brought in respect of such offences under the Competition Act.

3.8 Review Process

In general, the Phase 1 review is expected to be completed within 30 working days, commencing on the working day after the day of receipt of a completed application. If a Phase 2 review is required, the Commission will endeavour to complete it within 120 working days of the applicant(s) submitting a completed Form M2 and a response to the Phase 2 information request that is deemed satisfactory by the Commission. In any event, the indicative timeframe for Phase 2 will only commence after the expiry of the indicative timeframe of 30 working days for the Phase 1 review.

Merger parties should note that the indicative timeframes are not binding on the Commission and that the Commission has the power to "stop the clock" during the review – eg, if the merger parties fail to provide the Commission with the additional information requested within the stipulated time period (or any extensions of time given), or if commitments are being considered.

3.9 Pre-notification Discussions With Authorities

Parties may either engage the Commission in pre-notification discussions (PNDs) or seek confidential advice before submitting Form M1 and commencing the formal notification process.

PNDs

To expedite the review process, merger parties intending to make an application may engage the Commission in PNDs to discuss the content of the notification and the timing of the formal notification.

No specific timetable is given, since the Commission states that the length and formality of PNDs depend on the merger parties' preference, the transaction's complexity and the concerns that may be raised. The Commission states that PNDs are most useful where a draft Form M1 is provided.

In PNDs, the Commission will generally not give its views on whether a merger situation is likely to proceed to Phase 2 review or if it might lead to an SLC.

While parties can engage in PNDs for anticipated mergers that may not yet be made public, PNDs are not intended to relate to purely speculative or hypothetical transactions. Parties should demonstrate a good faith intention to proceed with the transaction – eg, by already having a draft agreement in place.

Confidential Advice

Parties may approach the Commission for confidential advice on a merger, especially at the stage when merger parties are concerned about preserving the confidentiality of the transaction. This process is only available if the Commission is satisfied that the following conditions are met:

- the merger must not be completed but there must be a good faith intention to proceed with the transaction;
- the merger must not be in the public domain, unless exceptional circumstances apply;
- the merger situation must raise a genuine issue relating to competitive assessment in Singapore – eg, if there is a lack of relevant precedents – and therefore the Commission's approach to the merger situation is genuinely in doubt; and
- the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger in respect of which confidential advice

was obtained – eg, the completion date or abandonment of the merger.

If the Commission decides that the above conditions are not met, it will return the confidential information that was submitted by the merger parties. The Commission will not disclose the fact that confidential advice was requested, or the parties' information, to other organisations or foreign competition authorities unless relevant waivers are given by the merger parties.

3.10 Requests for Information During the Review Process

In both Phase 1 and Phase 2 reviews, the Commission may request additional or more comprehensive information when it is clear that the information is necessary. Applicants are encouraged to comply with such information requests promptly and by such deadline as the Commission deems appropriate, so that the merger assessment can be completed within the indicative timeframes. If the requested information cannot be furnished by the deadline, the applicants should promptly request an extension of time from the Commission.

The Commission may "stop the clock" and thereby extend the relevant time period for assessing the merger. If the applicant fails to provide the additional information within the deadline and any time extensions that have been granted, the Commission has the power to determine the application by not giving a decision, and then commence its own investigation into the merger using its statutory powers.

3.11 Accelerated Procedure

There is currently no separate accelerated review procedure available. That said, Phase 1 is generally considered a quick assessment that allows the Commission to issue a favourable decision in the case of a merger that is unlikely to raise any competition concerns.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The Commission employs the SLC test in assessing mergers. There is no precise threshold as to what constitutes an SLC. In applying the SLC test, the Commission will compare the likely state of competition in the scenario where the merger has proceeded, against the scenario where the merger has not proceeded (often referred to as the counterfactual). The counterfactual should not involve a violation of competition law.

4.2 Markets Affected by a Transaction

As noted in **2.5 Jurisdictional Thresholds**, the Commission will seek to define the relevant market(s), in order to assess the extent of competition in each relevant market both with and without the merger situation. However, as market shares alone do not provide deep insight into the nature of competition between firms in a market, an SLC could potentially be established at thresholds below those set out in **2.5 Jurisdictional Thresholds**, if other relevant factors provide strong evidence of an SLC.

4.3 Reliance on Case Law

While market definition depends on the specific facts and circumstances of the particular merger under assessment or investigation, the Commission may be guided by market definitions from other jurisdictions if such definitions are relevant, based on the facts of the case.

4.4 Competition Concerns

In assessing whether a merger situation might have the effect of an SLC in the relevant market, the Commission will look at:

- the extent to which the merger parties are close competitors;
- competition from existing competitors operating in the relevant market;
- competition from potential competitors; and
- the degree of countervailing buyer power of customers, such that some or all customers would be able to prevent the merged entity from raising prices.

For horizontal mergers, the Commission will consider whether the merger situation gives rise to non-co-ordinated effects or co-ordinated effects, or both.

Non-co-ordinated Effects (or Unilateral Effects)

Non-co-ordinated effects (or unilateral effects) may arise where, having merged with its closest competitor, a firm could find it profitable to raise prices (or reduce output, quality or innovation) because of the loss of competition between the merged entities. Rival firms in the market may also find it profitable to increase their prices independently because of the loss of competitive pressure arising from the merger. Non-co-ordinated effects may also arise when an existing firm merges with a potential or emerging competitor, thereby preserving the market power of the incumbent firm that would otherwise have been threatened, or in markets where innovation is an important feature of competition and where one or more of the merging parties is a key innovator and has the potential to exert significant competitive pressure in the future.

Co-ordinated Effects

Co-ordinated effects may arise due to the merger situation increasing the possibility that, post-merger, some or all firms in the same market may find it profitable to co-ordinate their behaviour by raising prices or by reducing quality, output or innovation. This may occur where a merger reduces competitive constraints from actual or potential competition in a market, thus increasing the probability of collusion or strengthening a tendency for competitors to collude.

Non-horizontal Mergers

Non-horizontal mergers, such as vertical mergers and conglomerate mergers, may also trigger competition concerns in certain circumstances. With respect to vertical mergers, the Commission will consider factors such as the possibility of foreclosure, the increased potential for collusion, the creation of barriers to entry and the ability of customers to exercise countervailing power. With respect to conglomerate mergers, the Commission will consider factors such as:

- the prospects of the conglomerate merger increasing the feasibility of potential co-ordinated and non-co-ordinated effects;
- whether the replication of the range of products offered by the merged entity itself represents a strategic barrier to entry; and
- the ability of customers to exercise countervailing power.

4.5 Economic Efficiencies

Economic efficiencies may be considered by the Commission at two distinct points in the analytical framework.

Firstly, efficiencies may be assessed when considering whether the merger is likely to lead to an SLC in the first place. A merger may not result in an SLC where, for example, the efficiency gains from the merger of two of the smaller firms in a market allow the merged entity to exert greater competitive pressure on larger competitors. Secondly, efficiencies may also be taken into account where they outweigh the adverse effects resulting from the SLC caused by the merger, such that there are net economic efficiencies in markets in Singapore.

In general, efficiencies must be demonstrable (ie, clear and quantifiable), merger-specific (ie, likely to arise from the merger), timely (ie, the benefits will materialise within a reasonable period of time) and sufficient in extent (with reference to the magnitude of the efficiencies).

4.6 Non-competition Issues

The Minister for Trade and Industry (the Minister) has the power to exempt a merger or an anticipated merger on the grounds of any public interest consideration, upon the application of a merger party that has been notified that the Commission proposes to issue an unfavourable decision in respect of the merger. For the purposes of the Competition Act, "public interest consideration" refers to "national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe". As of 11 May 2022, the Minister has not gazetted any other matters as "public interest considerations" under section 2 of the Competition Act.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, Singapore does not have general legislation prohibiting or requiring consent for foreign investment. However, some sectors and industries, such as news media, banking, telecommunications and real estate, have specific requirements on foreign ownership. These regulations are separate from the merger control rules under the Competition Act.

For example, the Telecommunications Act 1999 requires that a person must obtain the approval of the Info-communications Media Development Authority before becoming a 12% controller or a 30% controller, before obtaining effective control over a designated telecommunications licensee, or before acquiring any business (or any part of such business) of a designated telecommunications licensee as a going concern.

4.7 Special Consideration for Joint Ventures

The same substantive assessment applies to a joint venture that is deemed to constitute a merger for the purposes of the Competition Act. As the creation of a joint venture merger may increase the probability of co-ordination between the joint venture parent entities in some cases, the Commission will assess any co-ordination that takes place outside of the approved joint venture with a view to establishing whether the behaviour poses competition concerns.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Where the Commission makes a decision that a merger has infringed the Section 54 Prohibition, or that an anticipated merger will infringe the Section 54 Prohibition if it is carried into effect, it may give such directions as it thinks appropriate. The directions may include provisions prohibiting an anticipated merger from being brought into effect or requiring a merger to be dissolved or modified in such a manner as the Commission may direct (eg, requiring the disposal of such operations, assets or shares of such undertaking in a manner specified).

The Commission may also require merger parties that intentionally or negligently infringe the Section 54 Prohibition to pay a financial penalty determined by the Commission.

5.2 Parties' Ability to Negotiate Remedies

Generally, merger parties are encouraged to take the initiative to propose commitments that are appropriate to meet any competition concerns at any time before the Commission decides on the merger. The Commission will only accept commitments that are proportionate and sufficient to clearly address the identified adverse effects on competition. Even if merger parties propose commitments, the Commission may consider and impose alternative remedies.

5.3 Legal Standard

When deciding on the appropriate remedy, the Commission will take into consideration the effectiveness of different remedies and their associated costs, and will have regard to the principle of proportionality.

5.4 Typical Remedies

The Commission may consider two types of remedies: structural remedies and behavioural remedies.

Structural Remedies

Structural remedies are generally preferred to behavioural remedies because they clearly address the market structure issues that gave rise to the competition problems and, once implemented, require little ongoing monitoring by the Commission. Typically, structural remedies involve the sale of one of the overlapping businesses that led to the competition concern. The Commission considers that, ideally, this should be a self-standing business that is capable of being fully separated from the merger parties and, in most cases, will be part of the acquired enterprise.

The sale should be completed within a specified period, subject to the Commission's approval of the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. Otherwise, it is unlikely that the proposed divestiture will be an effective remedy for the anti-competitive elements identified.

In appropriate cases, the Commission will also consider other structural or quasi-structural remedies, such as the divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences.

Behavioural Remedies

The Commission will consider behavioural remedies in situations where divestment is considered to be impractical or disproportionate to the nature of the concerns identified. In some cases, behavioural remedies may also be necessary to support structural divestment.

In determining which remedies would be appropriate and comprehensive, the Commission will take into account how effectively the action would prevent, remedy or mitigate the competition concerns caused by the merger. The Commission's starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially reduced as a result of the merger. Given that the effect of a merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects, although other remedies may be considered in view of the associated costs and effectiveness.

5.5 Negotiating Remedies With Authorities

As the Commission may accept commitments at any time before making its decision, parties can generally propose commitments at any time during the Commission's review or investigation. While merger parties are encouraged to take the initiative to propose commitments that they think may be appropriate to meet any competition concerns, the Commission may also invite merger parties to consider whether they want to offer commitments.

Phase 1 and 2 Reviews

If the Commission identifies competition concerns in Phase 1 which indicate that a Phase 2 review may be appropriate, those concerns will be communicated to the applicant(s) in writing through an issues letter. This presents the applicant(s) with a final opportunity to propose commitments to address these concerns in Phase 1.

Towards the end of Phase 2, if the Commission reaches a preliminary view that the merger is likely to give rise to an SLC, it will issue a Statement of Decision (Provisional). The Statement of Decision (Provisional) may outline remedies that the Commission considers appropriate, and parties will be given a final opportunity to respond and propose commitments.

Invitations to Comment

In both Phase 1 and Phase 2, where the Commission considers that the commitments proposed by the merger parties are a suitable remedy, it will issue an invitation to comment on its website, and may also approach third parties individually for their views. Having obtained third party views, the Commission will decide whether or not the commitments are appropriate and may be accepted. Where commitments have been accepted, the Commission will issue a favourable decision and may publish the details of all commitments as part of its decision on the merger on its public register. If an unfavourable decision is issued (eg, if the Commission finds that the proposed commitments would not be appropriate or sufficient to address competition concerns arising from the merger), directions will be given in writing to such person(s) as the Commission considers appropriate, and the decision and directions will be published on the public register.

5.6 Conditions and Timing for Divestitures

Divestitures to a pre-approved buyer should be completed within a specified period. An independent trustee may be appointed, at the undertaking's expense, to monitor the operation of the business pending disposal and/or to handle the sale if the undertaking has not completed the divestiture within the specified period.

If the parties are required to complete divestitures pursuant to a commitment accepted by the Commission, which has issued a favourable decision, the Commission may revoke the decision for failure to adhere to the terms of the commitment.

Where divestitures are ordered pursuant to directions imposed by the Commission but are not complied with, the Commission may seek to enforce its directions with a district court. See **2.13 Penalties for the Implementation of a Transaction Before Clearance** on the possible penalties for non-compliance with the Commission's directions.

5.7 Issuance of Decisions

The Commission will give notice of its decision to the applicant(s), announce the decision on its website, and publish the text of the decision (with confidential information redacted if the Commission agrees with the confidentiality claims of the merger parties) on the public register.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

For foreign-to-foreign transactions, there have been two cases where the Commission have accepted commitments from the merger parties:

- on 29 January 2016, the proposed acquisition by ADB BVBA of all the shares of Safegate International AB from Fairford Holdings

Private AB received a clearance decision from the Commission that was subject to certain commitments (ADB-Safegate); and

- on 24 May 2021, the Commission granted approval for the acquisition of Refinitiv Holdings Limited by the London Stock Exchange Group plc, conditional upon the implementation of and compliance with the final commitments (LSE-Refinitiv).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

If merger parties have included ancillary restrictions in their notification application, a clearance decision will cover ancillary restrictions as well. Separate notifications for guidance, or a decision, may be necessary for parties that have not notified their mergers.

The Commission considers that ancillary restrictions are agreements, arrangements or provisions that are directly related and necessary to the implementation of a merger. Pursuant to an exception under the Third Schedule of the Competition Act, restrictions that fit within this definition are excluded from the application of Section 34 of the Competition Act, which prohibits anti-competitive agreements, and Section 47 of the Competition Act, which prohibits abuse of a dominant position.

However, a restriction is not automatically deemed directly related to the merger simply because it is agreed at the same time as the merger, or is expressed to be so related. To be directly related, the restriction must be economically connected with the merger but ancillary or subordinate to its main object.

A restriction is likely to be necessary if, for example, in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably greater difficulty. In determining the necessity of the restriction, the Commission will consider whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger.

In addition, merger parties must demonstrate that they have chosen the option that is the least restrictive of competition, if equally effective alternatives are available for attaining the same objective.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are permitted to be involved in the review process; see **7.2 Contacting Third Parties** for further information. Third parties may also make complaints to the Commission.

In general, parties that suffer loss or damage as a result of a competition law infringement will have a private right of action to seek relief in civil proceedings. Such rights will only arise after the Commission has made a decision that a merger has infringed the Section 54 Prohibition and the appeal period has expired, or, where an appeal has been brought, upon the determination of the appeal. Private actions must be brought within two years from the date of the Commission's decision or from the determination of the appeal, whichever is later.

Relief may be in the form of an injunction or declaration, damages, and such other relief as the court deems fit.

7.2 Contacting Third Parties

The Commission gathers information about the competitive effects of the merger from the merger parties and from third parties, including customers, competitors, suppliers, and other regulatory bodies and government departments, where relevant.

The Commission will invite third parties to comment on the merger and commitments (if any) via a public consultation exercise.

7.3 Confidentiality

Details of notified mergers will be published on the public register when the Commission receives a satisfactory application. The details published will usually include:

- the names of the merger parties;
- a description of the transaction;
- a description of the merger parties' business activities (worldwide and in Singapore);
- a description of the overlapping goods or services, including brand names;
- a description of substitute goods or services; and
- the applicant's views, including but not limited to the definition of the relevant markets, barriers to entry and countervailing buyer power, and the competitive effects of the merger.

All relevant information, including information that may be confidential, must be provided to the Commission. Both confidential and non-confidential versions of an application or submission should be provided, as non-confidential versions are required to facilitate the Commission's discussions and meetings with third parties, and the publication of a non-confidential version of the decision without delay.

If excessive or unreasonable confidentiality claims are made, the Commission may "stop the clock" until the applicant files a non-confidential version that is deemed acceptable by the Commission.

While the Commission will treat all parties' submissions on confidentiality seriously, confidential information may need to be disclosed in exceptional circumstances. In such cases, the Commission will liaise with the parties in advance to consider ways to minimise any detriment to them. Applicants will also be given an opportunity to review the draft decision before publication to determine whether it contains confidential information, although the Commission retains the final discretion to decide whether or not information is confidential.

7.4 Co-operation With Other Jurisdictions

The Commission is permitted under the Competition Act to enter into co-operation arrangements with any foreign competition body with approval from the Minister, which may take the form of information exchange or any other assistance as may be necessary to assist in the enforcement or administration of competition laws.

The Commission has entered into a number of memoranda of co-operation and understanding, as follows:

- on 22 June 2017, the Commission and Japan's Fair Trade Commission concluded a memorandum of co-operation;
- on 30 August 2018, the Commission signed a memorandum of understanding with Indonesia's Commission for the Supervision of Business Competition; and

- on 17 September 2019, the Commission concluded a memorandum of understanding with Canada's Competition Bureau.

More recently, the Commission signed memoranda of understanding with the Philippine Competition Commission and the State Administration for Market Regulation of the People's Republic of China, on 29 November 2021 and 29 December 2021, respectively. Generally, the memoranda reinforce and formalise existing technical assistance and co-operation between the Commission and these foreign antitrust authorities. Co-operation includes work on areas such as information exchange, case notification, co-ordination of enforcement, technical co-operation and the sharing of experiences.

On 16 May 2019, the Commission announced that it had joined the International Competition Network's Framework on Competition Agency Procedures (CAP), as a founding member. The CAP advances basic non-binding principles on procedural fairness and transparency among antitrust agencies and enables closer co-operation through dialogues to better understand the processes of participating agencies.

Form M1 requires the parties to state which other jurisdictions they intend to notify (or have notified) of the merger. Merger parties will also be asked if they would be willing to provide a waiver that allows the Commission to exchange confidential information with competition agencies in other jurisdictions.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Parties have a right to appeal to the Competition Appeal Board (the Board) against the Commission's decision or direction (including interim measures). The Board is an independent body comprising members appointed by the Minister.

Any merger party may appeal against the Commission's decision, whereas the Commission's direction may be appealed by the party on whom the direction is imposed. The Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, as long as it is a decision or direction that the Commission itself could have given. While parties may appeal against the Commission's refusal to vary, substitute or release existing commitments, they cannot appeal against the Commission's refusal to accept any commitments offered.

An appeal to the Board against a direction will not operate to suspend that direction, except in the case of appeals against financial penalties; the infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

Further appeals against the decisions of the Board are limited only to points of law and the amount of the financial penalty imposed, and may be made to the General Division of the High Court and then to the Court of Appeal. Only a party to the proceedings at which the Board reached its decision can make such appeals. The General Division of the High Court may determine any such appeal by confirming, modifying or reversing the Board's decision and making such further or other order on appeal.

It is also possible to bring an action in judicial review. Parties must make an application under Order 24 of the Rules of Court 2021, before a judge, for permission to bring an action in judicial review. Once permission is granted, parties must make the judicial review application to the General Division of the High Court within 14 days.

8.2 Typical Timeline for Appeals

Parties that wish to appeal to the Board must lodge a notice of appeal in the prescribed form within four weeks of the date on which the appellant was notified of the contested decision or the date of publication of the decision, whichever is earlier. The Board may, in its discretion and on the appellant's application, extend the time limit provided for lodging a notice of appeal.

As soon as is practicable, the Board will:

- set a timetable outlining the preparatory steps to be taken by the parties for the oral hearing of the appeal;
- fix the hearing date;
- notify the parties in writing of the timetable and the date and place of the hearing; and
- send the parties a report summarising the factual context of the case and the parties' principal submissions, if it is considered to be necessary for the expeditious disposal of the appeal.

As of 11 May 2022, there has only been one appeal filed before the Board in respect of the Section 54 Prohibition in Singapore. The matter concerned Uber's appeal against the Commission's decision issued on 24 September 2018, which found that Grab and Uber had infringed the Section 54 Prohibition. Uber filed its notice of appeal on 20 October 2018 and, on 29 December 2020, the Board dismissed the appeal, upholding the Commission's financial penalties and directions. In addition, the Board awarded costs of the appeal to the Commission.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Parties to an anticipated merger or a completed merger have a right to appeal against the Commission's decision.

Any other person to whom the Commission has given a direction under Sections 58A, 67 or 69 of the Competition Act may also appeal to the Board.

As of 11 May 2022, there are no cases in which third parties have brought an appeal against a clearance decision by the Commission.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The most recent amendments to the Competition Act were passed on 19 March 2018 and came into effect on 16 May 2018, following a public consultation conducted between 21 December 2017 and 11 January 2018. Relevant to merger control, the amendments formalised the existing process for the Commission to give confidential advice on anticipated mergers, and widened the Commission's powers of enforcement, enabling enforcement officers to conduct interviews with persons after entering the premises for the purpose of an investigation, without having to issue a notice under Section 63(1) of the Competition Act.

There are no current proposals to revise the Competition Act, although newly revised guidelines came into effect on 1 February 2022. The revised guidelines considered amendments made to the Competition Act in 2018 as well as recommendations from the Commission's E-commerce Platforms Market Study, the Commission's experience in applying the Competition Act and international best practices. Of relevance to merger control are the CCCS Guidelines on the Substantive Assessment of Mergers, the CCCS Guidelines on Merger Procedures and the CCCS Guidelines on Directions and Remedies (which were previously named the CCCS Guidelines on Enforcement).

Key changes to the CCCS Guidelines on the Substantive Assessment of Mergers include the following:

- clarifying that competing on data protection can be an aspect of competition on quality;
- stating that innovation can be harmed by a reduction in competition and that mergers of important innovators may affect competitive dynamics even if they do not have large market shares;
- clarifying that data can be a barrier to entry and expansion;
- refining its views and assessment of conglomerate mergers;
- introducing considerations by the Commission on the use of interim measures;
- clarifying that countervailing buyer power focuses on customers' commercial significance to the suppliers; and
- stating that counterfactuals should not themselves also involve violations of competition law.

With respect to the CCCS Guidelines on Merger Procedures, the Commission now requires information to be provided on the top ten rather than top five customers in its Form M1.

Amendments to the CCCS Guidelines on Directions and Remedies include the following:

- during the Phase 1 review, commitment proposals that are accepted in-principle trigger a 50-working day administrative timeline for the market testing of commitment proposals (extendable by the Commission by 40 days); and
- during the Phase 2 review, the existing 120-working day review period will generally not be extended to evaluate commitment proposals. However, if the notifying parties submit a fresh proposal or resubmit their commitments proposal after a Statement of Decision (Provisional) has been issued, the Commission will "stop the clock" in order to market test and assess the proposed commitments.

9.2 Recent Enforcement Record

As of 11 May 2022, a total of 96 mergers have been notified to the Commission since the merger provisions came into force on 1 July 2007. The Commission has cleared 85 mergers, with three mergers pending, while the remaining eight mergers have been withdrawn or abandoned. Of the 85 clearance decisions, the following five mergers were cleared conditional to the Commission receiving remedies or commitments from the parties:

- the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business in Singapore (cleared on 13 November 2014);
- ADB-Safegate (cleared on 29 January 2016);
- the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd (cleared on 25 September 2017);
- the acquisition by Pathology Asia Holdings Pte Ltd of Innovative Diagnostics Private Limited and Quest Laboratories Pte Ltd (cleared on 21 October 2019); and
- LSE-Refinitiv (cleared on 24 May 2021).

Of these cases, only the ADB-Safegate and LSE-Refinitiv mergers concerned foreign-to-foreign transactions.

As of 11 May 2022, the Grab-Uber case is the only case in which the Commission has:

- investigated a merger that was not notified to the Commission;
- issued its first-ever interim measures direction; and
- imposed financial penalties for an infringement of the Section 54 Prohibition.

Following the Grab-Uber merger announcement on 26 March 2018, the parties started the process of transferring acquired assets without notifying the Commission. This led to the Commission initiating an investigation of its own accord, as there were reasonable grounds to suspect an infringement of the Section 54 Prohibition. While investigations were ongoing, the Commission issued interim measures directions, which, inter alia, required the parties to cease any action that could lead to further integration of the merger or prejudice the Commission's ability to assess the merger.

Ultimately, when the Commission issued its final infringement decision on 24 September 2018, a total of approximately SGD13 million in financial penalties was imposed on Grab and Uber for completing an irreversible merger that harmed competition, as the transfer of assets made it impossible to restore competition and market conditions to the pre-transaction state. The Board dismissed Uber's appeal against the infringement decision on 29 December 2020, upholding the Commission's financial penalties and directions.

9.3 Current Competition Concerns

The Commission carried out a public consultation on proposed amendments to its guidelines between 2020 and 2021. In relation to merger control, while part of the amendments were procedural refinements and clarifications, certain amendments can be traced back to the Commission's findings and recommendations from its E-commerce Platforms Market Study (published on 10 September 2020), where the Commission found that certain areas could benefit from further clarity and guidance. As a result, the Commission proposed amendments to address areas such as where mergers involve firms that operate in different product markets (ie, conglomerate mergers).

The Commission clarified in its Guidelines on the Substantive Assessment of Mergers that, where one or more of the merging parties is a multi-sided platform, market shares may alternatively be measured by the number of monthly active users (including buyers and sellers on each side of the platform), the number of transactions and the gross value of the product or service. The Commission has also stated that a merger involving innovative and fast-growing new entrants may change the competitive dynamics even if such firms do not have a large market share. In view of the Commission's findings and recommendations, it appears that the e-commerce industry could be an area of interest for the Commission.

Drew & Napier LLC is a full-service law firm, with one of the oldest and largest dedicated competition law practices in Singapore. The practice has grown in tandem with the development of national and sectoral competition laws in Singapore. It comprises an experienced and highly qualified team of 12 lawyers who handle competition and regulatory matters both generally under the Competition Act 2004 and in the carved-out sectors such as telecommunications, media, energy and post. Since 1999, the practice has worked on every noteworthy competition law-related matter in the telecommunications, media and postal sectors. Drew & Napier is regularly commissioned by the Singapore competition regulators to undertake market studies, and regularly assists regional companies, multinational corporations, associations, government bodies and industry regulators on a wide range of matters in Singapore and ASEAN member countries.

AUTHORS

Lim Chong Kin heads the competition, consumer and regulatory, as well as technology, media and telecommunications practices. He has played a key role in the liberalisation of various strategic industries in Singapore, including the telecommunications, media and postal markets, assisting in the development of the licensing/regulatory frameworks and the drafting of the sectoral competition laws for these sectors. He continues to advise various sectoral regulators on liberalisation, market access, licensing, competition regulation, merger reviews and enforcement issues, including successfully defending the regulators in Ministerial appeals. Chong Kin is a member of the Law Society of Singapore, the Singapore Academy of Law, the Law Society of England and Wales, the Pacific Telecommunications Council and the American Bar Association. He has co-authored the Singapore chapter on subjects such as cartels and merger control for a number of legal guides.

Corinne Chew is the deputy head of Drew & Napier's competition, consumer and regulatory practice. Her experience extends to all areas of competition law practice, including assisting clients in the filing of notifications to the Competition and Consumer Commission of Singapore, leniency applications, investigations and setting up competition law compliance and audit structures and dawn raid and whistle-blowing programmes in Singapore and the ASEAN region. Corinne is a member of the Law Society of Singapore and the Singapore Academy of Law, and has published material in "The Regionalisation of Competition Law and Policy within the ASEAN Economic Community" (Cambridge University Press 2018), as well as in several legal guides regarding cartels and merger control law in Singapore.

Drew & Napier LLC

10 Collyer Quay
10th Floor Ocean Financial Centre
Singapore 049315

Tel: +65 65 35 0733
Fax: +65 65 35 4906
Email: mail@drewnapier.com
Web: www.drewnapier.com

SOUTH AFRICA

Law and Practice

Contributed by:
Judd Lurie and Amanda Mfuphi
Bowmans see p.562

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant merger control legislation in South Africa is the Competition Act 89 of 1998, as amended (the Act) and the regulations promulgated in terms of that Act. Merger control is regulated under Chapter 3 of the Act.

1.2 Legislation Relating to Particular Sectors

All foreign transactions are subject to the provisions of the Act for merger control purposes, meeting the definition of a merger and the relevant merger control thresholds. See **2.4 Definition of "Control"** and **2.5 Jurisdictional Thresholds**.

In addition, the Competition Amendment Act 18 of 2018 (the Amendment Act) requires mergers involving a foreign acquiring firm, which may adversely affect the national security interests of South Africa, to be notified to a committee to be constituted by the President. The list of national security interests has not yet been published, and the relevant provision is, as such, not yet operative.

The committee will be required to consider and decide whether the merger may have an adverse effect on the national security interests of South Africa within 60 business days of receiving the relevant notice (this period can be extended by the President).

Any decision made by the competition authorities would be automatically revoked should the committee prohibit the merger involving a foreign acquiring firm.

The Act also grants the Minister of Finance the power to withdraw the Competition Commission's (the Commission) jurisdiction to assess a merger that involves an acquisition of a bank in terms of the Banks Act 94 of 1990, generally where the Minister of Finance considers it in the public interest to do so. When a Commission receives a merger relating to an acquisition of a bank, the Commission must send formal correspondence to the Minister of Finance so that they can determine whether they want to exercise this power.

In addition to the Act, certain sector-specific legislation requires additional notifications for mergers in particular sectors, including mining, gambling, telecommunications, insurance, private healthcare and others.

1.3 Enforcement Authorities

The Act is enforced by the Commission, the Competition Tribunal (the Tribunal), and the Competition Appeal Court (the CAC). The Commission is the primary body investigating mergers (prohibited practices and conducting market inquiries). The Commission is the decision-maker in the case of intermediate mergers. The Tribunal is the adjudicative body that hears appeals or reviews and is the decision-maker in the case of large mergers (and in relation to prohibited practices). The CAC is the appellate court to which decisions of the Tribunal may be taken. The CAC is the court of final instance, other than in relation to constitutional matters, which may then be heard by the Constitutional Court of South Africa (if leave to appeal is granted).

The relevant categories of mergers are set out in **2.5 Jurisdictional Thresholds**.

2. JURISDICTION

2.1 Notification

Notification to the Commission is mandatory where the definition of a merger and the relevant thresholds are met: the Act requires a party to a large or intermediate merger (see **2.5 Jurisdictional Thresholds**) to notify the Commission of that merger and prevents the parties from implementing that merger until it is approved by either the Commission or the Tribunal (or the CAC) as the case may be.

Transactions not meeting these thresholds (ie, small mergers) are only notifiable in limited instances (see **2.5 Jurisdictional Thresholds**).

2.2 Failure to Notify

Failure to notify the Commission of a merger or implementing a notifiable merger prior to approval being obtained is a contravention of the Act. It attracts an administrative fine of a maximum of 10% of a firm's annual turnover (which may be increased up to 25% where the firm is a habitual offender) or in respect of exports from South Africa. The fine may be imposed on all parties to the transaction. The Tribunal has the power to order a divestiture of a merger implemented without the approval of the competition authorities as a remedy. However, this would typically be a remedy of last resort and the Tribunal has not ordered it to date.

The Commission has published the Guidelines of its approach on the imposition of a fine for a failure to notify. The Commission's approach to determining an appropriate administrative penalty involves five steps:

- Step 1 – the Commission will assess whether the failure to notify was wilful or deliberate or a bona fide mistake.
- Step 2 – the Commission will determine the base amount with reference to the category of the merger (intermediate or large merger) and the filing fee for such merger (ZAR165,000 in the case of an intermediate merger and ZAR550,000 in the case of a large merger. Small mergers attract no fee). The base amount will be an amount equal to double the applicable merger filing fee.
- Step 3 – the Commission will then consider the duration of the contravention and add an amount to the base amount for each month of the contravention.
- Step 4 – once the Commission has determined the amount in Step 3, the Commission will then take into any mitigating or aggravating factors to adjust the amount, as the case may be.
- Step 5 – the Commission will consider the 10% limit imposed by the Act.

The Act also contains criteria to be taken into account when imposing an administrative penalty, including the behaviour of the respondent and any level of profit derived from the contravention.

The Commission's power is limited to recommending or proposing a penalty to the Tribunal and,only the Tribunal and CAC are empowered by the Act to impose an appropriate penalty.

The administrative penalties imposed by the Tribunal vary and depend on the facts of the case. The Tribunal has imposed the following administrative penalties recently:

- ZAR1,250,000;
- ZAR1,000,000; and
- ZAR577,500.

The administrative penalties or fines imposed by the Tribunal are made public on the Tribunal's website. For confidentiality reasons, the percentage of the fine of the turnover of the respondent is generally not published.

2.3 Types of Transactions

For a transaction to be notifiable, both the financial thresholds (see **2.5 Jurisdictional Thresholds**) and the definition of a merger must be met. A merger occurs where one or more firms (or persons) acquire or establish direct or indirect control over the whole or part of the business of another firm. The Act provides that the establishment of this control could be as a result of the purchase or lease of shares, interest or assets, by amalgamation, or any other means. Notably, the Act does not provide a closed list of how "control" may be achieved.

Moreover, the Act notes that a merger may be achieved in any manner. This includes by way of contract (eg, an extensive management or voting pool agreement) or by way of asset acquisition where those assets constitute the whole or part of the business of another firm, eg, where they have market share or productive capacity attributable to them.

Internal restructurings have generally not been regarded as giving rise to a merger, as defined, where the ultimate control remains unaffected. There is a recent decision, though, Mondi Limited and Mondi PLC and the Competition Commission, which found an internal restructuring to be notifiable on the facts of that particular case (which involved the undoing of the dual-listed structure of Mondi). As such, practitioners assess internal restructurings on a case-by-case basis.

2.4 Definition of "Control"

Section 12 of the Act provides that a party has control of a firm if that party:

- beneficially owns more than half the issued share capital of the firm;
- is entitled to a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that party;
- is able to appoint or veto the appointment of a majority of the directors of the firm;
- is a holding company, and the firm is a subsidiary of that company;
- is a trust and has the ability to control the majority of the trustees or appoint or change the majority of the beneficiaries of the trust;
- in the case of a close corporation, owns the majority of members' interests or controls directly or has the right to control the majority of members' votes in the close corporation; or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the categories above.

The last item is a catch-all provision intended to catch minority and other interests, but only to the extent that the minority interest grants the party the ability to materially influence the policy of the firm. The competition authorities have found that a firm can influence the strategy of the firm through, inter alia, having the ability to veto a business plan, a budget or the appointment, firing or remuneration of key management personnel, as exercising control over the firm.

2.5 Jurisdictional Thresholds

There are two categories of mergers that require mandatory notification and approval prior to lawful implementation in South Africa. These are "intermediate" and "large" mergers. The categorisation is determined according to certain assets and turnover thresholds set out below.

For an intermediate merger:

- the target firm must have assets in or turnover in, into or from South Africa of at least ZAR100 million (Target Threshold); and
- the value in one, combined with the entire acquiring group's assets in or turnover in, into or from South Africa, must be at least ZAR600 million (Combined Threshold).

For a large merger:

- the values above are replaced by ZAR190 million (Target Threshold) and ZAR6.6 billion (Combined Threshold).

Note that small mergers (ie, where the thresholds are not met) are only notifiable at the request of the Commission (within six months of implementation) or in limited circumstances in accordance with its 2009 Guideline on Small Merger Notification (the Guideline). The Guideline states that the Commission will require the notification of a small merger if, at the time of entering into the transaction, any of the firms involved are:

- subject to an investigation by the Commission for prohibited conduct (such as cartel conduct, resale price maintenance, or abuse of dominance); or
- respondents to pending proceedings referred by the Commission to the Tribunal. The Guideline is merely a policy document, it does not have the force of law.

The Commission has published a revised Guideline for comment that also requires the notification of small mergers where one or more parties operate in digital markets.

2.6 Calculations of Jurisdictional Thresholds

The Determination of Merger Thresholds and Method of Calculation Notice (the Notice) sets out the method of calculation of thresholds. The Notice provides that the assets, and the turnover, of a firm in, into or from South Africa must be calculated in accordance with the International Financial Reporting Standards (IFRS) (or, in practice, any other applicable recognised accounting standard, eg, GAAP).

The Notice provides that the asset value of a firm is based on the gross value of the firm's assets as recorded on the firm's balance sheet for the end of the immediately previous financial year prior to the merger. In relation to revenue, the annual turnover of a firm considered will be the gross revenue of that firm from income in, into or from South Africa, arising from the following:

- sale of goods;
- the rendering of services; and
- the use by others of the firm's assets yielding interest, royalties and dividends, and events as recorded on the firm′s income statement for the immediately previous financial year before the merger.

Foreign sales or assets should be calculated at an average exchange rate of relevant currency, ie, ZAR, for 12 months up to the end of the previous financial year.

Note that:

- any combination of assets or turnover can be used to arrive at the thresholds – essentially, the larger of each of the parties' South African assets or turnover is used in the calculation;
- the acquiring group needs to be considered on a consolidated basis, ie:
  - (a) the acquiring firm itself;
  - (b) every firm that the acquiring firm controls, both directly and indirectly; and
  - (c) every firm controlling the acquiring firm, directly or indirectly, together with all firms controlled by those firms (again, directly or indirectly);
- the values used to calculate the thresholds are usually those as reflected in the relevant firms' most recent audited financial statements or, where these do not exist, management accounts. However, in the instance where audited financials exist, if more recent management accounts or draft financials exist that cover the full financial year, consideration should be given to these – provided

that they have been prepared in accordance with IFRS or any other applicable recognised accounting standard.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See **2.6 Calculations of Jurisdictional Thresholds**.

2.8 Foreign-to-Foreign Transactions

The Act applies to all economic activity within or having an effect within South Africa. By implication, foreign-to-foreign transactions may be subject to merger control in South Africa should the companies' activities have an effect within South Africa. However, the notification of mergers is dependent on the thresholds being met, and these are calculated in relation to combined turnover or assets in South Africa only. Accordingly, the Act is applicable to foreign-to-foreign mergers to the extent that the parties have assets in South Africa or turnover generated in, into or from South Africa. Note that where a target has no sales in, into or from South Africa or assets in South Africa, no merger notification can be triggered.

2.9 Market Share Jurisdictional Threshold

South Africa does not have a market share threshold and uses a financial threshold test as explained in **2.5 Jurisdictional Thresholds**.

2.10 Joint Ventures

The Act does not specifically refer to joint ventures, however, joint ventures are not exempted by any provision of the Act. To the extent that a joint venture constitutes a "merger" as defined, the merger control provisions of the Act will apply. Generally, "greenfield" joint ventures will not be caught by the Act, but a combination of existing operations may be.

The Commission has published a non-binding practitioners' note to help determine whether a joint venture is caught. To the extent that a joint venture is not a "merger", the prohibited practices provisions of the Act may nevertheless apply.

2.11 Power of Authorities to Investigate a Transaction

See **2.5 Jurisdictional Thresholds**.

The Act does not provide a time limit or statute of limitations for merger control as it relates to mandatory notifiable mergers.

2.12 Requirement for Clearance Before Implementation

Parties cannot lawfully implement a notifiable merger without the approval of the competition authorities in South Africa.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Penalties may be imposed for any notifiable merger, including foreign-to-foreign transactions, ie, implemented before clearance is obtained from the competition authorities. See **2.2 Failure to Notify**.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect of a notifiable merger; all mergers require approval from the competition authorities before they can be implemented in South Africa. Failing firm mergers, where there may be an imminent loss of employment, are often approved on an expedited basis. The competition authorities approved a series of mergers (three separate mergers) involving Ellerines Furniture (Pty) Ltd, which was under business rescue proceedings, within two to three weeks to prevent the anticipated loss of employment.

2.15 Circumstances Where Implementation Before Clearance Is Permitted
It is possible to put in place hold-separate or ring-fencing arrangements or both to allow merging parties to close a transaction outside South Africa if this can be done without implementing the merger in South Africa. While authorities have not provided an official statement in support of this, hold-separate and ring-fencing arrangements have been put in place previously. It is generally advisable to inform the Commission of this.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification
There are no deadlines for the notification of the merger in South Africa, and notification can be made at any time prior to the implementation of the transaction.

3.2 Type of Agreement Required Prior to Notification
Parties are permitted to submit the merger notification without a signed agreement and may submit the merger on the basis of another written document setting out the essential terms of the transaction, such as a letter of intent, offer letter, a term sheet, or draft agreement. This is provided that the material terms of the transaction are settled and recorded on such a document and not subject to material change.

3.3 Filing Fees
The applicable merger filing fees depend on the category of the merger. The filing fee for an intermediate merger is ZAR165,000, and the filing fee for a large merger is ZAR550,000. Should the Commission require parties to notify a small merger, there will be no filing fee payable.

The filing fee must be paid prior to filing the merger, and proof of payment must be submitted as part of the merger filing bundle.

The Act does not stipulate which party is responsible for payment of the fees, ie, generally a matter of commercial negotiation between the parties.

3.4 Parties Responsible for Filing
The Act places an obligation on the "parties to the merger" to file the merger. In practice, the primary acquiring, and primary target firms jointly submit a single merger filing to the competition authorities. However, the Act makes provision for parties to request the Commission to submit separate merger filing in the case of hostile takeovers.

3.5 Information Included in a Filing
South Africa has prescribed merger forms that detail the type of information and documents required for a complete merger filing. These forms are accompanied by declarations that confirm the accuracy of the information submitted. Generally, parties submit a report assessing the effect of a transaction as part of the notification. Various documents relating to the transaction must be submitted, such as the merger agreement, board documents, the parties' financial statements and most recent budgets/business plans. Depending on the complexity of the transaction, parties also file expert economic reports in support of their merger filing.

3.6 Penalties/Consequences of Incomplete Notification
The Commission may issue a notice of incomplete filing (within five business days in the case of a large merger or ten business days in the case of an intermediate) if the filing is deemed incomplete. This notice has the consequence of stopping the investigation period until the parties submit the outstanding information to the

Commission. Once the parties submit the outstanding information, the investigation period will restart on day one.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If, at any time, the Commission believes that a document filed in respect of a merger contains false or misleading information, the Commission may issue a notice to demand corrected information. This notice has the consequence of stopping the investigation period until the parties submit the corrected information to the Commission. Once the parties submit the updated information, the investigation period will restart on day one.

In addition to the above consequences, it is also an offence in terms of the Act to knowingly provide false information to the Commission. This offence attracts a fine not exceeding ZAR10,000, imprisonment not exceeding six months, or both a fine and imprisonment.

3.8 Review Process

For intermediate mergers, the Commission is the decision-maker and has an initial 20 business days to consider the merger. The Commission may extend a further 40 business days. This means that the Commission only has 60 business days to finalise its investigation of an intermediate merger and determine whether the transaction is approved (with or without conditions) or prohibited. This period cannot be extended.

In large mergers, the Commission makes a recommendation to the Tribunal, which acts as the decision-maker. The Commission has 40 business days to consider a large merger and make a recommendation to the Tribunal. This may be extended by single periods not exceeding 15 business days on the consent of the parties. Where the parties refuse, the Tribunal may, on application by the Commission, extend this by one or more periods of no more than 15 business days at a time. Within ten business days of the Commission submitting its recommendation to the Tribunal, the Tribunal must issue a notice of set down for a hearing to decide on the merger. The hearing is subject to the availability of the Tribunal but usually occurs a week or two after the recommendation. Decisions in non-contentious cases are generally issued on the day of the hearing, with reasons for the decision following. The Tribunal has the power to approve, approve with conditions, or prohibit a merger.

Contested merger proceedings will take longer to be decided.

3.9 Pre-notification Discussions With Authorities

This may be done, but it is not common. The process can be treated as confidential.

3.10 Requests for Information During the Review Process

Information requests are common in South Africa, and the level of detail of the requests depends on the complexity of the transaction. Information requests do not stop the clock.

3.11 Accelerated Procedure

There is no short-form, fast-track, or accelerated procedure in South Africa. The parties may request the Commission to review the transaction on an expedited basis and the Commission typically endeavours to conduct an expedited review on transactions with time pressures, such as financial distress. See **2.14 Exceptions to Suspensive Effect**.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Where a merger occurs, the test is whether the merger is likely to substantially prevent or lessen competition and, if so, whether any technological, efficiency or other pro-competitive gains may result from the merger that may offset the lessening of competition. Relevant factors to be considered are:

- the strength of competition in the market;
- the probability that firms in the market will behave competitively following the merger;
- the actual and potential level of import competition;
- ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration and history of collusion in the market;
- degree of countervailing power in the market;
- likelihood of the merged firm having market power;
- dynamics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration;
- whether the business of a party has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

The competition authorities must also determine whether a merger can or cannot be justified on public interest grounds by considering the effect that the merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

These public interest factors carry equal weight to the competition assessment. Before a merger can be filed with the Commission, a non-confidential version needs to be served on the parties' South African employees, which enjoy automatic rights of intervention in the merger process. The Department of Trade, Industry and Competition is also provided with a full copy of the merger notification by the Commission, and the responsible Minister enjoys automatic rights of intervention on public interest grounds.

4.2 Markets Affected by a Transaction

The Commission conducts the ordinary market definition assessment by assessing demand- and supply-side substitutability for both the product and geographic market. There is no de minimis threshold.

4.3 Reliance on Case Law

Where there is no local precedent, foreign precedent may be considered. European (including the European Commission), the US and the UK decisions are most often considered.

4.4 Competition Concerns

The competition authorities assess all of the above. The general standard of assessment is set out in **4.1 Substantive Test**, ie, whether the merger is likely to substantially prevent or lessen competition, and, if so, whether any technological, efficiency or other pro-competitive gains are likely to result from the merger that may offset that adverse outcome.

4.5 Economic Efficiencies
The Act provides that the assessment of efficiencies will only be relevant once it is established that the merger substantially prevents or lessens competition.

The South African competition authorities tend to recognise three types of efficiencies:

- dynamic efficiencies (innovation);
- pecuniary or commercial benefits; and
- productive efficiencies (plant level, multi-plant level, research development, capital cost, etc).

However, pecuniary efficiencies are not considered pro-competitive gains in defence of an anti-competitive merger. The Tribunal has held that the efficiencies or pro-competitive gains claimed must be merger-specific, verifiable or real.

The Tribunal has also found that an efficiency gain may include "new products or processes that will flow from the merger of the two companies, or that identifies new markets that will be penetrated in consequence of the merger, markets that neither firm on their own would have been capable of entering, or that significantly enhances the intensity with which productive capacity is utilised". The Tribunal stressed that this is by no means a closed list.

4.6 Non-competition Issues
As set out in **4.1 Substantive Test**, public interest issues (non-competition issues) are part of the substantive test of merger analysis in South Africa. Public interest considerations have equal weight to competition considerations.

The competition authorities focus on the impact of mergers on the greater spread of ownership by historically disadvantaged South Africans and workers in firms in the market. There has been a recent trend where the competition authorities impose conditions that seek to introduce a greater spread of ownership by historically disadvantaged persons, especially where a transaction results in a diminution in this regard. Loss of employment and job preservation is another key focus. Often moratoriums on job losses are imposed.

There are no rules for FDI. However, see **1.2 Legislation Relating to Particular Sectors**.

4.7 Special Consideration for Joint Ventures
Joint ventures are subject to the ordinary substantive test set out in **4.1 Substantive Test**.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions
The Act provides the competition authorities with the power to approve a merger, approve a merger with conditions, or prohibit a merger.

The competition authorities prohibit the implementation of a merger if the authorities find that the merger substantially prevents or lessens competition and/or cannot be justified on public interest grounds. The competition authorities would ordinarily only prohibit if there were no appropriate remedies to mitigate the competition or public interest concerns identified.

A significant majority of mergers notified with the competition authorities are approved. The Commission prohibited one case during the 2020/21 financial year and recommended that the Tribunal prohibit the merger between Senwesbel and Suidwed (Pty) Ltd (Senwes/Suidwed). The Tribunal did not uphold the Senwes/Suidwed prohibition but approved the transaction with conditions.

5.2 Parties' Ability to Negotiate Remedies
Parties can negotiate remedies with the competition authorities. These may be behavioural or structural in nature.

The ordinary process in merger investigations is that the Commission formally communicates to the parties the competition or public interest concerns identified by the investigation and provides the parties with an opportunity to make submissions and offer remedies to the concerns identified by the Commission. The parties and the Commission must reach an agreement on remedies prior to the Commission making its final decision in the case of a small or intermediate merger because the Commission cannot reverse its decision, and it becomes functus officio. In the case of a large merger, remedies are typically negotiated prior to the recommendation but may also be negotiated before the Tribunal decides on the matter, eg, during the hearing or the period leading up to it.

5.3 Legal Standard
There is no express legal standard that the remedies imposed by South African competition authorities must meet to be acceptable. However, the competition authorities impose remedies tailored to mitigate the harm identified and capable of being implemented, monitored and enforced.

5.4 Typical Remedies
The remedies imposed by the competition authorities are dependent on the harm identified. The competition authorities ordinarily impose behavioural conditions to address the harm if feasible and only orders a divestment as a remedy of last resort, should the behavioural remedies not be appropriate to address the harm identified.

The competition authorities regularly impose remedies to address public interest issues identified by the investigation. These public interest remedies are generally imposed on large international transactions. These include moratoriums on job losses and, more recently, the establishment of employee share ownership schemes (in line with **4.6 Non-competition Issues**), investment commitments, social upliftment conditions, etc. It cannot be over-emphasised how prominent public interest features in merger analysis in South Africa.

5.5 Negotiating Remedies With Authorities
Parties can begin negotiating remedies as soon as the Commission formally communicates the concerns identified by its investigation; however, discussions on potential remedies should take place prior to the Commission making its final decision/recommendation. In certain circumstances, parties may file with upfront remedies, ie, where they know concerns may arise.

The competition authorities in South Africa ordinarily attempt to agree on remedies with parties and do not unilaterally impose remedies without the buy-in of the parties. However, in small and intermediate mergers, the Commission has the power to impose conditions on a merger, and the Act does not require the Commission to obtain the consent of the parties prior to imposing a condition. In large mergers, the Commission has the power to recommend conditions to the Tribunal, and the Tribunal will be the decision-maker.

The Act does not set out a procedure for the negotiation of conditions between the Commission and the parties. The general procedural steps followed by the Commission with respect to remedies involve the following:

- The Commission formally communicates to the parties the competition concerns or public interest concerns identified by the investigation and provides the parties with an opportunity to make submissions.
- The Commission then invites the parties to offer remedies to the concerns identified by the Commission. The parties and Commission would engage in a negotiation process to find practical and agreeable remedies.
- Should the parties and the Commission agree to the remedies, these will be made subject to the merger approval/recommendation.
- Should the parties and the Commission not agree on a set of remedies, the Commission may choose to impose the remedies on the merger approval insofar as small or intermediate mergers are concerned. In large mergers, the Commission would make those remedies part of its recommendations to the Tribunal, and these remedies will be ventilated as part of the Tribunal hearing process.
- The parties have the option to appeal the remedies imposed by the Commission before the Tribunal and by the Tribunal to the CAC.

5.6 Conditions and Timing for Divestitures

The Commission requires divestment to take place in a short period (usually no longer than 12 months) and will generally insist that an independent trustee be appointed to oversee the process and take over the divestiture process should the parties fail to divest the business within a specified period.

The merger can be implemented prior to complying with the remedies if the remedies require compliance after the implementation of a merger (which is almost always the case). Most remedies imposed by the competition authorities specify periods for compliance.

The Act provides that the Commission can revoke the merger approved by the Commission if there has been a breach of conditions and/or request the Tribunal to impose an administrative penalty. The Tribunal can revoke a merger approved by the Tribunal upon application by the Commission if there has been a breach of conditions. This has never happened to the best of the authors' knowledge.

5.7 Issuance of Decisions

In the case of small and intermediate mergers, the Commission issues a Form CC 15 Clearance Certificate to the firm that filed the merger notification and also published a notice of the approval in the Government Gazette (ie, it is made public). In instances of a prohibition, the Commission issues a Form CC 16 Prohibition Notice to the firm that filed the merger notification and, at the same time, makes available to each participant a copy of its reasons for the decision. This decision is also published in Government Gazette.

In the case of large mergers, the Tribunal issues the approval certificate in the Form CT 10 (within ten business days of the hearing, but usually on the day) and thereafter issues written reasons for its decision (and a non-confidential version is published on its website) and publishes a notice of its decision in the Government Gazette, within 20 business days after issuing the Form CT 10 (although it sometimes takes longer). In instances of a prohibition, the Tribunal will issue a prohibition notice in the Form CT 11 and will thereafter issue written reasons for its decision (and a non-confidential version is published on its website) and publishes a notice of its decision in the Government Gazette, within 20 business days after issuing the Form CT 11.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The competition authorities' approach to requiring remedies is the same in foreign-to-foreign mergers as it is in mergers involving local companies, and the Commission has recently imposed remedies on foreign-to-foreign transactions. The Commission imposed behavioural supply and public interest conditions in the merger between Alstom Societe Anonyme and Bombardier Transportation (Investments) UK Limited. In addition, the Commission imposed behavioural conditions related to data and foreclosure concerns in the merger between Google LLC and Fitbit Inc (USA).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The competition authorities do consider ancillary restraints as part of their review if they are part of the merger agreement or brought to the attention of the Commission during the merger review process. The Commission may impose remedies to amend the restraint if it has concerns with the duration or scope of the restraint in the main merger agreement. In the merger between Afrique Pet Food (Pty) Ltd and Phil Africa Foods (Pty) Ltd, and Martin and Martin (Pty) Ltd, the Commission approved the merger subject to the merged entity reducing the restraint of trade from five years to three years. The Commission has imposed similar types of remedies in various mergers.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Any person may voluntarily file any relevant information in respect of the merger.

That said, the Commission ordinarily contacts third parties such as customers, competitors, suppliers, industry associations or other market participants as part of its merger investigation process. These third parties are then afforded an opportunity to provide their views on the merger and provide any information to the Commission, which the Commission will consider as part of its review process. In practice, the Tribunal also allows such third parties to make oral representations before it during the hearing.

Should a third party wish to formally participate in a Tribunal hearing, eg, through questioning witnesses and inspecting books, documents or items presented at the hearing, the third party must file a substantive application to be recognised as a participant in the merger proceedings. Sometimes, parties may simply allow such participation to curtail the process.

In addition to the above, trade unions or employee representatives of the parties' employees and the Minister of Trade, Industry and Competition have an automatic right to participate in merger proceedings on public interest grounds (see **4.1 Substantive Test**).

7.2 Contacting Third Parties

The Commission ordinarily contacts third parties (see **7.1 Third-Party Rights**) through written information requests as part of its merger investigation process. The Commission also conducts telephonic meetings with third parties. The Commission generally requests formal written submissions by competitors and customers, particularly where serious competition concerns are raised.

7.3 Confidentiality

The Act requires parties to serve a copy of the non-confidential version of the merger notification on trade unions representing a substantial number of South African employees (or to an employee representative should there be no such trade unions) prior to filing with the Commission. Proof of service must be included in the merger notification bundle. As such, notification of the transaction will invariably be in the public domain, given this requirement. In addition, the Commission publishes merger activity updates and a list of pending cases it is investigating on its website.

The Act provides a framework wherein the parties can claim certain information as confidential, and the competition authorities will treat that claimed information as confidential. The Act defines confidential information as "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".

7.4 Co-operation With Other Jurisdictions

There is no legal obligation on the Commission to co-operate in with other regulators or to recognise any determinations made by other competition authorities. The Commission does, however, generally engage with other regulators in international transactions through the memoranda of understanding it has concluded with various regulators such as, inter alia, the Director-General Competition of the European Commission, BRICS competition authorities, Competition Commission of Kenya, and the Federal Competition and Consumer Protection Commission.

Prior to engaging other authorities, the Commission informs the parties that it intends to have engagements with various jurisdictions where the merger is notified, and it requests the parties to waive confidentiality and sign the necessary waivers to enable such engagements.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

See **1.3 Enforcement Authorities**.

The Commission is also an administrative body and is subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000. It must ensure that it provides fair administrative action to parties before it.

8.2 Typical Timeline for Appeals

The parties must file a request for consideration of the Commission's decision in a small or intermediate merger within ten business days after the Commission issues its decision.

The parties are required to file an appeal of the Tribunal's decision with the CAC within 20 business days of the Tribunal's decision.

Appeals are generally heard relatively quickly (within a few weeks) unless highly contested. Parties can also request an expedited hearing of an appeal or review where there is urgency, and directions will be provided as to future conduct of the appeal.

There are a number of prohibitions that have been successfully appealed at the Tribunal and/or CAC. These include, inter alia, the merger between the JSE Limited and Link Market Services South Africa (Pty) Ltd10, the merger between Cape Karoo (Pty) Ltd and Klein Karoo

International (Pty) Ltd and Mosstrich (Pty) Ltd11, and the Joint Venture of Nippon Yusen and Mitsui O.S.K.12.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The only third parties that can appeal a clearance are the Minister and the trade union or employee representatives of the employees of the parties (provided the trade unions had been a participant in the proceedings of the Commission). The Amendment Act permits the Minister to apply for leave to appeal even if it did not participate. Again, this is on public interest grounds.

In the Wal-Mart/Massmart merger, the Commission found that the merger did not raise any competition concerns and, therefore, would not substantially prevent or lessen competition in South Africa. Noting the absence of competition concerns, the Commission unconditionally approved the merger. The Commission's decision was met with objections and was taken on appeal to the Tribunal by the Minister and the South African Commercial, Catering and Allied Workers Union (SACCAWU), who both raised issues on public interest concerns, such as the effect of the merger on employment, local manufacturers, local suppliers and small and medium-sized businesses. Although the Tribunal approved the merger, it altered the Commission's decision from an unconditional approval into a conditional approval wherein the Tribunal imposed public interest conditions related to employment and requiring the merged entity has to establish a programme to develop local suppliers and SMMEs by investing ZAR100 million and train local suppliers on how to do business with the merged entity.

The Tribunal's decision was taken on further appeal to the CAC by the Minister and SACCAWU. The Minister sought a review of the Tribunal's decision, and SACCAWU sought the merger to be prohibited outright. The CAC confirmed the approval and revised two of the conditions imposed by the Tribunal.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The Competition Act was substantially amended in 2019, as indicated in **1.2 Legislation Relating to Particular Sectors**. The new provision of the Amendment Act relating to mergers involving a national security interest is yet to come into the office, and there is no indication at this stage when the provision will become operational.

9.2 Recent Enforcement Record

The majority of mergers are approved in the ordinary course, and we have not observed trends relating to the prohibition of transactions in South Africa. Large international investments into South Africa are usually approved subject to conditions relating to investment, social upliftment, and the like – this stems from the general policy as opposed to any merger-specific harm.

As noted, the Amendment Act introduced a new provision related to public interest, which requires the Commission to consider the impact of the merger on the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. The Commission has previously communicated that its position is that this new provision requires that any transaction must promote the greater spread of ownership by historically disadvantaged persons or workers in South Africa.

The Commission's above position has not been tested before the Tribunal, and parties have resisted conditions in this regard where there is no diminution in such shareholding and especially in foreign-to-foreign transactions.

9.3 Current Competition Concerns

The Commission continues to focus on all competition concerns in merger regulation. In December 2021, the Commission published a Concentration Report highlighting concentration levels in sectors, and the report found that concentration persists in numerous sectors, such as farming, agro-processing, healthcare and financial services. The report indicates that although merger activity has not necessarily contributed to growing concentration by highly concentrated industries, there is a need to pre-emptively address the trend to higher levels of concentration through merger creep in sectors increasingly characterised by oligopolistic structures.

Public interest considerations in merger regulation continue to be the focus of the Commission.

Bowmans is a leading Pan-African law firm. The firm has a track record of providing domestic and cross-border legal services in the fields of corporate law, banking and finance law and dispute resolution, spanning over a century. With over 400 specialised lawyers, the firm is differentiated by its geographical reach, independence and the quality of legal services it provides. It is present in six countries in Africa – Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka) – and at the forefront of developments in African competition law. The firm monitors competition law developments in various jurisdictions, considers the impact on clients' business activities in Africa and strives to develop the application of the law pragmatically. Clients include local and international businesses operating in Africa as well as multinational operations investing in Africa.

AUTHORS

Judd Lurie is a partner in the Competition Practice team at Bowmans with experience practising in both South Africa and the UK. He is a specialist in all aspects of competition law, and his expertise extends across the entire African continent. He regularly advises on high-profile transactions requiring multi-jurisdictional filings and prohibited practices. These include advising Ardagh Glass in respect of its acquisition of Consol Glass, South Africa's most significant glass producer, as well as PepsiCo on its USD1.7 billion acquisition of Pioneer Foods. The acquisition was one of PepsiCo's largest outside the US. Judd has authored articles for a variety of local and international publications and regularly presents at competition law conferences.

Amanda Mfuphi is a senior associate in the Competition Practice team at Bowmans' Johannesburg office. Prior to joining the firm, Amanda was a senior analyst in the Competition Commission of South Africa's (Commission) M&A Division and an active member of the International Competition Network's Merger Working Group (ICN MWG) and the Commission's representative on the ICN MWG. He has extensive experience analysing the competitive effects of mergers as well as monitoring compliance with merger conditions and pre-implementation investigations. Amanda has advised clients on high-profile merger filings and prohibited practices investigation before the Commission.

Bowmans

11 Alice Lane
Sandton
Johannesburg
South Africa

Tel: +27 11 669 9000
Fax: +27 11 669 9001
Email: info-jhb@bowmanslaw.com
Web: www.bowmanslaw.com

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Law and Practice

Contributed by:
Paul S Rhee, Song Ryu, Young Min Kang and Yong Shik Shin
Yoon & Yang LLC ***see p.582***

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Contributed by: Paul S Rhee, Song Ryu, Young Min Kang and Yong Shik Shin, **Yoon & Yang LLC**

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Monopoly Regulation and Fair Trade Act (MRFTA) is the relevant merger control legislation in South Korea. The MRFTA prohibits "business combinations" that restrict competition (Article 9 of the MRFTA) and stipulates the transacting parties' obligations to notify the Korea Fair Trade Commission (KFTC) (Article 11 of the MRFTA). The Enforcement Decree of the MRFTA provides additional regulations regarding merger filing and the merger-review process.

The KFTC has internal guidelines for additional guidance regarding merger filing and the merger-review process, such as:

- the Merger Review Guidelines;
- the Merger Filing Guidelines;
- the Business Combination Corrective Measure Imposition Criteria;
- the Business Combination Corrective Measure Imposition Guidelines; and
- the Criteria for Imposing Administrative Fines for Failure to Comply with Business Combination Related Corrective Measures.

1.2 Legislation Relating to Particular Sectors

South Korea does not have any other relevant legislation for foreign transactions or investment or relating to particular sectors. However, other statutes related to the finance, telecommunication, and broadcasting sectors, such as the Act on the Structural Improvement of the Financial Industry, the Financial Holding Companies Act, and the Telecommunications Business Act, grant review authority over business combinations in the relevant sectors to the sector-specific regulators (ie, the Financial Supervisory Commission (FSC), the Korea Communication Commission (KCC) or Ministry of Science and ICT (MSIT)), but requires those regulators to consult with the KFTC. In such cases, the relevant party is exempted from its obligation to notify the KFTC (Article 11.4 of the MRFTA).

1.3 Enforcement Authorities

The KFTC, an administrative body established under the Prime Minister's Office, enforces the MRFTA.

Generally, other authorities are not involved in the KFTC merger review process. However, in the case of finance, telecommunication and broadcasting sectors, the FSC, KCC or MSIT is required to consult with the KFTC during its review regarding the merger's potential for anti-competitive effects (see **1.2 Legislation Relating to Particular Sectors**). In practice, the FSC, KCC or MSIT first requests that the KFTC review whether the merger restricts competition and will conduct its own review after obtaining the results of the KFTC review.

2. JURISDICTION

2.1 Notification

Notification is mandatory where the size of the merging parties exceeds the thresholds (see **2.5 Jurisdictional Thresholds**).

There is no notification requirement in the following circumstances (Article 11.3 of the MRFTA):

- where an "investment company or investment association for the establishment of small and medium enterprise" defined under Article 2, subparagraphs 10 and 11 of the Support for Small and Medium Enterprise Establishment Act:
  - (a) holds shares of a "business founder" (defined under Article 2, subparagraph

2), or a "venture business" in excess of the percentage specified in Article 11.1, subparagraph 1 of the MRFTA (ie, 20%, or 15% if the target company is listed on the Korea Exchange, see **2.3 Types of Transactions**); or
(b) becomes the largest shareholder by participating, jointly with another company, in the establishment of a "business founder" or "venture business"; or

- where a "new technology venture capitalist" or a "new technology venture capital fund" established under the Specialised Credit Finance Business Act:
  (a) holds shares of a "new technology business entity" defined under Article 2, subparagraph 14-3 and 14-5 of the Korea Technology Finance Corporation Act in excess of the percentage specified in Article 11.1, subparagraph 1 of the MRFTA; or
  (b) becomes the largest shareholder by participating, jointly with another company, in the establishment of a "new technology business entity"; or
- where a company subject to the notification requirement:
  (a) holds shares of any of the following companies in excess of the percentage specified in Article 11.1, subparagraph 1 of the MRFTA; or
  (b) becomes the largest shareholder by participating, jointly with another company, in the establishment of any of the following companies:
    (i) an "investment company" subject to the Financial Investment Services and Capital Markets Act; or
    (ii) a company designated as a "concessionaire of a public-private partnership project for infrastructure" under the Act on Public-Private Partnerships in Infrastructure; or
    (iii) an "investment company" established for investing in a company referred to in section b) ii) (but limited to a company established pursuant to the relevant law for the purpose of rental housing projects); or
    (iv) a "real estate investment company" under the Real Estate Investment Company Act.

2.2 Failure to Notify

The MRFTA imposes an administrative fine of up to KRW100 million for failure to make a timely and correct notification (Article 130 of the MRFTA).

In practice, the KFTC imposes administrative fines according to the above rule. The decision to impose an administrative fine is made through a formal resolution by the KFTC and that resolution is made public. In 2020 and 2021, the KFTC imposed administrative fines of KRW110 million (12 cases) and KRW425 million (30 cases), respectively, for failing to notify.

2.3 Types of Transactions

Business combinations that are subject to merger control include the following transactions (Article 11.1 of the MRFTA):

- acquisition or ownership of 20% or more of the shares of another company (or 15% for companies listed on the Korea Exchange). Acquisition of shares means gaining ownership of shares by purchase or transfer of ownership from a former owner of the shares;
- acquisition of additional shares in a company where the acquiring party already holds 20% or more of the shares in the company (15% for companies listed on the Korea Exchange) and the acquisition results in the acquiring party becoming the largest shareholder;
- interlocking directorate (where an officer or employee holds an officer's position

in another company); merger with other companies, which means the absorption of one company that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former with the statutory formalities under the Korean Commercial Code;
- acquisition of business (or sometimes substantial assets), which means gaining ownership of a specific business including assets (liabilities and employees) by purchase or transfer of ownership from a former owner of the business; and
- participation in the establishment of a new company; only the investor with the largest shareholding of a new company is required to notify.

An interlocking directorate is subject to merger control only when the company subject to the notification requirement is a large company (ie, company or companies with total assets or total sales of all affiliates are over KRW2 trillion). In addition, although other transactions involving a large company are subject to pre-merger notification, an interlocking directorate is subject to post-merger notification (see **3.1 Deadlines for Notification**).

Transfer of shares, interlocking directorate, and company establishment among affiliates are not subject to notification requirements (Articles 9.1 and 11.1 of the MRFTA). However, mergers and business transfers among affiliates are subject to notification requirements, although such transactions will be subject to simplified review (see the Merger Filing Guidelines).

Transactions not involving the transfer of shares or assets can be subject to notification requirements, for example, in the case of interlocking directorates.

2.4 Definition of "Control"

There is no definition of "control" under the MRFTA for the purpose of determining the scope of a merger. However, the de facto standards of control can be indirectly inferred from the definition of transaction types as merger filing requirements, such as percentage of shares and interlocking directorate (see **2.3 Types of Transactions**).

2.5 Jurisdictional Thresholds

One party to the transaction (including worldwide affiliate companies both before and after the transaction) has total assets or annual turnover in the amount of KRW300 billion (KRW2 trillion in the case of interlocking directorate) or more and the other party in the amount of KRW30 billion or more.

The acquirer will be required to report the transaction to the KFTC even if the above requirements are not satisfied when the transaction amount meets a certain threshold and the acquiree has substantial business activities in the domestic market (Article 11.2 of the amended MRFTA). The duty to file arises when (i) the transaction amount is KRW600 billion or more and (ii) the products or services were sold or provided to 1 million purchasers or more in the domestic market in any month or the annual R&D budget was KRW30 billion or more, during the three years immediately preceding the filing (Articles 19 of the Enforcement Decree of the MRFTA).

In addition to these general thresholds, local thresholds are applied to overseas mergers, including transactions where:

- a foreign company acquires another foreign company; or
- a Korean company acquires a foreign company.

If each of these merging parties (including worldwide affiliate companies) has an annual local turnover of KRW30 billion or more, notification of the merger is mandatory. Turnover generated from transactions between affiliates are not included when calculating the annual local turnover (the Merger Filing Guidelines).

When a foreign company participates in establishing a company in Korea or when a foreign company acquires a Korean company, the local turnover threshold does not apply.

The MRFTA does not provide special jurisdictional thresholds applicable to particular sectors (see **1.2 Legislation Relating to Particular Sectors**).

2.6 Calculations of Jurisdictional Thresholds

Jurisdictional thresholds are calculated based on total assets or annual turnover (see **2.5 Jurisdictional Thresholds**), and the calculation includes worldwide affiliate companies both before and after the transaction.

When converting a foreign company's financial statements in foreign currency to Korean won, the exchange rate as of the end of the year immediately preceding the fiscal year of the merger is applied to the total assets, paid-in capital, and total shareholders' equity, while the average exchange rate of the immediately preceding fiscal year is applied to the total turnover (same for local turnover) and net profit (see the Merger Filing Guidelines).

Jurisdictional thresholds, based on total assets or annual turnover, are based on publicly disclosed book value.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Jurisdictional thresholds are calculated on a group-wide basis, meaning that the total assets or total turnover of all the affiliate companies worldwide, both before and after the transaction, are relevant.

In Korea, the calculation of jurisdictional thresholds is not based on the total turnover of the seller and target so the seller's turnover does not need to be included with that of the target.

"Group-wide" is defined as companies belonging to the same "business group," where "business group" is defined as a group of companies, the businesses of which are controlled by the same person, determined by shares or "control" (Article 2 of the MRFTA).

Although there is no explicit regulation, the KFTC may consider changes in the business during the reference period, and the notifying party may submit additional materials relevant to a change in the business that is beneficial to them.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if each party (including worldwide affiliate companies) to the transaction has an annual local turnover of KRW30 billion or more (see **2.5 Jurisdictional Thresholds**) in addition to satisfying the general thresholds. Turnover generated from transactions between affiliates are not included when calculating the annual local turnover (the Merger Filing Guidelines).

2.9 Market Share Jurisdictional Threshold

In South Korea, there is no market share jurisdictional threshold.

2.10 Joint Ventures

There is no special provision in the MRFTA exempting joint ventures. Thus, joint ventures will be subject to merger control under the MRFTA if the parties to the joint venture meet the threshold requirements (see **2.3 Types of Transactions**). The largest shareholder of a newly established company (ie, new joint venture company) must file a merger notification to the KFTC.

2.11 Power of Authorities to Investigate a Transaction

The KFTC is not allowed to investigate a transaction that does not meet the thresholds for the purpose of merger control. However, the act of jointly establishing a new company (ie, a new joint venture company) can be considered collusion under certain circumstances (Article 40 of the MRFTA), and in these cases it is possible that the KFTC will conduct a cartel investigation.

The KFTC can sanction a party to a transaction in violation of the MRFTA within five years of commencing an investigation and, if there was no such investigation, within seven years from the end of the unlawful act (Article 80 of the MRFTA).

2.12 Requirement for Clearance Before Implementation

In the case of pre-notification, implementation of a transaction must be suspended until clearance by the KFTC (Article 11.8 of the MRFTA).

2.13 Penalties for the Implementation of a Transaction Before Clearance

The KFTC can impose an administrative fine of up to KRW100 million for implementation of a pre-notified merger before its clearance (Article 130 of the MRFTA).

For reference, anticompetitive mergers were previously criminally punishable; however, criminal punishment of anticompetitive mergers has been abolished in the amended MRFTA effective 30 December 2021.

If a party implements a transaction without the KFTC's approval, the KFTC may issue a corrective order to the party to suspend the transaction or make remedies (Article 14 of the MRFTA). Thus, in practice, parties rarely implement transactions after notifying the KFTC but before receiving its approval. This practice applies to both foreign-to-foreign and domestic transactions.

However, there are cases where a party subject to pre-merger notification notifies the KFTC after the merger, in which case the KFTC imposes an administrative fine. The KFTC's decision to impose an administrative fine is made public.

2.14 Exceptions to Suspensive Effect

There is no general exception to, or procedure for, waiving suspensive effect in South Korea.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There is no circumstance in which the KFTC permits closing before clearance.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Pre-merger notification is required for certain types of business combination where (i) either of the parties to the transaction is a large company that has worldwide assets or annual turnover of KRW2 trillion or more (including the assets and turnover of its affiliates), or (ii) the transaction amount meets a certain threshold and the acquiree has substantial business activities in the domestic market (see **2.5 Jurisdictional**

Thresholds) (Article 11.6 of the MRFTA). If either of such requirements are satisfied, notification can be filed at any time after the date of signing the agreement but before the completion of the transaction, as long as the transaction is not completed before it is cleared by the KFTC.

If neither of the requirements above is satisfied, only a post-merger notification is required. For these mergers, notification should be made within 30 days after the completion of the transaction.

An interlocking directorate requires only a post-merger notification, even if one of the parties is a large company.

The KFTC imposes administrative fines for violation of notification deadlines in practice, and any such decisions are publicly disclosed.

3.2 Type of Agreement Required Prior to Notification

Generally, both pre-merger and post-merger notifications occur after signing of a binding agreement (see **3.1 Deadlines for Notification**).

However, a system of voluntary preliminary notification is also in place. Even without a signed agreement, a company that plans to merge with another can request that the KFTC review the planned merger before the ordinary notification period and decide whether the planned merger will substantially restrict competition. In such a case, the notifying party still needs to file a formal notification with the KFTC and go through the normal merger-review process.

3.3 Filing Fees

There is no filing fee for the KFTC's review or notification.

3.4 Parties Responsible for Filing

The acquiring company is responsible for filing. For an acquisition or ownership of another company's shares, the party that acquires or owns at least 20% of another company (or at least 15% for companies listed on the Korea Exchange) must notify the merger with the KFTC. For an establishment of a new joint-venture company, the largest shareholder must notify the KFTC.

3.5 Information Included in a Filing

The KFTC provides notification forms for five different types of transactions, such as share subscription, in its Merger Filing Guidelines (see **2.3 Types of Transactions**). A business entity subject to the notification requirement must provide information about the notifying company and the counterpart company's status, finance, sales in South Korea, and the competition in the relevant market using the relevant form for the transaction and must submit a report about potential anti-competitive effects. If the KFTC deems it necessary, it may request further data or information.

A business entity subject to the notification requirement must submit the relevant notification form, depending on transaction type, along with the documents required by the form. The business entity must submit materials supporting the nature of the transaction, such as the shareholder status of the notifying company and the target company, the status of affiliates, the status of relevant market, transaction agreements, the interlocking directorate plan (in the case where the notifying entity and a related party are planning to acquire shares or an interlocking directorate with respect to a company in its possession), a copy of corporate registration, and the annual audit report.

The filing must be submitted in the Korean language, and documents in a foreign language are usually submitted with a Korean translation.

Documents are not required to be certified, notarised or apostilled.

3.6 Penalties/Consequences of Incomplete Notification

If the details of notification or attached documents are incomplete, the KFTC will request the party to supplement the materials and will suspend the review process until a sufficient response is submitted.

The KFTC requires parties to supplement material in practice when it deems it necessary during review.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The KFTC imposes an administrative fine if the notifying party supplies misleading information in the filing (Article 130 of the MRFTA). However, it is difficult to find an instance where a notifying party supplied misleading information in practice.

3.8 Review Process

The review process in South Korea is not divided into phases and there are regulations only on the possibility of extending the review period.

In principle, the KFTC must finish the review within 30 days from the notification, but it may extend the review period up to an additional 90 days after the lapse of the initial 30-day period. Accordingly, the KFTC may review merger cases for 120 days in total.

3.9 Pre-notification Discussions With Authorities

There are no pre-notification discussions in South Korea.

3.10 Requests for Information During the Review Process

The majority of the notified mergers pass the KFTC review without further requests for information. If the KFTC finds it necessary to request additional information, mostly related to issues raised during its review, it will ask the parties to provide the information within a certain time limit. In such case, the progress of the review period is suspended (ie, the clock is stopped) until the parties satisfactorily provide the requested additional information.

3.11 Accelerated Procedure

In the KFTC Merger Review Guidelines, the KFTC presumes that the following mergers do not substantially restrict competition and therefore conducts a simplified review:

- mergers between affiliates;
- transactions in which a controlling relationship is not established between parties;
- conglomerate mergers by companies other than a large company that has worldwide assets or annual turnover of KRW2 trillion or more (including those of its affiliates);
- conglomerate mergers that are not substitutive or complementary; and
- mergers with a clear purpose of investment (PEF, ABS, SPC).

In such cases, the KFTC only reviews factual matters of the notified case based on documentation provided and informs the company of the review result, in principle, within 15 days from the date of notification.

The KFTC has discretion to determine the timeline for clearance within the specified review period (see **3.8 Review Process**) and there are no official procedures for expediting the review process.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The MRFTA prohibits a merger which substantially restricts competition in a particular market.

The MRFTA provides that the following circumstances substantially restrict competition (Article 9.3 of the MRFTA):

- the aggregate market share of each of the merging companies meets all of the following conditions:
  - (a) meets the requirements for a market dominant company (that is, the market share of a single company is above 50%, or the sum of the market share for no more than three companies is above 75% in a particular market);
  - (b) is the largest in the relevant market; and
  - (c) exceeds the market share of the second-ranking company in the market by more than 25%;
- when a merger conducted directly by a large company or through its related party meets all of the following conditions:
  - (a) the merger is in a business area where market share of small and medium enterprises under the Framework Act on Small and Medium Enterprises is at least two thirds of the entire market; and
  - (b) the merger will result in the large company having at least 5% of the market share.

A merger is considered not to restrict competition substantially in the following cases (analysis of market concentration, KFTC Merger Review Guidelines):

Consideration of Market Concentration

- For horizontal mergers, one of the following applies:
  - (a) the post-merger Herfindahl-Hirschman Index (HHI) (that is, an assessment of market concentration made by taking the sum of the squares of individual market shares of all industry participants) is less than 1,200; or
  - (b) the post-merger HHI falls between 1,200 and 2,500 and the HHI increase between the pre- and post-merger positions is less than 250 points; or
  - (c) the post-merger HHI exceeds 2,500, and the HHI increase is less than 150.
- For vertical and conglomerate mergers, either of the following applies:
  - (a) in each of the relevant markets, the post-merger HHI is less than 2,500 and the market share of the party is less than 25%; or
  - (b) the parties rank no higher than fourth in each of the relevant markets.

In the case of “innovative markets” (markets where innovative activities such as research and development are essential, due to the nature of the industries such as IT and semiconductors), market shares may be difficult to determine based on the total product sales. Consequently, the market concentration can be determined by taking into account R&D costs, size of assets and capacity specialised for innovative activities, the number of patent applications or citations, and the number of companies that participate in the innovation competition (provided in the 2019 revision of the KFTC Merger Review Guidelines).

Consideration of Other Factors

However, whether or not competition is actually restricted will be determined based on the totality of the following factors in addition to the market concentration:

- to determine whether a horizontal merger substantially restricts competition, factors such as market concentration before and after the merger, monopoly effects, co-operative effects, level of foreign and global com-

petition, the possibility of new entrants, the existence of substitute products and adjacent markets are considered together;
- to determine whether a vertical merger substantially restricts competition, factors such as market foreclosure effects and co-operative effects are considered together;
- if there is a possibility that the merged company, after the merger, may use "information assets" (ie, a set of information that is collected for various purposes and managed, analysed, and utilised in consolidation, such as big data) to form, strengthen or maintain its market power, the following factors are also considered (provided in the 2019 revision of the KFTC Merger Review Guidelines):
  (a) whether the information assets obtained through the merger are difficult to obtain through other methods;
  (b) whether the merging company's incentive and ability to limit its competitor's access to information assets increases as a result of the merger;
  (c) whether, for example, restriction on access to information assets after the merger is expected to have negative effects on competition;
  (d) whether the merging company is more likely to impede non-price competition, such as reducing the quality of the services related to the collection, management, analysis and utilisation of information assets.

4.2 Markets Affected by a Transaction

The definition of the market related to the transaction is determined based on the object of the transaction (product market) and the transaction region (geographic market).

Product Market

The product market, based on the objective of the transaction, is seen as the collection of products that a considerable number of buyers could instead choose to purchase in the event of a meaningful increase in the price of a certain product for a meaningful period of time. The following factors are considered:

- similarity of the product's function and utility;
- similarity of the product's price;
- buyers' perception of product substitution and related purchasing behaviour;
- sellers' perception of product substitution and related decision-making behaviour;
- Korean Standard Industrial Classification notified by the National Statistical Office of Korea;
- transaction stage (manufacturing, wholesale, retail); and
- transaction counterparty.

However, in the case where the industry of the merged company, by its nature, requires innovative activities such as R&D or involves sustainable innovative competition, and where at least one of the merging parties is an important business entity in that competition, areas with similar innovative activities can be defined separately (innovative market) or defined together with the manufacturing and sales markets (provided in the 2019 revision of the KFTC Merger Review Guidelines).

Geographic Market

The geographic market, based on the transaction region, is seen as the entire region into which a considerable number of buyers could shift their purchases in response to an event where the price of a certain product remains constant in all other regions, but there is a meaningful increase in the product's price for a meaningful period of time in a specific region. The following factors are considered:

- characteristics of the product (product decay, transmutability, fragility) and seller's business

ability (production capacity, scope of sales network);
- the buyer's perception of the possibility of changing the purchasing region and related purchasing behaviour;
- the seller's perception of the possibility of changing the purchasing region and related decision-making behaviour; and
- ease of shifting purchasing region in terms of time, economy, and legality.

There is no de minimis clause based on the parties' total sales or market size in South Korea.

4.3 Reliance on Case Law

The KFTC refers to the relevant decisions of foreign competition authorities in some cases. In particular, as the USA, EU, Japanese and Chinese authorities and the KFTC often simultaneously conduct merger review of the same transaction, it is common for the KFTC to consider decisions from the foregoing jurisdictions.

4.4 Competition Concerns

The KFTC investigates whether competition is substantially restricted in a certain transaction area, regardless of the nature of the merger, such as horizontal, vertical, or both. The KFTC considers monopoly effects, co-operative effects and market foreclosure effects in addition to market concentration in its investigation (see **4.1 Substantive Test**).

4.5 Economic Efficiencies

Even if a merger restricts competition, if the effect of enhanced efficiency resulting from the merger is larger than the negative effects of restricting competition, or if the merging company cannot survive without the merger, the KFTC permits such a merger (Article 9.2 of the MRFTA). However, the burden of proof of the above lies with the merging parties.

The effect of "enhancing efficiency as a result of a merger" refers to the enhanced efficiency in the areas of production, sales and R&D, or the effect of enhanced efficiency on the national economy as a whole as determined based on the following (KFTC Merger Review Guidelines).

The effect of enhancing efficiency in the areas of production, sales, and R&D can be assessed by taking the following into consideration:

- whether production cost can be minimised through economy of scale, integration of production facilities, rationalisation of production process, among others;
- whether sales cost can be lowered, or sales or exports can be boosted by integrating or sharing sales network;
- whether sales or exports can be boosted by sharing market information;
- whether logistics cost can be minimised by sharing transportation and storage facilities;
- whether production-related technology and research abilities can be improved by complementing each other's technology or sharing or effectively utilising a skilful workforce, organisation, and capital; or
- whether other expenses can be reduced considerably.

The effect of enhancing efficiency on the national economy as a whole can be assessed by taking the following into consideration:

- whether the enhanced efficiency makes a significant contribution to job creation;
- whether the enhanced efficiency makes a significant contribution to the development of regional economies;
- whether the enhanced efficiency makes a significant contribution to the development of forward- and backward-related markets;
- whether the enhanced efficiency makes a significant contribution to the stabilisation of

the nation's economy through a stable supply of energy, among others; or
- whether the enhanced efficiency makes a significant contribution to addressing environmental pollution.

4.6 Non-competition Issues

The KFTC takes into account non-competition issues (eg, job creation, development of regional economies, development of forward- and backward-related markets, stabilisation of the nation's economy and improvements in environmental pollution) in determining national enhanced efficiency effects (see **4.5 Economic Efficiencies**), which is explicitly permitted under the KFTC Merger Review Guidelines.

The notifying company submits a report on enhanced efficiency effects in a merger filing, and the KFTC takes this into account during its review. However, in practice, there has been no case where a merger was permitted, despite a finding that the merger restricted competition, because of enhanced efficiency effects.

4.7 Special Consideration for Joint Ventures

The MRFTA treats joint ventures as business combinations that are subject to merger control. A party in the process of becoming the largest shareholder of a newly established company (ie, new joint-venture company) must file a merger notification to the KFTC.

In any case, some joint ventures formed between competitors may be considered unlawful restrictive agreements or practices if the parties (ie, parent companies) intend to carry out the main part of their business by establishing a joint venture (Article 40.1 of the MRFTA).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The KFTC can prohibit or interfere with a transaction by imposing various remedies, including (Article 14 of the MRFTA):

- prohibition of transactions;
- disposition of all or parts of the shares acquired;
- resignation of an officer;
- transfer of business;
- restrictions on the business method or business scope of the combined enterprise to prevent the negative effects of restricted competition; and
- any other measures necessary to correct violations of the MRFTA.

The KFTC imposes remedies in the form of corrective measures when it makes an adverse decision on a case. The KFTC can require that the parties make a report confirming compliance with remedies within a certain time period.

5.2 Parties' Ability to Negotiate Remedies

When the KFTC has concerns about a transaction, the parties may voluntarily submit corrective measures, such as divestitures or behavioural remedies, and apply for a "consent decree". A "consent decree" is a procedure whereby a company subject to the KFTC investigation submits a corrective measure for voluntary resolution to resolve anti-competitive concerns, and the KFTC concludes its investigation without finding of any infringement when the corrective measure is deemed fair, to restore free competitive order (Article 89 of the MRFTA).

In September 2013, Microsoft Corporation executed an agreement with Nokia Corporation to acquire Nokia's mobile phone and service business and filed a merger notification with the KFTC in November 2013. In February 2015, the KFTC decided to initiate the consent decree process with Microsoft to resolve issues in connection with the acquisition. It is the first merger review case where the KFTC decided to initiate the consent decree process.

5.3 Legal Standard

When complying with standards for imposing remedies regarding a merger, the KFTC must comply with the following general principles.

Remedies must reflect the facts of a merger properly and be reviewed on a case-by-case basis, and must remedy effectively anti-competitive concerns caused by the merger. This is determined by considering factors such as whether the remedy can resolve all of the anti-competitive concerns caused by the merger, whether the remedy can be easily implemented and supervised, and whether the anti-competitive concerns can be eliminated in the near future.

The remedy must be imposed to the minimum extent necessary to resolve the anti-competitive concerns caused by the merger and restore or maintain the current level of competition effectively and the remedy must be feasible and sufficiently clear and specific to determine objectively whether it has been implemented.

In the event that a remedy is imposed, the remedy must be structural, and behavioural remedies can only be imposed with the structural remedies to supplement the implementation of the structural remedies. However, if structural remedies are impossible or ineffective, imposing only behavioural remedies is permitted.

5.4 Typical Remedies

The KFTC imposes appropriate structural and behavioural remedies to resolve concerns about anti-competitive effects on a case-by-case basis. In recent cases, the KFTC mainly imposed measures such as restrictions on the business method and transfer of business.

However, it is difficult to find cases where a remedy addressed non-competition issues.

5.5 Negotiating Remedies With Authorities

When the KFTC has concerns about a transaction, the parties may voluntarily submit corrective measures, such as divestitures or behavioural remedies, and apply for a "consent decree" (see **5.2 Parties' Ability to Negotiate Remedies**).

The KFTC cannot initiate a consent decree procedure on its own. Instead, the company suspected of a violation must submit a written application for a consent decree to the KFTC. The consent decree application must include facts that specify the conduct engaged by the company and corrective measures necessary for the restoration of competitive order (Article 89 of the MRFTA).

The KFTC decides whether to initiate the consent decree process by comprehensively considering factors, such as the need for quick measures and the need for direct compensation for consumer harm. Once the consent decree process is initiated, the KFTC must provide interested parties, including the applicant, an opportunity to submit their opinion during a period of at least 30 days, and provide notification thereof to interested parties or make an announcement through its official gazette or website (Article 90 of the MRFTA).

The KFTC may approve a consent decree when the corrective measure submitted by the applicant satisfies the following requirements:

- the corrective measure must be in balance with the corrective measure and other sanctions expected to be ordered in the event the relevant conduct is found to be a violation of the MRFTA; and
- the corrective measure must likely to be found appropriate to restore fair and free competitive order.

5.6 Conditions and Timing for Divestitures

When imposing asset divestitures, the KFTC must specify the assets to be sold, sale period and other additional obligations.

The merging company as a rule selects the counterparty of the divestiture and the KFTC may require the merging company to consult in advance with the KFTC on the adequacy of the counterparty.

The KFTC may require the merging company to consult with the KFTC before concluding the asset sale agreement in order to supervise the adequacy of such agreement.

As a rule, the deadline for implementing a divestiture is determined by considering the size of the assets to be sold, the scope, complexity, overall economic conditions and industry practices within the range of three to six months. However, the KFTC may extend the implementation period once within the range of three to six months, pursuant to its authority or at the request of the merging company.

In the event that the KFTC imposes a remedy, the KFTC has in effect approved the transaction on the condition that the remedy is implemented, and thus the transaction can proceed. However, the remedy must be implemented within the specified period.

In the event that a party fails to implement the remedy imposed by the KFTC, the KFTC can impose an enforcement fine (Article 16 of the MRFTA).

Furthermore, if a party does not comply with a remedy, the party may be punished by imprisonment of not more than three years or by a fine not exceeding KRW150 million (Article 125 of the MRFTA).

5.7 Issuance of Decisions

The KFTC issues a formal written decision after completing the review process.

The KFTC only publicises the result of its review if an anti-competitive merger is brought to the full Commission hearing or if it is in the public interest.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In 2021, a total of 110 merger notifications were filed with the KFTC regarding foreign-to-foreign transactions, and none of those transactions were subject to corrective measures.

In 2020, a total of 105 merger notifications were filed with the KFTC regarding foreign-to-foreign transactions, and the KFTC imposed remedies in connection with Danaher Corporation's acquisition of the biopharma business from General Electric Company, the KFTC required the sale of all Danaher or General Electric assets related to eight biopharmaceutical processing products.

In 2019, a total of 127 merger notifications were filed with the KFTC regarding foreign-to-foreign transactions, and none of those transactions were subject to corrective measures.

In 2018, a total of 95 merger notifications were filed with the KFTC regarding foreign-to-foreign transactions, and the KFTC imposed remedies in the following two cases:

- in connection with Qualcomm's acquisition of NXP, the KFTC required the sale of standard-essential patents (SEP) and system patents owned by NXP; and
- in connection with the merger between Linde and Praxair, KFTC required the sale of all Linde or Praxair assets held in South Korea related to domestic supply of oxygen, nitrogen and argon.

Furthermore, in November 2017, the KFTC imposed behavioural remedies on the share acquisition between Maersk Line A/S and Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG. In April 2017, the KFTC imposed structural remedies on the acquisition of E. I. du Pont de Nemours and Company by The Dow Chemical Company.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

There is no regulation on ancillary restraints in Korea.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are not allowed to participate actively in the review process. However, they can submit information and their opinions. Third parties are not required to show a special interest in the transaction.

Any class of third party (eg, formal complainant) does not have different rights from those of other third parties (Article 93.1 of the MRFTA). Third parties can also be heard during the full Commission hearing upon KFTC's approval (Article 93.2 of the MRFTA).

7.2 Contacting Third Parties

When the KFTC recognises that it is necessary, it can consider the opinions of interested parties. In the case of a merger that has anti-competitive concerns, the KFTC often contacts third parties for their opinions (ie, competitors, customers, suppliers, and experts), and the KFTC generally respects these opinions. In addition, third parties can also be heard during the full Commission hearing and present their opinions upon KFTC's approval.

In practice, the KFTC contacts third parties in a variety of ways, such as telephone calls or a formal request to submit an opinion regarding the relevant transaction.

Because there is no negotiation procedure in Korea, there are no cases where the parties propose remedies or where the KFTC contacts a third party regarding a market test of the remedies.

7.3 Confidentiality

The KFTC does not publicise merger notifications or related information obtained during its review. The KFTC only publicises the result of its review if an anti-competitive merger is brought to the full Commission hearing or if it is in the public interest.

The KFTC keeps information related to business secrets confidential, and any party can request that certain information it provides to the KFTC be kept confidential.

7.4 Co-operation With Other Jurisdictions

Based on Article 56 of the MRFTA, the KFTC can:

- conclude co-operation agreements with foreign governments;
- provide assistance for enforcement activities of foreign competition authorities (this must not infringe South Korean national laws or important national interests); and
- support a foreign government's law enforcement activities through reciprocity, even though it may not have signed any co-operation agreement with the foreign government.

The co-operation can occur regarding both general policy matters and specific transactions. However, in practice, the co-operation occurs in relation to reviews of the same or similar transactions.

The KFTC is not required to obtain the parties' permission to co-operate with other jurisdictions.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Any party engaged in a merger can file an appeal with the KFTC or Seoul High Court if dissatisfied with a decision of the KFTC.

8.2 Typical Timeline for Appeals

The appellant can file an appeal with the KFTC for re-consideration within 30 days of receiving the written decision being challenged (Article 96 of the MRFTA). It can also appeal directly to the Seoul High Court within 30 days of receiving the written decision being challenged for judicial review (Articles 99 and 100 of the MRFTA). If the appellant is dissatisfied with the result of the KFTC's re-consideration of its original decision, it can still file an appeal to the Seoul High Court for judicial review within 30 days after receiving the KFTC's written decision on re-consideration of its original decision.

In the case of a merger where Shinsegae acquired shares of Wal-Mart Korea, the KFTC imposed a remedy ordering Shinsegae to transfer four Wal-Mart Korea regional branches to a third party other than the top three companies in terms of sales. The Seoul High Court found that:

- in the case of Daegu's Siji-Gyeongsan district, which was one of the four regions, only Shinsegae and Wal-Mart operated stores among the top three companies;
- it is difficult to find a potential acquirer other than the top three companies in an oligopoly of four to five companies; and
- the order violated the proportional principle because Shinsegae would have no choice but to accept unfavourable sales conditions, given that both the sale period and target transfer company were limited.

Thus, the Seoul High Court held that the KFTC's remedy orders for all four regions were unlawful (Seoul High Court Decision 2006Nu30036 rendered on 3 September 2008).

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties have no right of appeal.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

In December 2020, the MRFTA was wholly amended, and the amended MRFTA has been effective since 30 December 2021. With respect to merger filings, the duty to report based on the transaction amount has been added by the amendment. Even when an acquiree's total assets or annual turnover do not meet the current filing thresholds, the acquirer will be required to report the transaction to the KFTC when the transaction amount meets a certain threshold and the acquiree has substantial business activities in the domestic market (Article 11.2 of the MRFTA).

The transaction amount subject to filing is KRW600 billion. Substantial business activities of the acquire in the domestic market will be determined based on whether the products or services were sold or provided to 1 million purchasers or more in the domestic market in any month or the annual R&D budget was KRW30 billion or more, during the three years immediately preceding the filing (Article 19 of the Enforcement Decree of the MRFTA).

In February 2019, the KFTC revised its Merger Review Guidelines in order to take into account "innovative markets" and "information assets (such as big data)" in the merger review process. The revision specified standards for defining the relevant market, calculating the market concentration and determining anti-competitive effects in reviewing M&A relating to industries based on innovation (ie, industries where innovation competition such as R&D is essential and occurs continuously), such as IT, and provided a more effective review of innovation reducing effects manifested in, for example, potential acquisition of competitors.

According to the revised KFTC Merger Review Guidelines, when a company acquires another company in the process of product R&D or that has accumulated a large amount of information assets, even if the acquiring company's external market share in the relevant industry is not large, the M&A can still consider anti-competitive issues resulting from "innovation reducing effects" or the "monopolisation of information assets" in an innovation market. Thus, in reviewing M&A in the innovative industry (R&D intensive industries) or information assets industry (industries that accumulate a large amount of data such as mobile communications, SNS, and finance), the KFTC is now able to consider the characteristics of innovative markets in defining the relevant industry and reviewing anti-competitive effects (see **4.1 Substantive Test** and **4.2 Markets Affected by a Transaction**).

The KFTC took into account "information assets" during its deliberation of the acquisition of Woowa Brothers, the largest food delivery app operator in South Korea, by Delivery Hero SE, a German food delivery service company. The KFTC ruled that the acquisition of Woowa Brothers by Delivery Hero SE raised anticompetitive concern because consumers may become locked in the services at substantially lower cost and higher efficiency than competitors due to the merging of information assets (see **9.2 Recent Enforcement Record**).

9.2 Recent Enforcement Record

Investments in new businesses, which were atrophied during the COVID-19 pandemic, have become active and reorganisations of business structures by integrating same or similar businesses within a business group have increased. In 2021, the KFTC reviewed a total of 1,113 merger filings (amounting to KRW349 trillion), which has increased by 248 cases since 2020. The KFTC imposed administrative fines in 30 of those cases. The KFTC reviewed a total of

110 foreign-to-foreign transactions and none of those transactions were subject to corrective measures. The main details of the cases most recently reviewed by the KFTC are as follows.

- In February 2022, the KFTC granted conditional approval of the acquisition of Asiana Airlines, the second-largest airline in South Korea, by Korean Air, the largest airline in South Korea. The KFTC found that the merger raised concern of restraining competition in some of the overlapping routes and imposed structural remedies such as transfer of slots and traffic rights within the next ten-year period. In parallel, the KFTC imposed a restriction on rate increase on the subject routes and prohibition on a decrease in the number of supplied seats that would last during the performance of the structural remedy.
- In January 2022, Korea Shipbuilding & Offshore Engineering withdrew its merger filing with respect to its acquisition of Daewoo Shipbuilding & Marine Engineering. The reason appears to be that the European Commission prohibited the merger between the two companies on 13 January 2022. The KFTC terminated its review following the withdrawal of filing.
- In December 2020, the KFTC granted conditional approval of the acquisition of Woowa Brothers, the largest food delivery app operator in South Korea, by Delivery Hero SE, a German food delivery service company. By reasoning that the acquisition raised anticompetitive concerns, the KFTC imposed a remedial order under which all of the shares (100%) of Delivery Hero Korea, the second largest food delivery app operator in South Korea, held by Delivery Hero SE had to be sold.
- In 2020, the KFTC reviewed a total of 865 merger filings (amounting to KRW210.2 trillion), which has increased by 100 cases since 2019. Such increase in filings resulted from the M&A market activation caused by the economic downturn following COVID-19. The KFTC imposed administrative fines in 12 of those cases. The KFTC reviewed a total of 105 foreign-to-foreign transactions and imposed remedies in Danaher's acquisition of the biopharma business from General Electric.
- In 2019, the KFTC reviewed a total of 766 merger filings (amounting to KRW 448.4 trillion), and imposed administrative fines in 12 of those cases. KFTC reviewed a total of 127 foreign-to-foreign transactions, and a corrective measure due to a finding of anticompetitive concern was not imposed in any of these cases.

9.3 Current Competition Concerns

According to the KFTC's work plan for 2022, the KFTC plans to expedite reviews of M&A in the aviation field where restructuring is expected, and actively review M&A in the new industries such as e-commerce, software, and biopharmaceutical industries. In addition, the KFTC plans to supplement the standard for review of mergers to counter against platform operators' transfer or strengthening of dominance through mergers.

In response to the fourth industrial revolution, such as the rise of IT, semiconductors and Internet companies, including Google and Facebook, the KFTC is preparing a merger review of "innovation markets" that reflects the currently unrealised value of "information assets". As part of this effort, the KFTC recently revised the KFTC Merger Review Guidelines (see **4.1 Substantive Test**, **4.2 Markets Affected by a Transaction** and **9.1 Recent Changes or Impending Legislation**).

Yoon & Yang LLC is a full-service legal service provider with over 440 attorneys and other professionals based in Seoul, South Korea, with offices in Tashkent, Uzbekistan; Jakarta, Indonesia; and Ho Chi Minh City and Hanoi, Vietnam. The firm's antitrust and competition practice group has over 45 attorneys and other professionals, including former senior level officials of the Korea Fair Trade Commission, former judges and prosecutors. The group has extensive experience in merger control matters, from analysing anti-competitiveness of potential transactions and possible remedies and preparing and filing merger notifications to negotiating consent decrees with the Commission. The group has successfully represented United Technologies in the Commission's merger review of its acquisitions of Raytheon, Rockwell Collins and Goodrich as well as Microsoft in the Commission's merger review of its acquisition of Nokia's mobile device and service business, which resulted in the Commission's first consent decree in a merger control case.

AUTHORS

Paul S Rhee is a senior foreign attorney and partner at Yoon & Yang. He has been practising in South Korea for over 20 years, advising multinational corporations on M&A and antitrust matters involving merger control, the interface between antitrust law and intellectual property rights, abuse of dominance, cartels and corporate leniency programmes, unfair business practice and administrative/civil/criminal procedures. He has co-authored numerous chapters and publications in his field of expertise. He is a member of the American, Connecticut, District of Columbia and National Asian Pacific American Bar Associations.

Song Ryu is a partner at Yoon & Yang with over 15 years of antitrust practice experience. He advises Korean and multinational corporations on broadcasting/communications and antitrust matters involving merger control, the interface between antitrust law and intellectual property rights, abuse of dominance, corporate leniency programmes, unfair business practice, subcontracting and administrative/civil/criminal procedures. He has co-authored numerous chapters and publications in his field of expertise. He is a member of the Korean Bar Association and was a visiting foreign attorney at Ropes & Gray LLP's New York City office.

Young Min Kang is a partner at Yoon & Yang. He advises Korean and multinational corporations on antitrust matters involving merger control, the interface between antitrust law and intellectual property rights, abuse of dominance, corporate leniency programmes, unfair business practice, subcontracting, franchising, multi-level marketing, false advertisement and administrative/civil/criminal procedures. Before joining the firm, he was an associate in the antitrust practice group of Kim, Choi & Lim and a public service advocate at the Human Rights Support Division of the Ministry of Justice and the Korea Legal Aid Corporation. He is a member of the Korean Bar Association.

Yong Shik Shin is an associate at Yoon & Yang. He advises Korean and multinational corporations on antitrust matters involving merger control, the interface between antitrust law and intellectual property rights, abuse of dominance, corporate leniency programmes, unfair business practice, subcontracting, franchising, multi-level marketing, false advertisement and administrative/civil/criminal procedures. He is a member of the Korean Bar Association.

Yoon & Yang LLC

34th Floor, ASEM Tower
517 Yeongdong-daero
Gangnam-Gu
Seoul 06164
South Korea

Tel: +82 260 037 532
Fax: +82 260 037 033
Email: psrhee@yoonyang.com
Web: www.yoonyang.com

YOON & YANG
법무법인(유) 화우

SWEDEN

Law and Practice

Contributed by:
Fredrik Lindblom and Sanna Widén
Advokatfirman Cederquist KB see p.599

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Swedish rules on merger control are found in the Swedish Competition Act (2008:579) (the "Act"), primarily in Chapter 4.

The Swedish Competition Authority (SCA) has issued the following two guidance documents on the application of the rules.

- The Swedish Competition Authority's Regulations on the Notification of Concentrations between Undertakings under the Swedish Competition Act – this document contains instructions as well as the notification form itself.
- Guidance from the Swedish Competition Authority for the notification and examination of concentrations between undertakings – this document provides guidance on the SCA's handling of merger cases, mainly regarding procedural issues.

Both documents are available in English on the SCA's website.

As is the case for all EU member states, EU merger control rules could be of relevance. First, if the thresholds for filing under the EU Merger Regulation (EUMR) are met, a filing under Swedish merger control rules is not necessary even though the thresholds for filing in Sweden are met. Further, jurisdiction could be transferred between Sweden and the European Commission under the EUMR referral rules.

Generally speaking, the SCA relies considerably on EU precedents and analysis.

1.2 Legislation Relating to Particular Sectors

There is no other relevant legislation for foreign transactions or investments in Sweden as far as merger control is concerned. Please refer to **9.1 Recent Changes or Impending Legislation** regarding rules on foreign direct investments.

1.3 Enforcement Authorities

The SCA is the authority responsible for enforcing the Act. There is no other authority involved in merger review (although the SCA could, and does, consult with other authorities if such authorities could provide input to an investigation, eg, the Swedish Post and Telecom Authority in mergers involving the postal or telecoms sectors).

2. JURISDICTION

2.1 Notification

If the thresholds for compulsory filing are met, notification is necessary and there are no exceptions. It should be noted that the Act does not contain the exceptions listed in Article 3(5) of the EUMR (trading in securities, etc). However, those situations should not be considered concentrations under Swedish merger control law either.

As will be further explained in **2.5 Jurisdictional Thresholds**, there is an "alternative threshold", which if triggered allows for voluntary filing or a right for the SCA to request a filing. The reason for submitting a voluntary filing in these circumstances would be to pre-empt a request for a filing by the SCA, which it may only issue if the transaction raises potential competition concerns.

2.2 Failure to Notify

There are no penalties, administrative or criminal, for failing to notify. The SCA can request that a filing be made, subject to a fine. If a notification is made pursuant to such a request, however, no fine is due. To date, no such fines have been imposed.

2.3 Types of Transactions

The Swedish merger control rules catch transactions whereby control over an undertaking changes on a lasting basis by way of a merger, an acquisition or the creation of a full-function joint venture. Such transactions constitute “concentrations”. Internal reorganisations are not caught (as there is no ultimate change of control).

Normally, concentrations arise by way of share or asset transfers; however, other agreements/events could also trigger a need to notify, eg, shareholders’ agreements conferring control (the right to appoint a certain number of directors on the board, veto rights, etc), or de facto control established on the basis of attendance rates at annual general meetings in companies with dispersed shareholder structures (typically listed companies). Essentially, Sweden follows the EU definition of a concentration, and guidance can be found in the European Commission’s Consolidated Jurisdictional Notice, to which express reference is made in the SCA’s guidelines referred to at **1.1 Merger Control Legislation**.

2.4 Definition of “Control”

Only transactions giving rise to a change of control on a lasting basis are caught. “Control” is defined as having the possibility to exert decisive influence over an undertaking. The term should be considered to have the same meaning as under EU merger control law, and guidance can be found in the European Commission’s Consolidated Jurisdictional Notice.

2.5 Jurisdictional Thresholds

The Swedish merger control thresholds are met if:

- the combined aggregate turnover in Sweden of all undertakings concerned in the preceding financial year exceeded SEK1 billion; and
- at least two of the undertakings concerned each had turnover in Sweden the preceding financial year exceeding SEK200 million.

This threshold will be referred to as the “compulsory threshold”.

There is also an “alternative threshold”: if the SEK1 billion requirement is met, but the SEK200 million requirement is not, the SCA may, “where particular grounds exist” request a party to notify the concentration. In these cases, it is also possible for the parties to submit a notification voluntarily. If several transactions take place between the same parties during a two-year period, the transactions (and the turnover involved) should be considered as one concentration (so that it is not possible to avoid a notification by splitting up one transaction into several smaller ones).

2.6 Calculations of Jurisdictional Thresholds

The term “turnover” means net sales of all goods and services within an undertaking’s ordinary course of business. If possible, audited annual accounts should be used to determine turnover. The Swedish definition of turnover is the same as under EU merger control, and guidance can be found in the European Commission’s Consolidated Jurisdictional Notice. Foreign currency should be converted to SEK using either the Swedish Central Bank or the European Central Bank’s average annual exchange rates.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

On the buyer side, turnover of the entire corporate group should be included. All entities ultimately controlled by the same parent company are considered to belong to the same group (subsidiaries, sub-subsidiaries, sister companies, etc). In joint control scenarios, all undertakings (including their corporate groups) acquiring control should be taken into account.

On the seller side, only the target's (whether incorporated or organised as a branch, division, etc) turnover should be taken into account (including any subsidiaries).

Turnover Thresholds

As a main rule, the turnover thresholds are based on the preceding financial year's audited annual accounts. If there have been any structural changes since the last audited financial year – eg, acquisitions or divestments – account should be taken of such changes (on a full-year basis).

The Swedish rules on calculation of turnover and undertakings whose turnover should be taken into account are the same as under EU merger control law, and guidance can be found in the European Commission's Consolidated Jurisdictional Notice.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to Swedish merger control if the turnover thresholds are met. There is no local effects test or similar for the compulsory threshold. However, the alternative threshold could be viewed as having a local effects test component. Under this threshold, the SCA can request a notification as long as the parties' combined turnover in Sweden exceeds SEK1 billion (can be fulfilled by one party only), but only if "particular grounds exist". This requirement should be interpreted as meaning "if the concentration could give rise to competition concerns" and, for competition concerns to arise, it typically requires that there must be an overlap in Sweden/local effect.

2.9 Market Share Jurisdictional Threshold

The Swedish thresholds are based solely on turnover, meaning that market shares are not relevant for establishing jurisdiction. Again, however, a potential exception to this rule would be the alternative threshold, under which the SCA can request a notification if the parties' combined turnover exceeded SEK1 billion in Sweden and "particular grounds exist".

For the latter requirement to be met, it would seem necessary that the combined market share is substantial. However, there is no set market share threshold under the alternative threshold.

2.10 Joint Ventures

The creation of a "full-function" joint venture – ie, one which "on a lasting basis fulfils all the functions of an autonomous economic entity" – constitutes a concentration and is therefore subject to Swedish merger control and must be notified if the compulsory threshold (see **2.5 Jurisdictional Thresholds**) is met. The procedure under the alternative threshold may be applied to full-function joint ventures as well. Other joint ventures are considered co-operative JVs and fall under the regular competition rules, in particular the prohibition on anti-competitive agreements (Article 101 TFEU and/or the Swedish equivalent).

The full-function test is the same as under EU law, meaning that the JV, in order to be full-function, should have an independent market presence, sufficient resources and financing, day-to-day management, and it should not merely be an extension of the parent companies' business (eg, a sales agency) and not conduct business predominantly with the parent companies.

2.11 Power of Authorities to Investigate a Transaction

If none of the turnover thresholds is met, the SCA does not have the power to investigate the transaction (nor does any other authority). The Act contains a general statute of limitation stating that a concentration cannot be blocked more than two years after it has occurred (which typically should be in connection with signing). As it takes the SCA 4 to 5 months to arrive at a prohibition (Phase 1 and Phase 2), the effective statute of limitation is shorter, around 18 to 20 months from when the concentration occurred.

This assessment is based on the assumption that the SCA would not request a notification and start investigating a concentration if that concentration would risk being time-barred before the authority could act against it.

Considering the European Commission's communication in March 2021 on how Article 22 EUMR should be applied, the SCA has the possibility to refer transactions that it may not examine under Swedish competition law to the European Commission.

2.12 Requirement for Clearance Before Implementation

The Swedish merger control regime is suspensory; a notified transaction may not be implemented before approval from the SCA has been obtained. This standstill obligation is automatic.

2.13 Penalties for the Implementation of a Transaction Before Clearance

There are no sanctions for closing prior to clearance; however, if necessary to uphold the standstill, the SCA can order the parties not to take any implementing measures, and make such order subject to a fine. Such order can also contain hold-separate measures. No fines have been imposed on foreign-to-foreign transactions.

It is possible for the SCA to use the rule on prohibition of anti-competitive agreements (Article 101 TFEU and/or the Swedish equivalent) to sanction an exchange of sensitive information and market co-ordination prior to the closing of a transaction as a tool to uphold and sanction the standstill obligation, regardless of whether the transaction is notifiable or not. The SCA has noted that the possibility exists but has, as of yet, not used this tool.

2.14 Exceptions to Suspensive Effect

There is no general exception to the standstill obligation; unlike the EUMR, for example, the Act does not include an exception for public bids. However, the Act contains a general possibility for the SCA to grant a derogation from the standstill obligation.

The legislator has mentioned that a ground for such derogation could be to avoid unnecessary financial harm. It should, for example, be possible to receive a derogation in order to save a failing firm or to complete a public bid if special circumstances can be demonstrated.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the SCA would permit closing before clearance, aside from the possibility to grant a derogation from the standstill obligation. The Act does not set out any explicit possibilities to carve out a local competition concern in order to implement global closing. However, it is believed it would be possible under the general derogation provision to arrange for such a solution.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no deadline for filing, meaning that a filing can be submitted at any time as long as it is done before implementation. As set out in **2.2 Failure to Notify**, there are no penalties for failure to notify.

3.2 Type of Agreement Required Prior to Notification

Normally, a filing is made on the basis of a binding agreement; however, "good faith intention" filings are possible. Typically, as long as the parties can show their intention to carry out the transaction, a filing can be made earlier (eg, at the stage of a letter of intent or memorandum of understanding signed by the parties). The SCA is likely to require that the plan for the proposed transaction is set out in writing.

3.3 Filing Fees

There is no filing fee.

3.4 Parties Responsible for Filing

The party or parties acquiring control is/are responsible for making the notification and is/are the notifying party/parties in the procedure. In the case of a true merger, the merging parties are notifying parties. The target undertaking or seller is not a notifying party.

3.5 Information Included in a Filing

The notification should follow the format provided by the SCA (similar to the Form CO in EU merger control). Aside from the notification itself, the filing should include annual reports and transaction documents. The level of detail depends on the concentration.

Concentration

If the concentration gives rise to "affected markets" (above 20% market share in the case of horizontal overlaps and 30% in the case of vertical links), the parties are also obliged to submit internal documents prepared for the purposes of the transaction (market studies, report to the board, etc). If the concentration does not give rise to any competition concerns, it is possible to receive permission from the SCA to exclude or only submit limited data regarding certain information (eg, market shares in upstream or downstream markets).

Filing

The main notification document must be in Swedish. However, annexes and subsequent submissions (reports, market studies, etc) may be accepted in English.

The filing process is generally speaking not formalistic. Submissions, including the notification itself, are normally made via email. Certifications, notarisations, etc, are not required.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the formal investigation and the legal time limits will not start running. In practice, the SCA has opted for issuing requests for information in order to get the missing information, and in one instance the lack of information and slow responses to requests for information have made the SCA open and carry out an in-depth investigation.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If incomplete or misleading information is supplied, the SCA can "stop the clock", which prolongs the investigation. The possibility to stop the clock was introduced in 2014 and has not been frequently used in practice. Otherwise, there is no specific provision penalising incorrect or misleading information, although as a general principle the approval decision could be declared null and void in a separate court proceeding under general principles.

3.8 Review Process

The Swedish merger control review process is divided into two phases: an initial phase (known as Phase 1) and an in-depth phase (Phase 2). Phase 1 is 25 working days and Phase 2 is 3 (additional) months. If remedies are offered in Phase 1, the phase is extended by 10 working days.

Phase 2 can be extended by one month at a time following consent from the parties, or in special circumstances the SCA can make a unilateral decision to extend the deadline. Such extension decisions could be prompted, for example, by a remedy proposal. However, this is by no means an automatic, customary or often applied extension possibility for the SCA.

In 2021, the average turnaround time for a Phase 1 decision was 14 working days and 114 working days for Phase 2 investigations.

3.9 Pre-notification Discussions With Authorities

The actual time before a clearance decision is rendered can be longer if the notifying party engages in pre-notification contacts with the authority, which is recommended by the SCA and common practice unless the concentration is wholly unproblematic. Pre-notification contacts are treated confidentially, are flexible and do not follow a prescribed format. Among other things, during such discussions the notifying party can request waivers from information requirements in the notification form.

3.10 Requests for Information During the Review Process

Formal requests for information have become more common as the SCA has decided to be increasingly formalistic and use the possibility more often. However, it is not uncommon that the case handler requests confirmation or information via an informal phone call. Requests for information from the SCA do not tend to be burdensome, but it will naturally depend on the relevant case.

If the parties do not respond to requests for information in time and/or submit incomplete or misleading information, the SCA can stop the clock, which prolongs the investigation. This relatively new possibility for the SCA (introduced in 2014) has to our knowledge not been frequently applied.

3.11 Accelerated Procedure

There is no formalised fast-track procedure; however, in unproblematic cases (eg, private equity transactions with no overlaps) the SCA will often deliver a decision considerably faster than 25 working days, sometimes within 10 working days. In 2021, the average turnaround time for a Phase 1 decision was 14 working days.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The SCA employs the Significant Impediment to Effective Competition (SIEC) test, which is in line with the EUMR and most other competition regimes in the EU. Under the SIEC test, a concentration will be prohibited if it threatens to impede significantly effective competition within Sweden as a whole or a substantial part thereof.

4.2 Markets Affected by a Transaction

The SCA first takes into account the markets as defined by the parties and ensures that they are in line with previous case law as well as consistent with segmentations in the industry concerned. There is no communicated de minimis level below which competition concerns are deemed unlikely. However, the thresholds for when a simplified notification can be made (below 20% market share for horizontal mergers and below 30% for vertical mergers) are, however, indications for when concentrations are deemed unproblematic.

Moreover, there is a presumption in the EUMR that concentrations where the parties' market share does not exceed 25% are unproblematic, which is arguably also applicable in Swedish merger control.

4.3 Reliance on Case Law

The SCA aims to apply the rules in consistency with EU merger control law, and guidance on the substantive assessment can be found in the European Commission's horizontal and non-horizontal guidance documents. The SCA may also rely on case law from other Nordic competition authorities due to the similarities in market structures.

4.4 Competition Concerns

During its review, the SCA will investigate whether the concentration gives rise to problematic market share levels (including HHI index analysis), unilateral effects and co-ordinated effects; in vertical and conglomerate mergers it will primarily investigate whether the concentration gives rise to anti-competitive foreclosure. The SCA will also consider factors such as countervailing buyer power, potential market entry and failing firm defence/counterfactual analysis.

4.5 Economic Efficiencies

The SCA will take efficiencies into consideration as long as they are transaction-specific, verifiable and will ultimately benefit consumers. The authority urges parties to bring forward efficiency arguments as early as possible in the process in order to allow the SCA to be fully able to analyse and take them into account.

4.6 Non-competition Issues

The SCA is required to take one non-competition issue into consideration: a concentration can only be prohibited as long as "no significant national security or supply interests are set aside". This provision has never been applied by the authority and otherwise only competition issues are taken into account.

4.7 Special Consideration for Joint Ventures

In investigations into full-function joint ventures, the SCA will consider horizontal overlaps, vertical links, as well as any spill-over effects between the parent companies, ie, whether their ownership of the joint venture could lead to anti-competitive co-ordination.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Since January 2018, the SCA has had the power to, as first instance, prohibit concentrations. In order to prohibit a concentration, the SCA must prove that the concentration "significantly restrains the occurrence or the development of effective competition within the country as a whole, or a substantial part thereof".

5.2 Parties' Ability to Negotiate Remedies

If the SCA identifies competition concerns during its investigation, the parties will be informed accordingly. The parties are then able to propose, discuss and negotiate remedies. There are no set time limits for when remedies must be offered, but the SCA strives to hold a state-of-play meeting after 15-20 working days into Phase 1, where Phase 1 remedies can be discussed.

In Phase 2, the SCA asks that remedies are offered at the latest three weeks prior to the end date. If remedies are offered later than that, the authority asks that the parties' consent to a one-month extension of Phase 2. It should be noted that the courts, on appeal, may also impose remedies (ie, approve a concentration subject to remedies).

5.3 Legal Standard

There are no explicit legal standards for remedies set out in the Act. However, the remedies offered must eliminate the competition concerns identified and the SCA applies the European Commission's guidance on remedies.

5.4 Typical Remedies

Like most other competition authorities, the SCA has a strong preference for divestiture remedies, ie, structural remedies that fully remove an overlap/competition concern, ideally without the need for detailed and lengthy monitoring post-merger. Remedies only have to address competition concerns.

5.5 Negotiating Remedies With Authorities

Parties can begin negotiating remedies as soon as they are informed about the identified competition concern. If a certain competition concern is "obvious" and/or acknowledged by the parties, and the parties wish to secure Phase 1 clearance, it is possible to discuss and prepare remedies in advance during pre-notification contacts.

The SCA cannot propose or demand remedies on its own motion, although the authority can, of course, make its view known to the parties and indicate what is likely to be necessary in order to secure clearance. As such, the SCA cannot impose remedies that have not been agreed by the parties.

It is possible to offer remedies even in Phase 1, in which case the phase is extended by 10 working days (ie, 35 working days in total). In Phase 2, remedies do not automatically prolong the investigation, but if necessary the phase can be extended by one month at a time.

Once remedies are offered, the SCA will analyse them and conduct a market test (eg, interview third parties as to whether the proposed remedies can solve the identified competition concern and conduct market surveys). The parties may negotiate and adjust the remedies in order to reach a solution that is acceptable to the SCA. If a solution is reached, the SCA will approve the merger subject to compliance with the remedies.

5.6 Conditions and Timing for Divestitures

Typically, the notifying party will commit to implementing the remedy package post-closing; ie, the transaction is approved and the implementation of the remedy follows after. In divestiture remedies, the notifying party will typically have a number of months in which to implement the remedy, and if it does not succeed then the mandate to divest will pass to a trustee. The obligation to implement a remedy will typically be subject to penalty payment; ie, a pre-set penalty payment which will be enforced if the remedy is not complied with.

However, there is no specific sanction for breach of a remedy (unlike, for example, the EUMR, under which the parties can be fined by up to 10% of turnover for breach of a remedy).

5.7 Issuance of Decisions

The SCA's decision to approve a concentration is issued to the parties (normally only to the notifying party). The decision is made public on the SCA's website (with appropriate confidentiality for business secrets). If the SCA decides to prohibit a concentration, it will also publish the decision on its website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Prohibitions

The SCA issued its first prohibition decision under the new rules in April 2019. The transaction concerned a joint venture co-operation amongst three out of four producers of the three most popular cheeses in Sweden. The SCA's decision was appealed to the Patent and Market Court for review. Before the Patent and Market Court rendered its judgment, an arbitration award hindered the completion of the concentration. As a result, the Patent and Market Court ultimately found that a substantial review would only relate to a hypothetic situation and therefore annulled the SCA's decision and dismissed the case.

Previously, the SCA had to file a summons application with the courts. In many cases, the decision to go to court was in practice tantamount to a prohibition as merging parties tended then to withdraw their notification. In recent years, the SCA has blocked a number of mergers this way; for example, in 2016 Schibstedt's acquisition of property listing website Hemnet (following lengthy remedy negotiations which apparently did not convince the SCA), Kronfågel/Lagerberg (chicken breeding) and Visma's public bid for Fortnox (enterprise application software).

There have also been two court proceedings in the last five years: Swedbank's acquisition of Svensk Fastighetsförmedling (real estate agency services) was prohibited by the District Court (now Patent and Market Court) in 2014, and before the appeal court rendered its judgment Swedbank abandoned the concentration. In 2016, the Patent and Market Court of Appeal cleared Logstor's acquisition of Powerpipe (district heating pipes) after the SCA sought to block the merger.

Remedies

Remedies are not common in Swedish merger control but during the last years, a few mergers have been approved subject to remedies. The most recent examples, in 2021, pertain to Dagab's acquisition of Bergendahl, that involved behavioural remedies to ensure supplies of daily consumer goods to new entrants on the market, and in the merger between Altia and Arcus where the remedies consisted of divestments of akvavit and vodka brands. In 2020, the SCA approved Gasum's acquisition of Lidingö Clean Gas and Nauticor subject to behavioural commitments relating to third parties' possibility to use the facility. In 2019, Karo Pharma's acquisition of Trimb was approved subject to divestment of a hydrocortisone product line.

The SCA has not yet acted against any purely foreign-to-foreign transactions, although several transactions that have been blocked or required remedies have involved foreign companies/corporate groups with presence in Sweden.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

A clearance decision covers ancillary restraints as long as the restraints are directly related and necessary to the implementation of the transaction. This follows directly from the Act.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are involved in the review process, typically by being interviewed by the SCA and/or by responding to questionnaires. Particular weight is given to the views of customers of the merging parties.

Third parties do not have any particular rights and do not have status as parties to the proceedings. They can request access to the SCA's file, but this is a right that stems from the Swedish constitution and is not specific to merger control proceedings.

7.2 Contacting Third Parties

The SCA typically contacts third parties as part of the review process. Such contacts usually take the form of telephone interviews but can also include written questionnaires. The SCA has started to formalise its contacts with third parties during the market investigation by sending out written questions to competitors, customers and suppliers in a manner similar to the European Commission. The SCA will also market test remedies offered by the parties.

7.3 Confidentiality

Once a notification has been made, it becomes public and visible in the SCA's registry and a non-confidential summary is made available online via the registry. According to the principle of access to public records, anyone (competitors, media, citizens, etc) can request a copy of the notification and other documents in the SCA's file. However, the parties can claim confidentiality for business secrets, typically by annexing a non-confidential version of the notification and subsequent submissions.

The SCA normally respects sound confidentiality claims.

7.4 Co-operation With Other Jurisdictions

The SCA co-operates with other competition authorities, in particular those within the European Competition Network (ECN), ie, the European Commission and the national competition authorities of the EU. The SCA is also active in, for example, the ICN and the OECD. In addition, there is an agreement between the Nordic competition authorities regarding the exchange of confidential information in competition cases. In transactions involving several Nordic competition authorities, it is not uncommon that the case handlers are in contact.

Within the ECN, the SCA co-operates and (seeks to) share information according to the "Best Practices on Co-operation between EU National Competition Authorities in Merger Review" (adopted by the EU Merger Working Group, 8 November 2011), which is available on the SCA's website. The ECN authorities exchange the existence of a notification and certain non-confidential information within its network. If it is beneficial for the handling of multi-jurisdictional cases, the parties are also urged to grant waivers regarding confidential information.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The SCA's decision to block a concentration can be appealed to the Patent and Market Court, whose judgment may be appealed to the Patent and Market Court of Appeal.

8.2 Typical Timeline for Appeals

If a decision is appealed to the Patent and Market Court, the Court has six months to render a judgment from the date the case was lodged with the Court. If the judgment from the Patent and Market Court is appealed to the Patent and Market Court of Appeal, that Court has another three months to render a judgment calculated from the last day to appeal the judgment of the Patent and Market Court.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties cannot appeal a clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

In 2014, "stop the clock" was introduced in the Act. Accordingly, the SCA can now (like many other competition authorities) stop the legal time limits in the event that the parties do not provide a timely response to requests for information and/or provide incorrect information.

In the autumn of 2016, the court system was amended so that the competent courts for competition cases, including mergers, are the Patent and Market Court and the Patent and Market Court of Appeal. However, this is not a major change in practice for merger parties.

In 2018, the SCA was given authority to prohibit concentrations as first instance, which on appeal is subject to judicial review by the courts. The Swedish system has thereby been further aligned with the EU system and most other competition regimes in the EU.

There are no proposals to change legislation or implementing regulations in relation to mergers. Regarding rules concerning foreign direct investments, an official government report was published in November 2021 proposing legislation to allow Sweden to review such transactions. As of May 2022, no formal bill has been submitted to the parliament but one is expected to be sent to parliament in the autumn of 2022.

9.2 Recent Enforcement Record

The SCA has received around 60 to 80 notifications per year in recent years. In 2016-20, it opened up 12 Phase 2 investigations. In the last five years, there have been two judgments by the court of first instance and two cases have been dismissed as the parties decided not to complete the concentrations. In 2016, one concentration was ultimately cleared by the Patent and Market Court of Appeal.

In 2019, the SCA's first prohibition decision under the new regime was appealed to the Patent and Market Court, although the case was dismissed (see **5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**).

9.3 Current Competition Concerns

Due to the possibility to request a notification below the thresholds, the SCA has stated that it believes it has appropriate tools to address competition concerns in relation to merger control. It may, however, be noted that the SCA, in its enforcement report for 2020, has identified a challenge as transactions have become increasingly complex and resource intensive over time, whereby the authority does not have the opportunity to prioritise incoming notifications.

Furthermore, it should be mentioned that the SCA has publicly encouraged companies to file “below the thresholds”, ie, when the alternative (but not the compulsory) threshold is met. The most high-profile case in recent years, Swedbank/Svensk Fastighetsförmedling, was below the thresholds and the SCA took actions to prohibit the merger. The parties withdrew the transaction during the proceedings in the appellate court.

In order to avoid a request for a filing in those cases, which typically would be prompted by complaints from third parties or press coverage, the parties can choose to file voluntarily.

Advokatfirman Cederquist KB is a top-ranked business law firm, regarded as one of the leading law firms in Sweden. Cederquist offers full services from its office in Stockholm and provides clients with specialist expertise. The firm consists of over 100 lawyers. The EU, Competition and Public Procurement group consists of seven lawyers. The group draws on a profound international network for support in other jurisdictions. The firm's lawyers are fluent in Swedish, English and French. Major international deals and transactions handled by the firm include acting as legal adviser in a number of corporate acquisitions of Swedish companies on behalf of foreign corporations, investment banks and law firms, as well as acquisitions of companies outside Sweden. The firm acts as legal adviser on behalf of foreign corporations, entities, organisations, funds, investment banks and law firms in all practice areas in Sweden.

AUTHORS

Fredrik Lindblom is a partner and head of Cederquist's EU, Competition and Public Procurement group. He has substantial experience of international and national competition proceedings, including merger control, cartel investigations, abuse of dominance and vertical restraints issues. Fredrik began his career in Brussels; following his experience at the European Commission's DG COMP, he worked at two international law firms before returning to Stockholm, where he has practised exclusively in competition and EU law for the past 22 years. The majority of his experience is related to M&A advice, both for industrial and PE clients, but also with a specific focus on vertical restraints.

Sanna Widén is an associate in Cederquist's EU, Competition and Public Procurement group working primarily with EU and competition law matters since 2017. Sanna holds an LLM from the College of Europe and has completed a traineeship in a merger unit at the European Commission's DG COMP.

Advokatfirman Cederquist KB

P.O. Box 1670
SE-111 96
Stockholm
Sweden

Tel: +46 8 522 065 00
Fax: +46 8 522 067 00
Email: fredrik.lindblom@cederquist.se
Web: www.cederquist.se

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SWITZERLAND

Law and Practice

Contributed by:
Marcel Dietrich and Richard Stäuber
Homburger see p.615

CONTENTS

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Swiss merger control is governed by the Federal Act on Cartels and other Restraints of Competition (Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO).

In addition, the Swiss Competition Commission (ComCo) and its Secretariat have published communications and guidelines on the application of the relevant merger control provisions.

1.2 Legislation Relating to Particular Sectors

There is currently no general foreign investment control regime in force in Switzerland. Special requirements apply in certain sectors where the conduct of business requires prior authorisation (in particular in sectors that were formerly served by public monopolies), such as telecommunications, broadcasting and airline transport services. Furthermore, the acquisition of a real estate company (a company with the primary purpose of holding real estate) in Switzerland may require a permit from the competent cantonal authority under the Federal Act on the Acquisition of Real Estate by Foreign Persons.

This legislative framework may change, however. In March 2020, the Swiss parliament asked the Federal Council (Switzerland's executive body) to propose foreign investment control legislation, aimed in particular at protecting Swiss know-how, employment, public order and safety. In August 2021, the Federal Council presented the key points of its proposal for Swiss investment control. Under the planned regime, acquiring control over Swiss companies by foreign investors shall be subject to review in certain industries (that are not yet determined) if the companies provide non-substitutable services or if state entities in security-relevant areas are critically dependent upon them. Furthermore and regardless of the sector, review is envisaged for investments by foreign states or state-related actors. The draft bill of the Federal Council is, however, still pending and expected to be published in late spring 2022.

1.3 Enforcement Authorities

Swiss merger control law is enforced by the ComCo and the Secretariat. The ComCo consists of 11 to 15 members (currently 12), elected by the Federal Council, and is the decision-taking body. The Secretariat conducts investigations, prepares the decisions of the ComCo and, together with one member of the presiding body of ComCo, issues the necessary procedural rulings.

The total headcount of the Secretariat amounted to 76 employees (65.2 FTE), as per the end of 2021 (most recent report available). The Secretariat is split into four departments responsible for product markets, services, infrastructure and construction; a fifth department, resources, provides administrative and technical services within the Secretariat.

In the banking sector, the Swiss Financial Market Supervisory Authority (FINMA) may intervene if it considers that the concentration risks impairing the interests of creditors. In such case, the FINMA takes the place of the ComCo, which it shall invite to submit an opinion.

2. JURISDICTION

2.1 Notification

Notification is compulsory if the relevant turnover thresholds are exceeded or if an undertaking concerned has been held to be dominant in a relevant market in a final and binding decision (see **2.5 Jurisdictional Thresholds**). There are no exceptions to this regime.

2.2 Failure to Notify

If a notifiable concentration is implemented without prior notification, the undertaking that was obliged to notify may be fined with up to CHF1 million. In such case, the ComCo may investigate the concentration ex officio and impose any necessary remedies. In addition, the responsible individual person(s) may be fined with up to CHF20,000.

There have been several cases where undertakings have been fined for failing to notify. These fines are made public. So far, no individuals have been fined.

If a notifiable concentration is not notified, its legal effect under civil law is suspended (ie, the closing is null and void).

2.3 Types of Transactions

The following transactions constitute concentrations subject to merger control:

- merger of two or more previously independent undertakings;
- any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof.

2.4 Definition of "Control"

Control is understood under Swiss merger control as the ability to exercise a decisive influence over the activities of another undertaking by the acquisition of rights over shares or by any other means. It is irrelevant whether control is acquired directly or indirectly, de jure or de facto. The means of obtaining control may in particular involve the acquisition of the following, either individually or in combination:

- ownership rights or rights to use all or parts of the assets of an undertaking; and/or
- rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

The acquisition of minority or other interests that do not confer control are not notifiable in Switzerland. However, such acquisition may be reviewed as a potentially anticompetitive agreement. According to the ComCo, an acquisition may constitute an anticompetitive agreement if the parties intend to co-operate.

2.5 Jurisdictional Thresholds

Swiss merger control in the first instance applies a turnover test. A concentration is notifiable if two turnover thresholds are cumulatively met: (i) in the financial year preceding the concentration, the undertakings concerned together reported a turnover of at least CHF2 billion or a turnover in Switzerland of at least CHF500 million; and (ii) at least two of the undertakings concerned reported a turnover in Switzerland of at least CHF100 million. Compared to international standards, these turnover thresholds are relatively high. Undertakings concerned are, in case of a merger, the merging parties and, in case of an acquisition of control, the acquiring and the acquired undertaking (ie, excluding the seller).

In addition, notification of a concentration is mandatory – irrespective of the turnover achieved – if one of the undertakings concerned (acquirer and target, but excluding the seller) has in a final and non-appealable decision been held to be dominant in a market in Switzerland, and if the concentration concerns either that market, an adjacent market or a market upstream or downstream thereof. For this threshold to be applicable, dominance needs to be determined in the binding part of the decision – ie, the notification obligation is not triggered if an undertaking is only held to be dominant in the reasoning of a decision.

2.6 Calculations of Jurisdictional Thresholds

Turnover is calculated on a consolidated basis (excluding intra-group sales). Turnover is geographically allocated to the place where competition for the relevant customer has taken place, which normally is the domicile of the customer. If the parties to the concentration make no sales to customers in Switzerland, but merely the invoicing is carried out via billing addresses in Switzerland for transaction taking place outside of Switzerland, such turnover is not considered to be achieved in Switzerland.

In the case of insurance companies, "turnover" is replaced by "annual gross insurance premium income", and in the case of banks and other financial intermediaries by "gross income".

Sales booked in a foreign currency shall be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland. In practice, the average yearly exchange rates published by the Federal Tax Administration are regularly used to convert foreign currencies.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The turnover of an undertaking concerned comprises the turnover of the entire group – ie, the turnover of its subsidiaries, parent companies, sister companies and joint venture companies, but excluding intra-group sales. The seller's turnover need not be included with that of the target. The turnover of a joint venture that is jointly controlled by undertakings concerned shall be apportioned among those undertakings in equal parts (again, excluding any intra-group sales).

Changes in the business during the reference period are reflected similarly as under EU competition law. The turnover of a business divested in the financial year preceding the concentration must be fully subtracted, and the turnover of acquired businesses fully added.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Switzerland if the relevant thresholds are met. According to the Federal Supreme Court, the fact that the thresholds are met in a certain case sufficiently indicates local effects.

An exception applies to foreign joint ventures. The Secretariat has published a notice according to which it does not consider the establishment of a joint venture in Switzerland notifiable (even if the turnover thresholds are met by the joint venture's parent companies) if the joint venture does not have any activities in Switzerland and such activities are neither planned nor foreseeable.

2.9 Market Share Jurisdictional Threshold

Jurisdictional thresholds in Switzerland are in the first instance turnover-based. The additional notification obligation based on one party's confirmed dominance (see **2.5 Jurisdictional Thresholds**) requires that the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof. Therefore, confirmed dominance of one party is in itself not sufficient to trigger a notification obligation.

Conversely, it is also not required that there is a substantive overlap in that market where one party is dominant for this threshold to be met, but it is sufficient that the transaction has a competitive relation to such market.

2.10 Joint Ventures

Three types of joint ventures are subject to merger control:

- the acquisition of joint control over an existing joint venture constitutes a concentration if the joint venture performs all the functions of an autonomous economic entity on a lasting basis;
- the creation of a new joint venture constitutes a concentration if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if the business activities from at least one of the controlling undertakings are transferred to the joint venture; and
- the acquisition of joint control over an existing undertaking constitutes a concentration.

2.11 Power of Authorities to Investigate a Transaction

If the jurisdictional thresholds are not met, the ComCo does not have power to investigate a transaction or to impose any corrective measures if a transaction creates or strengthens a dominant position liable to eliminate effective competition.

2.12 Requirement for Clearance Before Implementation

Implementation of a transaction must be suspended prior to clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If a notifiable transaction is implemented before clearance, the undertakings concerned may be fined up to CHF1 million. The responsible individual(s) may in addition be fined up to CHF20,000. These fines are made public. Fines have also been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

The parties may request the ComCo to authorise implementation of the concentration prior to the review period. The parties need to show good cause for such implementation in that the concentration could otherwise not be implemented or that third parties may suffer significant harm if implementation is suspended during the review period.

Special rules apply to concentrations of banks that are deemed necessary for reasons of creditor protection. Such concentrations are reviewed by the Swiss Financial Market Supervisory Authority (FINMA), which may allow implementation at any stage of the proceedings.

There are no specific rules for public takeover bids. The ComCo should be contacted in advance in case of such bids in order to allow for co-ordination of their proceedings with the proceedings of the competent takeover board. It is also possible to request authorisation prior to the expiry of the review period in such cases or to propose arrangements on voting rights (see **2.15 Circumstances Where Implementation Before Clearance Is Permitted**).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

To our knowledge, a carve-out of affected businesses or assets to allow for closing of a global transaction before receipt of clearance in Switzerland has so far not been accepted by the ComCo. In particular, in the case of takeover bids, the ComCo has in practice accepted arrangements on the limitation of voting rights during pending merger control proceedings.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There are no specific deadlines for notification. Notification must be submitted prior to the implementation of the concentration, and the concentration must not be implemented prior to clearance (or grant of a derogation from the suspensive effect). Implementation without notification (see **2.2 Failure to Notify**) or during pending proceedings (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**) may be fined up to CHF1 million.

In addition, the responsible individual(s) may be fined up to CHF20,000.

3.2 Type of Agreement Required Prior to Notification

In principle, a concentration can only be notified once the parties have reached a binding agreement. In practice, the ComCo accepts notifications already at an earlier stage when the parties can document a good faith intent to reach a binding agreement, as expressed in particular in a letter of intention or memorandum of understanding. There has yet to be any cases where a notification has been accepted at a stage where such good faith intention could not be documented in writing.

3.3 Filing Fees

For the Phase I review period, a filing fee of CHF5,000 is charged. Usually, the notifying undertaking is asked for payment after expiry of the review period. For a Phase II investigation, the fees are charged based on the time spent by the ComCo and the Secretariat. Hourly rates range from CHF100 to CHF400, depending on the urgency of the matter and the seniority of the respective individuals.

3.4 Parties Responsible for Filing

In case of a merger, both merging parties need to jointly submit the notification. In case of an acquisition of control, the notification obligation is upon the undertaking(s) acquiring control. If a joint notification is made, the notifying companies have to designate at least one joint representative.

3.5 Information Included in a Filing

The ComCo has published a form for the notification of concentrations. Essentially, the notifying undertaking(s) are required to submit the following information:

- name, domicile and a brief description of the business activities of the undertakings concerned;
- description of the planned concentration, including the goals that are pursued with it;
- turnover, gross premiums or gross income, as the case may be, of the undertakings concerned for Switzerland and worldwide;
- information on the relevant product and geographic markets affected, including market shares of the undertakings concerned and principal competitors for the preceding three years; and
- information regarding market entries in the past five years and excepted market entries as well as the market entry costs.

In addition, copies of the following documents need to be provided:

- most recent annual accounts and reports of the undertakings concerned;
- agreements affecting or related to the transaction;
- in case of a public takeover, offer documentation; and
- report, analyses and business plans made with regard to the concentration, to the extent

they contain relevant information for the competitive assessment of the concentration.

The notification form may be submitted in any official Swiss language – ie, German, French or Italian. Accompanying documents may also be submitted in English. There are no requirements for formalisation of submitted documents, such as certification, notarisation or apostillation.

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties for incomplete notifications. However, the review period will only commence once the notification is complete. Within ten days as of submission of the notification, the Secretariat confirms its completeness, or requests additional information.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

An undertaking submitting incorrect or misleading information may be fined up to CHF100,000. In addition, the ComCo may withdraw the clearance decision.

3.8 Review Process

The ComCo is required to notify the undertakings concerned within one month from receipt of the complete notification whether it intends to open an investigation (Phase I). If no such notice is given within that time period, the transaction may be implemented. Regularly, the ComCo provides the companies in such case with a comfort letter that it considers the concentration as unobjectionable.

If the ComCo decides to open an investigation, it must be completed within four months, unless the ComCo is prevented from doing so for reasons attributable to the undertakings concerned (Phase II).

3.9 Pre-notification Discussions With Authorities

The parties can and typically do engage in pre-notification with the Secretariat. The parties submit a draft filing that the Secretariat will review and comment upon with regard to information missing for the notification to be considered complete. In complex transactions, pre-notification is generally welcomed by the Secretariat and highly recommended.

3.10 Requests for Information During the Review Process

The Secretariat regularly requests information during the review process. If the request pertains to information that the Secretariat considers required for completeness of the notification, the review period only starts once such information has been submitted. The Secretariat may also request additional information that is not required for completeness of the notification.

The parties are obliged to provide such information within the deadline set by the Secretariat, but the request does not suspend the review period.

3.11 Accelerated Procedure

Prior to the notification of a concentration, the undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification. The Secretariat may grant exemptions from the obligation to submit particular information or documents. In practice, this is relevant in particular for foreign-to-foreign mergers with limited effects on the Swiss market.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test is based on a dominance test supplemented by an additional test on the remaining degree of competition. According to this "dominance-plus test", a concentration may only be prohibited, if:

- the transaction creates or strengthens a dominant position;
- that dominant position is liable to eliminate effective competition in the relevant market; and
- the transaction does not strengthen competition in another market outweighing the negative effects of the dominant position.

Compared to other jurisdictions, this threshold is high. In view of this high threshold, in the past 22 years (the current merger control system was introduced in 1996), only four mergers have been prohibited by the ComCo: Berner Zeitung/Thuner Tagblatt (1998, notification withdrawn prior to formal prohibition); Berner Zeitung/20 Minuten (2004, subsequently cleared upon appeal subject to obligations); France Télécom/Sunrise Communications (2012); and Ticketcorner/Starticket (2017).

It is currently contemplated to replace this dominance-plus test by the SIEC test (significant impediment to effective competition) as applied in the EU. The Federal Council (Switzerland's executive body) has published a draft for an amendment of the Cartel Act and conducted a public consultation procedure that lasted until March 2022. The Federal Council may (or may not) take into account the comments received during the consultation procedure for its draft of the revised Cartel Act that will, in a next step, be published and submitted to parliament.

4.2 Markets Affected by a Transaction

Markets are considered affected by the transaction if either two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland, or in which one of the undertakings concerned holds a market share of 30% or more in Switzerland.

4.3 Reliance on Case Law

The ComCo regularly considers the practice of the European Commission, in particular with regard to market definitions. Furthermore, the case law in neighbouring countries of Switzerland will also be considered, namely the practice of the German Federal Cartel Office.

4.4 Competition Concerns

As mentioned in **4.1 Substantive Test**, the current substantive test in Switzerland is a dominance-plus test. Applying this test, the ComCo investigates unilateral effects, co-ordinated effects in case of oligopolies, conglomerate effects, as well as vertical concerns and the elimination of potential competition.

4.5 Economic Efficiencies

In the past, the ComCo regularly did not consider economic efficiencies as a mitigating factor. In theory, efficiencies may be taken into account if they are likely to prevent the elimination of effective competition.

Further, under the Swiss substantive test, economic efficiency gains in one market may outweigh the effects of the creation or strengthening of a dominant position in another market (see **4.1 Substantive Test**). This part of the test has for a long time not had practical relevance. In a recent case, however, the ComCo has for the first time authorised a concentration (Gateway Basel Nord, 2019) explicitly based on that provision (Article 10(2)(b) Cartel Act), which indicates an increased role of economic efficiencies in Swiss merger control law (see **9.2 Recent Enforcement Record**).

4.6 Non-competition Issues

The ComCo does not consider non-competition issues, such as industrial policy, national security, foreign investment, employment or other public interest issues, in its review of planned concentrations. As an exception to that principle, the Cartel Act provides that in a concentration of banks that is deemed necessary by the Swiss Financial Market Supervisory Authority for reasons related to creditor protection, the interests of creditors may be given priority (Article 10(3) Cartel Act). In such a case, the Financial Market Supervisory Authority takes the place of the ComCo.

Further, in case of a prohibition of a concentration by the ComCo, the undertakings concerned may request the Federal Council of Switzerland to authorise the concentration for reasons of public interest. In such a case, the Federal Council may take into account both competition-related and non-competition-related considerations in its assessment of the concentration. Up to now, no such authorisation has been granted.

The Federal Council (Switzerland's executive body) is currently drafting a proposal to introduce foreign investment control into the Swiss legal framework (see **1.2 Legislation Relating to Particular Sectors**). The draft bill is expected for late spring 2022. According to the key points that the Federal Council already communicated, the investment control rules will be separate from the merger control rules. It is envisaged that the notification must be submitted to the State Secretariat for Economic Affairs (SECO) and that the competence not to approve a notifiable investment will, however, be exclusively with the Federal Council.

4.7 Special Consideration for Joint Ventures

No specific rules are applicable to joint ventures, but they are assessed under the dominance-plus test as well (see **4.1 Substantive Test**).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The ComCo may prohibit or interfere with a transaction only if the conditions of the dominance-plus test are met (see **4.1 Substantive Test**). If the companies do not comply with a prohibition decision, the ComCo may take all necessary steps to restore effective competition. In particular, the ComCo may order the separation of any combined undertakings or the cessation of the controlling influence. In addition, the ComCo may sanction companies that do not comply with a prohibition decision with a fine of up to CHF1 million.

5.2 Parties' Ability to Negotiate Remedies

A concentration may be cleared subject to certain conditions or obligations. The law does not specify the types of conditions or obligations that may be ordered. In practice, both divestitures and certain behavioural remedies have been implemented, and the scope of these remedies will be discussed by the parties with the ComCo.

In case of international transactions, it is particularly important to co-ordinate the remedies offered with those offered to other competition authorities, in particular the European Commission.

5.3 Legal Standard

The law does not set a standard that remedies must meet to be deemed acceptable.

5.4 Typical Remedies

Both behavioural and structural remedies have been used in practice, and their choice depends on the characteristics of the affected markets and the identified competition concerns. While the ComCo prefers structural undertakings (ie, divestitures), it has shown to be more open to behavioural remedies than the European Commission. Remedies ordered by the ComCo can only take into account competition issues.

5.5 Negotiating Remedies With Authorities

Other than in EU merger control proceedings, there are no procedural provisions under Swiss law as regard to remedies, such as the timing of their negotiations. The most appropriate moment to commence remedy negotiations has to be determined in the individual case.

The ComCo does not depend on the parties to propose remedies, ie, it can order remedies on its own. However, in practice the parties are closely involved in the development of potential remedies.

5.6 Conditions and Timing for Divestitures

Swiss law distinguishes between conditions and obligations: conditions need to be implemented before the concentration is completed, whereas obligations need to be implemented thereafter. In the latter case, according to the practice of the ComCo, the remedy must be implemented within a specified period – ie, it is not sufficient for the parties to commit to divest certain assets "as early as possible".

If remedies are not fully complied with, the ComCo may impose sanctions of up to CHF1 million or, in case of repeated non-compliance, an amount of up to 10% of the overall turnover of all the undertakings concerned in Switzerland.

5.7 Issuance of Decisions

At the end of Phase I proceedings (preliminary investigation), the ComCo may issue an order to clear the transaction if conditions and obligations are imposed. Without remedies, the ComCo does not regularly issue a formal order at the end of Phase I, but provides the parties with a comfort letter clearing the transaction. The ComCo cannot prohibit the transaction at the end of a Phase I.

At the end of Phase II proceedings (in-depth investigation), a formal decision is ordered clearing (potentially subject to conditions and/or obligations) or prohibiting the concentration.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In 2017, the ComCo issued a prohibition decision (one of only four prohibitions since 1996) regarding the proposed concentration of Ticketcorner and Starticket. There has not been a clearance subject to conditions and/or obligations recently.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The ComCo only considers ancillary restraints to the extent they are directly related to and necessary for the concentration. Whether these conditions are given is assessed according to criteria that are comparable to the criteria applicable under EU competition law, as set out in the European Commission's Notice on Ancillary Restraints.

However, ancillary restraints that qualify under these criteria are not automatically covered by the clearance of the transaction, but only upon specific request. The ComCo expects the notifying undertaking(s) to specifically describe the ancillary restraints and provide an assessment in the notification as to why they qualify as directly related and necessary to the concentration.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The Secretariat regularly sends out questionnaires to third parties, in particular customers and competitors, to solicit their opinion on a planned concentration and to obtain a better understanding of the market conditions and the competitive environment. These third parties do not have any formal procedural rights. The ComCo is neither obliged to send out questionnaires nor to consider the replies received.

Third parties also do not have legal standing to appeal merger decisions.

7.2 Contacting Third Parties

The Secretariat regularly contacts third parties as a part of its review process by sending out questionnaires. In case remedies are offered, the Secretariat may obtain the assessment of such remedies by market participants (ie, market testing).

7.3 Confidentiality

The fact of the submission of a notification is not made public. Conversely, the decision to open an investigation proceeding (Phase II) and the final decision of the ComCo authorising or prohibiting a concentration are published in the Official Federal Gazette and in the Swiss Official Gazette of Commerce. Further, the ComCo regularly publishes the reasoning of its merger decisions in its quarterly journal.

The undertakings concerned may specify what information they consider as business secrets and ask the ComCo to keep such information confidential. In the event of a difference of opinion on whether certain information constitutes a business secret, the ComCo will issue an appealable order.

7.4 Co-operation With Other Jurisdictions

The agreement between the EU and Switzerland concerning the co-operation on the application of their competition law provides a framework for the co-operation between the ComCo and the European Commission. By virtue of this agreement, information may under limited circumstances be shared with the other authority without consent of the undertakings concerned (second generation agreement). In such case, the ComCo has to notify the undertaking concerned and invite it to state its views before transmitting the data to the European Commission.

With regard to other authorities, such exchange of information is only possible with the consent of the parties. Typically, the ComCo will then request a waiver letter from the undertakings concerned.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Decisions of the ComCo in merger control cases are subject to an appeal to the Federal Administrative Court. The Federal Administrative Court has full jurisdiction to review the ComCo's findings of fact, legal assessment and sanctions or penalties, under all aspects of fact and law.

The judgment of the Federal Administrative Court may be appealed to the Federal Supreme Court. The Federal Supreme Court can review the judgment only with respect to its conformity with the law. It is bound by the facts that have been established before the Federal Administrative Court, unless they are manifestly incorrect or have been determined in violation of legal provisions.

8.2 Typical Timeline for Appeals

An appeal to the Federal Administrative Court needs to be filed within 30 days of formal notification of the ComCo's decision. The duration of the appeals proceedings varies, but regularly amounts to significantly more than a year.

An appeal to the Federal Supreme Court needs to be filed within 30 days as of receipt of the formal notification of the judgment of the Federal Administrative Court. The duration of the proceedings regularly amounts to a year or more.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties cannot appeal a clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

With respect to the substantive test for assessing mergers, the replacement of the current dominance-plus test by the SIEC test (significant impediment to effective competition) as applied in the EU is currently being contemplated. The Federal Council (Switzerland's executive body) has published a draft for an amendment of the Cartel Act and conducted a public consultation procedure, which lasted until March 2022. In the next step, the draft of the Federal Council will be published and submitted to parliament (see **4.1 Substantive Test**).

In March 2020, the Swiss parliament asked the Federal Council to propose a foreign investment control legislation, aimed in particular at protecting Swiss know-how, employment, public order and safety. In August 2021, the Federal Council presented the key points of its proposal for Swiss investment control. The draft bill of the Federal Council is still pending and expected to be published in late spring 2022 (see **1.2 Legislation Relating to Particular Sectors**).

9.2 Recent Enforcement Record

In 2017, the ComCo issued its fourth prohibition decision in the 22-year history of merger control in Switzerland by prohibiting the proposed merger between Ticketcorner and Starticket, two Swiss ticketing companies that are controlled by Tamedia and Ringier, two Swiss media groups. The two companies are active, among others, in the market for distribution of tickets for events, such as concerts and shows, through physical and online channels (primary ticketing). The ComCo concluded that the proposed merger would eliminate effective competition in primary ticketing, and strengthen the market position of the two ticket companies. For lack of feasible remedies, the concentration was prohibited.

In 2019, the ComCo explicitly relied on economic efficiency considerations in a recent concentration in the logistics sector (Gateway Basel Nord). In the respective case, three companies planned a large terminal with gateway function for combined transport resulting in major efficiency gains (lower shunting costs and volume bundling). The investigation by the ComCo revealed the possibility of eliminating effective competition in the markets for certain cargo-handling services.

As provided for under Article 10(2)(b) Cartel Act, a concentration leading to or strengthening a dominant position liable to eliminate effective competition can be cleared if the concentration strengthens competition in another market such that the harmful effects of the dominant position are outweighed (see **4.5 Economic Efficiencies**). The ComCo considered that the large terminal would lead to considerable improvements in combined transport and significant savings of cost and time, mainly related to rail freight transport and operator services. It concluded that these improvements outweighed the disadvantages in the markets for cargo-handling services. Therefore, the ComCo cleared the concentration unconditionally.

9.3 Current Competition Concerns

Given the high threshold for intervention that requires a dominant position liable to exclude effective competition (see **4.1 Substantive Test**), single-firm dominance (unilateral effects) is rather rare. Instead, there is a certain focus of the ComCo on collective dominance (co-ordinated effects), where it is assumed that the merged entity may enter into collusive practices together with another company. A full analysis of these effects was recently conducted in a proposed merger in the telecommunications sector (Sunrise/UPC, 2019) and in an acquisition of joint control over an existing undertaking in the field of rail transport of goods and related logistics (SBB Cargo, 2020).

Homburger combines the know-how, drive and passion of all its specialists to support clients in reaching their goals. Whether Homburger advises clients on transactions, represents them in proceedings or helps them in regulatory matters, it is dedicated to delivering exceptional solutions. The competition and regulatory teams advise clients on Swiss and EU competition law, commercial public and administrative law, as well as regulated markets. They represent clients before administrative authorities and courts, as well as in civil litigation. The teams are two of Switzerland's finest and largest, and are renowned for their broad expertise in all aspects of competition law as well as public and administrative law. Their services are aimed at Swiss and international clients from all industries. The team combines the firm's know-how in all areas of commercial public and administrative law of relevance to clients. It has broad experience advising clients on regulatory frameworks in regulated markets in Switzerland.

AUTHORS

Marcel Dietrich is the head of Homburger's competition and regulatory teams. His practice focuses on Swiss and European competition and antitrust law as well as on commercial public and administrative law and regulated markets. He has extensive and long-standing experience in all areas of competition law. He also advises on compliance matters and internal investigations. With regard to regulated markets, he specialises in energy, healthcare and pharma, media and telecommunications, infrastructure and transport as well as in public procurement. He is a member of various national and international competition law associations. He regularly publishes and lectures on various subjects of competition law, and commercial public and administrative law.

Richard Stäuber is a partner in Homburger's competition and regulatory teams, focusing on Swiss and European competition and antitrust law. He has broad experience in representing businesses in all areas of competition law before authorities and courts, including cartel and abuse of dominance proceedings, national and international merger control procedures, dawn raids and leniency proceedings. He further regularly advises clients on distribution arrangements, co-operation projects and licence agreements. He is a Non-Governmental Advisor to the Swiss Competition Commission for the International Competition Network (ICN) and co-editor of the Swiss Journal of Competition Law (Schweizerische Zeitschrift für Kartellrecht).

Homburger AG

Prime Tower
Hardstrasse 201
8005 Zurich
Switzerland

Tel: +41 432 221 000
Fax: +41 432 221 500
Email: lawyers@homburger.ch
Web: www.homburger.ch

Homburger

TAIWAN

Law and Practice

Contributed by:
Stephen Wu, Yvonne Hsieh, Wei-Han Wu and Erica Chiu
Lee and Li, Attorneys-at-Law see p.633

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Taiwan Fair Trade Act (TFTA) is the relevant merger control legislation in Taiwan, which was last amended on 14 June 2017 with the newly amended Enforcement Rules of the TFTA ("Enforcement Rules") being announced on 7 April 2022. The supplementary rules on merger control include the Directions for Enterprises Filing for Mergers, the Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings ("Merger Guidelines"), the Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers and the Guidelines on the Provision of Pre-Filing Consultation Service.

See **9.1 Recent Changes or Impending Legislation** for details of a series of amendments to the merger control regime that the Taiwan Fair Trade Commission (TFTC) is considering.

1.2 Legislation Relating to Particular Sectors

The Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers is the relevant legislation for merger filings related to foreign mergers. The filing requirements (thresholds, timeframe, documents, etc) for foreign mergers are the same as those for domestic transactions. However, the TFTC will take the local effect into consideration when determining whether it will exercise the jurisdiction.

In Taiwan, there is no other legislation for mergers relating to particular sectors. However, under several of the TFTC's guidelines on sectoral control of certain industries affecting public welfare, such as airlines, banking/finance, or 4C industries, certain specific factors will be taken into account by the TFTC when reviewing a merger involving that particular industry.

1.3 Enforcement Authorities

The TFTC is the competent authority enforcing the TFTA. It is not only the regulatory body responsible for the execution of the TFTA, but also the agency which interprets the TFTA by rulings and stipulates the enforcement rules and relevant regulations of the TFTA. The TFTC may seek comments from other authorities during the review process but the TFTC has the final say on its decision.

2. JURISDICTION

2.1 Notification

If any of the filing thresholds is met, a notification is compulsory.

The following circumstances are exceptions for a notification even if the filing thresholds are met:

- where an enterprise or its 100% held subsidiary combines with another enterprise in which it already holds 50% or above of the voting shares or capital contribution;
- where enterprises of which 50% or above of the voting shares or capital contribution are held by the same enterprise combine;
- where an enterprise assigns all, or a substantial part of, its business or assets, or all or a substantial part of its business that could be separately operated, to another enterprise to be newly established and wholly owned by the former enterprise – please note that "substantial part" is not further defined under the TFTA and thus should be judged on a case-by-case basis;
- where an enterprise redeems its outstanding shares in order to convert them into treasury stock or because of minority shareholders' exercise of appraisal rights, causing the other

shareholders' shareholdings to be increased to one-third or more of the voting shares in the enterprise; or
- where a single enterprise reinvests to establish a subsidiary and holds 100% of the shares or capital contribution of such subsidiary.

On 18 July 2016, a ruling was promulgated by the TFTC to exempt the following types of transactions from the requirement to make a filing:

- an enterprise merging with another enterprise that is under the control of the latter enterprise or is its subordinate enterprise;
- an enterprise merging with another enterprise where both are under the control of the same controlling enterprise;
- an enterprise transferring its part of (or entire) voting shares or capital contribution of a third enterprise to another enterprise that is under the control of the latter enterprise or is its subordinate enterprise;
- an enterprise transferring its part of (or entire) voting shares or capital contribution of a third enterprise to another enterprise that is under the control of the same controlling enterprise.

For a foreign-to-foreign transaction, the TFTC may not exercise its jurisdiction when such combination has no direct, substantial and reasonably foreseeable effect on the Taiwan market (ie, local effect). However, as the TFTC has the sole discretion to determine whether the local effect exists in the proposed transaction, the parties to a foreign-to-foreign transaction can still submit the notification to avoid any non-compliance risk.

2.2 Failure to Notify

Failing to notify a combination that meets a filing threshold may cause the TFTC to impose penalties including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises if the TFTC discovers such violation. The TFTC is also authorised to impose an administrative fine of between TWD200,000 and TWD50 million.

Penalties imposed on parties for violation of merger control rules will be published by the TFTC. Public information shows that there was no penalty imposed during 2021 in terms of merger control violation.

2.3 Types of Transactions

According to the TFTA, a transaction that falls under the definition of a "combination" which also meets certain thresholds as prescribed by the TFTA, requires a notification to the TFTC in advance. According to the TFTA, a "combination" is broadly defined to include:

(i) mergers;
(ii) holding or acquisition of one-third or more of the voting shares of, or interest in, another enterprise;
(iii) a transfer or lease of the whole, or a substantial part of, an enterprise's business or assets;
(iv) a contractual arrangement with another enterprise for joint operation on a regular and ongoing basis, or the management of another enterprise's business on a contract of entrustment; and
(v) a direct or indirect control over the business operation or personnel management of another enterprise – whether "control" exists should be evaluated on a case-by-case basis since there is no definitive definition thereof.

Internal restructuring or reorganisation, under certain circumstances, may fall into the exceptions under the TFTA and be exempted from a filing obligation. Please refer to **2.1 Notification** for details. An operation that does not involve the transfer of shares or assets (eg, shareholders' agreements, contractual arrangement on joint business operation) will constitute a combination only if it falls under the combination defined under (iv) or (v) set forth above.

2.4 Definition of "Control"

Whether "control" exists is not defined under the TFTA, and thus should be evaluated on a case-by-case basis.

Acquisition of a minority shareholding or other interests less than control will constitute a combination only if it falls under the combination defined under (ii), (iv) or (v) as set forth in **2.3 Types of Transactions**.

2.5 Jurisdictional Thresholds

Under Article 11 of the TFTA, a notification would be required if:

- as a result of the combination, any of the enterprises will acquire at least one-third of the market share;
- any of the enterprises participating in the combination holds a market share of at least one-quarter before the combination; or
- the preceding fiscal year's turnover of a participating enterprise exceeded the amount set forth by the TFTC, ie:
  - (a) the aggregate global turnover of all the participating enterprises in the preceding fiscal year exceeded TWD40 billion, and at least two of the participating enterprises had a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;
  - (b) for a combination among non-financial enterprises, one of the participating enterprises generated a turnover in Taiwan of at least TWD15 billion in the preceding fiscal year, while the other participating enterprise generated a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year; or
  - (c) for a combination between financial enterprises, one of the participating enterprises generated an annual turnover of at least TWD30 billion, while the other participating enterprise generated an annual turnover of at least TWD2 billion.

Paragraph 2, Article 11 of the TFTA specifically stipulates that the turnover should be calculated on a "group/consolidated" basis by including the sales revenues of an enterprise that is controlled by, controlling, or affiliated with the enterprise in the combination, and of an enterprise where both itself and the enterprise in the combination are under common control of the same enterprise or enterprises.

The "control/subordinate" relation under Article 11 Paragraph 2 of the TFTA above is further explained in Article 6 of the Enforcement Rules. The details are as follows.

- When enterprise X holds more than half of the shares in enterprise Y, or if enterprise X directly/indirectly controls the business operation or the appointment or discharge of the personnel of enterprise Y, enterprise X can be viewed as having control over enterprise Y. Furthermore, in the event that the whole or the substantial part of the business or assets of enterprise Y is assigned or leased to enterprise X, or where enterprise X jointly operates with enterprise Y on a regular basis, or is entrusted by enterprise Y to operate enterprise Y's business which results in enterprise X having controlling over enterprise Y, this situation can also be deemed as a type of "control/subordinate" relation.
- If a person or an organisation and/or its related persons hold a majority of the total number of outstanding voting shares or the total capital of another enterprise, it should be concluded that the "control/subordinate"

relation exists among the aforementioned entities.
- The "control/subordinate" relation is presumed to exist if a majority of the executive shareholders or directors in a company are simultaneously acting as the executive shareholders or directors in another company, or if a majority of the total number of outstanding voting shares or the total amount of the capital interest of a company and another company is held by the same shareholders.

Please note that for foreign entities, when calculating the turnover threshold, only the Taiwanese sales are relevant, which shall include (i) sales generated "in" Taiwan by the parties' affiliates, branch offices, or any other entities defined by Paragraph 2, Article 11 of the TFTA, and (ii) direct sales "into" Taiwan by selling to Taiwanese customers.

2.6 Calculations of Jurisdictional Thresholds

For more details on the calculation of the jurisdictional thresholds, please see **2.5 Jurisdictional Thresholds**. The TFTA is silent on the conversion of the sales booked in a foreign currency. In practice, using the annual average exchange rate published by the Central Bank of Taiwan for the conversion is acceptable to the TFTC.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

For details, please see **2.5 Jurisdictional Thresholds**.

Specifically, Paragraph 2, Article 11 of the TFTA stipulates that the turnover should be calculated on a "group-wide /consolidated" basis – ie, by including the sales amount of an enterprise that is controlled by, controlling, or affiliated with the enterprise in the combination, and of an enterprise where both itself and the enterprise in the combination are controlled by the same enterprise or enterprises.

The TFTA is silent on whether any change in the business during the reference period (such as other acquisitions, divestments or business closures) should be factored in when calculating the turnover; however, in general, the TFTC accepts the annual turnover figures stated in the parties' audited financial statements as the benchmark to calculate the turnover.

2.8 Foreign-to-Foreign Transactions

As long as a foreign-to-foreign transaction falls under the definition of a combination as stated in **2.3 Types of Transactions**, and it meets any of the filing thresholds as provided in **2.5 Jurisdictional Thresholds**, such transaction is subject to the merger control in Taiwan.

There is a local effects test under the TFTA. According to the Guidelines on Handling Extra-territorial Mergers, which were last amended in December 2016, after weighing the following factors, the TFTC may decide not to exercise its jurisdiction over a pure foreign-to-foreign transaction, considering:

- whether there will be a direct, substantial, and reasonably foreseeable effect on the domestic market;
- the relative weight of the merger's effects on the relevant market of Taiwan and the foreign countries;
- the nationalities, locations, and principal places of business of the combining enterprises;
- the explicitness and foreseeability of the intent to affect market competition in Taiwan;
- the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises;

- the feasibility of enforcing administrative dispositions;
- the effect of enforcement on the foreign enterprise(s);
- international conventions and treaties, or provisions of international organisations; and
- whether any party has any production or service facilities, distributors, agents, or other substantive sales channels within the territory of Taiwan.

Thus, parties to an extraterritorial combination may, based on their own assessment of the factors above, conclude that due to lack of local effect arising from the proposed transaction, no filing is required in Taiwan. Despite the aforesaid, it is the TFTC who has the final say on whether a filing would be required.

It is also worth noting that a filing would be required even when a target has no sales and/or assets in Taiwan as long as the transaction falls under the definition of a combination stated in **2.3 Types of Transactions** and the parties meet any of the filing thresholds stated in **2.5 Jurisdictional Thresholds**.

2.9 Market Share Jurisdictional Threshold

Given that the TFTA does not limit the filing threshold assessment to only overlapping products/services, it is possible for one party – either a target or an acquirer – to meet the threshold in the absence of a substantive overlap.

2.10 Joint Ventures

Joint ventures are likely to be covered by the merger control rules, as long as they meet the definition of combination under the TFTA and any filing threshold is triggered.

The term "joint venture" is not defined under the TFTA. However, the TFTC ruled in 2002 that the establishment of a joint venture, whether it is a newly incorporated enterprise or an existing enterprise, will be subject to merger control if it constitutes a combination defined under the TFTA. Note that a joint venture is not further categorised into different types based on its function or corporate structure by the TFTA.

2.11 Power of Authorities to Investigate a Transaction

The TFTC does not have the power to investigate a transaction that does not meet the jurisdictional thresholds. However, the TFTC has the power to issue letters to the parties requesting them to provide explanations and relevant documents to prove that the jurisdictional thresholds are not met, if deemed necessary.

The statute of limitation for the TFTC to enforce merger control regulations is five years.

2.12 Requirement for Clearance Before Implementation

Implementation of a transaction must be suspended until clearance is obtained.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The sanctions for implementing a transaction prior to receiving clearance are the same as those applicable for the failure to file a notification; please see **2.2 Failure to Notify**. Public information revealed that no penalties have been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to or waivers from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There is no exception under the TFTA that allows parties to close the transaction prior to receiving the TFTC's clearance. Furthermore, whether the TFTC will accept the parties' proposal to temporarily carve-out transactions related to Taiwan is unclear, since no case precedent is available.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

The law does not stipulate a deadline for making a filing. However, since the TFTC requests a definitive agreement or relevant board resolution to be submitted with the notification to evidence the parties' intention of conducting the transaction, once the parties' board approves the proposed transaction or completes the signing of the definitive agreement, the parties may then make a filing, which is deemed as the earliest time.

3.2 Type of Agreement Required Prior to Notification

A definitive agreement or relevant board resolution to be submitted along with the notification is required in order to prove the parties' intention of conducting the transaction. The TFTC will review whether a filing based on a less formal agreement such as a letter of intent or memorandum of understanding is acceptable in each case. If the parties are unable to provide any written agreement indicating the parties' intention of proceeding with the proposed transaction, the TFTC may reject the filing.

3.3 Filing Fees

No filing fee is required.

3.4 Parties Responsible for Filing

The following parties shall file a combination notification:

- all the enterprises involved in the transaction, where an enterprise is merged into another enterprise, regularly runs operations jointly with another enterprise, or is commissioned by another enterprise to run operations;
- the holding or acquiring enterprise, where an enterprise holds or acquires shares or capital contribution of another enterprise;
- the transferee or lessee, where an enterprise transfers or leases its operations or assets to another enterprise; and
- the controlling enterprise, where an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

If an enterprise required to file has not yet been established, the existing enterprises in the merger shall file the notification. Companies considering a combination should note that the Enforcement Rules indicate that, in a combination-type acquisition of shares or capital contributions of another enterprise, if a control/subordinate relation exists between the acquirers or the acquirers are under common control of one or more entities, the ultimate parent company of the acquirers shall be the notifying party.

3.5 Information Included in a Filing

The information required to be included in the main context of a filing is listed as follows.

- The participating parties' company basic information.
- The information as to the cost of production or other operational cost, selling prices, quantity and value of production, and sales of the (i) top three major, and (ii) related products/services of the participating parties for the last three years in Taiwan.

- The horizontal competition information regarding structure of the relevant market of the participating parties in Taiwan.
- The market information regarding the upstream (suppliers) and downstream (customers) industries for the participating parties in Taiwan.
- Description of the transaction, including:
  - (a) the estimate time frame and closing date;
  - (b) the consideration;
  - (c) the result of the transaction (ie, post-closing structure); and
  - (d) whether the proposed transaction is also notified in other jurisdiction, if so, its review status.
- Description of the relevant market, including:
  - (a) the product market;
  - (b) the geographic market; and
  - (c) horizontal and vertical competition status (including major competitors).
- Information regarding the possible obstacles in entering the relevant market, including:
  - (a) the minimum capital or working capital requirement for entering into the relevant market, if any;
  - (b) the legal restriction for entering into the relevant market, if any;
  - (c) the intellectual property involved in the relevant market, if any;
  - (d) the materials supply sources, if any;
  - (e) the ratio of the fixed cost to the total cost of the production of relevant products, if applicable;
  - (f) the tariff or non-tariff barrier, if applicable;
  - (g) the impacts to the market which would be caused by the transaction, if any; or
  - (h) any other obstacle regarding the market entry.
- An economic analysis of:
  - (a) the advantages created by the proposed transaction to each of the participating parties;
  - (b) the disadvantage to each of the participating parties if the proposed transaction is prohibited;
  - (c) the advantages created by the proposed transaction to the overall economy in Taiwan created by the proposed transaction; and
  - (d) the anti-competition disadvantages to the Taiwan market caused by the proposed transaction.
- The participating parties' investment status in Taiwan, such as subsidiaries and branches.

The supporting documents that should be enclosed along with a filing are listed as follows:

- the participating parties' latest annual reports or financial reports;
- a copy of the definite agreement of the proposed transaction or resolutions adopted by the board meeting of the participating parties approving the proposed transaction;
- power of attorney executed by the participating parties' ultimate parent company authorising local counsel to file the combination notification on behalf of them; and
- the participating parties' most recent certificate of incorporation.

The language must be Chinese (Mandarin) when submitting the filing. If there is any document written in foreign language, excerpted translation should also be prepared. All other documents can be in duplicate copy, except the power of attorney should be original copies (no certifications, notarisations or apostilles are required).

3.6 Penalties/Consequences of Incomplete Notification

In practice, the TFTC may reject the filing or request the parties to withdraw the filing if the notification is deemed incomplete after several rounds of RFIs. There is no penalty under such circumstance but the parties cannot close the deal since no clearance has been granted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The TFTC may impose penalties including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises if the TFTC discovers such violation that the notifying party is deemed to have supplied inaccurate or misleading information in the filing and proceeds with the combination. The TFTC also has the power to impose an administrative fine of between TWD100,000 and TWD1 million.

There is no case precedent in this regard during the past five years, according to public information.

3.8 Review Process

The review process is not divided into different phases by the TFTC. Rather, after the initial filing is submitted, the TFTC will request the parties to provide supplemental information by issuing request for information (RFI) letter. Until the TFTC deems all the required documents and information have been provided, such RFI procedure will end. Once the TFTC deems that the filing is complete, the waiting period can start to run. Then, the parties to the proposed transaction are free to proceed with the merger if the TFTC does not make any objection to the filing within 30 business days following the filing date (with complete documents and information). If it is deemed necessary, the TFTC may shorten the 30-day waiting period or extend the period for up to 90 business days.

3.9 Pre-notification Discussions With Authorities

The Guidelines on Offering Pre-Filing Consultation was published by the TFTC on 18 August 2021, which aims to help the notifying parties clarify certain filing related issues before the parties submit a formal filing. However, given that the TFTC's opinions expressed in such consultation is non-binding, it is not necessarily the case that the parties will find such consultation beneficial to their filing decision. The process is treated confidentially.

3.10 Requests for Information During the Review Process

The requests for information (RFI) will be issued by the TFTC during the review process requesting the parties to supplement information; such requests reset the clock. Subject to the complexity of the case, there may be two or more rounds of RFIs.

3.11 Accelerated Procedure

Other than the simplified procedure stated below, there is no other type of accelerated procedure or informal way to expedite the clearance.

The waiting period of the following circumstances can be shortened by applying the simplified procedure. The following circumstances are eligible for a simplified procedure.

- The enterprise files the notification for reaching the turnover threshold, but its respective market shares meet one of the following criteria:
  - (a) where the combining parties engage in a horizontal merger, the combined market shares after the merger are below 20%;
  - (b) where the combining parties engage in a horizontal merger, the combined market shares after the merger are below 25% and the market share of one of the participating parties is below 5%;
  - (c) where the combining parties engage in a vertical merger, the combined market shares in each individual market are below 25%.
- Where the combining parties engage in a conglomerate merger, the factors below are considered, and it is established that the

parties do not have any major potential for competition between each other:
  (a) the impact of an increase of regulation and control on the cross-industry operation by merging parties;
  (b) the probability of cross-industry operation by the merging parties because of technological advancement; and
  (c) the merging parties' original cross-industry development plan besides the merger.
- One of the enterprises participating in the merger directly owns more than one-third and less than half of the voting shares or paid-up capital of the other merging party.

Nonetheless, the TFTC would still request the parties to follow the standard procedure in certain situations, such as where the merger involves major public interest, or the entry barriers are high, even if they have met the above-mentioned criteria for the simplified procedure.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

After all relevant factors are considered, if there is no suspicion of obvious competition restraints, the TFTC will conclude the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraint. Otherwise, the TFTC should further examine overall economic benefits to determine whether the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraint.

4.2 Markets Affected by a Transaction

In general, to determine the markets that may be affected by the transaction, the TFTC will examine the markets where the parties' activities overlap and/or have vertical relationship. In practice, the TFTC will also look into the parties' respective major businesses in Taiwan from time to time, even if such businesses have no relevance to the proposed transaction. There is no de minimis concept under the TFTA.

4.3 Reliance on Case Law

To our knowledge, the TFTC may sometimes rely on its own case precedents to review the present case. Although the TFTC may take the case laws in other jurisdictions into consideration, it is less likely that the TFTC will solely rely on other jurisdictions' views to make its decision.

4.4 Competition Concerns

The competition concern that the TFTC will investigate varies with the types of combinations. If the combining enterprises engage in a horizontal combination, the TFTC will take the following factors into consideration:

- unilateral effects;
- co-ordinated effects;
- market entry;
- countervailing power; and
- other factors that may impede the competition.

If the combining enterprises engage in a vertical combination, the TFTC will take the following factors into account:

- the possibility for other competitors to choose trading counterparts after the combination;
- the level of difficulty for businesses not participating in the combination to enter the relevant market;
- the possibility for the market power being abused by their participating parties in the relevant market;
- the possibility of increasing competitors' cost;
- the possibility of concerted actions occurring as a result of the combination; and
- other factors likely to lead to market foreclosure.

When reviewing conglomerate combinations, the following factors may be considered by the TFTC to determine whether potential competition exists between the parties to a conglomerate combination:

- the possibility of change of regulations and its impact on the participating parties' cross-industry operations;
- the possibility of technological improvement enabling the engagement in cross-industry operations by the participating parties;
- whether any of the participating parties originally has the intention to develop cross-industry operations; and
- other factors likely to have an impact on market competition.

Under the circumstances that significant potential competition is deemed likely in a conglomerate combination, it is required to further analyse the factors concerning anti-competition under a horizontal or vertical combination.

4.5 Economic Efficiencies

While the TFTC will certainly consider economic efficiencies when determining whether the proposed transaction will benefit the economy overall, there is no case precedent on how the TFTC weighs this factor.

4.6 Non-competition Issues

Whether the TFTC will take into account any non-competition issues as part of the review process is unclear, since no case precedent is available. The TFTA or relevant regulation is silent on whether the consideration of these non-competition issues should be permitted.

The ruling for foreign direct investments in Taiwan is separate from the merger control regime. In principle, an investment into Taiwan is subject to the prior approval of the Investment Commission, the Ministry of Economic Affairs.

4.7 Special Consideration for Joint Ventures

There are no special considerations in the substantive review of joint ventures; however, the possible co-ordination issues between joint venture parents will be examined by the TFTC.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The TFTC has the ability to prohibit or otherwise interfere with a transaction; it exercises its power by issuing a binding decision at the end of the regulatory process. Such decision is generally in one of the following four categories:

- a waiver to the jurisdiction (for extraterritorial transactions with no local effect);
- clearance without condition;
- clearance with conditions; and
- a prohibition on the combination.

In a decision that the TFTC prohibits a combination, it will state its reasons therein regarding the anti-competition disadvantages to the Taiwan market caused by the proposed transaction.

5.2 Parties' Ability to Negotiate Remedies

Though the proposal of remedy mechanism is not provided in the TFTA, our experience suggests that when the TFTC has concerns about a transaction, the parties are able to propose remedies to the TFTC for its consideration. If the proposed remedies would constitute a material change to the notification, and hence the TFTC would require additional information for its evaluation, the TFTC may stop the clock and the waiting period will be reset only after the supplemental information is submitted. If the proposed remedies would not constitute a material change to the notification, the TFTC will take into account such remedies when rendering its decision on the merger notification before the waiting period expires. The TFTC will assess whether it would grant its clearance with conditions referring to such remedies.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable.

5.4 Typical Remedies

In terms of the particular kinds of remedies that are typically used in practice, since the primary purpose of the remedies is to eliminate the anti-competition concerns, most competition authorities in different jurisdictions recognise that divestitures, a type of structural remedy, are the best way to achieve such a goal. In line with these international practices, the TFTC appears to accept structural remedies for the divestitures (disposal of shares held by the party) and impose such remedies as conditions to its clearance. In fact, the public records indicate that the TFTC has indeed adopted the divestment approach in a transaction involving a cable television business.

The TFTC amended the Merger Guidelines in September 2012 to include its official standards for remedies. According to the Merger Guidelines, TFTC can impose the following remedies as conditions.

- Measures impacting the structural aspect: order the parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations, or remove personnel from certain positions.
- Measures impacting the behavioural aspect: order the parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment, and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedies on a case-by-case basis. The Merger Guidelines also point out that the TFTC may seek the parties' opinions on the possible remedy before making a final decision.

Whether remedies are ever required to address non-competition issues is unclear since no case precedent is available.

5.5 Negotiating Remedies With Authorities

The parties can begin negotiating remedies with the TFTC within the waiting period by submitting a proposal to the TFTC. Meanwhile, the TFTC has the authority to propose remedies on its own motion. Though the TFTC may choose to consult the parties before imposing the remedies, the TFTC can nonetheless impose remedies that the parties have not agreed. Regarding the procedural steps with respect to remedies, please see **5.4 Typical Remedies**.

5.6 Conditions and Timing for Divestitures

With regard to the standard approach regarding conditions and timing for divestitures or other remedies, please see **5.4 Typical Remedies** for details.

Depending on the nature of that remedy, it is acceptable for the parties to complete the merger before complying with the remedies. The TFTC will conduct periodic reviews of the parties' behaviour or divestment status to ensure that the parties comply with the conditions imposed by the TFTC.

Since the remedies will serve as conditions to the TFTC's clearance, the parties must adhere to the conditions. In the event that the TFTC discovers any violation, the TFTC may impose penalties on the parties, including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises. The TFTC also has the power to impose an administrative fine of between TWD 200,000 and TWD 50 million.

5.7 Issuance of Decisions

When the TFTC clears a transaction without any condition/remedy, it will only publish a news release summarising its decision on its website and does not issue a formal decision letter. For a decision with condition/remedy or prohibiting a transaction, the TFTC will issue an official decision to the parties, which will also be published on the TFTC's website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Thus far, the TFTC has never imposed "structural" remedies (such as divestment of assets or disposal of shares) in foreign-to-foreign mergers. However, the TFTC has certainly attached behavioural remedies to a few foreign-to-foreign mergers, most of which involve sensitive industries such as the semiconductor or technology licensing industries.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

To our knowledge, no case precedent is available in Taiwan. Thus, whether ancillary restraints (such as non-competition agreement) will be covered by a clearance decision is unclear.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties (eg, customers, competitors, complainants) may have opportunities to be involved in the review process.

If the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion. In some cases where the TFTC considers that the transaction will have a great impact on the local market, it will (i) hold a symposium or a public hearing and invite competitors, upstream and downstream enterprises, relevant competent authorities and scholars to provide their opinions, and/or (ii) issue letters to the parties' Taiwanese customers, suppliers and sometimes competitors to seek their opinions.

7.2 Contacting Third Parties

As stated in **7.1 Third-Party Rights**, if the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion.

It is unclear whether the TFTC will "market test" any remedies offered by the parties.

7.3 Confidentiality

As stated in **7.1 Third-Party Rights**, if the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion. Under such circumstances, the fact of the notification and/or description of the transaction will be publicised.

The parties may request the TFTC not to disclose the specific confidential information to the public and handle combination notifications confidentially. If the parties have any particular concerns about the TFTC's public announcement, they can also submit an application requesting the TFTC not to disclose certain information regarding the combination transaction. However, whether such request will be granted will be subject to TFTC's discretion. If the TFTC considers that the information about the transaction has an impact on the Taiwanese market, it will reject the non-disclosure request and make a public announcement soliciting the public's opinions. Nevertheless, in general, the TFTC will not disclose the parties' commercial information specifically marked confidential in their filings to the general public, such as trade secrets.

7.4 Co-operation With Other Jurisdictions

While reviewing the filing for some cross-border transactions, the TFTC will consult the regulatory authorities of the parties' home countries. In addition, there are several co-operation agreements and memorandums for the application of competition regulations between the TFTC and the following countries: Australia; Canada, France, Hungary, Mongolia and New Zealand. Co-operation between the TFTC and these countries can be anticipated.

It is unclear whether such co-operation is simply on general policy level or whether the TFTC exchanges specific transaction information with other jurisdictions.

In practice, the TFTC will seek the parties' consent before sharing information with other jurisdictions.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The parties (or any interested parties with legal standing) may appeal against the TFTC's administrative decision to the High Administrative Court for judicial review within two months of the receipt of said decision.

The procedure of administrative litigation is basically the same as the procedure of civil litigation. The case will be heard in a court and the TFTC, as the defendant, and the parties subject to the decision, as the plaintiff, will be in front of judges in a formal legal proceeding.

Although the decision of the High Administrative Court can be appealed to the Supreme Administrative Court for legal review, the Supreme Administrative Court will not hold any hearing. The High Administrative Court's judgment will be reversed only when such judgment is legally flawed.

8.2 Typical Timeline for Appeals

The parties (or any interested parties with legal standing) can appeal against the TFTC's decision to the court within two months of receipt of the decision. The timeline for an appeal is approximately 12 to 18 months. To our knowledge, during the past five years, no enterprise has filed an appeal in the High Administrative Court against the TFTC's merger filing decision.

8.3 Ability of Third Parties to Appeal Clearance Decisions

If any clearance decision will have an adverse effect or impose burdens on a third party, such interested third party can appeal. To our knowledge, during the past five years, no third party has filed an appeal in the High

Administrative Court against the TFTC's merger filing decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

According to the announcements released by the TFTC in June 2021 and the minutes of the TFTC Commissioners' meetings held during the second quarter of 2021, the TFTC is proposing a series of amendments to its merger control regime. The TFTC, for example, published the Guidelines on Offering Pre-Filing Consultation on 18 August 2021, aiming to assist the notifying parties in clarifying filing related issues in advance, such as type of combination and filing threshold. Other amendments include (i) modifying the Merger Notification Form, and (ii) allowing the online submission of a filing through the TFTC's filing system.

The TFTC is also considering, among others, repealing the Disposal Directions (Guidelines) on Extraterritorial Mergers and concurrently amending the Disposal Directions (Guidelines) on Handling Merger Filings. While it is uncertain when the other proposed amendments will take effect, it is apparent that reforming the merger control regime is one of the TFTC's enforcement priorities this year.

9.2 Recent Enforcement Record

According to public information, the TFTC reviewed a total of 69 merger filing cases in 2021, and among them, 32 cases were approved while the review process of the other 37 cases terminated, which means that the TFTC decided to waive its jurisdiction over those cases; no case was prohibited. Public information also shows that there was no sanction decision in terms of merger control in 2021.

9.3 Current Competition Concerns

In March 2022, the TFTC published a draft White Paper on Competition Policy in the Digital Economy, inviting comments and feedback from the public on this draft. While the competition issues explored in the draft White Paper include "killer acquisitions" and the role of privacy in merger review, it is unclear at present whether the draft White Paper will lead to amendments to the merger control rules to specifically address the issues arising from digital mergers.

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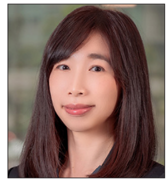
AUTHORS

Stephen Wu is the partner leading the competition law practice group in Lee and Li. He is also the founding chairman and an active member of the Competition Law Committee of the Taipei Bar Association. Stephen has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He has co-authored various articles and Taiwan chapters for many competition law publications and has been recognised as being among the world's leading competition/antitrust lawyers by international legal directories. Stephen is also active in public policy reform projects in diversified practice areas, such as knowledge-based economics, corporate governance, M&A transactions, telecommunications and media convergence, venture capital, limited partnerships, industrial holding companies and investors' protection.

Yvonne Hsieh is a senior counsellor of Lee and Li. She joined the firm in 2000 and focuses her practice on mergers and acquisitions, international investment, antitrust and competition laws, securities investment, and telecommunications and broadcasting. Yvonne is specialised in the privatisation of listed companies and also works with many private equity funds on their investments in Taiwan. Furthermore, she is very experienced in handling merger control filings, cartel and unfair competition investigations, and has successfully represented numerous clients in these matters. She has been recognised by one international legal directory as being among the world's leading competition lawyers.

Wei-Han Wu is an associate partner at Lee and Li. She joined the firm in 2008 and is a core member of the firm's competition law practice group. Ms Wu advises clients on the full range of competition law, focusing on merger control, cartel work, restrictive practice and unfair trade matters. She has extensive experience in representing international corporations in major deals relating to her practice areas before the Taiwan Fair Trade Commission and in proceedings before the administrative courts. Ms Wu is also frequently involved in various cases at the intersection of antitrust, digital economy, IP and privacy protection. She regularly writes and speaks on a variety of competition law topics. She has been listed by one international legal directory as a "future leader" in the competition sector.



Erica Chiu is a core member of the competition law practice group of Lee and Li and advises clients on the full range of competition law issues, focusing on merger control, cartel work, restrictive practice and unfair trade matters. Ms Chiu has extensive experience in representing international corporations in major deals before the Taiwan Fair Trade Commission and in proceedings before the administrative and civil courts in Taiwan. She has also participated in several M&A cases. In addition, Ms Chiu advises companies on corporate compliance and provides services regarding contract review and drafting.

Lee and Li, Attorneys-at-Law

8F, No. 555, Sec. 4, Zhongxiao E. Rd.
Taipei 11072
Taiwan

Tel: +886 2 2763 8000 ext. 2388
Fax: +886 2 2766 5566
Email: stephenwu@leeandli.com
Web: www.leeandli.com

Trends and Developments

Contributed by:
Stephen Wu, Yvonne Hsieh, Wei-Han Wu and Erica Chiu
Lee and Li, Attorneys-at-Law ***see p.639***

Overview of Taiwan Merger Control

Merger control in Taiwan is regulated by the Taiwan Fair Trade Act (TFTA), and the competent authority is the Taiwan Fair Trade Commission (TFTC). The principle is that a filing with the TFTC would be required for a transaction that falls within the definition of a "combination" under the TFTA if any of the filing thresholds is met.

Types of combination

According to Article 10 of the TFTA, a "combination" is defined to include:

- a merger;
- holding or acquisition of at least one-third of the voting shares of or interest in another enterprise;
- a transfer or lease of all or a substantial part of an enterprise's business or assets;
- having an arrangement with another enterprise for joint operation on a regular, ongoing basis, or the management of another enterprise's business based on a contract of entrustment; or
- having direct or indirect control over the operation or personnel of another enterprise.

Filing thresholds

Under the TFTA, there are both a turnover filing threshold and a market share filing threshold:

- the aggregate global turnover of all the enterprises to a combination in the preceding fiscal year exceeded TWD40 billion, and each of at least two of the enterprises had a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;
- for a combination of non-financial enterprises, one of the enterprises generated a turnover in Taiwan of at least TWD15 billion in the preceding fiscal year while the other enterprise generated a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;
- as a result of the combination, the enterprises to a combination will jointly acquire at least one-third of the market share in Taiwan; or
- one of the enterprises participating in the combination holds a market share of at least one-fourth in Taiwan before the combination.

Substantive test and review timeline

In terms of the substantive test, as prescribed under Article 13 of the TFTA, if the TFTC concludes, after considering all relevant factors, that the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraint, clearance would be granted.

With respect to the timeline, if the TFTC does not make any objection to the filing within 30 working days following the filing date, the parties to the proposed transaction would be free to proceed with the merger. The TFTC may shorten the 30-day waiting period or extend the period by up to another 60 working days if it deems necessary.

It should be noted that the aforesaid filing date refers to the date on which the TFTC confirms that all required documents and information have been completed. To be specific, after receiving the initial filing, the TFTC may issue letter(s) of request for information (RFI) instructing the parties to provide supplemental information. Such RFI procedure will end if and when the TFTC is satisfied that the parties have submitted all required documents and information.

Recent Amendments to Improve Efficiency

In the past year, the TFTC has made a number of amendments to its merger control regulations in order to improve the efficiency of its merger reviews and the quality of its decisions.

Guidelines on the Provision of Pre-Filing Consultation Services ("Consultation Guidelines")

In August 2021, the TFTC launched its pre-filing consultation services for enterprises to consult the TFTC before submitting their merger filings to the TFTC. The key points of the Consultation Guidelines are summarised below.

Who can request the consultation service?

This service is offered to participating parties who are planning to submit their merger filings to the TFTC. The request may be made by the participating parties on their own or through their agents with the proper power of attorney.

What is the scope of the consultation service?

Through the consultation service, the TFTC will assist the participating parties in clarifying questions such as whether the subject transaction has met the definition of a combination, whether any filing threshold has been reached, which entities should be named as the participating/notifying parties in the merger filing, what documents should be submitted for merger review and which type of procedure should apply for merger review.

How is the consultation service requested?

The consultation service may be requested via an enquiry in hard copy or via the service box at the TFTC's official website. In the request, the details of the matters that are in need of consultation must be provided, including the names of the participating parties, the products and/or services involved in the proposed transaction, the transaction structure, the markets that could potentially be affected by the transaction, the date on which the merger filing is expected to be submitted and the documents related to the transaction. Providing such information in full and in detail will ensure the efficiency and effectiveness of the consultation service.

What is the timeframe for utilising the consultation service, and is there any exception?

To ensure that the TFTC is adequately prepared to respond to the consultation, the consultation request should be made at least ten working days prior to the expected filing date. For complex merger cases, it is advisable to make the request earlier so as to enhance the effectiveness of the consultation service. On the other hand, if the participating parties submit their merger filing to the TFTC within ten working days of making the consultation request, the TFTC may cease the consultation service but directly proceed with the merger review procedure.

How will consultation enquiries be handled?

In addition to review of written documents, the TFTC may also elect to hold a meeting in person or via teleconference.

Is there a limit to the number of times the participating parties may request the consultation service?

Considering the limited time and resources the TFTC have for reviewing merger filings, in principle, participating parties may make only one consultation request for one merger filing.

What about confidentiality?

In view of the highly confidential nature of merger transactions, the Consultation Guidelines stipulate that the information and materials disclosed by the participating parties during the consultation process shall be kept confidential by the

TFTC personnel involved in providing the consultation service.

Does the consultation have any binding effect?
The advice provided by the TFTC through the consultation service is for reference only and does not bind the TFTC's decision on the review of merger filings subsequently submitted by the participating parties.

Adoption of e-filing system
The TFTC announced its amendments to the Directions for Enterprises Filing for Merger ("Merger Directions") in August 2021. One of the key changes is to adopt an e-filing system.

In the past, merger filings could only be submitted in hard copies. Now, under the Merger Directions, the TFTC will also accept submissions in electronic files – that is, the notifying parties may use the TFTC's Merger Notification and Concerted Action Application Online Filing System to submit their merger filings (including the supplemental filings during the RFI procedure). Nevertheless, the TFTC can still require the notifying parties to provide hard copies of their merger filings where it deems it necessary for its review and verification.

As the TFTC's merger review period is calculated based on working days, the Merger Directions stipulate that where a notifying party uploads the electronic files of its merger filing on a non-working day, such filing will be deemed officially received by the TFTC on the next working day after the files are uploaded to the TFTC's system by the notifying party.

Trend and Outlook

In the era of digital economy
To address the competition issues arising from the emergence of novel business models in the digital economy and the rise of technology giants, the Digital Economy Competition Policy Task Force at the TFTC started to draft the White Paper on Competition Policy in the Digital Economy in 2021; following several rounds of Task Force meetings and Commissioners' meetings, the TFTC finally released the draft White Paper on 2 March 2022. Among the topics discussed in the draft White Paper, the following two are related to merger control.

Killer acquisitions
The unresolved issue in this area is whether major digital technology giants' acquisitions of potentially competitive start-ups constitute violations of the competition law. Thus far, the TFTC has no experience of handling so-called "killer acquisitions", even though it has dealt with conglomerate merger cases of technology giants and has accumulated law enforcement experience in examining merger cases from the perspective of "potential competition". For future enforcement, the draft White Paper indicates that the TFTC will continue to monitor the international development trends and adjust relevant review standards and principles in a timely manner. Moreover, when dealing with the issues of killer acquisitions in the future, the TFTC should also consider the benefits arising from technological innovations.

Privacy in merger reviews
Another of the issues addressed in the draft White Paper is whether personal data protection is a parameter for assessing competition when reviewing the establishment of a new joint venture. Thus far, the TFTC has not included privacy protection in its analysis, but will start to consider how privacy protection can be internalised in a merger review from the perspective of "quality" competition. Nonetheless, according to the draft White Paper, if the TFTC wants to examine privacy issues in a merger filing case, it must first determine whether there is competition by the means of privacy protection, and such privacy issues should be considered only when the par-

ties use privacy protection as a way to retain or attract users. In the context of protecting privacy and maintaining competition, the TFTC should consider not only the potential disadvantage of reduction in privacy protection after the merger, but also the potential disadvantage to competition that may result from enhancing privacy protection.

The draft White Paper also recognises the difficulty of quantifying the extent and necessity of privacy protection which can pose a challenge to law enforcement in terms of seeing privacy protection as a "competition on quality". In the short term, the TFTC may seek the views of privacy and consumer protection authorities in order to apply the rule of reason test properly and to allow for a more comprehensive analysis in the context of merger reviews. In addition, the TFTC will continue to look at how other countries develop a more objective and even quantitative analysis, with a view to improve enforcement.

Proposed abolishment of the Guidelines on Handling Extraterritorial Combinations ("Extraterritorial Guidelines")

As of the date of this article, according to the Extraterritorial Guidelines, the TFTC will exercise its jurisdiction over a foreign-to-foreign combination only if the subject transaction will affect the Taiwanese market. Therefore, even though legally speaking it is the TFTC, not the parties to a transaction, that has the discretion to determine the local effect, in practice there may be some room for the parties to argue that a filing in Taiwan should not be required based on the lack of local effect.

However, according to the public notice posted by the TFTC on its website in early January 2022, the TFTC plans to abolish the Extraterritorial Guidelines and amend the Guidelines on Handling Combination Notifications ("Guidelines") by incorporating certain principles prescribed under the Extraterritorial Guidelines.

The TFTC stated in its notice that for an extraterritorial combination, since the TFTA clearly prescribes the thresholds triggering the filing requirements, it seems unnecessary for it to additionally determine whether or not to exercise its jurisdiction over an extraterritorial combination. Hence, the TFTC deems it appropriate to follow the practices of the competition agencies in the USA, the EU, Japan and Korea and to apply the "effect principle" when evaluating any "local effect" of a combination. Therefore, the Extraterritorial Guidelines should be abolished. Thereafter, for a combination without a significant local effect, the simplified filing procedure will apply, as stipulated under the amendments to the Guidelines.

According to the draft amendments to the Guidelines, the factors being considered by the TFTC in determining local effect are basically those set forth under the soon-to-be-abolished Extraterritorial Guidelines. As of now, there is no indication as to when the proposed amendment above will take effect.

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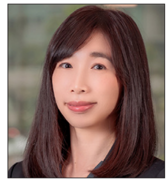

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Lee and Li, Attorneys-at-Law

8F, No. 555, Sec. 4, Zhongxiao E. Rd.
Taipei 11072
Taiwan

Tel: +886 2 2763 8000 ext. 2388
Fax: +886 2 2766 5566
Email: stephenwu@leeandli.com
Web: www.leeandli.com

理律法律事務所
LEE AND LI
SINCE 1965 ATTORNEYS-AT-LAW

TURKEY

Law and Practice

Contributed by:
Gönenç Gürkaynak, K Korhan Yildirim and Görkem Yardım
ELIG Gürkaynak Attorneys-at-Law ***see p.662***

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Contributed by: *Gönenç Gürkaynak, K Korhan Yildirim and Görkem Yardım,*
ELIG Gürkaynak Attorneys-at-Law

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Article 7 of Law No 4054 on Protection of Competition ("Competition Law") governs mergers and acquisitions in particular, and mandates the Turkish Competition Board ("Board") to regulate and establish a merger control regime. Accordingly, certain mergers and acquisitions are subject to the Turkish Competition Authority's ("TCA") review and approval in order to gain validity.

Law No 7246, the amendment to the Competition Law, was published in the Official Gazette and entered into force on 24 June 2020 (the "Amendment Law"). Furthermore, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board ("Communiqué No 2010/4") is the primary legal instrument that establishes the Turkish merger control regime. On 4 March 2022, the TCA published Communiqué No 2022/2 on the Amendment of Communiqué No 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communiqué No 2022/2"). Communiqué No 2022/2 introduces certain new regulations concerning the Turkish merger control regime, which has fundamentally affected the notifiability analysis of merger transactions and the merger control notifications submitted to the TCA.

Other guidelines adopted by the TCA on merger control matters are:

- the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control (Guideline on the Concept of Control);
- the Guideline on the Assessment of Horizontal Mergers and Acquisitions;
- the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions;
- the Guideline on Market Definition;
- the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (Guideline on Undertakings Concerned); and
- the Guideline on Remedies Acceptable in Mergers and Acquisitions (Remedy Guideline).

1.2 Legislation Relating to Particular Sectors

No other legislation is applicable to foreign transactions or investment in Turkey as far as the merger control rules are concerned, although there are specific merger control rules for mergers concerning banks, privatisation tenders and certain other sectors.

Banks

Banking Law No 5411 provides that mergers in the banking industry fall outside of the merger control regime, subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Competition Law does not apply to foreign acquiring banks already operating in Turkey, if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation Tenders

Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY30 million. Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the TCA before the public announcement of the tender specifications.

The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction will be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Other Sector-Specific Rules

There are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. For example, in the energy sector, approval from the relevant authority is required for share transfers of more than 10% (5% in case of publicly traded company shares) in an electricity or natural gas company, and in the broadcasting sector, Law No 6112 states that a transfer of shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

The relevant legislation is enforced by the TCA, a legal entity with administrative and financial autonomy, which consists of the Board, the Presidency and service departments. The Board is the competent decision-making body of the TCA and is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is located in Ankara.

The Main Services Unit consists of:

- six supervision and enforcement departments;
- a department of decisions;
- an economic analysis and research department;
- an information management department;
- an external relations, training and competition advocacy department;
- a strategy development, regulation and budget department;
- a press department; and
- a cartel on-the-spot inspections support division.

There is a "sectoral" job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors. For instance, the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers concerning the telecommunication sector and of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. JURISDICTION

2.1 Notification

Article 7 of Communiqué No 2010/4 amended by the Communiqué No 2022/2 provides for the following thresholds:

A transaction will be required to be notified in Turkey if one of the following increased turnover thresholds is met (all currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2021):

- the aggregate Turkish turnover of the transaction parties exceeding TRY750 million (approximately EUR71.9 million or USD84.9 million) and the Turkish turnover of at least two of the transaction parties each exceeding TRY250 million (approximately EUR23.9 million or USD28.3 million); or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TRY250 million (approximately EUR23.9 million or USD28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion (approximately EUR287.9 million or USD

39.7 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TRY250 million (approximately EUR23.9 million or USD28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion (approximately EUR287.9 million and USD339.7 million).

Communiqué No 2022/2 introduced a thresholds exemption for undertakings active in certain markets/sectors. Pursuant to Communiqué No 2022/2, "the TL 250 million Turkish turnover thresholds" mentioned above will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

The new regulation does not seek the existence of an "affected market" in assessing whether a transaction triggers a notification requirement, and if a concentration exceeds one of the alternative jurisdictional thresholds, the concentration will automatically be subject to the approval of the Competition Board.

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction.

The following transactions are not subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to a change of control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with such securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the target company;
- statutory and compulsory acquisitions by public institutions or organisations, for reasons such as liquidation, winding-up, insolvency, cessation of payments, concordat or privatisation; and
- acquisition by inheritance.

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company with Law No 6741. Transactions performed by the Turkish Wealth Fund and/or companies established by the Turkish Wealth Fund are not subject to merger control rules.

2.2 Failure to Notify

Competition Law

The Competition Law introduces penalties for failing to notify, or for closing the transaction before clearance. Where the parties to a merger or acquisition that requires the Board's approval close the transaction without or before obtaining the Board's approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s); in acquisitions, the fine is levied on the acquirer, whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether or not the TCA ultimately clears the transaction.

The minimum amount of this fine is set at TRY47,409 (approximately EUR3,000 and USD3,200 as of 6 May 2022) for the year 2022, and is revised each year.

Article 7 Violations

If the parties close a transaction that violates Article 7 (ie, those that significantly impede competition especially by creating a dominant position or strengthening an existing dominant position), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

If the parties close a notifiable merger or acquisition without or before the approval of the Board, the transaction will be deemed legally invalid with all attendant legal consequences in Turkey, pending clearance.

If the Board finds that the transaction violates Article 7, it shall order the parties concerned, by a resolution, the behaviours which should be followed or avoided in order to establish competition, and the structural remedies such as transfer of certain activities or shareholdings. However, the relevant amendment introduces "first behavioural, then structural remedy" rule for Article 7 violations; therefore, in cases where behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings shall comply with the structural remedies in minimum of six months. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter. There have been many cases where companies have been fined for failing to file a notifiable transaction (BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; Brookfield/JCI, 20-21/278-132, 30 April 2020; A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016; Tekno İnşaat, 12-08/224-55, 23 February 2012; Zhejiang/Kiri, 11-33/723-226, 2 June 2011, etc).

The penalties are made public as they are announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis over all or part of one or more undertakings by one or more undertakings or persons who currently control at least one undertaking, through the purchase of assets or a part or all of its shares, an agreement or other instruments; and
- the formation of a full-function joint venture.

These transactions are caught if they exceed the applicable thresholds (see **2.1 Notification**).

Operations that do not involve the transfer of shares or assets can be caught if they result in a change of control and the parties' turnovers surpass the applicable thresholds.

2.4 Definition of "Control"

Communiqué No 2010/4 provides the definition of "control", which is akin to the definition in Article 3 of Council Regulation No 139/2004.

According to Article 5(2) of Communiqué No 2010/4, control can be constituted by rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the possibility of exercising a decisive influence on an undertaking, particularly by ownership or the right to use all or part of the assets of an undertaking, or by rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

Acquisitions of minority or other interests that do not lead to a change of control on a lasting basis are not subject to notification. However, where acquired minority interests are granted certain veto rights that may influence the strategic management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for the jurisdictional thresholds and a threshold exemption for the undertakings active in certain markets/sectors.

2.6 Calculations of Jurisdictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. The calculation methods can be summarised as follows:

- the turnover of the entire economic group will be taken into account, including that of the undertakings controlling the undertaking concerned and that of all undertakings controlled by the undertaking concerned;
- when calculating turnover in an acquisition transaction, only the turnover of the acquired part will be taken into account with respect to the seller;
- the turnover of jointly controlled undertakings (including joint ventures) will be divided equally by the number of controlling undertakings; and
- two or more transactions carried out by the same parties within a two-year period will be considered as one transaction for the purpose of turnover calculation.

However, there are certain special turnover calculation methods for entities such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc.

Communiqué No 2022/2 also updates the rules that apply to the calculation of turnover of the financial institutions in accordance with the recent changes on the financial regulations. The recent updates of Article 9 of Communiqué No 2010/4 are as follows: (i) for the calculation of financial institutions' turnovers, Communiqué No 2022/2 aligns the wordings and terms in view of the applicable banking and financial regulations – it excludes the term "participation banks" and refers to the term "banks" in general, which covers all legal forms of banks; and (ii) Communiqué No 2022/2 updates the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board referred in Article 9 of Communiqué No 2010/4.

Regarding financial institutions, the turnover considered in the special turnover calculation method consists of the sum of the following.

Banks and Participation Banks

As included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430): interest and profit sharing income, collected fees and commissions, dividend income, commercial profits/losses (net), and other operational income.

Financial Leasing, Factoring and Funding Companies

As included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the

Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525): real operating income and other operating income.

Intermediary Institutions and Portfolio Management Companies

As included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842): sales income, interests, fees, premiums, commissions and other income, other operating income, shares in the profits/losses of the investments valued via the equity method, and financial income other than operating income.

Insurance, Reassurance and Pension Companies

In accordance with the last financial statements or data either published by the Undersecretariat of the Treasury, the Association of Insurance and Reinsurance Companies of Turkey or the Pension Monitoring Centre, or disclosed to the public by the companies related to the merger or acquisition, to be confirmed by the Undersecretariat of Treasury: domestic direct premium production for insurance companies (gross), domestic direct premium production for reassurance companies (gross), the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance.

Other Financial Institutions

Interest and similar income, income generated from securities, commissions, net profit generated from financial activities, and other operation income.

Sales and assets that are booked in a foreign currency should be converted into Turkish lira by using the average exchange buying rate of the Central Bank of Turkey for the financial year in which the sales or assets are generated.

Turnover-based thresholds are used in the Turkish merger control regime; therefore, the regime does not deal with asset-based thresholds.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See **2.6 Calculations of Jurisdictional Thresholds**.

The seller's turnover is only included in exceptional situations. It is included in joint-venture transactions if the seller remains a controlling party of the joint-ventures post-transaction (ie, both the seller and the buyer would be considered as buyers in cases where the buyer and the seller form a joint venture).

During the reference period, the Board will only consider the changes if they are reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law states that the criterion to apply is whether or not the undertakings concerned affect the goods and services markets in Turkey. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction can still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows mergers and acquisitions in the local and international press, and also the case practice of the

European Commission (the "Commission") and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification.

The transaction could trigger a mandatory merger control filing requirement if it concerns the formation of a joint venture that will not be active in Turkey in the foreseeable future, to the extent the parents trigger the applicable thresholds.

Board Decisions

There have been some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Turkey and considered them notifiable (most recently, Mitsubishi UFJ/Societe General, 14 May 2020, 20-24/309-149; TFS/SMMAF, 19-23/359-162, 27 June 2019; Leoni/Hengtong, 19-08/93-38, 21 February 2019; DENSO/Aisin Seiki, 19-04/32-13, 17 January 2019).

For example, in Daimler/Volkswagen-MT Holding (19-06/61-25, 7 February 2019), which concerns the acquisition of joint control over a JV that provides an online platform for sales and purchases of high-quality used cars to dealers and consumers in Germany, the Board decided that the transaction is subject to merger control filing in Turkey.

2.9 Market Share Jurisdictional Threshold

Article 7 of Communiqué No 2010/4 provides turnover-based thresholds and does not seek a market share threshold when assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

To the extent that the joint venture is full-function, the transaction is subject to merger control once the turnover thresholds are exceeded. To qualify as full-function, there must be joint control over the joint venture, and the joint venture must be an independent economic entity established on a lasting basis.

The Guideline on the Concept of Control explains the concept of full-functionality. The following elements should be considered:

- sufficient resources to operate independently;
- activities that go beyond one specific function for the parents;
- independence from the parents in sale and purchase activities; and
- operations on a lasting basis.

See **2.8 Foreign-to-Foreign Transactions** for the Board's approach regarding joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the SIEC test, the TCA may still investigate the transaction, even if it does not meet the jurisdictional thresholds, either upon complaint or on its own initiative. The applicable limitation period is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance Before Implementation

The Turkish competition law regime features a suspension requirement, whereby implementation of a notifiable concentration is prohibited until approval by the Board (Sections 7, 10, 11 and 16 of the Competition Law). See **2.13 Penalties for the Implementation of a Transaction Before Clearance**. The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition shall not be legally valid until the approval of the Board is received, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms (the acquirer(s) in the case of an acquisition, or both merging parties in the case of a merger). A monetary fine imposed as a result of a violation of the suspension requirement will be no less than TRY47,409 (approximately EUR3,000 and USD3,200 as of May, 6 2022) for 2022. The wording of Article 16 does not give the Board discretion on whether or not to impose a monetary fine in case of a violation of the suspension requirement; once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied frequently in practice, see:

- BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020;
- Brookfield, 20-21/278-132, 30 April 2020;
- A-Tex Holding/Labelon Group, 16-42/693-311, 6 December 2016;
- Tekno İnşaat, 12-08/224-55, 23 February 2012; Zhejiang/Kiri, 11-33/723-226, 2 June 2011; and
- Ajans Press-İnterpress Medya/Mustafa Emrah Fandaklı/Ziya Açıkça, 10-66/1402-523, 21 October 2010.

2.14 Exceptions to Suspensive Effect

If the control is acquired from various sellers through a series of securities transactions in the stock exchange, the concentration could be notified to the Board after the transaction is realised, provided that the following conditions are satisfied:

- the concentration is notified to the Board without delay; and
- the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception provided by the Board, which ensures that the full value of the investment is protected.

Other than this, there are no general exceptions to the suspensive effect and it is not possible to seek a waiver or obtain derogation from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Board would not permit closing before the clearance decision. There is no specific regulation allowing or disallowing carve-out or hold-separate arrangements, but the Board has so far consistently rejected all carve-out or hold separate arrangements proposed by undertakings (eg, Total SA, 20 December 2006, 06-92/1186-355; CVR Inc-Inco Limited, 1 February 2007, 07-11/71-23). The Board argued that a closing is sufficient for it to impose a suspension violation fine, and an analysis of whether change in control actually took effect in Turkey is unwarranted. The Board therefore considers the “carve-out” concept to be unconvincing.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no specific deadline for filing in Turkey. However, the filing should be made and approval should be obtained before the closing.

In practice, it is recommendable to file the transaction at least 60 calendar days before the projected closing.

See **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification: parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Opel-Saft, 20-08/78-45, 6 February 2020; Greenbriar/BDP, 18-43/680-333, 15 November 2018; JIM/Terratec, 18-31/529-260, 12 September 2018 and Jihong/Grammer AG, 17-35/541-232, 26 October 2017). However, Communiqué No 2010/4 requires the submission of a written document prior to notification – ie, a filing cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

No filing fees are required under the Turkish merger control regime.

3.4 Parties Responsible for Filing

Pursuant to Article 10 of Communiqué No 2010/4, a filing can be made solely by one of the parties or jointly by some or all of the parties. The filing can be submitted by the parties' authorised representatives. In the event of filing by just one of the parties, the filing party should notify the other party.

3.5 Information Included in a Filing

The notification form is similar to Form CO. The Board requires one hard copy and an electronic copy of the notification form in Turkish to be submitted. The recent updates allow notifying parties to submit the notification form via "e-Devlet", an elaborate system of web-based services, including electronic submission. E-devlet was already made available for submissions, especially during the pandemic period. Now, Communiqué No 2010/4 explicitly mentions this alternative way of submission to make it official.

Additional documents are also required, such as the executed or current copies and sworn Turkish translations of the transaction document(s) that brings about the transaction, financial statements, including the balance sheets of the parties, and, if available, market research reports for the relevant market. A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences of Incomplete Notification

The TCA considers a notification to be complete when it receives the notification in its complete form. The parties are obliged to file correct and complete information with the TCA. If the parties provide incomplete information, the Board would request further data regarding the missing information. The Board deems notification to be complete on the date when the submitted information is complete.

In practice, the Board sends written information requests when there is information missing. The TCA's written information requests will cut the review period and restart the 30 calendar-day period as of the date on which the responses are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The TCA imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision) in case incorrect or misleading information is provided by the parties (Brookfield, 20-21/278-132, 30 April 2020; Akzo Nobel, 10- 24/339-123, 18 March 2010).

3.8 Review Process

Upon its preliminary review (Phase I) of the notification, the Board will decide either to approve or to investigate the transaction further (Phase II).

The Board notifies the parties of the outcome within 30 calendar days following a complete filing. There is an implied approval mechanism where a tacit approval is deemed if the Board does not react within 30 calendar days upon a complete filing. However, in practice, the Board almost always reacts within the 30-day period, either by sending a written request for information or – very rarely – by rendering its decision within the original 30-day period. In addition, the TCA frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 60 calendar days before the projected closing.

If a notification leads to an investigation (Phase II), it turns into a full-fledged investigation, which, under Turkish law, takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months.

3.9 Pre-notification Discussions With Authorities

Other than privatisation tenders, the Turkish merger control rules do not have a pre-notification mechanism. Also, in practice, a filing is seen as a one-sided review by the TCA, once a formal one-shot notification is made. The TCA may issue various information requests, but it will only do so after the notification is made: see **3.6 Penalties/Consequences of Incomplete Notification** and **3.8 Review Process**.

3.10 Requests for Information During the Review Process

It is common practice for the TCA to send written requests to the parties of the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

The TCA's written information requests will cut the review period and restart the 30-day period as of the date on which the responses are submitted.

3.11 Accelerated Procedure

Communiqué No 2010/4 also brought a modified notification form that will replace the current notification form as of 4 May 2022. According to the modified notification form, there is a short-form notification (without a fast-track procedure) if a transition from joint control to sole control is at stake or if there are no affected markets within Turkey.

The Turkish merger control regime does not include a fast-track procedure to speed up the clearance process. Apart from close follow-up with the case-handlers reviewing the transaction, the parties have no other possible way to speed up the review process.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test is a SIEC test with the Amendment Law, similar to the approach under ECMR. Hereby, the TCA will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. There is no case law or secondary legislation, as of the time of writing, regarding how the SIEC test will be applied.

In terms of creating or strengthening a dominant position, Article 3 of the Competition Law defines a dominant position as: "any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply". Market shares of about 40% and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indication of a dominant position in a relevant product market.

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where two or more of the parties are commercially active in the same product market (horizontal relationship), or where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship).

4.3 Reliance on Case Law

The TCA closely follows the Commission decisions (eg, L'Oréal SA v The Body Shop, 06-41/515-136, 7 June 2006; IBM Danmark v Maersk Data, 04-69/983-239, 27 October 2004; Flir Systems v Raymarine, 10-44/762-246, 17 June 2010; Efes Pazarlama, 05-48/696-184, 21 July 2005) as well as the CJEU's precedents, and regularly incorporates them into its decisions.

The Board has also referred to the US Federal Trade Commission decisions (eg, Google, 16-39/638-284, 16 November 2016), as well as the French and German competition authorities' precedents (eg, BSH Ev Aletleri, 17-27/454-195, 22 August 2017; Yemeksepeti, 16-20/347-156, 9 June 2016).

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, and may also consider co-ordinated effects (Ladik, 20 December 2005, 05-86/1188-340) and vertical effects (Migros, 9 July 2015, 15-29/420-117 – the transaction was conditionally cleared). However, the TCA has not yet prohibited a transaction on the grounds of "conglomerate effects".

4.5 Economic Efficiencies

The Board considers economic efficiencies to the extent that they operate as a beneficial factor in terms of better-quality production or cost-savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

Efficiencies that result from a concentration may play a more important role in cases where the activities of the parties overlap in Turkey regardless of their combined market shares. Unlike the previous sample notification form, the new form introduced with the Communiqué No 2022/2 does not provide liberty to skip the relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

4.6 Non-competition Issues

The TCA does not take non-competition issues such as industrial policies, national security, foreign investment, employment or other public interest issues into account when assessing a merger. Therefore, the TCA is independent while carrying out its duties. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

The TCA has so far kept its independence and impartiality in its enforcement activities while considering both local and foreign investors. Merger control regulations are also applicable for foreign direct investments and there are no other separate merger control regulations for foreign direct investments.

4.7 Special Consideration for Joint Ventures

Special consideration is given to joint ventures under the Turkish merger control regime. A joint venture must not have the object or effect of restricting competition between the parties and itself. Article 5 of the Competition Law defines that the parties may notify the non-full-function joint venture to the Board for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has the object or effect of restricting competition between the parties and the joint venture.

The standard SIEC test applies to the full-function joint venture. In addition, the notification form includes a certain section that is aimed at collecting information to assess whether the joint venture will lead to co-ordination. Article 13/3 of Communiqué No 2010/4 provides that the Board would carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

Non-full-function joint ventures are not subject to merger control but may fall under Article 4, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full-function joint venture fulfils the conditions of individual exemption.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Board may render either a clearance or a prohibition decision; it may also decide to give a conditional approval.

The Board has broad powers during the investigation stage. If it determines that the transaction may violate the Competition Law, the Board may notify the undertaking or associations of undertakings concerned of a decision regarding the actions to be taken or avoided so as to establish competition and maintain the situation before infringement, and forward its opinion on how to terminate such infringement.

The Board may re-examine a clearance decision at any time, and decide on prohibition and the application of other sanctions for a merger or acquisition if the clearance was granted based on incorrect or misleading information from one of the undertakings or if the obligations provided in the decision are not complied with.

For there to be a prohibition decision, the Board must show that the transaction could significantly impede competition. In cases of conditional clearance, the Board must show that the transaction would have produced these effects, absent the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

The parties are able to negotiate remedies according to Article 14 of Communiqué No 2010/4, which enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7.

The Remedy Guideline requires that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. It states that the parties can submit behavioural or structural remedies, and explains the acceptable remedies, such as divestment in order to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure issues (eg, networks, intellectual property, essential facilities) and remedies on concluding/amending long-term exclusive agreements.

5.3 Legal Standard

Pursuant to the Remedy Guideline, the parties must take the following principles into consideration when submitting proposed remedies:

- parties must base their remedies on the legal and economic principles specific to the transaction at hand – solutions must aim to protect the market from the potential effects of the transaction through the protection of the market's competitive structure;
- the main expectation from a remedy is to protect the pre-transaction level of competition;
- the remedy must protect competition not the competitors; and
- the conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been proven to be sufficient in eliminating the problem of significant reducing competition. In addition, the Remedy Guideline requires the remedies to be capable of being implemented effectively as soon as possible, as market conditions may not stay the same until the implementation of the proposed remedy.

5.4 Typical Remedies

The number of cases in which the Board has requested divestment or licensing commitments or other structural or behavioural remedies has increased dramatically in the last few years. In practice, the Board is inclined to apply different types of divestment remedies. Examples of the Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms, etc.

The Remedy Guideline

The Remedy Guideline includes all steps and conditions for the enforcement of remedies.

The intended effect of the divestiture will take place only if the divestment business is assigned to a suitable purchaser that is capable of creating an effective competitive power in the market. To make sure that the business will be divested to a suitable purchaser, the proposed remedy must include the elements that define the suitability of the purchaser.

The approval of a possible purchaser by the Board is dependent on the following requirements:

- the purchaser must be independent of and not connected to the parties;
- the purchaser must have the financial resources, business experience and ability to become an effective competitor in the market through the divestment business;
- the transfer transaction to be carried out with the purchaser must not cause a new competitive problem – in the event that such a problem exists, a new remedy proposal will not be accepted; and
- the transfer to the purchaser must not cause a risk of delay in the implementation of the commitments – the purchaser must be capable of obtaining all the necessary authorisations from the relevant regulatory

authorities concerning the transfer of the divestment business.

The conditions may be revised on a case-by-case basis. For instance, in some cases, an obligation may be imposed such that the purchaser is not the one that seeks financial investment but the one that is active in the sector.

As per the Remedy Guideline, there are two methods that are accepted by the Board. The first is for a purchaser fulfilling the aforementioned conditions to acquire the divested business, within a period of time following the authorisation decision and upon the approval of the Board. The second is the signing of a sales contract with a suitable purchaser before the authorisation decision ("fix-it-first").

5.5 Negotiating Remedies With Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process.

There have been several cases where the Board has accepted remedies or commitments (such as divestments) proposed to or imposed by the Commission, as long as these remedies or commitments ease competition law concerns in Turkey (eg, Bayer/Monsanto, 18-14/261-126, 8 March 2018; Nidec/Embraco, 19-16/231-103, 18 April 2019; Synthomer plc/OMNOVA Solutions, 20-08/90-55, 6 February 2020).

See **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**.

5.6 Conditions and Timing for Divestitures

The Board may condition its approval decision on the observance of the remedies. The characteristics of the remedies are important when determining whether the parties may complete the transaction before the remedies are complied with. The remedies have different natures – some a condition precedent for the closing, some an obligation that could only be complied with after closure – and the parties cannot complete the transaction before the remedies are complied with before the closing.

The TCA imposes a turnover-based monetary fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be used) if the parties do not comply with the remedies.

5.7 Issuance of Decisions

The Board serves the final decisions to the representative(s) of the notifying party/parties, and also publishes final decisions on the website of the TCA after any confidential business information is taken out.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In an example of a conditional clearance case (Synthomer plc/OMNOVA Solution, 20-08/90-55, 6 February 2020), the Board granted its conditional approval to the transaction based on the commitments provided by the parties to Commission during its Phase II review. Moreover, in Nidec/Embraco (19-16/231-103, 18 April 2019), Bayer Aktiengesellschaft (18-14/261-126, 8 May 2018) and in NV Bekaert (15-04/52-25, 22 January 2015), the Board granted its conditional approval to the transactions based on the commitments provided by the parties during its Phase II review. The Board also prohibited the acquisition by Setur (a subsidiary of Koç Holding, Turkey's largest industrial conglomerate) of Beta Marina and Pendik Turizm.

While there are few decisions where behavioural remedies were recognised (eg, Bekaert/

Pirelli, 22 January 2015, 15-04/52-25; Migros/Anadolu, 9 July 2015, 29/420-117), the great majority of conditional clearance decisions rely on structural remedies (eg, Harris Corporation/L3 Technologies, 20 June 2019, 19-22/327-145; Nidec/Embraco, 18 April 2019, 19-16/231-103).

In some of these cases (eg, Cadbury/Schweppes, 07-67/836-314, 23 August 2007), the parties initially proposed purely behavioural remedies, which ultimately failed. However, in Luxoticca/Essilor (1 October 2018, 18-36/585-286), certain structural and behavioural remedies were submitted to the TCA and the Board approved the transaction.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The Board's approval of the transaction shall also cover the restraints that are directly related and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint shall be covered to the extent that its nature, subject-matter, geographic scope and duration are limited to what is necessary to enforce the transaction.

General rules on ancillary restraints are defined in the Guideline on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed as ancillary; therefore, the Board will not allocate a separate part in its decision to explaining about the ancillary status of all the restraints. The Board may review the restraints per the parties' request, and may launch an Article 4 investigation if the ancillary restrictions are not compliant with the merger control regulation.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The Board is authorised to request information from third parties such as customers, competitors, complainants and other persons related to the transaction. During the review process, third parties may submit complaints about a transaction and request a hearing from the Board, provided that they prove their legitimate interest to do so. They may also challenge the Board's decision regarding the transaction before the competent judicial tribunal, again provided that they prove their legitimate interest.

If the legislation requires the TCA to ask for another public authority's opinion, this would cut the review period, which would start when the Board receives the public authority's opinion.

7.2 Contacting Third Parties

The Board frequently contacts third parties as part of its review process, where needed, usually in a written form; oral communication with third parties is of an exceptional nature. There are a limited number of decisions where the Board has applied an economic test on the proposed remedies (eg, Mars Sinema v AFM, 11-57/1473-539, 17 November 2011). Although the Board does not tend to conduct a proper economic analysis, it does, however, make a comprehensive assessment on the content of the proposed remedies (eg, Anadolu v Moonlight Capital, 15-29/420-117, 9 July 2015).

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Once the parties have notified a transaction to the TCA, the existence of a transaction is no longer a confidential matter. Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No 2010/3") is the main legislation that regulates the protection of commercial information, pursuant to which undertakings must identify and justify information or documents as commercial secrets.

It is the undertakings' obligation to request confidentiality from the Board in writing, and to justify their reasons for the confidential treatment of the information or documents. The general rule is that if confidentiality is not requested, then the information and documents are accepted as non-confidential.

The reasoned decisions of the Board are published on the website of the Authority after confidential business information has been removed. Moreover, the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the TCA are, in principle, open to the public, although the Board may decide that the hearing shall be held in camera, in order to protect public morality or trade secrets. Article 15(2) of Communiqué No 2010/3 implies that the TCA may not take into account confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose such information and documents that could be considered trade secrets by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

7.4 Co-operation With Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the Commission, in order to exchange information. Article 43 of Decision No 1/95 of the EC-Turkey Association Council (Decision No 1/95) empowers the TCA to notify and request the Commission (Competition Directorate-General) to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey) and, thus, the Commission has the authority to request the Board to apply relevant measures to restore competition in the relevant markets.

In addition, TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations.

In the past, the Commission has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

Authorities are not obliged to seek the parties' permission to share information with each other.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions before the administrative courts of Ankara, including decisions on interim measures and fines. Third parties can also challenge a Board decision before the competent administrative courts, provided that they have a legitimate interest. Decisions of the Board are considered as administrative acts, thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

Filing an administrative action does not automatically stay the execution of the decision of the Board, however, at the request of the plaintiff, the court – by providing its justifications – may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

Judicial Review Period

Administrative litigation cases are subject to judicial review before the regional courts. This creates a three-level appellate court system consisting of administrative courts, regional courts and the High State Court.

Regional Courts

The regional courts will go through the case file, on both procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances under Article 46 of the Administrative Procedure Law.

In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account.

8.2 Typical Timeline for Appeals

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can challenge a Board decision before the competent administrative courts provided they have a legitimate interest.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

Communiqué No 2022/2 was published in the Official Gazette on 4 March 2022 and it entered into force on 4 May 2022. Communiqué No 2022/2 raised the jurisdictional turnover thresholds under Article 7 of Communiqué No 2010/4.

Two of the most significant developments that the Communiqué No 2022/2 entails, inter alia, are the introduction of threshold exemption for undertakings active in certain markets/sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Competition Authority.

Communiqué No 2022/2 does not seek a Turkish nexus in terms of the activities that render the threshold exemption. In other words, it would be sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to become applicable, provided that the target company (a) generates revenue from customers located in Turkey; or (b) conducts R&D activities in Turkey; or (c) provides services to the Turkish users in any fields other than the above-mentioned ones. Accordingly, Communiqué No 2022/2 does not require (a) generating revenue from customers located in Turkey; or (b) conducting R&D activities in Turkey; or (c) providing services to the Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

Concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be more closely scrutinised by the Competition Authority.

9.2 Recent Enforcement Record

Enforcement actions by the Board are very frequent in the merger control field. There are several cases where the Board levied monetary fines against the parties for failing to notify in foreign-to-foreign transactions. The same is true for conditional clearances. So far, only a few transactions have been blocked altogether (eg, Setur, 15-29/421-118, 9 July 2015).

9.3 Current Competition Concerns

The Board adopted many significant decisions in the past year.

In TIL/Marport (20-37/523-231, 13 August 2020), the Board refused to grant approval to the acquisition of sole control of Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (Marport) by Terminal Investment Limited Sàrl (TIL). The Board stated that the transaction mainly related the container terminal management sector while Marport's other activities included temporary storage, pilotage and towage and ancillary port services. The Board defined the relevant product market as "port management for container handling services" by referring to its Limar/Mardaş decision.

The Board also made two separate downstream market definitions as (i) port management for container handling services concerning transit traffic; and (ii) port management for container handling services concerning hinterland traffic. As for the relevant geographic market, the Board preferred a narrow definition and defined the relevant geographic market as "Northwest Marmara" for the markets concerning local loads. However, the geographic market definition for the markets concerning transit loads was left open.

In defining the relevant geographic markets, the Board took into consideration various factors such as the location of the ports, the transportation facilities and customer choices. In its competitive assessment, the Board stated that the transaction led to a horizontal overlap in the port management for the container handling services market and a vertical overlap in the container line transportation market. The Board applied the SIEC test rather than solely assessing whether the transaction led to the creation or strengthening of a dominant position in the relevant markets. In conclusion, taking into account that the transaction was likely to cause significant impediment of effective competition, the Board refused to grant clearance within the scope of Article 7 of the Competition Law.

The Board's no-go decisions are very rare. The Marport decision is of significant importance as it constitutes a recent example in which the Board decided not to clear a joint-to-sole control transaction further to its detailed competitive assessment based on the SIEC test, which was recently introduced to the Turkish Competition law enforcement.

With regard to 2021, the Board reviewed 309 transactions in total, including 277 mergers and acquisitions that were approved unconditionally, three decisions that were approved conditionally. Twenty-nine were out of the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to a lack of change in control).

Contributed by: Gönenç Gürkaynak, K Korhan Yildirim and Görkem Yardım, *ELIG Gürkaynak Attorneys-at-Law*

ELIG Gürkaynak Attorneys-at-Law is a leading law firm of 95 lawyers based in Istanbul. Founded in 2005, the firm combines a solid knowledge of Turkish law with a business-minded approach to developing legal solutions that meet the ever-changing needs of its clients in their international and domestic operations. The competition law and regulatory department contains four partners, eight counsel and 40 associates. In addition to its unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience of defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases and leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

AUTHORS

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law and heads the competition law and regulatory department. He has more than 25 years of competition law experience, including working as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Gönenç represents multinational companies and large domestic clients in investigations of the Turkish Competition Authority, antitrust appeal cases and merger clearances. Additionally, he has co-ordinated various worldwide merger notifications, drafted non-compete agreements and clauses, and prepared hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

K Korhan Yildirim is a partner in the competition law and regulatory department at ELIG Gürkaynak Attorneys-at-Law. He has more than 15 years of extensive experience in all areas of competition law, including cartel agreements, abuse of dominance, concentrations and joint ventures. Korhan has represented various multinational and national companies before the Turkish Competition Authority, Administrative Courts and the High State Court. He has given numerous legal opinions and provided training in relation to compliance with competition law rules. Korhan has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia.

Görkem Yardım is a counsel at ELIG Gürkaynak Attorneys-at-Law. Yardım graduated from Ihsan Doğramacı Bilkent University, Faculty of Law, in 2011. He was admitted to the Ankara Bar in 2012 and later on transferred to the Istanbul Bar. He obtained his first LLM degree in Law & Economics from Ihsan Doğramacı Bilkent University in 2013 and then obtained his second LLM degree from King's College London in 2014. Yardım joined ELIG Gürkaynak Attorneys-at-Law in 2014. He has extensive experience in merger and acquisition filings, competition law compliance matters and investigations conducted by the Turkish Competition Authority.

ELIG Gürkaynak Attorneys-at-Law

Çitlenbik Sokak, No 12
Yıldız Mahallesi 34349
Beşiktaş, İstanbul
Turkey

Tel: +90 212 327 17 24
Fax: +90 212 327 17 25
Email: gonenc.gurkaynak@elig.com
Web: www.elig.com

Trends and Developments

Contributed by:
Zeynep Şener and Yegân Liaje
Liner Law** **see p.670

Overview of Merger Clearance Applications Before the Turkish Competition Authority in 2021 and the First Half of 2022

The Turkish Competition Authority faced a rise of around 40% in merger clearance cases between 2020 and 2021, from 220 cases decided in 2020 to 309 cases reviewed and resolved upon by the Turkish Competition Board in 2021. As per the 2021 M&A Visibility Report of the Turkish Competition Authority, 118 of the 309 notified transactions concerned targets established in Turkey, whereas more than half (ie, 173 cases) were transactions that were closed abroad between foreign parties. The increase in merger clearance cases in 2021 to a level above the past nine years' average was likely impacted by the Turkish lira losing value against the euro and the US dollar and therefore more transactions exceeding the statutory turnover thresholds for mandatory merger clearance notification in Turkey. These turnover thresholds were revised upwards in March 2022 along with other significant changes in Turkish merger control rules, which are discussed below in Section A.

Among the 309 merger control decisions of the Turkish Competition Board in 2021, 29 transactions were found to be out of the scope of Turkish merger control regulations, either because no lasting change of control was found or because the relevant statutory turnover thresholds were not exceeded by the transaction parties. Between the remaining transactions notified to the Turkish Competition Authority, 277 were cleared unconditionally whereas three were subject to a conditional clearance based on remedies offered by the parties and accepted by the Turkish Competition Board. Please see Section B below for a brief overview of these conditional clearance decisions of the Turkish Competition Board.

Based on online announcements of the Turkish Competition Authority as of 6 June 2022, 41 transactions have been notified for merger clearance in Turkey in the first half of 2022 and more than half of these notifications (ie, 22 cases) have been resolved with the clearance of the Turkish Competition Board already, although the detailed decisions have not been published yet. The Turkish Competition Board has announced its decision to move to the final investigation stage (the equivalent of Phase II proceedings in Turkey) in two ongoing merger clearance cases in the first half of 2022, one regarding the acquisition of assets composed of cement plants, mills and packaging facilities in Turkey and the other regarding the acquisition of sole control over a Turkish target company active in the refractory materials sector.

A. Changes to Turkish Merger Control Rules and Guidelines in March 2022

A new communiqué from the Turkish Competition Authority (Communiqué No 2022/02, the "Amendment Communiqué") has come into force on 4 May 2022, amending several key elements of the Communiqué Regarding Mergers and Acquisitions Subject to Competition Board Approval (the "Merger Clearance Communiqué"), which is the main piece of secondary legislation setting out the merger control rules applicable in Turkey. The Amendment Communiqué was published in the Official Gazette of the Republic of Turkey dated 4 March 2022 and numbered 31768. An overview of the key amendments can be reviewed below.

Contributed by: *Zeynep Şener and Yegân Liaje,* ***Liner Law***

1. Turnover Thresholds for Required Merger Clearance Applications Revised

A merger or an acquisition that is within the scope of the Merger Clearance Communiqué is required to be cleared by Turkish Competition Board before it can have legal effect in Turkey, provided that the Turkish and global turnovers of the transaction parties exceed the thresholds given under Article 7 of the Merger Clearance Communiqué. The Amendment Communiqué has revised these thresholds upwards in line with the current needs of the market and the foreign currency rate fluctuations in Turkey, without changing the structure of the relevant subclauses (a) and (b) of Article 7(1). The revisions can be seen below along with the previous numbers (which are indicated in brackets):

(a) the aggregate Turkish turnover of the transaction parties exceeds (TL100) TL750 million and at least two of the transaction parties individually have a Turkish turnover over (TL30) TL250 million; or

(b) the Turkish turnover of the target asset or business in acquisition transactions (or of at least one of the transaction parties in merger transactions) exceeds (TL30) TL250 million and at least one of the other transaction parties has a worldwide turnover over (TL500 million) TL3 billion.

The Merger Clearance Communiqué sets out the principles applicable to calculating the relevant turnovers of the transaction parties as follows:

- Turnover is defined as net sales as per the Turkish Uniform Chart of Accounts in the financial year immediately preceding the merger control notification (or if this is not possible to calculate for any reason, in the financial year closest to the merger control notification when such calculation can be made).
- The foreign currency exchange rate applicable to the turnover calculation shall be the average foreign currency purchase rate in the relevant turnover year as published by the Central Bank of the Republic of Turkey. For notifications to be made in 2022, the average euro purchase rate published by the Central Bank of the Republic of Turkey in 2021 was EUR1/TRY10.4687; whereas the average 2021 USD purchase rate was USD1/TRY8.8854.
- When calculating the turnovers of the transaction parties in mergers and the acquirer party in an acquisition, group turnover will be taken into consideration in line with the detailed group definition provided in the Merger Clearance Communiqué and in-group sales shall be excluded. On the other hand, only the turnover of the target entit(ies) and/or asset(s) shall be taken into consideration when calculating the turnover of the transferee party.
- The Merger Clearance Communiqué also sets out specific income statement line items that shall be included when calculating the turnovers of financial institutions such as banks; financial leasing, factoring and financing companies; intermediary institutions and portfolio management companies; insurance, reinsurance and pension companies; and other financial institutions. These items have been revised in the Amendment Communiqué in line with changes in the regulations applicable to such financial institutions.

2. Different Turnover Threshold Structure Introduced for Acquisitions of Technology Undertakings

As per the new subparagraph 2 of Article 7 under the Merger Clearance Communiqué, in the case of acquisitions of technology undertakings that (i) operate in the Turkish market; or (ii) have R&D

activities in the Turkish market; or (iii) provide services to users located in Turkey, the thresholds of TL250 million provided above under subclauses (a) and (b) of Article 7(1) shall not be sought. Accordingly, for technology undertakings the relevant merger control notification thresholds in Turkey would read as follows:

(a) the aggregate Turkish turnover of the transaction parties exceeds TL750 million; or
(b) at least one of the transaction parties (other than the target asset or business in acquisition transactions) has a worldwide turnover over TL3 billion.

Technology undertakings are defined as "undertakings operating in the fields of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agriculture chemicals and health technologies, or assets related thereto". The purpose of this addition has been explained in the announcement of the Turkish Competition Authority as ensuring that acquisitions of technology undertakings by undertakings with notable market power in digital markets are largely subjected to review and thereby preventing killer acquisitions of start-ups and developing undertakings. It is in this spirit that we would compose the revised (b) threshold without the threshold of TL250 million in the manner provided above, ie referring not to "at least one of the transaction parties" but to "at least one of the transaction parties (other than the target asset or business in acquisition transactions)", on the basis that in the original threshold under Article 7(1), the second threshold refers to "at least one of the other transaction parties". Nevertheless, please note that the Amendment Communiqué simply states that the thresholds of TL250 million provided under subclauses (a) and (b) of Article 7(1) shall not be sought in the case of acquisitions of technology undertakings.

3. The SIEC Test Introduced Under 2020 Amendment to Turkish Competition Law Reflected

The applicable criterion for the assessment of mergers and acquisitions by the Turkish Competition Board for merger clearance purposes was changed on 24 June 2020 from a "dominance test" to a "significant impediment of effective competition ("SIEC")" test. Accordingly, Law No 7246 Regarding the Amendment of the Law on the Protection of Competition (published in the Official Gazette dated 24 June 2020 and numbered 31165) revised Law No 4054 on the Protection of Competition (the "Turkish Competition Law", first published in the Official Gazette dated 13 December 1994 and numbered 22140) by amending Article 7 concerning which mergers or acquisitions are prohibited under Turkish Competition Law. In the previous merger control regime, mergers or acquisitions that would result in a significant reduction of competition in any goods or services market in all or a part of the country with a view to the creation of a dominant position or the strengthening of an existing dominant position were against the law and prohibited. In the current revised merger control regime, the creation of a dominant position or the strengthening of an existing one is no longer a required criterion in the merger control review of the Turkish Competition Board. Instead, mergers or acquisitions that would result in the significant reduction of effective competition in any goods or services market in all or a part of the country, foremost by the creation of a dominant position or the strengthening of an existing one, are against the law and prohibited.

Therefore, in the new regime, a transaction that does not create or strengthen a dominant position but is deemed to significantly reduce effective competition in a market for goods or services within the whole or a part of the country could theoretically be blocked by the Turkish Competition Board, although the existence of a dominant position remains an important factor in the merger control review of the Board. This introduction of the SIEC test replacing the "dominance test" was finally reflected in the Merger Clearance Communiqué with the Amendment Communiqué.

4. Standard Notification Form for Merger Clearance Applications Reconfigured

A new notification form has been included as an annex to the Amendment Communiqué, which replaces the existing notification form provided under the Merger Clearance Communiqué. In the announcement of the Turkish Competition Authority, the changes have been described as being part of a transition into a completely electronic format. In a practice accelerated by the global COVID-19 pandemic, notification forms can already be submitted electronically to the Authority over the e-government services platform; however, the notification form is completed offline and is not itself in electronic form. The contemplated transition into a completely electronic format is expected to reduce secretarial costs and allow for a quicker turnaround for merger clearance applications by making it possible for applicants to provide missing information in a faster and more practical manner based on the Authority's requests for information following the notification. Indeed, the form has been re-formatted to include more box-ticking and tables rather than long-form explanations, with several previous questions now broken down into multiple items with a specific answer format.

In addition to such formatting changes, there have also been substantive revisions. The new form covers all of the content that was requested under the previous form; however, several transaction- and market-related questions now require more specific answers with more hard data. Significantly, the notification form has been rearranged under five headings that bring together related queries that were previously spread out under ten different headings, which allows for a more systematic approach. The five new headings are:

1) Information Regarding the Transaction;

2) Information Regarding the Parties;

3) Information Regarding the Markets;

4) Joint Ventures; and

5) Contact Information.

A final notable change that will impact the burden on applicants when filling out the notification form is the instruction on which parts of the form can be omitted in transactions where there is less likely to be a significant anti-competitive concern. In the previous notification form, sections 6 (Information Regarding the Affected Market), 7 (Market Entry Conditions and Potential Competition) and 8 (Efficiency Gains) could be omitted:

(a) if one of the transaction parties shall acquire full control of an undertaking that was previously under its joint control; or
(b) with respect to any affected market in Turkey and the relevant geographic markets, if in such affected market, the aggregate market share of the transaction parties is less than 20% for horizontal relationships, and less than 25% for vertical relationships.

However, in the new notification form, the relevant queries under the new sections 3 (Information Regarding the Markets), 4 (Joint Ventures) and 5 (Contact Information) corresponding to the former sections identified above and including information identifying affected markets and providing market shares in affected markets can be omitted only:

(a) if one of the transaction parties shall acquire full control of an undertaking that was previously under its joint control; or
(b) if there is no affected market in Turkey.

It remains the case that under the relevant guidelines of the Turkish Competition Authority, there is a defeasible assumption that if the aggregate market share of the transaction parties is less than 20% for horizontal relationships, and less than 25% for vertical relationships, any anti-competitive impacts of the merger or acquisition transaction are not at a level that requires detailed investigation or withholding merger clearance. Nevertheless, the Turkish Competition Authority now requests full information under the new notification form if there is any affected market in Turkey.

5. Revisions to the Guidelines on the Assessment of Horizontal and Non-horizontal Mergers

In line with the amendments to the Merger Clearance Communiqué, the Turkish Competition Authority has announced that it has revised the Guidelines on the Assessment of Horizontal Mergers and Acquisitions (the "Horizontal Merger Guidelines") and the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions (the "Non-Horizontal Merger Guidelines"). The new 2022 versions of the Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines (together, the "Assessment Guidelines") that have been published include revisions that can be grouped as follows.

(i) Reflection of the introduction of the SIEC test replacing the dominance test

The references to the dominance test have been replaced by the SIEC test in the Assessment Guidelines and further explanations have been added in the appropriate sections to illustrate the Turkish Competition Authority's approach to the "significant impediment of effective competition" criterion.

In particular, under the Horizontal Merger Guidelines, we see further developed discussion of close competition and close substitutes under the section on unilateral effects. In the section on coordinated effects, a new table putting together the general criteria for the assessment of coordinated effects is provided and new paragraphs on the impact of mergers with maverick firms and the impact of surplus capacity are added. The section on potential competition is fleshed out and a new section on acquisitions of start-ups and nascent firms is introduced, covering both killer acquisitions and impact on potential competition. As for the Non-Horizontal Merger Guidelines, in addition to varied revisions to reflect to SIEC criterion, subsections on input limitation under the section on unilateral effects are expanded, as well as the section on conglomerate mergers.

(ii) Inclusion of more guidance on technology and digital sector transactions

In general, the revisions to the Assessment Guidelines reveal a notable effort to bring in more examples based on the different competition dynamics that may apply to transactions in sectors where intellectual property, data and network/platform users are the most important assets and innovation is a central market force, such as pharmaceuticals, chemicals, biotechnology, technology, and digital sectors.

Under the Horizontal Merger Guidelines, a new section titled "Effects Related to Innovation and Consumer Data" has been added. Specific references to technology and digital sector acquisitions are made under the new section on acquisitions of start-ups and nascent firms. In the pre-existing section on the likelihood of market entries, there is a new evaluation of the role of data in forming a barrier to entry in digital platform markets.

In the Non-Horizontal Merger Guidelines, a new section titled "Other Unilateral Effects" has been added to cover the impact of a vertically integrated merged entity now having access to the commercially sensitive information of competitors active in upstream or downstream markets, with specific references of digital services and platforms. The discussion on coordinated effects under the relevant section has also been revised to include new examples from sectors that have "data-heavy" characteristics.

B. Notable Merger Control Decisions of the Turkish Competition Board in 2021

As mentioned above, the Turkish Competition Board resolved upon three merger clearance cases in final investigation proceedings in 2021 (the equivalent of Phase II proceedings in Turkey). All of these matters were also before the European Commission in Phase II proceedings and in two of them, the Turkish Competition Board resolved upon conditional clearance of the cases on the basis of the remedy packages that were presented to the Commission, with the rationale that the implementation of those remedies would also impact the competition concerns in Turkey.

In the acquisition of sole control over the hydraulics business of Eaton Corporation plc by Danfoss A/S (Decision No 21-25/313-144 dated 4 May 2021), the final investigation proceedings focused in particular on the markets for hydraulic steering components for off-road vehicles and orbit motors. The Turkish Competition Board issued a conditional clearance accepting the carve-out structural remedies presented to the Commission on the basis of evaluations regarding lesser entry barriers in Turkey in an imports-based market, the balancing nature of buyer power in the market, and the positive impact of the remedies on global competitive pressure.

The acquisition of Willis Towers Watson Public Limited Company by Aon plc was the other case cleared by the Turkish Competition Board in 2021 conditional upon the implementation of structural remedies presented by the transaction parties to the Commission (Decision No 21-35/503-246 dated 14 July 2021). The in-depth investigation of the Turkish Competition Board focused on the affected market of commercial non-life reassurance distribution, where the transaction would have resulted in the merger of two of three leading undertakings. In the end, the Board reached the assessment that the transfer of the global commercial non-life reassurance business of the target to a third party as committed before the Commission would also resolve the competitive concerns associated with the Turkish market.

The Turkish Competition Board also issued a conditional clearance in the acquisition by EssilorLuxottica SA of shares held ultimately by HAL Holding NV in GrandVision NV, this time on the basis of behavioural remedies presented by the parties specifically for the Turkish market (Decision No 21-30/395-199 dated 10 June 2021). The decision identified that EssilorLuxottica SA was in a dominant position in the wholesale market for ophthalmic lenses and brand sunglasses and had significant market power in other affected product markets, with the transaction parties horizontally overlapping in the retail sales market for optical products and vertically overlapping in the other product markets. The behavioural remedies targeted the findings of the Turkish Competition Board that the acquiring party would reach a market-leading vertical integration in Turkey after the transaction, along with a strong presence on the retail level, and included commitments regarding ensuring supply to customers other than the major local chain owned by the target.

Contributed by: *Zeynep Şener and Yegân Liaje,* ***Liner Law***

Liner Law is an elite boutique law firm established by partners who worked together for almost a decade in leadership positions of top-tier corporate legal practice in Istanbul, Turkey. With a special focus on corporate law, M&A and commercial agreements, Liner Law serves as a one-stop shop for cross-border corporate investors and foreign-capitalised companies in Turkey, with further capabilities in competition law, banking and finance, employment law, commercial litigation and data privacy. In addition to a combined transactional experience of 25 years, its partners have served as legal counsel to numerous European, American, East Asian and Middle Eastern corporate clients regarding their ongoing investments and operations in Turkey, in areas such as corporate governance, regulatory and antitrust compliance, employment law and data privacy regulations. Its strong competition practice focuses on merger clearance, negative clearance and exemption applications before the Turkish Competition Board in cross-border M&A and commercial projects.

AUTHORS

Zeynep Şener has been active in top-tier M&A and competition practice since 2012, with comprehensive experience advising international clients on cross-border investments in renewable energy, mining, pharmaceuticals, medical devices, industrial manufacturing, transportation, e-commerce and financial sectors. Prior to Liner Law, Zeynep was a partner in the Corporate/M&A department of a leading Turkish law firm, advising on commercial and M&A transactions and heading the firm's Competition practice. Zeynep represents clients in merger clearance notifications and negative clearance/exemption applications before the Turkish Competition Board, as well as on vertical and horizontal agreements. Zeynep is a US-qualified lawyer and a member of the Massachusetts Bar.

Yegân Liaje has more than 17 years of significant transactional and regulatory experience in M&A projects, particularly in energy, infrastructure, transportation, metals and mining, construction, healthcare and banking. Before establishing Liner Law, she led the Corporate/M&A department of a leading Turkish law firm, where she represented mainly international clients in M&A, joint ventures, tender offers, asset purchases and privatisations. Yegân was awarded a Fulbright scholarship to pursue law studies at the George Washington University Law School, where she received an LLM degree. Her second LLM degree is in corporate law from Galatasaray University, where she also completed her undergraduate legal education.

Contributed by: *Zeynep Şener and Yegân Liaje,* ***Liner Law***

Liner Law

Nef Offices 09
A Blok No 86
Sultan Selim Mah
Lalegül Sok. No 10
Kağıthane
Istanbul
Turkey 34400

Tel: +90 212 877 9165
Fax: +90 212 272 9588
Email: info@liner-law.com
Web: www.liner-law.com

UAE

Law and Practice

Contributed by:
Yousef Al Amly, Alex Saleh, Ahmad Saleh and Asad Ahmad
Mohammad Alsaadi In Association with GLA & Company see p.693

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Contributed by: *Yousef Al Amly, Alex Saleh, Ahmad Saleh and Asad Ahmad,*
Mohammad Alsaadi In Association with GLA & Company

1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Four legislations should be read together to understand the framework of antitrust and merger control in the United Arab Emirates (UAE). These legislations significantly interlink together to display the bigger picture for complying with the antitrust and merger control regulatory requirements and could be listed as follows (the "UAE Competition Legislations"):

- Federal Law No 4 of 2012 concerning the Regulation of Competition (the "Competition Law");
- Cabinet Resolution No 37 of 2014 Implementing Regulations of the Competition Law (the "Competition Regulations");
- Cabinet Resolution No 13 of 2016 on the Rates and Rules Applying to the Competition Law (the "Competition Threshold Rules"); and
- Cabinet Resolution No 22 of 2016 on Unified Definition of Small and Medium Enterprises (the "SME Definition Decision").

The Competition Law and Competition Regulations regulate merger control, prohibitions on antitrust arrangements, and abuse of a dominant position. Abuse of a dominant position includes predatory pricing, discriminating among customers without objective justification, refusal to supply, limiting production, failure to satisfy demand, and tying arrangements.

The Competition Law further provides that the aim of the law is to protect and enhance competition in the UAE and to combat monopoly practices through:

- providing a stimulating environment for businesses to enhance efficiency, competitiveness and the interest of consumers and to achieve sustainable development in the UAE; and
- sustaining a competitive market governed by the market's mechanisms through the principle of economic freedom by way of banning restrictive agreements, banning the businesses and actions that lead to the abuse of a dominant position, controlling the operations of economic concentrations and avoiding all that may prejudice, limit or prevent competition.

Meanwhile, the Competition Threshold Rules define what is meant by "dominance" and set out the relevant antitrust and merger control filing thresholds.

The relevance of the SME Definition Decision, on the other hand, is limited to defining small and medium enterprises exempt from the application of the Competition Law.

It should be noted that both the Competition Law and the Competition Regulations are, theoretically speaking, largely based on EU Competition Law and reflect many elements of the international best practice norms (including the US). However, it could also be said that the law would only apply if the thresholds under the Competition Threshold Rules are met, which are higher than most (if not all) of the jurisdictions in the Gulf and Middle East regions.

It is important to highlight that antitrust and merger control rules and restrictions under the UAE Competition Legislations (to be discussed later) do not apply to undertakings in Abu Dhabi Global Market (ADGM) or Dubai International Financial Centre (DIFC), even though Article (3) of the Competition Law provides that the law shall apply to all undertakings with regards to their economic activities in the UAE and exploitation of intellectual property rights inside or outside the UAE and affects competition in the UAE.

The reason why the UAE Competition Legislations do not apply to undertakings in such financial free zone areas can be legally justified via Article (121) of the UAE Constitution, which enabled the UAE federation to create financial free zones in the UAE, and most importantly, to exclude the application of certain federal laws in these financial free zones. Furthermore, Federal Law No 8 of 2004 on Financial Free Zones in the UAE further provides that financial free zones are exempt from all federal civil and commercial laws.

Neither ADGM nor DIFC have separate legislation to regulate antitrust or merger control. Accordingly, it is safe to assume that the UAE Competition Legislations apply only to onshore UAE undertakings and exclude financial free zone undertakings, which have no Competition Regulations. Having said this, the UAE Competition Legislations would still apply if any of the activities or transactions taking place:

- in or from either of those two financial free zones; or
- via an undertaking based in either of the two financial free zones (ie, ADGM or DIFC); and
- affects the competition in the UAE, whether directly, indirectly, or through an onshore-based subsidiary.

1.2 Legislation Relating to Particular Sectors

The UAE Competition Legislations apply to all undertakings operating in the UAE, as well as to activities that take place abroad and have an effect on competition in the UAE commercial activities and transactions across the UAE for both local and international undertakings.

It should be noted that the following are exempt from the application of the UAE Competition Legislations (the “Exempted Activities & Enterprises”):

- undertakings carrying out the activities or services in the following sectors:
- telecommunication sector;
- financial sector;
- cultural activities (written, audio or visual);
- gas and petrol sector;
- production and distribution of pharmaceutical products;
- postal services, including express mail services;
- activities related to the production, distribution and transport of electricity and water;
- activities of drainage, garbage disposal, sanitation and similar activities in addition to supporting environmental services; and
- land, sea and air transport sectors and transport by railways and related services.

Activities carried out by the UAE federal or local governments and actions initiated by undertakings pursuant to a resolution or authorisation by the UAE federal or local governments or under their supervision, including the actions of undertakings owned or controlled by the federal or local governments. The Competition Threshold Rules clarified that undertakings owned at least 50% by federal or local governments would fall within this exemption.

Small and medium enterprises (SME). For the purposes of identifying which enterprises are considered SMEs and, therefore, exempt, the SME Definition Decision provides that the following enterprises should be considered SMEs:

Micro Enterprises – these are enterprises which meet the following requirements:

- For enterprises in the trading sector, either:
  (a) have five employees or less; or
  (b) generate annually AED3 million or less.
- For enterprises in the manufacturing sector, either:
  (a) have nine employees or less; or

(b) generate annually AED3 million or less.
- For enterprises in the service sector, either:
  (a) have five employees or less; or
  (b) generate annually AED2 million or less.

Small Enterprises – these are enterprises which meet either of the following requirements:

- For enterprises in the trading sector, either:
  (a) have six up to 50 employees; or
  (b) generate annually AED50 million or less.
- For enterprises in the manufacturing sector, either:
  (a) have ten up to 100 employees; or
  (b) generate annually AED50 million or less.
- For enterprises in the service sector, either:
  (a) have six up to 50 employees; or
  (b) generate annually AED20 million or less.

Medium Enterprises – these are enterprises which meet either of the following requirements:

- For enterprises in the trading sector, either:
  (a) have 51 up to 200 employees; or
  (b) generate annually AED250 million or less.
- For enterprises in the manufacturing sector, either:
  (a) have 101 up to 250 employees; or
  (b) generate annually AED250 million or less.
- For enterprises in the service sector, either:
  (a) have 51 up to 200 employees; or
  (b) generate annually AED200 million or less.

1.3 Enforcement Authorities
The UAE Competition Legislations provides that the responsibility for enforcement lies with the Competition Department at the UAE Ministry of Economy (the "Competition Department"). The performance of the Competition Department is supervised by the Competition Regulation Committee, chaired by the Undersecretary of the Ministry of Economy (the "Competition Committee").

Both the Competition Committee and the Competition Department report to the UAE Federal Minister of Economy (the "Minister"), who heads the UAE Federal Ministry of Economy (the "Ministry").

2. JURISDICTION

2.1 Notification
Pursuant to the Competition Threshold Rules, economic concentration such as total or partial alienation, merger or acquisition is realised if the total transactions of a certain undertaking in the relevant market are more than 40%.

For activities or transactions meeting such threshold, filing the notification becomes compulsory. Otherwise, there is no requirement for a voluntary notification if such a threshold is met.

For the purposes of filing the notification, the filing is made to the Competition Department and attached to it, amongst other things, an economic report explaining the positive impact of the required exemption. The Competition Department will then assess the requested exemption and submit a report to the Committee. Within 14 days of receipt of the report, the Committee will then send its recommendation to the Minister of Economy, who will decide on the requested exemption within 90 days of notification of the request for exemption. This deadline may be extended by an additional 45 days. If the Minister does not issue his decision by the specified deadline, the notified activity or transaction will be deemed by law to be exempt.

On the other hand, no notification is required if the activity or transaction is relevant to the Exempted Activities & Enterprises.

2.2 Failure to Notify

Failure to notify a reportable economic concentration transaction may result in a fine between 2% and 5% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5,000,000.

Nevertheless, as far as we are aware, the Ministry has never disclosed any penalties that have been imposed for violating an economic concentration transaction. Penalties imposed by the Ministry usually become public when disclosed via the Ministry's official channels (ie, websites and social media pages) in addition to the local newspapers, which are likely to pick up immediately on such news.

2.3 Types of Transactions

The Competition Law has three defined terms key to understanding the regulatory framework of merger control in the UAE.

The first definition is "relevant market", which means "the commodity or service upon whose price, characteristics and usage aspects are replaceable by other commodities or services to meet a certain need of the consumer in a certain geographic area".

The second is the definition of "economic concentration", which is "any act resulting in a total or partial transfer (merger or acquisition) of a property, usufruct rights, rights, stocks, shares or obligations from an undertaking to another, empowering the undertaking or a group of undertakings to directly or indirectly control another undertaking or another group of undertakings".

As mentioned previously and pursuant to the Competition Threshold Rules, economic concentration exists if the relevant person(s) or undertaking(s) exceeds 40% of the total transactions of the relevant market in the UAE.

The definition of economic concentration is wide and includes several types of transactions, such as internal restructurings or reorganisations. The Competition Law does not consider control as a determining factor for triggering the regulatory requirement for notification. Rather, the determining factor will always be whether or not such transactions create dominancy or economic concentration.

Transactions not involving the transfer of shares or assets (such as shareholders' agreements, changes to articles of association, etc) can still be caught under the auspices of the UAE Competition Legislation if considered a "restrictive agreement" or leads to an abuse of a dominant position.

This brings us to the third significant defined term which is the definition of "agreements", defined as "agreements, contracts, arrangements, coalitions or practices between two undertakings or more or any cooperation among establishments or resolutions issued by undertakings' consortiums whether they are written or oral, explicit or implicit or public or confidential".

The Competition Law considers agreements between undertakings which aim to prejudice, limit or prevent competition in the UAE as "restrictive agreements", especially those:

- specifying the prices for buying or selling commodities or services, directly or indirectly, by creating the increase, decrease or stabilisation that may negatively affect the competition;
- specifying the conditions of buying, selling or performing of services and or any other similar obligation;

- colluding in bids, tenders, practices or any other supplying offers;
- phasing out or limiting the operations of production, development, distribution or marketing or any other aspects of investment;
- colluding to refuse to buy from or to sell or supply to certain undertaking(s) and to halt or impede such undertaking(s) from carrying out their activities or transactions;
- limiting the freedom of commodities or services flow to the relevant market(s) or withdrawing them from such market, including the concealment or storage of such commodities or services unlawfully, abstaining from dealing with such commodities or services or suddenly creating their abundance that may lead to trading such commodities or services with unreal prices;
- dividing markets or assigning clients based on geographic areas, distribution centres, quality of clients, seasons and time or any other basis that may negatively affect competition; and/or
- taking procedures to hinder the entrance of undertakings to the market, exclude such undertakings from the market or hinder joining existing agreements or coalitions.

Determining whether any undertaking is abusing its dominant position in the relevant market(s), the Competition Department will consider if such undertaking is:

- imposing the prices or conditions of reselling commodities or services directly or indirectly;
- selling a commodity or performing a service with a price less than the actual cost with the aim of hindering competitive undertakings from entering the relevant market, excluding them from such market(s) or causing them losses, preventing them from continuing their activities in such markets;
- discriminating without justification amongst clients with identical contracts with regards to prices of such commodities or services or the terms and conditions of buying or selling contracts;
- obliging a client not to deal with a competitive undertaking;
- the total or partial rejection to deal according to the usual commercial conditions;
- unjustifiably abstaining from dealing in commodities or services through buying or selling or limiting or hindering such dealing that may lead to imposing an unreal price of such commodities or services;
- suspending the buying or selling of commodities or services unless other commodities or services are in received in return which by nature or commercial use the latter commodities or services to be received in consideration is irrelevant to the original transaction in its normal business course;
- intentionally publishing incorrect information about commodities or prices; or
- decreasing or increasing the available supply of the commodity to create a false scarcity or abundance of such commodity.

To conclude the above, the triggering factor to consider whether transactions not involving the transfer of shares or assets are a restrictive agreement or an abuse of a dominant position would be:

- whether the relevant undertaking(s) meet the threshold identified in the Competition Threshold Rules, which always comes as the first step; and
- if yes, determine whether the activity or transaction captures any of the above prohibitions.

2.4 Definition of "Control"

Control is not a defined term under any of the UAE Competition Legislations. Control in the context of UAE merger control would be relevant only in two instances.

The first is the percentage of control required by UAE federal or local governments over undertakings to consider whether or not such undertakings are exempted from the application of the UAE Competition Legislations. So, if the control, directly or indirectly, by the federal or local government over an undertaking is 50% or more, then such undertaking is exempted from the UAE Competition Legislations. If the said control is less than 50%, then it will need to meet the threshold under the Competition Threshold Rules before being captured by the requirements or prohibitions of the Competition Law.

The second is to identify the controlling undertaking in the event of economic concentration as determined under the Competition Law. The purpose of identifying the controlling undertaking is to name it as being responsible for complying with the regulatory requirements under the UAE Competition Legislations.

2.5 Jurisdictional Thresholds

There are three jurisdictional thresholds under the Competition Law and the Competition Threshold Rules, which, if met, then require the regulatory notification requesting exemption in addition to the other obligations and restrictions under the UAE Competition Legislations. These jurisdictional thresholds are as follows:

- “restrictive agreements” if such agreements represent 10% or more of the total transactions of the undertaking in the relevant market with regards to a specific product(s) and/or service(s);
- “dominant position” is assumed if the market share of an undertaking exceeds 40% of its transactions in the relevant market with regards to a specific product(s) and/or service(s); and
- “economic concentration” is when the economic concentration transaction leads the undertaking to control more than 40% of the total transactions in the relevant market with regard to a specific product(s) and/or service(s).

It is worth mentioning that “total transactions” are defined under the general principles of EU competition laws (on which the Competition Law is significantly based) as the total value of sales of goods or services in the relevant market.

On the other hand, no special jurisdictional thresholds would apply to particular sectors, and the above applies across all sectors and regions in the UAE.

It is important to reiterate that the jurisdictional thresholds do not apply to Exempted Activities & Enterprises.

2.6 Calculations of Jurisdictional Thresholds

None of the UAE Competition Legislations has identified how jurisdictional thresholds are calculated (including how sales or assets booked in a foreign currency are converted or if the threshold is based on the book or fair market value). There is also no sufficient data, due to the absence of case law, to understand how the Competition Department would carry out such calculations.

The absence of case law could be justified by:

- the high jurisdictional thresholds usually not met by the undertakings based or doing business in the UAE and accordingly do not require any filings or notifications requesting exemptions;
- the huge volume of economic concentration transactions and activities taking place in financial free zones such as ADGM or DIFC exempted from the UAE Competition Legislations;

- many of the undertakings are carrying out activities that are categorised as Exempted Activities & Enterprises; and
- the several incentives provided by the UAE government to promote for UAE to be a regional hub leading to relaxing some of the regulatory restrictions usually found in developed markets, which at the same time, would not apply to the UAE, considered one of the most competitive emerging markets in the Gulf and Middle East regions.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

It is important to clarify that an "undertaking" is defined under the Competition Law as "any natural or legal person conducting an economic activity or any person in connection with such person(s) or any grouping of these persons regardless of their legal form". No other definitions are provided under the UAE Competition Legislations with regards to corporate entities or individuals, or group-wide.

This means that the undertaking meeting the threshold could be the undertaking directly involved in the economic concentration transaction or activity, or it could be a parent or holding company based outside the UAE.

Strictly speaking, the undertaking that is directly carrying out an economic concentration transaction or activity in a relevant market, whether based inside or outside the UAE and meets the jurisdictional threshold, as an entity and not as a group, will have to notify the Competition Department requesting an exemption.

However, if we apply the same principles applied in the EU, the calculation of the jurisdictional thresholds should be carried out after consolidating the turnover of the transactions of the group as a whole, not just the undertaking that is a party to the transaction.

Unfortunately, due to the absence of case law and the regulatory guidance on the calculation methodology, it is unclear if the Competition Department would strictly follow the wordings of the Competition Law or apply the same interpretation followed under the general principles of EU competition laws, including the method of reflecting changes in the business during a reference period (such as other acquisitions, divestments or business closures).

Therefore, the safe approach is to consult the Competition Department prior to concluding an economic concentration transaction where there are grounds to believe that the jurisdictional thresholds are met at the group level but not at the level of the undertaking.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions by way of sale, acquisition, or merger (whether shares or assets) are captured under the auspices of the UAE Competition Legislations once the jurisdictional thresholds under the Competition Threshold Rules are met, regardless of the location or nationality of the parties, and subject to the local effects test (ie, the parties carrying out their activity or transaction in a relevant market or engaging in activities or carrying out transactions that have harmful effects on competition in the UAE).

In general, 100% foreign ownership of UAE onshore companies is allowed, subject to restrictions or prohibitions on foreign investment for companies engaging in activities which have a strategic impact.

The Economic Departments in the Emirates of Dubai and Abu Dhabi have published lists of more than 1,000 commercial and industrial activities which do not have a “strategic impact”. Companies incorporated in these Emirates engaged in non-strategic activities are open to full foreign ownership.

2.9 Market Share Jurisdictional Threshold

There are no market share jurisdictional thresholds in the UAE, only a jurisdictional threshold. If the jurisdictional thresholds are met, notification becomes compulsory pursuant to the Competition Law and in accordance with the Competition Regulations.

2.10 Joint Ventures

Joint ventures are subject to the same restrictions and prohibitions applicable to any other activity or transaction. As long as the joint venture does not contain any condition making such arrangement a restrictive agreement or an economic concentration, the joint venture will not trigger any of the regulatory requirements under the UAE Competition Legislations to notify the Competition Department requesting an exemption.

If the joint venture is labelled as a restrictive agreement or an economic concentration, the filing of the notification becomes a regulatory requirement.

It is clear that filing the regulatory notification is first subject to meeting the jurisdictional threshold under the Competition Threshold Rules as an initial step and even prior to checking whether the joint venture is defined as a restrictive agreement or an economic concentration.

2.11 Power of Authorities to Investigate a Transaction

According to the Competition Regulations, the Competition Department has full powers and authorities to investigate, on its own initiative or following complaints submitted by third parties, complaints of a possible violation of competition practices and competition-related activities and transactions.

There is no limitation with regards to the Competition Department’s ability to investigate an activity or a transaction. During the investigation, the Competition Department can either hold interviews or request information from the enforcement or competent authorities in the UAE. Following the investigation, the department prepares a report and submits the same to the Minister to issue a decision.

2.12 Requirement for Clearance Before Implementation

Following the receipt of the regulatory notification, the Competition Department will assess it and ensure that it meets the formal requirements under the Competition Regulations. After assessing the notification, the Competition Department will notify the Minister to issue a final decision.

Legally speaking, a transaction (if it meets the regulatory thresholds and is considered by law an economic concentration transaction) should not be completed without obtaining clearance from the Minister. From a procedural aspect, a transaction could still be completed without such clearance since the federal and local authorities will not require it as part of the documents needed to effect a transaction in the public records and relevant constitutional documents such as commercial licences, commercial registries, notarised share transfer agreements, etc.

There is a clear prohibition in the Competition Law prohibiting the relevant undertakings from concluding any transactions during the merger control review period. Therefore, obtaining the clearance from the Minister is usually included as a condition precedent in the agreements of an economic concentration transaction, making it conditional to obtaining the clearance for closing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Failing to comply with the regulatory requirement to suspend the implementation of a transaction during the merger control review and until:

- a clearance is obtained; or
- the specified deadline expires.

This will lead to imposing a fine of no less than AED50,000 and no more than AED500,000.

2.14 Exceptions to Suspensive Effect

There are no exceptions under the UAE Competition Legislations to the suspensive effect of the regulatory notification.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Competition Law permits the Minister to temporarily approve, and for no more than 30 days, the continuity of a restrictive agreement or a dominant position practice until the final clearance is issued.

On the other hand, there are no similar provisions under the Competition Law for economic concentration transactions bearing in mind that the closing of such transactions does not interlink from a procedural aspect with obtaining the clearance from the Minister.

It could be said, however, that by way of analogy, a temporary clearance for economic concentration transactions could still be legally obtained from the Minister till the final clearance is issued since there is no clear prohibition for the Minister to provide such temporary approval and similar approval could be obtained for restrictive agreement or a dominant position practice.

In all events, risks of obtaining a temporary clearance should be considered, especially if the application for final clearance is rejected by the Minister and the parties are in a position where they are required to reverse the transaction.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is uncertainty regarding the precise time the transaction must be notified to the Competition Department. The Competition Law provides that economic concentration transactions have to be notified at least 30 days before completion of the transaction, while the Competition Regulations require the notification to be submitted at least 30 days from the conclusion of the transaction agreements.

The conservative approach would be to follow the Competition Regulations even though the Competition Law has superiority. Practically speaking, notifications should be made shortly after entering into the transaction documents since it is usually a condition precedent to obtain the regulatory approval prior to closing. In this case, the applicant would comply with both the Competition Law and the Competition Regulations.

As previously mentioned, failing to failure to notify a reportable economic concentration may result in a fine between 2% and 5% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5,000,000.

3.2 Type of Agreement Required Prior to Notification

The Competition Regulation indirectly requires a binding agreement prior to the notification for approving an economic concentration transaction. As part of the notification made to the Competition Department, it is required to attach a term sheet or an agreement, whether in an executed or draft form.

Therefore, a less formal agreement such as a letter of intent or memorandum of understanding can be attached to the notification. In all events and for the purposes of the notification, a written document should be provided explaining the transaction, whether in a signed or a draft form. Without it, the Competition Department would most likely put the application on hold until the term sheet or agreement is submitted as part of the notification filing.

3.3 Filing Fees

There are no fees for filing the regulatory notification.

3.4 Parties Responsible for Filing

According to the Competition Regulations, the regulatory filing for an economic concentration is made by the relevant undertaking(s). There is no clear definition of what is meant by relevant undertaking(s). It could be interpreted from the text that a relevant undertaking would be:

- the undertaking directly involved in the transaction; and
- meeting the jurisdictional threshold following the conclusion of the economic concentration transaction.

If more than one undertaking meets the above requirements, then filing should be made jointly.

Please refer to **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

3.5 Information Included in a Filing

In addition to:

- the notification form (which is still to be released by the Competition Department and, therefore, up to the date of this guide, notifications could be submitted in the form that the relevant undertaking deems appropriate as long as it complies with the regulatory requirements); and
- the term sheet or agreement, whether executed or in a draft form, the relevant undertaking(s) must also submit the following as part of the notification filing:
  - (a) constitutional documents of the relevant undertaking(s), including their memorandum and articles, which have to be duly attested;
  - (b) audited consolidated financial statements of the relevant undertaking(s) for the past two years;
  - (c) shareholders' register of the relevant undertaking(s); and
  - (d) an economic report analysing the positive impact of the transaction.

The notification form, term sheet or agreement (whether executed or in draft form) and the aforementioned attachments should be submitted in Arabic. An English translation of the notification form can also be filed, but practically speaking, the Competition Department will only refer to the Arabic documents and disregard the English copy.

The Competition Regulations require three hard copies of the notification with the attachments to be submitted. However, practically the Competition Department now accepts the notification and attachments to be sent in an electronic form, and it is no longer necessary to submit hard copies.

If some of the documents or information in the notification or its attachments are confidential, the relevant undertaking(s) may refer the Competition Department to such confidential information and may also submit a non-confidential summary of the same to maintain it.

Additional documents and information can be requested by the Competition Department during the process of the merger control review.

3.6 Penalties/Consequences of Incomplete Notification

There is no penalty for an incomplete notification if it was an honest mistake or done in good faith. The only consequence is that the Competition Department will not assess or analyse it until all documents are submitted, whether required by law or further requested by the Competition Department.

It is important to note that the 90 days timeframe, during which a decision should be issued and could be extended for an additional 45 days for this purpose, will not start until the Competition Department considers the notification complete, and this could only happen when all documents and information requested by the Competition Department are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Providing inaccurate or misleading information could lead to withdrawing the clearance given by the Minister.

A general provision provides that a fine of no less than AED10,000 and no more than AED100,000 will be imposed on whoever violates the provisions of the Competition Law or Competition Regulations.

Furthermore, a provision under the UAE Federal Penal Code No 3 of 1987 states that imprisonment and/or a fine will be imposed on anyone who, in bad faith, makes a false statement to a judicial or administrative authority.

Nonetheless, none of the above penalties should apply if the inaccurate information was provided by way of honest mistake or on good faith basis where the applicant honestly believed that such information was true and accurate.

Inaccurate information should be promptly rectified and updated once it is known to the relevant undertaking that such inaccurate information was provided.

3.8 Review Process

The review process is carried out in two phases. The first phase is carried out by the Competition Department, ensuring first that the notification is complete and includes all the relevant information and documents. To ensure the completeness of the notification, the Competition Department may require the relevant undertaking(s) and any other concerned party, as the Competition Department would deem appropriate, to provide the necessary information or documents or to attend interviews with the department. Consultations with other authorities in the UAE may also be made for the assessment.

Once all required documents and information are provided, the Competition Department will then prepare a detailed report on the economic concentration transaction notified. The report will include:

- a statement of all procedures and actions taken;
- the underlying data;
- the results of the assessment from both legal and economic aspects, especially with regard to the positive and negative effects of the

transaction on the competition in the relevant market; and
- the recommendation(s) of the Competition Department and proposed decision to be made by the Minister.

The second phase would be submitting the detailed report to the Minister for his review and final decision.

In all events, the process should not be longer than 90 days which could be extended for an additional 45 days; otherwise, approval should be assumed to be granted if no decision is made during this time frame. Such timeframe kicks off once all necessary documents and information are provided, and no further engagement is required with the Competition Department to prepare the detailed report.

3.9 Pre-notification Discussions With Authorities

Discussions and engagement with the Competition Department are carried out with:

- the relevant undertaking(s) directly concerned with the transaction;
- other undertakings or third parties believed by the Competition Department to be affected, directly or indirectly, by the transaction; and
- other UAE authorities, consultants or third parties as the Competition Department deems appropriate.

Such discussions could be notified to the relevant undertaking(s) or remain confidential. The Competition Department has full discretion to engage in the way it believes to be in the best interest of all concerned parties.

3.10 Requests for Information During the Review Process

There is no regulatory limitation or threshold as to the number of requests that could the Competition Department could make during its course of reviewing the documents and information required for reviewing the notification.

The Competition Department are entitled by law to request any number of interviews or any volume of documents or information from any of the concerned parties that the Department deems appropriate for its review.

Once the Competition Department declares that it has all the information it needs to prepare its detailed report, the 90 days clock starts counting down that could be extended for an additional 45 days.

There is no clarity on how common or burdensome some of these requests could be; however, practically speaking, it is highly likely to be reasonable and essential for adequately and accurately assessing the notification.

3.11 Accelerated Procedure

There is no short-form or fast-track, or other types of accelerated procedure for reviewing the notification. The process is one for any and all economic concentration transactions.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The substantive test employed by the Competition Department considers the below criteria during the course of reviewing the notification:

- actual and potential competition in the relevant market;
- new undertakings' ease of access to the relevant market;
- the extent of the potential impact on prices of relevant commodities or services;

- whether there are systemic barriers affecting the entry of new competitors;
- how likely is the emergence of a dominant position in the relevant market;
- the extent of the potential impact on innovation, creativity and technical competence;
- the extent of contribution required to promote investment or export, or support UAE undertakings' ability to compete in the international marketplace; and
- the extent of the impact on consumers' interests.

4.2 Markets Affected by a Transaction

Pursuant to the UAE Competition Legislations, an economic concentration is created if the market share of the undertaking(s) exceeds 40% of the total transactions in a relevant market of goods or services that are interchangeable based on their price, characteristics and usage, in the relevant market.

As such, the Competition Department will usually identify first the relevant market and then measure the market share in terms of the aggregate turnover of the relevant undertaking(s), divided by the total value of sales of the products or services pertaining to the relevant market.

As explained previously, "total transactions" is not defined under the UAE Competition Legislations, but could be interpreted as the combined annual turnover of the undertaking(s) from the total sales of the products or services pertaining to the relevant market.

4.3 Reliance on Case Law

Unfortunately, the case law of UAE merger control is rare and not publicly available due to the high threshold causing the limited application of the law. Therefore, reliance up to the date of this guide is heavily related on the interpretation of the UAE Competition Legislations.

4.4 Competition Concerns

Please refer to **4.1 Substantive Test**.

4.5 Economic Efficiencies

Please refer to **4.1 Substantive Test**.

4.6 Non-competition Issues

There are seven strategic sectors in which foreign investment is restricted or prohibited, according to Cabinet Decision No 55 of 2021 on the Determination of the List of Strategic Impact Activities. The restricted or prohibited sectors include security and defence, banks and insurance, and telecommunications. If the regulatory authority for the relevant sector approves the application by a foreign investor who wishes to invest in a company engaged in one of these sectors, it must determine the minimum percentage of share capital that must be held by UAE shareholders and the maximum percentage that may be held by the foreign shareholder.

However, sector regulators and other government authorities in the UAE retain a certain degree of discretion to approve or reject proposed transactions affecting competition in the UAE. Hence, for example, while the regulated sectors have been excluded from the scope of application of the Competition Law, investment in these sectors (including in relation to a foreign company operating through a branch in the UAE) will generally require a separate approval procedure to be undertaken with the relevant regulator, in particular, to update the undertaking's UAE licences and registration. Considerations in this context will not necessarily or exclusively be competition-related, and sector regulators and other government authorities retain considerable discretionary powers to reject a transaction where they have concerns, including national security or public policy.

Contributed by: *Yousef Al Amly, Alex Saleh, Ahmad Saleh and Asad Ahmad,*
Mohammad Alsaadi In Association with GLA & Company

4.7 Special Consideration for Joint Ventures

Joint ventures are not dealt with separately under the UAE Competition Legislations and are considered as any other transaction in terms of whether the undertaking is meeting the jurisdictional threshold and if there are any considerations as to whether it should be a restrictive agreement or if there is an abuse of a dominant position.

Therefore, other than the economic concentration aspects that will be evaluated, the Competition Department will also consider if the joint venture should be considered a restrictive agreement or abuses a dominant position.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Once the decision is made by the Minister, the relevant competent authorities (including the Ministry) have the power and authority to enforce the decision. The authorities has, therefore, the ability to prohibit or otherwise interfere with a transaction.

The clearance or rejection decision is made by the Minister, so it is worth highlighting the powers of the Minister that extend, amongst other responsibilities, to the following areas:

- commercial transactions;
- commercial agency;
- consumer protection;
- commercial companies, including publicly listed companies;
- financial and capital markets; and
- intellectual property.

Therefore, the Minister can significantly affect the provision of a product or a service in the UAE and can request the intervention of the UAE enforcement bodies to support any decision made in this regard.

On a relevant note, the Competition Law further provides that the Ministry shall coordinate with the competent authorities and the sectoral regulatory bodies for the execution of the provisions of the Competition Law.

Furthermore, employees of the Competition Department determined by a resolution of the UAE Minister of Justice in agreement with the Minister and the concerned authority shall have the capacity of judicial officers to prove the violations of the provisions of the UAE Competition Legislations.

5.2 Parties' Ability to Negotiate Remedies

When the Competition Department have concerns about a transaction, the parties may propose remedies; for example, divestitures or structural or behavioural remedies, and the Competition Department then has the sole discretion to reject or accept such remedies and include the same in its recommendations submitted to the Minister who will then consider such remedies and make a final decision.

5.3 Legal Standard

There is no specific legal standard that remedies must meet to be deemed acceptable, and it is up to the parties to agree with the Competition Department on the most suitable remedies, which then should be accepted by the Minister.

5.4 Typical Remedies

There are no particular remedies that are typically used in practice. Both structural remedies and behavioural (or conduct) remedies can be introduced and suggested, and there is no limitation under the UAE Competition Legislations as to what can be suggested as a remedy.

Again, this is subject to what would be agreed with the Competition Department as a suitable remedy which could also include remedies to address non-competition issues if deemed necessary.

5.5 Negotiating Remedies With Authorities

Remedies can be proposed anytime until the Minister makes the final decision. It can be proposed by the relevant undertaking(s) making the notification, the Competition Department or even the Minister, who can issue clearance of the economic concentration transaction subject to satisfying certain remedies.

Proposals for remedies are usually communicated in writing but can also be initially discussed verbally for the purpose of submitting the final proposal of the remedy in writing.

5.6 Conditions and Timing for Divestitures

Divestiture (ie, the commitment to sell a business unit) may either take the form of:

- a horizontal division where the same shareholders own the shares of the new companies; or
- a vertical division where part of the existing company is carved out and transferred to a newly established subsidiary owned by the parent company.

It is most likely that the Competition Department will entrust the relevant undertaking(s) with preparing the divestiture plan (if acceptable to the Competition Department) and overseeing the implementation of the same post issuing the clearance. However, there is no general preference for any type of divestiture, assessed on a case-by-case basis.

Hence, there is no standard approach regarding conditions and timing for divestitures or other remedies. It will be left to the remedy arrangement agreed with the Competition Department or stipulated in the clearance issued by the Minister, including as well completing a transaction before remedies are complied with.

Failing to comply with the remedies may lead to withdrawing the clearance and/or imposing a fine whose value will be subject to the discretion of the Competition Department and approval of the Minister while being limited to the thresholds stipulated by the Competition Law for fines imposed.

5.7 Issuance of Decisions

Decisions are issued formally permitting or prohibiting a transaction and notified to all concerned parties bearing in mind that a decision would be implied if it is not made during the 90-day window provided in Competition Law that may be extended for an additional 45 days.

Decisions are not available publicly and, therefore, cannot be revisited by the public to check such decisions. There is a privity to the parties made aware of such decisions which could be limited only to the undertaking(s) or include third parties such as concerned UAE authorities and regulatory bodies or parties directly or indirectly affected by the decision.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

We are not aware of the Competition Department requiring remedies or prohibiting foreign-to-foreign transactions since these are not publicly available information.

Contributed by: *Yousef Al Amly, Alex Saleh, Ahmad Saleh and Asad Ahmad,*
Mohammad Alsaadi In Association with GLA & Company

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

According to the Competition Regulations, the Minister issues a reasoned decision in either of the following forms:

- a clearance decision to approve the transaction if it does not negatively affect competition or if it has positive economic impacts on competition that outweigh the negative impacts; or
- a clearance decision to approve the transaction, provided that the relevant undertakings undertake to comply with the conditions and obligations specified by the Minister; or
- a decision to reject the transaction.

The decision should cover the transaction as a whole including any related arrangement (ancillary restraints) if it was part of the notification made to the Competition Department. No separate notifications would be required in addition to the decision.

The Minister may revoke the clearance if it appears that:

- the circumstances under which the approval has been granted no longer exist;
- the relevant undertaking(s) have breached any conditions or obligations on which the approval has been granted; or
- the approval has been granted on the basis of misleading or incorrect information. In that case, the Competent Authority shall take appropriate legal actions so as to sue and prosecute the relevant undertaking(s) in breach.

It should be noted that the Competition Department maintains a special record for recording decisions issued by the Minister regarding the notifications for approval of economic concentration transactions. This record is not publicly available.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Please refer to **3.9 Pre-notification Discussions With Authorities**.

7.2 Contacting Third Parties

The Competition Department may contact third parties in any manner they deem appropriate including telephone calls, emails, written letters to be sent by mail or electronically, or by way of interviewing such third parties (interviews are most likely to take place at the offices of the Competition Department).

The Competition Department may also request third parties that may be affected by the clearance of the transaction to submit their comments in this regard within 15 days from the Competition Department's request (market test).

7.3 Confidentiality

The Competition Law requires the Ministry to take steps to maintain the confidentiality of sensitive information which could cause serious damage if disclosed. In this regard, the Ministry is not permitted to disclose any information reviewed as part of the notification application unless such disclosure is to the concerned parties or upon the request of the relevant authorities.

Violating the confidentiality duties could under the Competition Law could lead to imposing a fine of no less than AED50,000 and no more than AED200,000.

Confidential documents submitted as part of the notification application should be labelled as “confidential” and non-confidential summaries should be provided.

7.4 Co-operation With Other Jurisdictions

The Competition Law provides that one of the responsibilities of the Ministry is to coordinate its activities with other UAE public bodies and foreign authorities with the aim of serving the purposes of such law.

The UAE Competition Legislations are not clear on the methodology or ways of co-ordination, specifically in instances where a transaction is also being reviewed by competition authorities in other jurisdictions, such as cases where the possibility of remedies has been raised in these jurisdictions, or in cases where it would be essential to seek confidentiality waivers from the relevant undertakings to allow the Ministry to exchange confidential information relating to the transaction.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Any concerned party can request in the Minister to review a competition decision adopted by the Minister himself within 14 days from the date the applicant becomes aware of such decision. The request should be in writing and explain the grounds based on which the request is made and attached to it all the necessary supporting documents.

The Committee will in return review the request and submit its recommendation in this respect to the Minister within 10 days from the date on which the application has been referred to it.

The Minister should adopt a final decision within 30 days from filing of the request. If a decision is not adopted within this timeframe, the request is deemed to be rejected.

Decisions issued by the Minister can be appealed before the competent court within 60 days from notification of the Minister’s decision to the concerned parties.

It is important to note however that the Minister may enter into a settlement with undertakings who are deemed to have breached the Competition Law, except for breaches of unauthorised disclosure of the confidential information protected under the Competition Law.

Settlement with breaching undertakings is subject to the following:

- undertakings who pay a fine which amount is no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

The settlement is immediately effective post the payment of the fine by the relevant undertaking.

8.2 Typical Timeline for Appeals

Please refer to **8.1 Access to Appeal and Judicial Review** for the timelines.

On a separate note, appeals are not a public record so we are not aware of any successful appeals.

Contributed by: *Yousef Al Amly, Alex Saleh, Ahmad Saleh and Asad Ahmad,*
Mohammad Alsaadi In Association with GLA & Company

8.3 Ability of Third Parties to Appeal Clearance Decisions

Please refer to **8.1 Access to Appeal and Judicial Review**.

It should be further noted that the public records of the courts, up to the date of this guide, do not show any decisions appealing a clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

Up to the date of this guide, there has not been any amendments to any of the UAE Competition Legislations. We are also unaware of any significant proposals to amend any of the UAE Competition Legislations.

9.2 Recent Enforcement Record

Competition enforcement records are not publicly available and there are no publicly available information about any enforcement records in terms of imposing fines, prohibiting transactions or requiring remedies, particularly for foreign-to-foreign transactions.

9.3 Current Competition Concerns

We are unaware of any current competition concerns of the Ministry or the Competition Department. Thus, there are no notable trends in the UAE with regards to merger control review or enforcement.

Mohammad Alsaadi In Association with GLA & Company provides strategic, cost-effective, and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE), it offers unique insights for companies seeking to establish or expand business operations in these nations. The firm's emphasis on deals is to get them cleared with the local Competition Authority and it has excellent relationships with regulators in the GCC, and has become successful in securing no objections from these bodies to clear these deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments, and committees on behalf of clients.

AUTHORS

Yousef Al Amly is a partner at GLA & Company and advises clients on complex corporate and commercial structures and transactions in relation to joint ventures, corporate restructuring, M&A, equity capital markets and commercial transactions (including franchise, distributorship and agency). This includes negotiating and drafting the terms and conditions of agreements and documentation related to any of the said transactions both in English and Arabic, such as commercial contracts, due diligence reports, shareholders' arrangements, sale and purchase agreements, acquisition finance, IPO prospectuses and other legal documents necessary to carry out corporate/commercial transactions.

Alex Saleh is a founder and managing partner of GLA & Company and takes a leading regional role in the firm concerning its M&A and Private Equity practice. With over 25 years of experience in both the GCC and the US, he has accumulated sizable expertise in the areas of banking and finance, M&A, capital market deals and infrastructure projects. His experience garners praise from the leading legal directories, and his transactions regularly win Deals of the Year from the same institutions and organisations.

Ahmad Saleh is a senior associate with the Corporate Department at GLA & Company and licensed in the State of Ohio, US, and the Federal District for the Southern District of Ohio, US. His practice focuses primarily on M&A, other local and cross-border transactions, and complex construction disputes. Since joining GLA & Company, Ahmad has successfully advised multinational clients across various industries, including construction and manufacturing, government contracting, finance, food and retail. Ahmad is regularly involved in acquisitions and other matters, and recently has been focusing on complex contractual disputes for major construction projects in the State of Kuwait.

Asad Ahmad is a senior associate at GLA & Company and a relentless advocate for his clients. He has been involved in a number of transactional and advisory works in various industries, including logistics, construction, finance, healthcare, and education. Asad's scope of practice has involved comprehensive representation with respect to M&A, conducting extensive due diligence exercises in relation to complex transactions, as well as distribution and agency arrangements. He has an extensive background in advising on the marketing of securities, corporate governance issues, policies, and regulatory compliance. Due to the increased need, Asad has expanded his expertise in advising on the framework of data protection and regulation.

Mohammad Alsaadi In Association with GLA & Company

1807 Opal Tower
Eighteenth Floor
Business Bay
P.O. Box 33341
Dubai
United Arab Emirates

Tel: +971 4 553 9448
Email: info@glaco.com
Web: www.glaco.com

UK

Law and Practice

Contributed by:
Samuel Beighton and Bernardine Adkins
Gowling WLG see p.718

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Enterprise Act 2002 (the "Enterprise Act") provides the primary legislative basis for the UK merger control regime. The Competition and Markets Authority (CMA) is the investigating authority and decision-maker under the general UK merger control regime (see **1.3 Enforcement Authorities**).

The CMA has issued a range of guidance, which is available on its website. Key guidance documents include "Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2 revised, as amended on 4 January 2022)" (the "J&P Guidance"), and "Merger assessment guidelines (CMA 129)" (the "Merger Assessment Guidelines").

1.2 Legislation Relating to Particular Sectors

There is no merger control legislation in the UK which specifically addresses foreign investment.

The National Security and Investment Act 2021 (the "NSI Act") entered into full force on 4 January 2022, establishing an investment screening regime distinct from the UK merger control regime (see **4.6 Non-competition Issues**).

The Enterprise Act establishes a general merger control regime in the UK (see **2.5 Jurisdictional Thresholds**).

The Enterprise Act also sets out specific jurisdictional and procedural provisions in relation to:

- "Public interest mergers": where transactions give rise to certain public interest considerations, including:
  - (a) the need for a sufficient plurality of persons controlling media enterprises;
  - (b) prudential regulation in the interest of maintaining the stability of the UK financial system; and
  - (c) the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies.
- "Special public interest mergers": where transactions involve:
  - (a) government contractors that receive or hold confidential defence-related information; and
  - (b) certain newspaper and broadcasting businesses.

The Secretary of State is able to intervene in public interest and special public interest mergers. Further guidance on these types of mergers is included within the J&P Guidance. For the purposes of this chapter, public interest mergers and special public interest mergers are generally not considered further.

1.3 Enforcement Authorities

Under the general UK merger control regime, the CMA is the investigating authority and decision-maker at Phase 1. At Phase 2, investigations are conducted by a group of independent panel members, supported by CMA staff (see **3.8 Review Process**).

2. JURISDICTION

2.1 Notification

Notification is voluntary. There is no general requirement for parties to obtain clearance before completing a transaction. However, the CMA is able to investigate "non-notified" transactions, and has a dedicated mergers intelligence function. This monitors merger activity, and identifies candidate transactions for possible investigation.

Formal Notification

Where the CMA is expected to have jurisdiction to investigate, and the transaction gives rise to prima facie competition concerns, the parties can include UK merger clearance as a condition precedent for completion, and proceed to engage in the process of formally notifying the transaction (see **3.4 Parties Responsible for Filing**, **3.5 Information Included in a Filing**, and **3.9 Pre-notification Discussions With Authorities**).

Informal Briefing Note

If the parties do not consider that the CMA has jurisdiction to investigate, and/or the transaction does not give rise to competition concerns, the parties can bring the transaction to the CMA's attention by submitting a short briefing note. Parties may decide to do this where they do not intend to obtain clearance, but wish to have a degree of comfort that the CMA does not consider the transaction to warrant further investigation.

As a general rule, the CMA will only consider a briefing note once the parties have entered into an agreement in respect of the transaction. In practice, this requires the parties to have considered the application of the UK merger control regime before entering into the transaction agreement. However, completion of the transaction agreement could be made conditional upon the CMA responding positively to the briefing note, and not opening an investigation.

Having received a briefing note, the CMA may request additional information to determine whether to investigate. If the CMA does not investigate the transaction following receipt of a briefing note, the CMA remains able to investigate subsequently (eg, if it receives credible additional information from third parties), provided that it does so within the relevant four-month statutory time limit (see **2.2 Failure to Notify**). Further guidance is available in the "Guidance on the CMA's mergers intelligence function (CMA56 revised)".

2.2 Failure to Notify

As notification is voluntary, there are no penalties for failing to notify.

Where a relevant merger situation is completed without clearance, the CMA is able to investigate (see **2.3 Types of Transactions**), and could ultimately require a completed transaction to be undone (see **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**).

When investigating anticipated and completed transactions, the CMA is also able to impose interim measures (see **2.12 Requirement for Clearance Before Implementation**).

2.3 Types of Transactions

The CMA is able to investigate a "relevant merger situation", which arises when:

- two or more "enterprises" have either ceased to be distinct, or arrangements are in progress or contemplation which, if implemented, would result in the enterprises ceasing to be distinct; and
- the applicable jurisdictional thresholds are satisfied (see **2.5 Jurisdictional Thresholds**); and
- the transaction either:
  - (a) is not completed; or
  - (b) was completed not more than four months before the CMA's decision on whether to refer the transaction for a Phase 2 investigation (the "Phase 2 reference decision"), except where completion occurred without being publicised and without the CMA being notified, in which case the four-month period starts from the earlier of the date

upon which completion was publicised, or the CMA was notified (see **2.11 Power of Authorities to Investigate a Transaction**).

Concept of an "Enterprise"

Under the Enterprise Act, an "enterprise" is defined as "the activities, or part of the activities, of a business".

The assets of a business could therefore constitute an enterprise. When assessing whether assets constitute an enterprise, the CMA will consider whether there is "economic continuity", whereby:

- the assets give the acquirer more than they might have acquired by going to market and buying the factors of production; and
- this "extra" obtained by the acquirer is due to the fact that the assets were previously used in the activities of the target business (see Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority [2015] UKSC 75).

In doing so, the CMA will carefully consider the facts of the case, and have regard to whether the transaction includes the transfer of:

- tangible and/or intangible assets;
- business data (including customer databases);
- employees;
- trade marks, trade names, or domain names; and/or
- goodwill.

2.4 Definition of "Control"

The concept of "control" is not limited to legal and de facto control (see the J&P Guidance), but also includes the ability to exercise material influence.

In this latter context, the CMA will assess the acquirer's ability to materially influence the policy of the target business as regards its conduct on the market (eg, its strategic direction and commercial objectives). This ability may arise as a result of shareholdings, board representation, and/or contractual, financial or other arrangements. The CMA consider the commercial reality of the transaction, including the overall relationship between the acquirer and the target business.

As a general rule, the CMA will view a shareholding exceeding 25% as enabling the acquirer to exercise material influence. The CMA will also consider whether a shareholding of 15% or more (and exceptionally, less than 15%) may confer material influence.

Increasing Control in Stages

A transaction that increases the acquirer's level of control (eg, increasing from material influence to de facto control, or from de facto control to legal control) may give rise to a new relevant merger situation.

Where an acquisition takes place in stages, and control is acquired over a number of transactions or events in a single two-year period, the CMA has the discretion to treat these as occurring on the date of the last transaction. In so doing, the CMA can also take into account transactions that are in contemplation.

2.5 Jurisdictional Thresholds

There are two alternative jurisdictional thresholds under the general merger control regime – the Turnover Test, and the Share of Supply Test.

The Turnover Test

The Turnover Test is satisfied if the UK turnover of the target exceeded GBP70 million in its financial year preceding either:

- completion of the transaction; or
- the CMA's Phase 2 reference decision, where the transaction has yet to complete.

"Turnover" for these purposes is the amount achieved by the target in the relevant financial year from the sale of products and/or the provision of services in the ordinary course of business in the UK (net of any sales rebates, value-added tax and other taxes directly related to that turnover). Turnover may be adjusted if the CMA considers it appropriate to do so (eg, if an acquisition or divestment following the end of the financial year has materially impacted upon the turnover value).

Specific provisions apply in relation to what constitutes "turnover" where enterprises are (in whole or in part) credit institutions, financial institutions, or insurance undertakings. These provisions are addressed within the J&P Guidance.

The J&P Guidance also details the approach to be taken when calculating the relevant value of turnover to be used in the Turnover Test (eg, in the context of a joint venture).

The Share of Supply Test

The Share of Supply Test is satisfied where:

- at least two enterprises ceasing to be distinct supply or procure goods or services of a particular description; and
- post-transaction, they will supply or procure at least 25% of those goods or services in the UK, or in a substantial part of it, with the transaction causing an increment in that share of supply or procurement.

Significantly, neither enterprise is required to have any turnover in the UK for the Share of Supply Test to be satisfied (see, for example, Roche/Spark), and there is no de minimis increment in the share of supply or procurement (see Sabre v CMA [2021] CAT 11).

In essence, the Share of Supply Test comprises three key elements:

- a product element (ie, the supply or procurement of goods or services of a particular description);
- a geographic element (ie, the UK, or a substantial part of it); and
- a quantitative element (ie, the 25% threshold).

Product element

The CMA has a broad discretion to describe the goods or services supplied or procured by the parties. Whilst the CMA will have regard to any "reasonable description" of a set of goods or services, the Share of Supply Test is not a market share test.

Geographic element

The CMA has a broad discretion to determine what constitutes a substantial part of the UK. The CMA will take into account factors including the size, population, and economic significance of an area. There is no need for a "substantial part of the UK" to constitute a single, undivided geographic area.

Quantitative element

The CMA has a broad discretion to apply whatever measure it considers appropriate to determine the parties' combined share of supply or procurement, and whether this satisfies the 25% threshold.

Consequently, the Share of Supply Test affords the CMA a considerable discretion to assert jurisdiction.

Sector-Specific Jurisdictional Thresholds

As noted within the J&P Guidance, in certain circumstances, mergers involving two or more water and sewerage (or water-only) companies are subject to sector-specific jurisdictional thresholds (see "Water and sewerage mergers: Guidance on the CMA's procedure and assessment, CMA49").

2.6 Calculations of Jurisdictional Thresholds

See **2.5 Jurisdictional Thresholds**.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See **2.5 Jurisdictional Thresholds**.

2.8 Foreign-to-Foreign Transactions

The jurisdictional thresholds are applicable by reference to the parties' activities in the UK, irrespective of whether the parties are UK entities (see **2.5 Jurisdictional Thresholds**).

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold test in the UK (see **2.5 Jurisdictional Thresholds**).

2.10 Joint Ventures

The creation of a joint venture, or a change in the ownership or control of an existing joint venture, would be capable of investigation under the UK merger control regime if it constitutes a "relevant merger situation" (see **2.3 Types of Transactions**).

2.11 Power of Authorities to Investigate a Transaction

The CMA has a period of four months from a completed transaction being publicised or notified to the CMA within which to make a Phase 2 reference decision.

The CMA will consider that a transaction has been publicised by the acquirer where:

- material facts about the transaction have been published in the national or relevant trade press in the UK; and
- the acquirer has itself publicised the transaction, typically by prominently displaying a press release upon its website.

Where the transaction is neither publicised, nor notified to the CMA, the four-month period does not start to run.

2.12 Requirement for Clearance Before Implementation

As notification is voluntary, there is no general requirement for parties to obtain clearance before completing a transaction.

However, when the CMA investigates anticipated and completed transactions, it can impose interim measures to (i) prevent pre-emptive action being taken by the parties; and/or (ii) require any pre-emptive action already taken to be undone.

Pre-emptive Action

Pre-emptive action is action which might prejudice the outcome of a Phase 2 investigation, or impede appropriate remedial action being taken (see Facebook v CMA [2021] EWCA Civ 701). This could include the parties:

- closing or selling sites;
- failing to retain key employees;
- weakening the independence of brands;
- discontinuing competing products; and/or
- exchanging confidential commercially sensitive information.

The CMA can impose interim measures in the form of (i) an initial enforcement order (IEO) at Phase 1; and (ii) an interim order (IO) at Phase 2. In addition, the CMA can accept interim measures in the form of interim undertakings at Phase 2.

Phase 1 Investigations

The CMA can impose IEOs to prevent and/or undo pre-emptive action, and will generally use its standard IEO template (available from its website). The CMA frequently imposes IEOs in relation to completed transactions, and also imposes IEOs in the context of anticipated transactions.

The CMA can also prevent the completion of the transaction if this in itself could result in pre-emptive action (see, for example, Gardner Aerospace/Northern Aerospace), and the CMA's guidance provides as examples where completion would:

- directly lead to the target business losing key staff, management, or operational capacity; or
- result in significant changes to the acquirer's and/or the target's business that would be difficult or costly to reverse.

The CMA does not typically prevent completion where it imposes an IEO in the context of an anticipated transaction.

Phase 2 Investigations

If the transaction is referred for a Phase 2 investigation, the IEO will remain in force unless the CMA imposes an IO at Phase 2, or accepts interim undertakings from the parties at Phase 2.

In any event, even in the absence of interim measures, where a reference is made for a Phase 2 investigation, the Enterprise Act prevents the parties:

- in anticipated transactions, from acquiring any interest in shares in a company to which the Phase 2 investigation relates during that investigation without the CMA's consent; and
- in completed transactions, from completing any further matters in connection with the transaction, or transferring ownership or control of the target business, without the CMA's consent.

Derogations from Interim Measures

Following receipt of written requests from the parties, the CMA may grant derogations from interim measures, and consent to the parties taking actions that would otherwise be prohibited.

Derogations will not be granted retrospectively (eg, to permit acts that have already occurred) and parties should therefore engage as early as possible with the CMA to discuss any derogation requests they consider to be urgent and necessary (including requests to enable the integration of non-UK aspects of a transaction).

Compliance with Interim Measures

In both anticipated and completed transactions, the CMA will ask the parties to provide information relating to their obligations under interim measures, including: (i) details of action taken before the interim measures were in effect that would not have been permitted under the interim measures; (ii) plans for integration; (iii) management of information flows and the use of appropriate safeguards; and (iv) planned and actual internal and external communications addressing the transaction.

The CMA considers that interim measures are *of vital importance to the functioning of the UK's voluntary regime*, and that parties should take a risk-based approach when designing and implementing steps to ensure compliance with interim measures. This requires a thorough review of every area of parties' businesses to identify any compliance risks, with steps taken to ensure compliance being appropriately tailored to these businesses.

The CMA will generally require the CEOs of the acquirer and the target business to each provide a compliance statement on a fortnightly basis, confirming that the relevant business has complied with the interim measures over that period.

In addition to the need for the parties to ensure compliance, the CMA may require the appointment (at the parties' cost) of a monitoring trustee, and/or a hold-separate manager, to oversee compliance with interim measures.

The CMA is able to impose penalties for non-compliance. If an addressee fails to comply with any interim measures without reasonable excuse, the CMA can impose a fine of up to 5% of the total value of the worldwide turnover of the enterprises owned or controlled by the addressee. For example, the CMA imposed fines totalling GBP52 million upon Meta for various failures to comply with an IEO imposed in relation to its acquisition of GIPHY.

Guidance addressing the CMA's approach to interim measures, the grant of derogations, and the steps that parties are expected to take to ensure compliance is provided in "Interim measures in merger investigations, CMA108".

2.13 Penalties for the Implementation of a Transaction Before Clearance

See **2.12 Requirement for Clearance Before Implementation**.

2.14 Exceptions to Suspensive Effect

See **2.12 Requirement for Clearance Before Implementation**.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See **2.12 Requirement for Clearance Before Implementation**.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no mandatory notification requirement, and no deadline for notification.

3.2 Type of Agreement Required Prior to Notification

There is no requirement for the parties to have entered into a transaction agreement prior to formally notifying a transaction. Instead, the CMA will generally need to be satisfied that there is a good faith intention to proceed with the transaction.

However, if the parties submit an informal briefing note to the CMA for consideration (see **2.1 Notification**), then the CMA will generally only consider this once the parties have entered into an agreement in respect of the transaction.

3.3 Filing Fees

Subject to limited exceptions, a merger fee is payable when the CMA reaches a Phase 2 reference decision (irrespective of whether the transaction is notified by the parties to the CMA, or is investigated by the CMA on its own initiative).

For cases in which UILs are accepted by the CMA (see **5.4 Typical Remedies**) the merger fee is payable upon the CMA's acceptance of those UILs.

Current Merger Fees

Merger fees vary by reference to the UK turnover of the target in its financial year preceding the transaction. At present, where payable, merger fees are:

- GBP40,000 where the UK turnover of the target was GBP20 million or less;

- GBP80,000 where the UK turnover of the target exceeded GBP20 million, but did not exceed GBP70 million;
- GBP120,000 where the UK turnover of the target exceeded GBP70 million, but did not exceed GBP120 million; and
- GBP160,000 where the UK turnover of the target exceeded GBP120 million.

A merger fee is to be paid within 30 days of the date of the CMA's invoice.

Exceptions

A merger fee is not payable if a transaction is notified to the CMA, but is found not to constitute a relevant merger situation.

A merger fee is also not payable where the acquirer and its group is a small or medium-sized enterprise (as defined under the Companies Act 2006).

No fee is payable in relation to the submission of an informal briefing note (see **2.1 Notification**).

3.4 Parties Responsible for Filing

Where a transaction is formally notified to the CMA, a so-called "merger notice" may be submitted by any person carrying on an enterprise to which the transaction relates.

3.5 Information Included in a Filing

The CMA's template merger notice (available from its website) sets out the categories of information to be provided by the parties when notifying a transaction to the CMA. The specific information necessary to assess a given transaction will depend upon the facts of that transaction (including, for example, the parties' activities and the extent to which these overlap).

The CMA asks that parties prepare and submit a draft merger notice for the purpose of pre-notification discussions (see **3.9 Pre-notification Discussions With Authorities**), with this draft including:

- information that the parties consider necessary for the CMA's Phase 1 investigation; and
- brief explanations as to why any information requested in the merger notice template has not been provided.

The parties may also include submissions in relation to the application of the de minimis exception to enable the CMA to consider whether the case is a possible de minimis candidate (see **4.1 Substantive Test**).

Parties should not underestimate the level of detail required to be provided in a draft merger notice. For example, the CMA will typically expect to receive a significant volume of the parties' internal documents, including:

- most recent business plans; and
- documents that:
  - (a) set out the rationale for the transaction; or
  - (b) assess or analyse the transaction with respect to competitive conditions, competitors, potential for growth or expansion, market conditions, market shares and/or the transaction valuation, including post-merger business plans or strategy (including integration plans and financial forecasts).

Requesting Further Information

The CMA is able to request further information from the parties, including information going beyond what is included within the merger notice template. The CMA will generally make a number of requests for further information during the course of pre-notification discussions.

Satisfactory Merger Notice

For a merger notice to be accepted by the CMA as satisfactory (such that the CMA's Phase 1 investigation may commence), the merger notice must include the prescribed information, and confirm that the transaction has been made public.

Merger notices should be provided in English, and the CMA has issued guidance addressing how documents should be submitted (see "Providing documents to the CMA", November 2017).

The CMA's Own Initiative Investigations

If the parties choose not to notify the transaction to the CMA, and the CMA instead investigates on its own initiative (eg, on the basis of publicly available information, and/or customer complaints), the CMA will generally seek information by issuing notices under Section 109 of the Enterprise Act (each a "Section 109 Notice") to obtain the information it requires to progress its investigation.

Provision of evidence

Section 109 of the Enterprise Act empowers the CMA to give notice to any persons requiring them to provide documents, information, or witness evidence (including by formal interview) by a set deadline. All documents that are responsive to a Section 109 Notice must be submitted to the CMA. Where a party does not meet the stated deadline to respond, the CMA is able to extend the statutory timetable for its review of the transaction (see **3.8 Review Process**).

If the CMA investigates on its own initiative, parties may still make submissions regarding the de minimis exception to enable the CMA to consider whether the case is a possible de minimis candidate (see **4.1 Substantive Test**).

3.6 Penalties/Consequences of Incomplete Notification

Penalties are not imposed where parties submit an incomplete draft merger notice. However, the CMA's Phase 1 investigation will not begin until after the CMA has confirmed that it has received a satisfactory merger notice.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

It is a criminal offence for an individual to:

- intentionally alter, suppress or destroy any document required to be produced under a Section 109 Notice (see **3.5 Information Included in a Filing**); or
- knowingly or recklessly provide false or misleading information to the CMA (or the Secretary of State, see **1.2 Legislation Relating to Particular Sectors**) in connection with any of their merger functions.

Upon conviction on indictment, an individual would be liable for a term of imprisonment of up to two years, or a financial penalty, or both.

Administrative Penalties

The CMA can impose administrative penalties in certain circumstances, including where parties intentionally or without reasonable excuse fail to comply with the requirements of a Section 109 Notice (see **3.5 Information Included in a Filing**).

The CMA can impose an administrative penalty of up to:

- GBP30,000 (fixed amount);
- GBP15,000 (daily rate); and
- GBP30,000 (fixed amount) and GBP15,000 (daily rate), where the CMA is able to impose both a fixed penalty and a daily penalty.

3.8 Review Process

There are two formal phases of investigation, Phase 1 and Phase 2.

In addition, prior to the commencement of a Phase 1 investigation, where the parties notify a transaction to the CMA they will typically engage in pre-notification discussions with the CMA (see **3.9 Pre-notification Discussions With Authorities**).

Phase 1

In a Phase 1 investigation, the CMA has a statutory time period of 40 working days from the commencement of its investigation within which to decide whether its duty to refer the transaction for a Phase 2 investigation is met (see **4.1 Substantive Test**).

During this time, the CMA will actively seek comments from interested third parties to inform its investigation (see **7.1 Third-Party Rights**). The CMA is able to extend the statutory time period in certain circumstances, including where the parties fail to respond to a Section 109 Notice by the stated deadline (see **3.5 Information Included in a Filing**).

Phase 2

In a Phase 2 investigation, the CMA has a statutory time period of up to 24 weeks to conclude its investigation. This time period can be extended, once, by up to eight weeks if there are special reasons why the investigation cannot be completed within this time period. This time period can also be extended if parties fail to respond to a Section 109 Notice by the stated deadline.

3.9 Pre-notification Discussions With Authorities

Pre-notification Discussions

In practice, parties are generally expected to engage in pre-notification discussions where they intend to submit a merger notice to the CMA.

Pre-notification discussions are not time-limited, and can last for a number of months in certain transactions. Pre-COVID-19, the average length of pre-notification discussions was 37 working days during the period from 1 April 2019 to 29 February 2020.

Pre-notification discussions are confidential. However, where a transaction has already been publicised by the parties, the CMA may wish to begin informal market testing during this stage.

Case Team Allocation

Parties that wish to engage in pre-notification discussions should submit a Case Team Allocation Form to the CMA (available from the CMA's website), and the CMA will aim to allocate a case team for the transaction within five working days.

Once allocated, the case team will review a draft of the merger notice, and identify any areas where it considers that additional information is required. In practice, it is not uncommon for the parties to receive two (or more) separate rounds of questions before a merger notice is considered to be satisfactory, enabling the CMA's Phase 1 investigation to commence.

Public Interest Concerns

In addition, where a transaction raises potential public interest concerns, parties are generally encouraged to engage with the relevant government departments as early as possible (see **1.2 Legislation Relating to Particular Sectors**).

3.10 Requests for Information During the Review Process

Before the start of the Phase 1 investigation (ie, the 40-working-day statutory time period), parties are required to provide a substantial volume of information and evidence to the CMA, irrespective of whether transactions are notified by using a merger notice, or investigated by the CMA on its own initiative (see **3.5 Information Included in a Filing**).

Despite this, parties may also receive detailed requests for information during a Phase 1 investigation, particularly if third parties raise credible competition concerns in relation to a transaction (see **7.1 Third-Party Rights**).

During a Phase 2 investigation, in addition to relying upon relevant information received during its Phase 1 investigation, the CMA will request a significant amount of additional information and evidence from the parties.

3.11 Accelerated Procedure

Where a transaction is subject to other regulatory processes (eg, the City Code on Takeovers and Mergers, or merger control regimes in other jurisdictions), the parties can inform the CMA of any timing constraints, and request that the CMA exercises its discretion to make its decision in advance of the relevant statutory deadline. The CMA is then able to decide whether to exercise its discretion to consent to this request.

Exceptionally, following a request by the parties to do so, the CMA may decide to "fast-track" the assessment of a transaction from a Phase 1 investigation into (i) the consideration of UILs (see **5.4 Typical Remedies**); or (ii) a Phase 2 investigation (see, for example, Cargotec/Konecranes).

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

CMA – Phase 1

At Phase 1, subject to limited discretionary exceptions outlined below, the CMA is required to refer transactions for a Phase 2 investigation where it forms a reasonable belief, objectively justified by the relevant facts, that it is or may be the case:

- that a relevant merger situation has been, or will be, created; and
- if so, that the creation of that relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition in a market or markets within the UK for goods or services (SLC).

The CMA does not apply market share or concentration thresholds to determine whether a loss of competition is substantial. Instead, the CMA considers that "substantial" in the context of an SLC has a range of meanings, and will depend on the facts of the case.

On the basis of the "is or may be the case" standard, the CMA must make a Phase 2 reference where it believes that a transaction is likely to result in an SLC (ie, a 50% likelihood or more), and the CMA is required to exercise its judgement to decide whether to make a Phase 2 reference when the likelihood of a transaction resulting in an SLC is below 50%, but greater than fanciful. However, the CMA is able to exercise its discretion not to make a Phase 2 reference where it believes the following:

- In relation to an anticipated transaction, the arrangements are not sufficiently advanced, or are not sufficiently likely to proceed, for a Phase 2 reference to be justified.

- The affected market(s) are of insufficient importance to justify a Phase 2 reference (the de minimis exception). For the purposes of the de minimis exception, where the annual value in the UK (in aggregate) of the market(s) in which there is a realistic prospect of an SLC arising:
  (a) is less than GBP5 million, the CMA will generally not consider a Phase 2 reference to be justified, unless the parties could in principle offer UILs (see **5.4 Typical Remedies**);
  (b) exceeds GBP15 million, the CMA will generally consider the market(s) concerned to be of sufficient importance to justify a Phase 2 reference; and
  (c) is between GBP5 million and GBP15 million, and it is not possible for the parties in principle to offer UILs, the CMA will consider whether the anticipated customer harm resulting from the transaction is materially greater than the average public cost of a Phase 2 reference (currently circa GBP400,000). In so doing, the CMA will have regard to aspects including:
    (i) the size of the market(s) concerned;
    (ii) the likelihood of an SLC occurring;
    (iii) the extent of competition that would be lost as a result of the transaction; and
    (iv) the expected duration of the SLC.
- Relevant customer benefits would outweigh the SLC. This discretion has rarely been exercised. For the CMA to exercise its discretion on this ground, it would need to believe that the transaction would benefit customers overall, despite its belief that there is a realistic prospect that the transaction will result in an SLC.

Further guidance on these discretionary exceptions is available in “Mergers: Exceptions to the duty to refer (CMA64)”.

In the event that these discretionary exceptions are not applicable, it may still be possible for the parties to offer UILs to the CMA, whereby the CMA will not make a Phase 2 reference if it ultimately accepts the offered UILs (see **5.4 Typical Remedies**).

CMA – Phase 2

At Phase 2, the CMA is required to decide on the balance of probabilities whether it is more likely than not:

- that a relevant merger situation has been, or will be, created; and
- if so, that the creation of that relevant merger situation has resulted, or may be expected to result, in an SLC.

If relevant, the CMA must then decide:

- whether any action should be taken to remedy, mitigate, or prevent the SLC, or any adverse effect(s) resulting from the SLC; and
- if so, what action should be taken, and whether this action should be taken by the CMA, or recommended by the CMA for others to take.

4.2 Markets Affected by a Transaction

The CMA uses market definition as a framework for assessing the competitive effects of a transaction. For this purpose, a relevant market will typically comprise both a product dimension, and a geographic dimension.

At Phase 1, the CMA may undertake an initial analysis of the boundaries of the relevant market without necessarily reaching a conclusion. At Phase 2, the CMA will usually reach a conclusion upon the boundaries of the relevant market.

However, the boundaries of the relevant market are not determinative of the outcome of the CMA’s competitive assessment. In particular, the

CMA recognises that it may need to consider constraints imposed from outside the relevant market, or as a result of segmentation within the relevant market, or other ways in which certain constraints may be more important.

Competitive Alternatives

The relevant product market will include the most significant competitive alternatives available to the customers of the parties to the transaction. For the purposes of this assessment, the CMA will generally consider evidence including:

- the parties' internal documents (and potentially customers' and/or competitors' internal documents);
- evidence received from the parties' customers and competitors; and
- third-party reporting (eg, industry reports).

As a starting point, in a horizontal merger (ie, where the parties are competitors), the CMA will focus upon the parties' overlapping products in the narrowest plausible candidate product frame of reference. In a non-horizontal merger (ie, where the parties are either active at different levels of the supply chain ("vertical mergers"), or at the same level of the supply chain but without competing ("conglomerate mergers"), the CMA will take at least one party's product as its starting point.

The CMA will then consider whether this product frame of reference can be widened, generally on the basis of demand-side substitution (eg, how the parties' customers would respond to a small, but significant and permanent, increase in product prices (eg, a 5% increase)), although the CMA may also consider aspects including supply-side substitution (eg, how existing competitors would respond to a small, but significant and permanent, increase in product prices) (see, for example, Danspin/Certain assets and goodwill of LY Realisations).

In addition, where competition concerns may arise in relation to non-price aspects (eg, product quality, and levels of innovation), the CMA will assess evidence in relation to non-price considerations (see, for example, Provisional Findings in Illumina/Pacific Biosciences of California).

Ongoing Dynamics

The CMA may also have regard to ongoing dynamics when considering a product frame of reference in which competitive conditions are expected to evolve. In this context, the CMA will seek to ensure that the relevant market captures the most significant competitive constraints that currently exist, as well as those that are expected to exist in the future (see, for example, Sabre/Farelogix).

The relevant geographic market will include the geographic area within which the parties' customers can obtain the most significant competitive alternatives (see, for example, Iconex/Hansol Denmark and R+S Group). For the purposes of this assessment, the CMA will generally consider evidence relevant to demand-side substitution.

Further guidance on the CMA's approach to market definition is provided in the Merger Assessment Guidelines (see **1.1 Merger Control Legislation**).

4.3 Reliance on Case Law

As the CMA's assessment is case-specific, and dependent upon the particular circumstances of the transaction and affected markets, the CMA's decision will be based upon the available evidence. This means that the CMA is not required to follow its own previous decisions.

4.4 Competition Concerns

A transaction gives rise to an SLC where it has a significant effect on rivalry, reducing competitive pressures upon firms to improve their offerings to customers, or to become more innovative or efficient over time. An SLC will therefore be expected to lead to an adverse outcome for customers.

In broad terms, there are three main types of competition concerns that may result in an SLC.

Unilateral Effects

These may arise in horizontal mergers where the transaction removes or reduces the rivalry between the parties (or will remove or reduce expected future rivalry), thereby enabling the combined entity to profitably increase prices, or worsen non-price aspects of competition.

When assessing unilateral effects, the CMA is increasingly focusing upon how closely the parties compete (or would be expected to compete in the future in the absence of the transaction) (see, for example, Provisional Findings in Illumina/Pacific Biosciences of California).

Significantly, where parties are considered to be close competitors, even small increments in market shares as a result of a transaction can give rise to material competition concerns.

Co-ordinated Effects

These may arise in horizontal mergers, as well as non-horizontal mergers, where the transaction either enables firms, or increases the ability of firms, to profitably align or co-ordinate their behaviour tacitly (see, for example, Breedon Group/Cemex Investments).

Vertical or Conglomerate Effects

These may primarily arise in non-horizontal mergers, where the transaction creates or strengthens the combined entity's ability and incentive to use its market power in at least one relevant market to reduce rivalry (see, for example, Meta/GIPHY in relation to vertical effects theories of harm, and Nvidia/Arm in relation to conglomerate effects theories of harm).

Evidence

As noted in **3.5 Information Included in a Filing**, the CMA will obtain a substantial volume of evidence during its investigation.

In addition to economic evidence (including customer survey evidence and economic modelling), the CMA is increasingly focusing its analysis in relation to competition concerns upon:

- evidence contained within the parties' internal documents, as well as the internal documents of third parties;
- evidence of the acquirer's methodology for valuing the target business; and
- evidence addressing the anticipated evolution of dynamic markets, and the parties' expected positions in the absence of the transaction.

Further guidance on the CMA's approach in relation to the assessment of competition concerns is provided in the Merger Assessment Guidelines (see **1.1 Merger Control Legislation**).

4.5 Economic Efficiencies

The CMA is able to consider transaction-specific economic efficiencies in its substantive assessment. Where efficiencies are claimed, the parties will need to provide compelling evidence that these are:

- timely, likely and sufficient to prevent an SLC from arising; and
- specific to the transaction (ie, such that they could not be achieved in the absence of the transaction).

The types of efficiencies the CMA generally expects to consider can broadly be categorised as:

- supply-side efficiencies, whereby the combined entity is able to supply products to customers at a lower cost post-transaction; and
- demand-side efficiencies, whereby the combined entity's products or services are more attractive to customers post-transaction.

Where parties intend to claim efficiencies, they are encouraged to engage with the CMA as early as possible in relation to these aspects.

4.6 Non-competition Issues

Under the general merger regime, the assessment of a transaction is undertaken on competition grounds. In this context, when assessing whether relevant customer benefits would outweigh an SLC (see **4.1 Substantive Test**), environmental issues may be considered in individual cases (see Merger Assessment Guidelines, paragraph 8.21).

In relation to public interest mergers, a transaction may be assessed on the basis of public interest considerations (potentially in addition to competition grounds). Special public interest mergers are assessed on the basis of public interest considerations only (see **1.2 Legislation Relating to Particular Sectors**).

The NSI Act (see **1.2 Legislation Relating to Particular Sectors**) introduced an investment screening regime to the UK, which is applicable to certain "domestic" and "foreign" transactions, and exists in addition to the UK merger control regime. The NSI Act enables the UK government to review a wide range of transactions on the basis that these may give rise to risks to national security, with specific transactions affecting 17 sectors requiring mandatory notification and clearance pre-completion (see, for example, "National Security and Investment Act: guidance on notifiable acquisitions"), and other types of transaction capable of being reviewed by the UK government at its election, or being voluntarily notified by the parties. If a transaction falls to be assessed on both competition and national security grounds, the Investment Security Unit (which is responsible for the administration of the NSI Act) will work closely with the CMA to manage the case (see "Guidance – The National Security and Investment Act alongside regulatory requirements").

4.7 Special Consideration for Joint Ventures

The CMA does not apply special considerations in the context of the substantive review of joint ventures under the UK merger control regime.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

At the end of a Phase 2 investigation, if the CMA considers that it is more likely than not that a transaction results in an SLC (see **4.1 Substantive Test**), it will identify remedies which effectively address the SLC and its adverse effects.

In practice, this means that the CMA is able to impose remedies at the end of a Phase 2 investigation, including prohibiting an anticipated transaction, or undoing a completed transaction.

5.2 Parties' Ability to Negotiate Remedies

Parties are able to offer remedies to address competition concerns in the context of Phase 1 and Phase 2 investigations, as well as during pre-notification discussions (see **5.4 Typical Remedies**).

In practice, parties are unable to negotiate remedies with the CMA, and it is for the CMA to decide whether to accept any remedies offered by the parties.

Where a given transaction is expected to result in competition concerns, parties will typically consider at an early stage the extent of the possible remedies that they would be required to offer (eg, to avoid reference for a Phase 2 investigation), and how these remedies would affect the commercial viability of the transaction.

5.3 Legal Standard

When determining a remedy, the CMA is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable for the purpose of remedying, preventing or mitigating the SLC and any adverse effects resulting from it.

5.4 Typical Remedies

Phase 1

If a transaction satisfies the test for a Phase 2 reference, the CMA is able to exercise its discretion to accept undertakings offered by the parties in lieu of a Phase 2 reference (UILs) where these are appropriate to remedy, mitigate, or prevent the SLC. The CMA cannot impose UILs upon the parties.

To accept offered UILs, the CMA needs to be sufficiently confident that these would resolve the identified competition concerns. This is because once the CMA accepts UILs, it ceases to be able to refer the transaction for a Phase 2 reference.

Offered UILs must therefore be capable of timely implementation, and be “clear-cut”, meaning that:

- there must not be material doubts about the overall effectiveness of the UILs to address the identified competition concerns; and
- it must be feasible to implement the UILs within the Phase 1 timetable (see **5.5 Negotiating Remedies With Authorities**).

Restoring competition

The CMA’s starting point is to seek to ensure that offered UILs would restore competition to the level that would have existed in the absence of the transaction.

On this basis, the CMA’s preference is for UILs to take the form of structural remedies (ie, divestment), and the CMA is extremely unlikely at Phase 1 to consider behavioural UILs to be sufficiently clear-cut.

Divestment

Where a divestment is to be made, the CMA will generally expect this to relate to the acquired business. However, the CMA will consider the divestment of aspects of the acquirer’s business if this does not present a greater risk in relation to addressing the SLC. In determining the scope of a divestment, the CMA will seek to identify the smallest viable, standalone business which can compete successfully on an ongoing basis. Depending upon the transaction, this could be a single site, or a number of sites, or a business division, or a subsidiary, or the acquired business in its entirety.

At Phase 1, unless the CMA considers there are reasonable grounds for not doing so, the CMA will generally require that a divestment is made to an “upfront buyer” (ie, a purchaser approved by the CMA, who has contractually committed to acquire the divestment business). If an “upfront buyer” cannot be identified, the CMA remains able to refer the transaction for a Phase 2 investigation.

Phase 2

At Phase 2, the CMA's preference is also for structural remedies. Whilst parties may offer remedies, the CMA is ultimately able to impose remedies.

Further guidance in relation to remedies is available in "Merger Remedies (CMA87)".

5.5 Negotiating Remedies With Authorities

See **5.2 Parties' Ability to Negotiate Remedies** and **5.4 Typical Remedies**.

Phase 1

Before offering UILs, the parties are able to consider the CMA's reasons for identifying an SLC (the "SLC decision").

Offering UILs

The parties have up to five working days after receipt of the SLC decision to offer UILs to address the SLC.

Offered UILs, together with the parties' proposed draft text of the offered UILs, should be formally submitted using the CMA's Remedies Form for Offers of UILs, and the CMA's UILs template (available from the CMA's website).

If UILs are offered, the CMA has until the tenth working day after the parties received the SLC decision to decide whether the offer (or a modified version) might be acceptable.

Modified offer

Where the CMA proposes a modified version of the offer, it will ask the parties if they agree to this, and the parties will have a short period of time to confirm whether they wish to offer the modified UILs.

If the CMA decides that the offered UILs might be acceptable, it will inform the parties, and publish a non-confidential version of its decision that the UILs may be acceptable in principle.

The CMA will then undertake a detailed assessment of the offered UILs, and must decide whether to accept these within 50 working days of the SLC decision (with this time period capable of extension by up to 40 working days, if the CMA considers there are special reasons for doing so, including in the context of an upfront buyer) (see **5.4 Typical Remedies**).

Public consultation

During this period, the CMA must publicly consult on the offered UILs, and provide third parties with a period of at least 15 calendar days in which to comment. If the offered UILs are modified, a second consultation of at least seven days will be required (unless the modifications are immaterial).

If the offered UILs are considered acceptable following the consultation(s), the CMA will request that the parties sign the UILs, after which they will be accepted by the CMA.

The CMA will announce this acceptance, and publish the UILs upon its website.

Phase 2

If the CMA reaches a provisional finding of an SLC, it will consult on possible remedies, and will consider remedies proposed by the parties and third parties, in addition to its own proposals.

Following this consultation process, the CMA will prepare a remedies working paper, which assesses different options and sets out the CMA's provisional decision on remedies.

The parties will receive the remedies working paper, and will generally have at least five working days to respond to this. The CMA may also consult third parties in relation to the proposed scope of remedies (and can publicly consult where deemed necessary).

Final report
Following this engagement on the remedies working paper, the CMA will make its final decision on the competition issues, and any remedies, which is published in a final report on its website.

Following publication of the final report, the CMA may choose to implement remedies by accepting undertakings (where offered by the parties), or otherwise by making an order, and the intended form of the remedies will be subject to consultation.

The CMA has a statutory deadline of 12 weeks following its final report to either accept undertakings, or to make an order (with this time period capable of extension by up to six weeks, if the CMA considers there are special reasons for doing so).

5.6 Conditions and Timing for Divestitures

See **5.4 Typical Remedies** and **5.5 Negotiating Remedies With Authorities**.

Where a divestment has an "upfront buyer" requirement (see **5.4 Typical Remedies**), the acquisition of the divestment business by the "upfront buyer" will be conditional upon the CMA's acceptance of UILs, or undertakings at Phase 2.

In the context of a "non-upfront buyer" divestment, the parties will be required to:

- obtain the CMA's approval of an appropriate purchaser to acquire the divestment business; and
- conclude a sale agreement with that purchaser.

The parties will generally be required to conclude the sale agreement within a relatively short time period (eg, three months), which will be set out in the context of the remedy.

If the parties cannot identify an appropriate purchaser within this time period, the CMA will generally be able to appoint a monitoring trustee to sell the divestment business at no minimum price.

Interim Measures or Undertakings

Where interim measures or undertakings are in place (or the transaction has been referred for a Phase 2 investigation), provided that the parties are able to obtain the CMA's consent (see **2.12 Requirement for Clearance Before Implementation**), it would be possible for a transaction to be completed whilst the divestment process is ongoing.

If a party breaches any remedies, the CMA can commence civil proceedings to enforce the remedies in question (eg, by seeking an injunction). Affected third parties can also commence civil proceedings, including for damages.

5.7 Issuance of Decisions

A formal, confidential version of the CMA's merger decision (at Phase 1 and/or Phase 2) is provided to the parties, with third parties' commercially sensitive information excised.

In addition, a formal, non-confidential version of the CMA's merger decision (from which commercially sensitive information will be excised) will be published on the CMA's website, and announced via the Regulatory News Service.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The CMA does not distinguish between transactions concerning only UK-based entities, and foreign-to-foreign transactions. Subject to satisfying the applicable legal thresholds, the CMA is able to impose remedies and prohibit foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

The CMA will generally not consider whether a transaction-related restriction constitutes an ancillary restraint, on the basis that the parties are able to self-assess this aspect.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

The CMA actively seeks comments from third parties when investigating a transaction, including in the context of remedies (see **5.5 Negotiating Remedies With Authorities**).

The CMA is also able to use its information gathering powers under Section 109 of the Enterprise Act to obtain evidence from third parties (see **3.5 Information Included in a Filing**).

7.2 Contacting Third Parties

See **7.1 Third-Party Rights**.

7.3 Confidentiality

Where the parties submit a merger notice, they are required to confirm that the transaction has been publicised before the merger notice can be accepted by the CMA as satisfactory (see **3.5 Information Included in a Filing**). This is as the CMA will actively publicise the transaction during the course of its investigation (see **7.1 Third-Party Rights**).

The parties are able to request that commercially sensitive information remains confidential, and the CMA will provide the parties with an opportunity to request the excision of such information from a range of documents published by the CMA in the context of its investigation.

7.4 Co-operation With Other Jurisdictions

Where the CMA is investigating a transaction that is subject to investigation in other jurisdictions, the CMA will generally seek to co-operate with other investigating competition authorities, but will maintain its independence in relation to decision-making (see, for example, Cargotec/Konecranes, which the European Commission cleared, but the CMA did not).

However, the Enterprise Act places certain restrictions upon the CMA's ability to exchange confidential information, and the CMA would therefore be expected to obtain the parties' consent to exchange such information.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Pursuant to Section 120 of the Enterprise Act, a party aggrieved by a decision in relation to the reference or possible reference of a transaction can apply to the Competition Appeal Tribunal (CAT) for a review of that decision.

The CAT's review is limited to applying the same principles as would be applied by a court on an application for judicial review. This means that the CAT's examination is confined to the lawfulness of the decision.

The CAT cannot substitute its own decision on the merits of the case, but can either dismiss the application or quash the decision (in whole or in part). If the CAT quashes the decision, it will refer the matter back to the original decision-maker with a direction to reconsider and make a new decision, as directed by the CAT.

Parties wishing to appeal a point of law arising from the CAT's judgment can apply to the Court of Appeal of England and Wales (the "Court of Appeal"), with the permission of either the CAT or the Court of Appeal.

8.2 Typical Timeline for Appeals

Any application for review by the CAT must be made within four weeks of the earlier of the date on which (i) the applicant was notified of the decision; or (ii) the decision was published.

There is no fixed timetable for the CAT's review. The CAT will generally regard applications to review a decision relating to a merger as meriting a high degree of urgency.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Aggrieved third parties can challenge clearance decisions (see, for example, IBA Health v OFT [2003] CAT 27).

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The UK government intends to introduce a merger control regime applicable to technology firms with strategic market status (SMS). Amongst other aspects, this regime would require SMS firms to notify the CMA of certain transactions pre-completion, with the CMA then able to decide whether to investigate.

The UK government also intends to introduce various reforms to the general UK merger control regime, including in the context of the CMA's ability to investigate (see **2.5 Jurisdictional Thresholds**) by:

- increasing the applicable value for the Turnover Test, so that this is satisfied if the UK turnover of the target exceeds GBP100 million;
- introducing a new jurisdictional threshold, enabling the CMA to investigate transactions with an appropriate link to the UK where at least one of the parties has (i) an existing share of supply of goods or services of 33% in the UK, or in a substantial part of the UK; and (ii) a UK turnover of GBP350 million; and
- introducing a "small merger" safe harbour, with transactions being exempt from review where each party's UK turnover is less than GBP10 million.

9.2 Recent Enforcement Record

In recent years the CMA has referred a relatively large proportion of transactions for Phase 2 investigations, resulting in a significant number of transactions either being (i) abandoned by the parties; (ii) subject to remedies; and (iii) being prohibited.

9.3 Current Competition Concerns

The CMA continues to focus upon "non-horizontal" theories of harm (eg, vertical and conglomerate effects), as well as theories of harm arising in the context of dynamic markets (see **4.4 Competition Concerns**).

Gowling WLG has more than 1,400 legal professionals and a presence in Europe, Canada, the Middle East, Asia and South America. Gowling WLG provides clients with in-depth expertise in key global sectors. The firm sees the world from the perspective of its clients, and collaborates across countries, offices, service areas and sectors to help them succeed – no matter how challenging the circumstances. The firm's EU, trade and competition team advises upon strategic acquisitions and investments, securing timely clearances in key jurisdictions worldwide. In so doing, the team establishes long-standing client relationships, and enhances its detailed, sector-specific knowledge. In addition to merger control and foreign direct investment issues, the team advises upon all aspects of UK and EU competition law, including dawn raids and investigations, anti-competitive arrangements, dominance and abuse, the interplay between competition law and IP rights, State aid and subsidy control, and distribution and e-commerce.

AUTHORS

Samuel Beighton is a partner in Gowling WLG's EU, trade and competition team. Samuel works with clients to enable them to grow and protect their businesses, advising on merger control issues in relation to key strategic acquisitions and investments. With a background in competition law economics, Samuel regularly represents clients before competition authorities (including the UK's Competition and Markets Authority, and the European Commission), and has a track record of successfully securing merger clearances in jurisdictions worldwide, across a broad range of sectors.

Bernardine Adkins is a partner, and head of Gowling WLG's EU, trade and competition team. With more than 30 years' experience of advising on merger control issues, Bernardine is regularly instructed by national and international clients in relation to complex, cross-border mandates. Amongst other appointments, Bernardine is a member of the advisory board of the Competition Law Forum at the British Institute of International and Comparative Law, and Vice-Chair of the Competition Policy Committee of the American Chamber of Commerce to the European Union.

Gowling WLG (UK) LLP

4 More London
Riverside
London
SE1 2AU
UK

Tel: +44 370 903 1000
Fax: +44 370 904 1099
Email: mail.uk@gowlingwlg.com
Web: www.gowlingwlg.com

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Trends and Developments

Contributed by:
Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden
Cleary Gottlieb Steen & Hamilton LLP** **see p.725

The CMA Post-Brexit: a Leading Force in Global Merger Enforcement

UK competition law enforcement has been transformed by Brexit, which, in addition to recalibrating the UK's relationship with Europe, has had far-reaching implications for EU merger control.

Brexit provided an opportunity for the independent UK antitrust agency, the Competition and Markets Authority (CMA), to expand its role and forge its own path as a global competition authority, no longer confined to reviewing matters that fell outside the jurisdiction of the European Commission (EC). As the CMA's outgoing Chief Executive, Dr Andrea Coscelli, has explained, the CMA's "ambition is very much to be at the top table discussing international mergers". To fulfil this ambition, the CMA secured considerable additional funding (around a 30% boost), moved to larger premises in London, opened new offices in Edinburgh, Belfast, and Cardiff, and increased its headcount. Dr Coscelli believes that the UK is now "in a very strong position to lead" global competition enforcement because "the upside [of leaving the EU] is that you take back control – genuinely – of the decisions".

The CMA's interventionist approach following Brexit reflects the view of its current leadership that merger enforcement has been too permissive in Europe over the past 30 years. According to Dr Coscelli, "we have learned over the last few years that concentration has increased too much in a number of markets and when we look at the outcomes… [they] are not good". This view of market concentration is shared by Mike Walker, Chief Economic Advisor at the CMA, who noted in the CMA's recent State of Competition Report, "a worrying combination of trends. We are seeing markets getting more concentrated, companies enjoying higher markups and the biggest firms maintaining their leading positions for longer". By way of example, Dr Coscelli has explained that the market for accountancy services was allowed to become too concentrated due to a "mistake many years ago in merger under-enforcement" stemming from the 1997 combination of Price Waterhouse and Coopers & Lybrand, which reduced the number of elite accountancy firms from six to five. Dr Coscelli has also highlighted the digital sector as an example of a highly concentrated market, calling in a recent joint statement with the Australian Competition and Consumer Commission and German *Bundeskartellamt* for rigorous merger control enforcement.

In the 18 months since Brexit took effect, the CMA has reviewed a number of transactions in parallel with the EC, confirming that it is unafraid to strike its own path. Before Brexit, the CMA predicted that divergent outcomes would be rare because the EU and the UK have similar legal tests for intervening in a merger (though the CMA's threshold for referring a case to Phase 2 is arguably lower than the EC's) and the EC and CMA apply similar analytical approaches. The CMA also said it would "where possible and appropriate … endeavour to coordinate merger reviews relating to the same or related cases" with the EC and other competition authorities and amended its Jurisdiction and Procedure Guidance in 2021 to allow for greater co-ordination. While the majority of cases reviewed in parallel by the EC and CMA have resulted in consistent outcomes, there have already been high-profile exceptions: cases where the outcomes were significantly different even though the CMA and EC were reviewing similar facts and markets. The lesson, for now at least, seems to be that merging parties should be prepared for rigorous reviews by both agencies and should not assume that those reviews will necessarily result in the same conclusions or outcomes.

The First Wave of Parallel Cases

Since 1 January 2021, 13 parallel EC/CMA review cases have been completed. In 11 of those cases, or 85%, the substantive outcome has been consistent.

In eight cases, both the CMA and EC unconditionally cleared transactions at Phase 1: Graphic Pack/AR Packaging, SK Hynix/Intel, AMD/Xilinx, Thermo Fisher/PPD, AstraZeneca/Alexion, IHS Markit/CME Global/JV, Microsoft/Nuance and Deutsche Post DHL/JF Hillebrand.

In one case, S&P/IHS Markit, the CMA and EC cleared the transaction subject to Phase 1 remedies, although the agencies pursued different theories of harm and required different divestment packages.

In two cases (NVIDIA/Arm and IAG/Air Europa), the transactions were referred to Phase 2 by both authorities and subsequently abandoned.

In two cases, the CMA and EC reached different conclusions, despite dealing with similar facts and markets.

Meta/Kustomer. The first divergent outcome occurred in Meta's acquisition of Kustomer, a small but growing player in the customer relationship management (CRM) software market. This case had all the ingredients for a consistent substantive outcome: the CMA and EC have a similar legal test, the markets were global, and the competition authorities were pursuing similar theories of harm. In particular, both authorities considered whether the merger would:

- increase Meta's data advantage in online display advertising; and
- give rise to vertical foreclosure of Kustomer's rivals by limiting their access to Meta's messaging channels (eg, WhatsApp and Messenger).

Moreover, the CMA has a stated focus on digital markets and acquisitions of nascent players in particular (eg, Meta/Giphy, which was blocked by the CMA last year). The CMA cleared the case unconditionally at Phase 1 a month after the EC referred the deal for an in-depth Phase 2 review. Ultimately, the EC cleared the deal subject to a ten-year commitment from Meta that it would provide free and non-discriminatory access to its messaging channels to Kustomer's rivals.

Cargotec/Konecranes. This transaction concerned two Finnish companies that supply cargo handling equipment and services in ports, terminals and shipyards worldwide. The EC and CMA examined the same markets and theories of harm: horizontal effects in several categories of cargo handling equipment in Europe-wide markets, as well as potential vertical concerns in the market for crane spreaders. The agencies noted in their respective press releases that they had been in regular contact throughout their investigations. Both the CMA and EC opened Phase 2 investigations and found that the combination of two of the main suppliers in a range of cargo handling equipment markets would harm competition. The divergence in outcomes, in this case, came down to differing views on the remedy offered. The parties offered to carve out two separate partial divestiture packages, one from each of Cargotec and Konecranes, to be sold to a single purchaser.

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After conducting two market tests, the EC accepted the remedy proposal and approved the merger in February 2022. The CMA, a month later, found the same package insufficient and blocked the merger, and the deal fell apart shortly afterwards. The CMA cited "substantial and wide-ranging composition risks" when rejecting the remedy and said that the divestment packages "would not enable whoever bought them to compete as strongly as the merging businesses do at present. The process of carving out these assets from the merging businesses' existing operations, and knitting them together into a new combined business, would be complex and risky, so could significantly impair how effectively the purchaser of that business would be able to compete". The CMA suggested that the merging parties would have to sell the entirety of one of their container handling businesses instead of their proposed mix-and-match remedy. The parties ultimately abandoned the merger as they felt a remedy of this scale jeopardised the rationale for the merger.

These early experiences of a parallel review show that while, for the most part, the CMA and EC's substantive analyses of similar issues have been consistent, divergent outcomes are possible even where the agencies are considering the same markets and the same facts. While the agencies are willing to work together, there is no formal obligation to co-operate. In addition, the EU and UK review timetables differ, and the CMA is less open to certain types of remedies than the EC, including behavioural commitments (demonstrated by the CMA's public criticism of the Google/Fitbit remedy accepted by the EC) and mix-and-match divestments (demonstrated by Cargotec/Konecranes).

Consistently High Intervention Rates

The CMA's general concerns over concentration levels in UK markets have also translated into consistently high intervention rates in mergers. 2020 saw the CMA frustrate ten transactions, and the intervention rate has remained high over 2021-22. From the start of 2021 to the time of writing at the end of May 2022, the CMA has frustrated another ten transactions.

It prohibited four transactions: TVS Europe Distribution/3G Truck & Trailer Parts, Facebook/Giphy, JD Sports/Footasylum (following remittal) and Cargotec/Konecranes.

It required significant divestment remedies in two transactions: in viagogo/StubHub, the CMA required the divestiture of one party's entire business outside of North America, and in FNZ/GBST, the CMA required a full divestment of GBST with a right to buy back a limited set of assets.

Another five were abandoned after the CMA raised antitrust concerns: Tronox /TiZir Titanium and Iron, Crowdcube/Seedrs, Imprivata/Isotec, NVIDIA/Arm and Ritchie Bros Auctioneers/Euro Auctions Gro.

The EC, by comparison, blocked only one transaction during 2021-22: Hyundai Heavy Industries /Daewood Shipbuilding & Marine Engineering in early 2022, which ended two years in which the EC had not prohibited any transactions. The EC, though, caused the abandonment of five transactions over 2021-22: Fincantieri/Chantiers de l'Atlantique, Air Canada/Transat, IAG/Air Europa, Kingspan Group/Trimo, and Greiner/Recticel.

Of the four UK prohibitions, Meta/Giphy was the CMA's first prohibition of a transaction involving Big Tech and a further demonstration of the CMA's focus on digital markets in all areas of competition enforcement, mergers included. In that case, the CMA was concerned by an alleged loss of potential competition in display advertising and Meta's alleged ability and incentive to disadvantage its social media rivals by limiting their access to Giphy's GIFs. Meta has appealed the decision. The CMA also imposed two fines on Meta for breaching a hold-separate order, one of which was record-breaking at GBP50.5 million. Two abandoned UK transactions (Crowdcube/Seedrs and Imprivata/Isosec) also involved the digital sector.

The CMA's successive assessments of the JD Sports/Footasylum transaction are also noteworthy. In July 2021, the CMA first blocked the transaction, a completed acquisition involving retailers of sports-inspired casual footwear and apparel. The prohibition decision was appealed and remitted (in part) to the CMA for reconsideration. On remittal, the CMA confirmed its prohibition decision in November 2021. Its substantive assessment focused on the closeness of competition between the companies, where the CMA concluded that JD Sports "is by far the closest competitor to Footasylum" and found that JD "will have a strong incentive to worsen Footasylum's offering". Interestingly, on remittal, the CMA's SLC was based on the removal of the constraint imposed by JD on Footasylum only. The CMA did not find that Footasylum was a strong constraint on JD. This change in the CMA's findings was based on market developments since the CMA's original Phase 2 investigation, which had weakened Footasylum.

Developments in the Pipeline

Two developments to the UK merger control regime are proposed that, if implemented, will further change the UK merger control landscape. The first proposal is a change to the CMA's jurisdictional thresholds for merger review, which is part of a suite of wide-ranging reforms the UK government has put forward to enhance the CMA's competition and consumer law enforcement powers. Specifically:

- The UK target turnover threshold would increase to GBP100 million (from GBP70 million). The government does not currently propose to make any changes to the existing (and alternative) 25% share of supply jurisdictional threshold, though, so transactions involving target companies with annual UK turnover under GBP100 million may still fall within the CMA's jurisdiction.
- A new jurisdictional threshold would be created, designed to target "killer acquisitions" (ie, acquisitions of nascent competitors by strong incumbents) that would allow the CMA to review transactions where:
  - (a) the acquirer has an annual UK turnover of GPB350 million and at least a 33% share of the supply of particular goods or services in the UK, without the need for an increment; and
  - (b) the transaction has a UK nexus. This change would increase the number of reviews involving larger companies with strong market positions acquiring start-ups or nascent players.
- A small merger safe harbour would be created, meaning the CMA would not have jurisdiction to review mergers where each party's UK turnover is less than GBP10 million.

The second proposal would involve a special reporting requirement for digital firms with "strategic market status" (SMS). The proposed SMS regime would introduce a mandatory pre-closing reporting obligation for transactions that exceed the following thresholds:

- the SMS firm acquires at least a 15% equity or voting share;
- the value of the holding is over GBP25 million; and
- the transaction meets a UK nexus test.

The CMA would then conduct an initial review to determine whether to open a formal inquiry into the transaction. Last year, the government was also proposing to lower the standard of proof

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for finding an SLC in respect of SMS mergers at Phase 2 from a "balance of probabilities" to a "realistic prospect" (the standard that the CMA applies at Phase 1). Following consultation on the proposals, the government has decided not to take this change forward, considering "concerns from stakeholders" on how this may unintentionally impact UK investment.

A Digital Markets Unit (DMU), charged with administering the new regime, has already been established and has around 70 staff. The DMU is currently a non-statutory body, operating within the CMA in shadow form, pending legislation.

As to the next steps, the most recent Queen's Speech, which sets out the UK government's legislative programme for the upcoming parliamentary session, included reference to a Draft Digital Markets, Competition and Consumer Bill, which would implement both the SMS firms' regime and the changes to the general jurisdictional thresholds. The CMA subsequently confirmed that the Bill will not be introduced in the next parliamentary session (2022-23) and that the government would legislate "as soon as Parliamentary time allows". These changes are likely to be controversial, and further consultation on the draft Bill is also expected. Updated merger review thresholds and the SMS merger regime are, therefore, still a while away.

These two proposals are in addition to the new standalone national security and investment rules that sit alongside the UK merger control regime, which came into force on 4 January 2022. The National Security and Investment Act introduced a mandatory notification regime for acquisitions in 17 sensitive sectors, as well as a wide "call-in" power for transactions that fall outside the mandatory regime if a risk to national security is suspected.

Finally, there are two significant leadership changes in the pipeline for the CMA this year. First, a new CMA Chair has been appointed after a two-year search. Marcus Bokkerink, former Managing Director and Senior Partner at Boston Consulting Group, is set to take over the role. Second, the CMA's current Chief Executive, Andrea Coscelli, is stepping down in July. Sarah Cardell, the CMA's General Counsel, will take over on an interim basis while the government undertakes a recruitment process for a new permanent Chief Executive.

Conclusion

In the six years since the Brexit vote, the CMA has taken its place as a global competition authority. Although co-operation and alignment between the EC and CMA have been achieved in most cases, there is no guarantee of the same outcome even where the agencies co-operate closely. The CMA is likely to maintain its rigorous enforcement of merger control in the coming years and has already shown that it is prepared to take a different decision from other competition authorities in parallel cases, requiring merging parties and their advisors to give close attention to timing strategy and remedy design in future complex parallel cases.

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AUTHORS

Nicholas Levy joined Cleary Gottlieb in 1990 and became a partner in 1999. He has extensive experience in notifying transactions to the European Commission, the Competition & Markets Authority, and antitrust agencies around the world. He advises on all aspects of antitrust law, including anti-cartel enforcement, collaborative arrangements, vertical agreements and unilateral conduct. Nicholas is consistently recognised as one of the leading antitrust lawyers in Europe.

Paul Gilbert became a partner at Cleary Gottlieb in 2021 and focuses on EU and UK competition law, including merger control, anti-competitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, Competition and Markets Authority, Competition Appeal Tribunal, and Court of Appeal. He was previously Deputy Director of Competition Policy at the UK Office of Fair Trading.

Jackie Holland joined Cleary Gottlieb as a partner in 2021. Her practice focuses on EU and UK antitrust enforcement, merger control, state aid/subsidies, competition litigation, market investigations, and sectoral regulation. She represents clients before the Competition and Markets Authority, the European Commission, sectoral regulators, the UK Competition Appeal Tribunal, and the European Court of Justice. Jackie previously held senior positions at the UK Office of Fair Trading, including Senior Director of the Policy Group and a Phase 1 decision-maker for mergers. She helped reform the agency's merger control regime and antitrust procedures and introduced a Procedural Officer to oversee the agency's casework.

Courtney Olden joined Cleary Gottlieb as an associate in 2020. Her practice focuses on EU and UK competition law, including merger control, anti-competitive agreements, and abuse of dominance. Courtney has represented clients before the European Commission, the UK Competition and Markets Authority and other jurisdictions. She previously practised at firms in London and Australia. She is qualified in Australia.

Cleary Gottlieb Steen & Hamilton LLP

2 London Wall Place
London EC2Y 5AU
England

Tel: +44 20 7614 2200
Fax: +44 207 600 1698
Email: nlevy@cgsh.com
Web: clearygottlieb.com

USA

Law and Practice

Contributed by:
Bradley Justus, Lisl J. Dunlop and Megan Walden
***Axinn, Veltrop & Harkrider LLP** see p.749*

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

Merger Control Legislation

The primary merger control legislation in the US is the Clayton Act, which prohibits acquisitions that may substantially lessen competition. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) governs the premerger notification process and is incorporated into the Clayton Act. Mergers may also be challenged under the Sherman Act, which prohibits agreements that unreasonably restrain trade (Section 1) and monopolisation, attempts to monopolise, and conspiracies to monopolise (Section 2), or the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition. States, as well as the District of Columbia, Puerto Rico and the Virgin Islands, have their own antitrust laws, many of which are analogous to the federal antitrust statutes.

Merger Guidelines

The FTC and the Antitrust Division of the Department of Justice (DOJ) (the "Agencies") share jurisdiction over merger review. In 2010, the Agencies jointly issued the current version of the Horizontal Merger Guidelines, which outline the Agencies' core analytical techniques, practices and enforcement policies regarding mergers of actual or potential competitors under the federal antitrust laws.

The Agencies finalised new Vertical Merger Guidelines in June 2020, which outline the "principal analytical techniques, practices and enforcement policies" applied to analyse non-horizontal mergers such as vertical mergers, "diagonal mergers", and mergers of complements. After the change in administration in January 2021, in September 2021, the FTC unilaterally withdrew the 2020 Vertical Merger Guidelines.

As of July 2022, the FTC and DOJ are working jointly to revise both the Horizontal and Vertical Merger Guidelines and have solicited public comment. As of July 2022, the Agencies have not announced an anticipated publication date for updated Merger Guidelines.

Agency Rules and Guidance

The FTC is authorised to issue formal regulations that are "necessary and appropriate" to carry out the purposes of the HSR Act. The "HSR Rules" are complex and extensive, and apply to reportability, exemptions, and filing procedures.

The FTC's Premerger Notification Office also issues guidance relating to the application of the HSR Act and related regulations, in the form of both formal and informal interpretations, and as well as posts on its *Competition Matters* blog.

1.2 Legislation Relating to Particular Sectors

Sector-Specific Approvals

Transactions within highly regulated sectors of the economy, such as banking, healthcare, insurance, telecommunications, railroads, and defence, may also require approval from their federal or state sectoral regulators. For example:

- banking transactions may require approval by the Federal Reserve Board;
- telecom transactions may require approval by the Federal Communications Commission;
- transactions involving energy companies may require approval of the Federal Energy Regulatory Commission;
- mergers of insurance companies may require approval by state Commissioners of Insurance; and
- mergers of healthcare organisations may be subject to review and approval by state health departments and antitrust agencies.

Foreign Direct Investment
The Committee on Foreign Investment in the United States (CFIUS) may seek to prohibit acquisitions of control of US businesses by non-US persons if it believes they threaten national security. Review may be initiated by either CFIUS or the parties. Typically, CFIUS reviews transactions that involve defence-related activities, critical infrastructure or technologies, personal data collection, or properties near sensitive US governmental facilities. For example, CFIUS has pressured foreign firms to abandon plans to acquire Magnachip, a semiconductor manufacturer, and to divest the dating app Grindr, which collected information on users' location, communications, and sexual orientation.

Although rare, the President may block any transaction after CFIUS review. Presidents have ordered foreign-owned firms to divest wind farms within observational range of a naval weapons training site, abandon a proposed acquisition of a semiconductor producer, and divest TikTok's US operations.

1.3 Enforcement Authorities
Primary Enforcement Agencies
Both the FTC and DOJ enforce the federal antitrust laws and share jurisdiction over merger review under the Clayton Act and the HSR Act. The FTC also has authority to challenge mergers under the FTC Act. In addition, the FTC manages the HSR prenotification regime. Under Section 16 of the Clayton Act, state Attorneys General can also seek to enjoin mergers, as 13 states and the District of Columbia did in 2019 in New York v Deutsche Telekom AG to attempt to prevent the merger of Sprint and T-Mobile.

The Agencies allocate merger cases through a co-operative clearance process that is primarily based on the expertise of each Agency. The FTC tends to investigate mergers relating to healthcare, pharmaceuticals, professional services, retail industries, and food, whereas the DOJ typically investigates mergers relating to media and entertainment, telecommunications, insurance, aerospace, financial services, and agriculture. In other industries, such as digital platforms, responsibility is less clear and the decision about which agency will review a transaction can be more complex and may cut into the initial review period.

Courts
To block or delay closing of a proposed merger, the Agencies must obtain injunctive relief from a federal district court. Private parties, including customers and competitors, may also challenge mergers in federal courts. For example, in 2021, Steves and Sons successfully challenged and unwound rival door manufacturer Jeld-Wen's years-old acquisition of CMI. Private enforcement actions, however, are relatively rare.

2. JURISDICTION

2.1 Notification
If the transaction meets the jurisdictional thresholds of the HSR Act and does not qualify for an exemption, the parties must each submit a premerger notification and observe the HSR waiting period. The parties must file their HSR Forms with both Agencies.

2.2 Failure to Notify
Failure to comply with the requirements of the HSR Act may result in civil penalties of up to USD46,517 per day. The FTC adjusts the maximum HSR civil penalty annually for inflation. In practice, parties are rarely penalised with the maximum amount.

Historically, the FTC has had an informal "one free pass" practice and generally has not sought civil penalties for a party's first inadvertent violation if that party self-reports the violation, makes a corrective filing, and provides a detailed explanation of the circumstances that contributed to their failure to file. The FTC routinely seeks penalties of hundreds of thousands or millions of dollars in cases where the FTC suspects bad faith or a party is a repeat offender.

2.3 Types of Transactions

HSR-Reportable Transactions

The HSR Act requires that parties to certain mergers or acquisitions notify the Agencies prior to closing the proposed transaction. HSR filing requirements apply to transactions involving the acquisition of voting securities, assets, or non-corporate interests that meet certain jurisdictional thresholds. See **2.5 Jurisdictional Thresholds**.

Internal Restructuring

To be HSR reportable, a transaction must result in a transfer of beneficial ownership of voting securities, assets, or non-corporate interests from one ultimate parent entity to a different ultimate parent entity. See **2.4 Definition of "Control"**. Restructurings or reorganisations in which the ultimate parent entity does not change generally do not require an HSR filing.

Entity Formation

HSR notification is required for the formation of certain types of joint ventures. The formation of corporate joint ventures is treated under the HSR Rules as acquisitions of voting securities of the venture by the venturers.

The formation of non-corporate joint ventures requires HSR notification only when one of the parties will "control" the new venture. See **2.10 Joint Ventures**.

2.4 Definition of "Control"

"Control" is defined under the HSR Act as either:

- holding 50% or more of the outstanding voting securities of an issuer or, where an entity has no outstanding voting securities, having the right to 50% or more of the entity's profits or, upon dissolution, its assets; or
- having the present contractual power to designate 50% or more of the directors of a corporation or of the trustees of certain trusts.

An entity or individual that is not controlled by any other entity is considered the Ultimate Parent Entity (UPE). The relevant "persons" for HSR Act purposes are the UPE of the acquiring party, together with all entities it controls directly or indirectly (the "Acquiring Person"), and the UPE of the acquired party, together with all entities it controls directly or indirectly (the "Acquired Person").

Minority Acquisitions

Minority acquisitions of voting securities – even small percentages – may be reportable if they meet the HSR thresholds and no exemption applies. In contrast, acquisitions of non-corporate entities are only reportable if the acquisitions confer control.

2.5 Jurisdictional Thresholds

Three jurisdictional tests determine whether a transaction is within the scope of the HSR Act:

- the commerce test;
- the "size-of-transaction" test; and
- the "size-of-person" test.

HSR thresholds are adjusted annually based on changes in the US gross national product. The revised thresholds are typically announced by the FTC in January and take effect 30 days later. The following discussion is based on the thresholds in effect from February 2022.

Commerce Test

The commerce test is met if either party is engaged in commerce or any activity affecting commerce; therefore, nearly all transactions will satisfy the commerce test.

Size-of-Transaction Test

The size-of-transaction test is met if, as a result of the transaction, the Acquiring Person will hold voting securities, assets, or non-corporate interests of the Acquired Person valued in excess of USD101 million. The size of the transaction includes the value of any voting securities, assets, and non-corporate interests of the Acquired Person already held by the Acquiring Person. Depending on the transaction structure, valuing the size of a transaction can be complex. See **2.6 Calculations of Jurisdictional Thresholds**.

Size-of-Person Test

The size-of-person test is applicable for transactions valued at more than USD101 million but not more than USD403.9 million. Transactions valued at more than USD403.9 million will be subject to HSR notification without regard to the size of the parties if no exceptions apply.

In general, the size-of-person test is met if:

- a party with total assets or annual net sales of USD202 million or more acquires voting securities or assets of a party that is engaged in manufacturing and has annual net sales or total assets of USD20.2 million or more;
- a party with total assets or annual net sales of USD202 million or more acquires voting securities or assets of a party that is not engaged in manufacturing and has total assets of USD20.2 million or more; or
- a party with total assets or annual net sales of USD20.2 million or more acquires voting securities or assets of a party that has total assets of USD202 million or more.

There also are specific size-of-person rules applying to joint venture formations.

Exemptions

Even if a transaction meets the HSR thresholds, it may still be non-reportable if it qualifies for one of the numerous exemptions. Some key exemptions include:

- acquisitions of certain assets in the ordinary course of business, including new goods and current supplies;
- acquisitions of certain types of real property, such as certain new and used facilities, unproductive real property (eg, raw land), office and residential property, and hotels and motels (excluding ski facilities and casinos);
- acquisitions of up to 10% of voting securities of an issuer if for the purposes of investment only;
- acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities that hold certain assets, the acquisition of which is exempt;
- stock dividends and splits and reorganisations;
- acquisitions of certain foreign assets and certain foreign-issuer voting securities; and
- intra-person transactions.

2.6 Calculations of Jurisdictional Thresholds

Size-of-Transaction Test

The size-of-transaction test is calculated based on the value of the voting securities, assets, and non-corporate interests that the Acquiring Person will hold in the Acquired Person as a result of the transaction.

- Publicly traded voting securities are valued based on the greater of the market price (generally the lowest closing quotation during the 45 days prior to closing) or the acquisition price (all consideration to be paid, whether

in cash or in kind). If both the market price and acquisition price are not determined, the value of the transaction is fair market value.
- Non-publicly traded voting securities acquisitions, asset acquisitions, and non-corporate interest acquisitions are valued based on the acquisition price or the fair market value depending on the situation.

Size-of-Person Test

The size-of-person test is calculated based on the worldwide sales or assets of the Acquiring and Acquired Persons as reflected in the parties' last regularly prepared consolidated annual income statements and last regularly prepared consolidated balance sheets. These financial statements must be no more than 15 months old. Where a person does not have a regularly prepared annual income statement or balance sheet, the UPE must prepare a pro forma balance sheet that lists all assets held at the time of the acquisition and – in the case of the Acquiring Person – excludes any cash to be used as consideration for the acquisition, any expenses incidental thereto, and any securities of the same Acquired Person. An Acquired Person's revenues and assets include the assets and/or revenues of the target.

The size-of-person assessment should reflect the annual net sales and total assets of all controlled entities at the time of the proposed acquisition. If there is a change of business between the date of the last balance sheets and time of filing – such as an acquisition or divestiture – it must be taken into account.

Sales or assets recorded in a foreign currency should be converted to US dollars based on the interbank exchange rate.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Whether an entity meets the HSR size-of-person threshold is based on the revenues and assets of the Acquiring and Acquired Persons. See **2.6 Calculation of Jurisdictional Thresholds**.

2.8 Foreign-to-Foreign Transactions

Certain foreign-to-foreign transactions and acquisitions of foreign assets or voting securities by US entities that are otherwise covered by the HSR Act may qualify for an exemption. These exemptions are intended to exclude from HSR reportability acquisitions that may have limited significance or impact in the USA.

Under the HSR Rules, a foreign person is an entity whose Ultimate Parent Entity is not incorporated in the United States, is not organised under the laws of the United States, and does not have its principal offices within the United States, or in the case of a natural person, a person who is not a citizen of the United States and who does not reside in the United States.

Asset Acquisitions

Acquisitions of assets located outside the USA that generated aggregate sales in or into the USA of USD101 million or less in the most recent fiscal year are exempt. This exemption applies to acquisitions by both US and non-US acquirors.

Asset acquisitions valued at USD403.9 million or less are exempt where both the Acquiring and Acquired Persons are foreign persons under the HSR Rules, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD222.2 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA have a fair market value of less than USD222.2 million.

Acquisitions of Voting Securities of a Foreign Issuer

Acquisitions of voting securities of a foreign corporate issuer by a US person are exempt unless the issuer holds US-based assets (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) with a fair market value of over USD101 million, or made sales in or into the USA, on an aggregate basis with its controlled entities, of over USD101 million in the most recent fiscal year.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt unless the acquisition will confer control of the issuer *and* the issuer holds US-based assets (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) with a fair market value of over USD101 million, or made sales in or into the USA, on an aggregate basis with its controlled entities, of over USD101 million in the most recent fiscal year.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt if the transaction is valued at USD403.9 million or less, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD222.2 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) are valued at less than USD222.2 million.

Acquisitions by or From Foreign Governmental Entities

Acquisitions by or from foreign governmental entities are exempt if the Ultimate Parent Entity of either the Acquiring or Acquired Person is controlled by a foreign state, foreign government, or foreign agency and the acquisition is of assets located within the foreign state or of voting securities or non-corporate interests of an entity organised under the laws of that jurisdiction.

2.9 Market Share Jurisdictional Threshold

The HSR Act filing thresholds do not include a market share test.

2.10 Joint Ventures

Joint ventures are subject to specific and complex rules under the HSR Act and may be notifiable unless an exemption applies. Under the HSR Rules, the contributors to a joint venture are deemed Acquiring Persons, and the joint venture is deemed the Acquired Person.

2.11 Power of Authorities to Investigate a Transaction

The Agencies have authority to investigate and challenge transactions that do not meet HSR filing requirements. Although such investigations occur somewhat infrequently, the Agencies at times have acted quickly to challenge non-reportable transactions, as in the FTC's 2021 challenge of DaVita's proposed acquisition of 18 dialysis clinics from the University of Utah – a transaction that was ultimately subject to a consent order. Parties should not assume that non-HSR reportable transactions will escape review.

The Agencies' power to challenge conduct under the Clayton Act, the Sherman Act, or the FTC Act does not have a statute of limitations, and therefore the potential for Agency scrutiny is indefinite. The Agencies may investigate a transaction even if they declined to challenge the transaction during the HSR review process. The FTC most notably exercised this authority in 2021 in bringing suit against Facebook, alleging, among other charges, that Facebook had consummated multiple anti-competitive acquisitions in an effort to maintain monopoly power, including its acquisitions of Instagram in 2012 and WhatsApp in 2014. In 2021, to inform ongoing discussions about the competitive effects of non-reportable transactions, the FTC issued a report examining 819 non-reportable transactions consummated by leading technology firms (Alphabet, Apple, Amazon, Google, and Microsoft) from 2010 to 2019.

In 2021, the FTC began sending warning letters to parties emphasising its post-closing authority in cases where the FTC was unable to complete its investigation within the HSR waiting period. These letters state that the FTC may continue to investigate and challenge such transactions and note that parties who choose to close while the FTC's investigation is ongoing do so "at their own risk."

2.12 Requirement for Clearance Before Implementation

If an HSR filing is required, parties may not close the transaction until the expiration or termination of the waiting period. Typically, the statutory waiting period is 30 days and begins after both parties submit their HSR filings and the filing fee has been paid. For open-market purchases, conversions, option exercises, and certain other (generally, non-negotiated) transactions, the waiting period begins once the Acquiring Person submits an HSR filing.

Unless the Agencies issue a second request or sue to block the transaction, the waiting period expires automatically on the 30th day after filing at 11.59pm Eastern Standard Time (EST), and the parties may close the transaction. In cash tender offers and certain bankruptcy transactions, the waiting period is shortened to 15 days. The waiting period extends to the next business day when a waiting period expires over a weekend or on a legal public holiday.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Parties that close a transaction or transfer beneficial ownership prior to the expiration or termination of the waiting period (conduct commonly referred to as "gun-jumping") are subject to civil penalties of up to USD46,517 per day. Although in the majority of cases the Agencies have imposed penalties substantially less than the maximum permitted by law, gun-jumping fines commonly range in the hundreds of thousands, if not millions, of dollars. See **2.2 Failure to Notify**.

2.14 Exceptions to Suspensive Effect

There are no exceptions to the waiting requirement of the HSR Act. Parties to all reportable transactions must observe the applicable waiting period prior to consummation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under no circumstances will the Agencies permit closing before expiration or early termination of the applicable waiting period. Carve-outs, ring fencing, or hold-separate agreements are not permitted. Premature closing may subject the parties to civil penalties of up to USD46,517 per day of non-compliance and potential additional equitable relief.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There are no deadlines for making HSR filings; parties can submit HSR filings at any time after executing a transaction agreement or letter of intent (LOI), and for certain types of transactions (eg, tender offers, secondary acquisitions, and certain bankruptcy transactions), parties may file prior to signing.

Once the waiting period ends, the parties have one year to close the transaction before a new filing is needed. In the case of an acquisition of less than a controlling interest in a corporation, the Acquiring Person has one year to meet or cross the notification threshold (based on size-of-transaction) it reported on its filed HSR Form. Once crossed, for four more years, the Acquiring Person may acquire further voting securities from the same Acquired Person without further HSR filing as long as the sum of the initial and further acquisitions does not cross the next, higher HSR notification threshold.

3.2 Type of Agreement Required Prior to Notification

A signed agreement, such as a letter of intent, merger agreement, or purchase and sale agreement typically must be submitted with each HSR filing, with the exception of certain types of transactions, such as tender offers, secondary acquisitions, and certain bankruptcy transactions. Agreements need not be formal or binding.

3.3 Filing Fees

The size of the transaction reported on the parties' HSR Form determines the filing fee:

- USD45,000 for transactions valued in excess of USD101 million but less than USD202 million;
- USD125,000 for transactions valued at USD202 million or greater, but less than USD1,009.8 million; and
- USD280,000 for transactions valued at USD1,009.8 million or greater.

Fees may be paid prior to or upon filing. The Acquiring Person is responsible for payment of the filing fee, although it may be allocated between the parties by agreement. Fees are payable by electronic wire transfer (EWT), bank cashier's check, or certified check. Fees must be paid in US currency.

3.4 Parties Responsible for Filing

For most transactions, both the Acquiring and the Acquired Persons must submit separate HSR filings.

3.5 Information Included in a Filing

A complete HSR filing consists of the HSR Form(s) (including required attachments and accompanying affidavit(s)) and the filing fee.

HSR Form

Among other requirements, the HSR Form requires each person to:

- describe the transaction's structure;
- list US revenues for the most recent completed year by North American Industry Classification System codes (NAICS Codes) and, for manufactured products, by North American Product Classification System codes (NAPCS Codes);
- provide additional disclosures with respect to any overlapping lines of business;
- submit all documents prepared by or for officers or directors for the purpose of evaluating or analysing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion into product or geographic markets, as well as all confidential information memoranda, bankers' books, other third party consultants' materials, and documents describing synergies and efficiencies ("4(c) and 4(d) documents"); and

- disclose information about each party's controlled entities, significant shareholders, and minority shareholdings.

An Acquiring Person must respond on behalf of itself and all its controlled entities. By contrast, an Acquired Person's filing is largely limited to disclosures concerning the entities or assets being sold.

Unlike antitrust or merger control filings in other jurisdictions, parties are not required to describe the transaction's impact on the market or competition. Instead, the Agencies rely on the 4(c) and 4(d) documents to assist in the assessment of the competitive impact of the transaction.

Parties are not required to translate HSR attachments into English but must provide any English-language versions that are available at the time of filing.

3.6 Penalties/Consequences of Incomplete Notification

The Premerger Notification Office of the FTC rejects as incomplete filings missing required information (often referred to as "bouncing" an HSR notification).

If the HSR filing is incomplete, the waiting period will not begin until the requisite information is provided. As long as parties observe the waiting period and take steps to cure any filing deficiencies, no fines will be levied.

Acquiring or Acquired Persons that consummate a reportable transaction based on an incomplete or inaccurate HSR Form may be subject to civil penalties. For example, in 2001 the DOJ obtained a penalty of USD4 million from the Hearst Corporation for 1,042 days of non-compliance with the HSR Act when Hearst failed to submit several 4(c) documents when notifying the Agencies of its acquisition of Medi-Span (a transaction that was subsequently unwound).

Additionally, an individual who knowingly signs an incomplete or inaccurate HSR Form on behalf of the Acquiring or Acquired Person may be subject to criminal punishment for perjury.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

See **3.6 Penalties/Consequences of Incomplete Notification**.

3.8 Review Process

Initial Waiting Period

The "initial waiting period" (30 calendar days or 15 days in the case of cash tender offers and certain bankruptcy transactions) begins when both parties have filed their HSR Forms (or when an acquirer files in the case of acquisitions of voting securities or non-corporate interests from third parties). If the initial waiting period expires without either Agency taking any action, the parties may consummate the transaction.

During the initial waiting period, either Agency may open a preliminary investigation of the proposed transaction to identify competitive issues and determine if further information is required. An Agency may request briefings with the parties and/or request that the parties provide additional information on a voluntary basis. Preparing for and co-operating with these requests increases the likelihood that staff will be able to resolve outstanding questions about the transaction during the initial waiting period.

Under the HSR Rules, parties to a transaction may restart the waiting period with no additional filing fee by withdrawing the filing and refiling within two business days. This "pull-and-refile" process effectively extends the initial waiting period by an additional 30 days to allow time to address unresolved issues and potentially avoid a second request.

Second Request

Before the end of the initial waiting period, the reviewing Agency may choose to issue a "second request" formally requesting additional documents and information. The issuance of a second request suspends the waiting period while the parties respond and certify substantial compliance. Second requests are burdensome and typically add months to the review timeline. Once each party has substantially complied with its second request, a second waiting period begins (typically 30 days, or 10 days in the case of a cash tender offer or bankruptcy filing). Parties to the transaction may enter into timing agreements with Agency staff that typically add 30 to 60 days to the review process after the statutory waiting period expires. If the reviewing Agency does not seek to block the transaction during the second waiting period, the parties may consummate the transaction.

3.9 Pre-notification Discussions With Authorities

For most transactions, pre-notification discussions with the Agencies are not required. When a transaction is likely to raise significant competitive concerns, parties may engage the Agencies in pre-notification discussions to provide additional time to review the transaction and reduce the risk or narrow the scope of a second request.

3.10 Requests for Information During the Review Process

Voluntary Access Letter

If the reviewing Agency opens a preliminary investigation, the reviewing Agency may issue a "voluntary access letter" (also called a "voluntary request letter") during the initial waiting period. A voluntary access letter requests information that is not required in the HSR filing, such as strategic and market plans, information on overlapping products, market share information, top customer contact information, customer win/loss data, competitor and supplier lists, and other information. Parties should be prepared to respond to a voluntary access letter within a few days. Prompt co-operation increases the likelihood that the reviewing Agency will be able to resolve competitive concerns within the initial waiting period.

Second Request

If competitive concerns are not resolved at the end of the initial waiting period, the reviewing agency may issue a "second request," which extends the waiting period until 30 days after compliance. A second request is a voluminous demand for documents and data as well as detailed interrogatories. Second requests are extraordinarily burdensome and costly. A typical second request response includes millions of pages of documents and compliance may take several months. Both Agencies have published model second requests that provide examples of the type of information typically requested.

Parties that receive second requests may enter into a timing agreement with the Agency establishing protocols for compliance with a second request, milestone dates for events leading up to substantial compliance, and extensions of time for the Agency to make an enforcement decision after waiting period expiry. Both Agencies have published model timing agreements on their websites.

3.11 Accelerated Procedure

All transactions subject to HSR notification requirements must complete an HSR filing. There is no short form or simplified procedure.

Historically, the Agencies granted "early termination" of the initial waiting period for transactions that posed little competitive risk. If early termination is granted, the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website.

In February 2021, the Agencies announced they would temporarily stop granting early termination. As of July 2022, the Agencies have not resumed granting early terminations.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

A detailed guide to the Agencies' recent approach to merger analysis is contained in the Horizontal and Vertical Merger Guidelines, although enforcement policies are in flux. In 2021, the FTC withdrew from the 2020 Vertical Merger Guidelines, and the Agencies have launched a joint public inquiry to revise and modernise the Guidelines.

In general, the Agencies review a proposed transaction to determine whether the transaction will create, enhance, or entrench market power or facilitate its exercise. The Agencies consider whether a transaction is likely to reduce competition or negatively impact consumers (eg, result in increased prices or reduced output, quality, or innovation) either because (i) the merged firm will have sufficient market power such that raising prices or reducing output, quality, or innovation will be profitable, or (ii) there will be so few firms left in the market that the remaining firms will be able to co-ordinate their conduct. The Agencies also consider vertical issues of whether a transaction will combine market power at different levels of the supply chain in a manner that might create the incentive and ability to disadvantage rivals, or provide access to competitively sensitive information of competitors.

To block a transaction, the Agencies must show in court that a transaction is likely to substantially reduce competition.

4.2 Markets Affected by a Transaction

Affected markets are defined on both a product and geographic dimension. In general terms, relevant product markets comprise all the products and services that customers perceive as close substitutes; a geographic market is that area where customers would likely turn to buy the goods or services in the product market. In addition to econometric analysis, the Agencies also consider a variety of qualitative factors, such as industry recognition of the product as its own market and whether the product has peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and/or specialised vendors.

4.3 Reliance on Case Law

There is a significant body of merger jurisprudence in the US courts. The Agencies do not rely on case law from other jurisdictions in making enforcement decisions, but may co-ordinate with foreign competition authorities on individual merger investigations.

4.4 Competition Concerns

The Agencies have traditionally investigated mergers under theories of unilateral effects, co-ordinated effects, the elimination of potential competition, and vertical merger theories of foreclosure of competitors and raising rivals' costs. The current leadership has expressed interest in moving away from the traditional "consumer welfare" standard (which focused on impacts on consumers from increased prices, lower quality, and reduced innovation) to considering a broader range of factors, including harms to workers, monopsony, conglomerate effects, aggregation of data, exclusionary practices, cross-market effects, and increased ownership by private equity firms.

Labour market issues are a particular priority for the Biden administration, and consequently impacts on workers have become significantly more important in merger reviews and challenges over the last two years. At the FTC, merging parties report labour markets being an area of inquiry in many initial investigations, and the Agency has recently considered bringing cases based on reduction of competition for nurses in hospital merger challenges. While DOJ's labour market antitrust enforcement has been focused more on employer collusion cases, it is also considering labour market impacts in merger cases, such as its 2021 case to block the merger of publishers Penguin Random House and Simon & Schuster, where it claimed that their merger would depress payments to authors. The Agencies have solicited public comment regarding how to revise their joint Merger Guidelines to better analyse a merger's effect on labour markets.

4.5 Economic Efficiencies

The Agencies will consider economic efficiencies generated by a transaction as a potential offset to competitive concerns. Both Agencies have expressed scepticism about efficiency justifications, however, and the "efficiencies defence" has not been routinely accepted by courts.

The burden on parties to demonstrate efficiencies is significant, and when a reviewing agency believes a transaction would harm competition, even well-documented and substantial efficiencies are unlikely to fully resolve concerns.

Parties must provide evidence that the asserted efficiencies are likely to occur, cannot be accomplished through other means, and are sufficient to counteract the proposed transaction's harm to consumers. For efficiencies to be recognised, they must be verifiable and merger-specific and cannot result in any anti-competitive reduction in output or service. The Agencies will not consider vague or speculative claims.

4.6 Non-competition Issues

Historically, the Agencies have not considered non-competition issues when analysing proposed transactions. The current leadership, however, has expressed a broader view of the role of antitrust than previous administrations, arguing that vigorous antitrust enforcement plays a role in supporting the "preservation of our democratic political and social institutions". In addition to considering a broader range of competition effects and a focus on labour markets (see **4.4 Competition Concerns**), the Agencies have suggested that they will consider impacts of transactions on a variety of factors, including the environment, social and racial inequity, and privacy.

4.7 Special Consideration for Joint Ventures

The Agencies typically review joint ventures (JVs) by analysing their overall competitive effect. JVs may be pro-competitive if they allow participants to provide goods or services that are less expensive, more valuable to consumers, or brought to market faster than would be possible without the JV. JVs may harm competition if they reduce the JV parties' incentives to compete against one another, if the parties' independent decision-making is limited outside of the JV because of combined control or combined financial interests, or if the JV facilitates collusion.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The judicial processes that each Agency may pursue to block a transaction differ.

DOJ

To obtain an order to either block a proposed transaction or unwind a completed transaction that may violate Section 7 of the Clayton Act, the DOJ must file in federal district court a complaint and motions for a preliminary injunction (if the transaction has not closed) and a permanent injunction.

To obtain a preliminary injunction to prevent a transaction closing pending a decision on the merits, the DOJ must show that its likelihood of success on the merits and the threat of irreparable harm outweighs any potential harm to the defendant and any opposing public interest in granting the injunction. To prove a Section 7 violation and obtain a permanent injunction, the DOJ has the burden to demonstrate with a "reasonable probability" (ie, greater than a "mere possibility" but less than a "certainty") that the merger will, or currently does, substantially lessen competition. Frequently, courts collapse the preliminary and final injunction hearings into one. The losing party may appeal to the federal court of appeals.

FTC

The most common path that the FTC follows to challenge a proposed merger is to seek a preliminary injunction in federal district court under Section 13(b) of the FTC Act, while simultaneously filing an administrative complaint under Part 3 of the FTC Rules seeking an order that the transaction violates the FTC Act ("Part 3 proceedings"). If a transaction has already closed, the FTC proceeds under Part 3 only. If the FTC fails to obtain a preliminary injunction (and does not appeal or loses an appeal of the preliminary injunction decision), its current policy is to discontinue Part 3 proceedings unless continuing to do so would serve the public interest.

To obtain injunctive relief under Section 13(b), the FTC need only make "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." This is understood to be a lower standard than the "balancing of the equities" standard applying to DOJ preliminary injunction cases.

Administrative complaints are litigated before an administrative law judge (ALJ), an FTC employee appointed by the Office of Personnel Management. The ALJ's initial decision and order may be appealed to the full Commission, whose decision may then be reviewed by the federal courts of appeal.

5.2 Parties' Ability to Negotiate Remedies

The Agencies have traditionally accepted remedies to address competitive concerns. Over the last several years, both Agencies have expressed a strong preference for structural remedies and scepticism of the effectiveness of behavioural remedies. See **9.2 Recent Enforcement Record**.

While remedy discussions may take place at any stage in the review process, they rarely begin before the Agency staff have investigated the transaction and identified concerns. In transactions with narrow but obvious concerns, parties may approach the Agency early with a pre-arranged "fix". See **5.4 Typical Remedies**.

5.3 Legal Standard

In September 2020, the DOJ issued its most recent Merger Remedies Manual, which states the DOJ will insist on a remedy that preserves competition and resolves the anti-competitive problem. Similarly, the FTC's 2012 Negotiating Merger Remedies Statement notes that "acceptable" remedies must "maintain or restore competition in the markets affected by the merger."

5.4 Typical Remedies

Remedies may be either structural or behavioural.

When the Agencies determine that a horizontal merger is likely to have anti-competitive effects, the Agencies generally prefer structural remedies consisting of divesting an ongoing standalone business unit. Structural divestitures consisting of less than a standalone business must include all assets (or licences to those assets) necessary for the divestiture purchaser to be an effective, long-term viable competitor of the merged entity. The FTC's 2012 Negotiating Remedies Manual and DOJ's 2020 Merger Remedies Manual provide insight into the Agencies' negotiating process and requirements, but may not fully reflect the preferences of the current administration.

The Agencies accept behavioural or conduct remedies in very limited circumstances and have increasingly expressed scepticism about whether behavioural remedies are effective.

The DOJ notes in its 2020 Merger Remedies Manual that conduct remedies alone are only appropriate when the parties prove that the transaction generates merger-specific efficiencies, structural relief is not possible, the conduct remedy is sufficient to cure the anti-competitive harm, and the remedy is effectively enforceable.

In very rare cases, the Agencies have also pursued disgorgement of profits in consummated mergers as a remedy. In 2015 in US v Twin America, the DOJ obtained disgorgement in a consent decree regarding a consummated joint venture. The FTC similarly obtained disgorgement in a consent decree regarding a consummated merger in FTC v Hearst Trust in 2001. (Note that the FTC's authority to obtain disgorgement is currently in question under a recent Supreme Court ruling.)

5.5 Negotiating Remedies With Authorities

The Agencies have different procedures for accepting and finalising negotiated remedies.

FTC

The parties and the FTC staff negotiate a proposed consent agreement that is incorporated into an Agreement Containing Consent Order (ACCO) and provisional Decision and Order (D&O), which must be signed by the staff and merging parties, approved by the Director of the Bureau of Competition, and approved by a majority of the Commissioners. At this point, the parties are usually permitted to close their transaction. The FTC then opens a 30-day public comment period, issuing a complaint, provisional D&O, and an Analysis of Proposed Consent Order to Aid Public Comment. Following the public comment period, the FTC can accept the D&O as final, reject it, or revise it.

DOJ

The parties and the DOJ staff negotiate a consent agreement in the form of a Proposed Final Judgement (PFJ). Once the PFJ has been approved by the Assistant Attorney General, the Agency files in federal district court a complaint, the PFJ and a competitive impact statement. The court makes a preliminary order accepting the PFJ, which usually permits the parties to close the transaction. Under the Tunney Act, the DOJ must publish the PFJ and related materials for a 60-day public-comment period, following which it submits a report to the court that the PFJ is in the "public interest" and the court makes the PFJ final. The Tunney Act proceeding is usually uneventful; however, in one notable recent case (CVS/Aetna, 2019), a judge did ask the parties to hold the acquired business separate pending public comment, and conducted hearings with live witnesses before concluding that the settlement was in the public interest.

5.6 Conditions and Timing for Divestitures

Conditions and Timing

Where a settlement requires a divestiture, the Agencies typically require the parties to obtain prior approval of a contractually bound buyer for the divested assets before they will approve the consent agreement.

The parties typically may close the merger upon entry of the consent agreement for public comment.

Monitoring and Enforcement

The Agencies monitor and enforce compliance with negotiated remedies. Where provided in the consent agreement, the Agencies may also appoint monitors to ensure the compliance and effectiveness of the remedy.

At the FTC, the Bureau of Competition Compliance Division monitors and enforces merger remedy compliance. Failure to comply with a remedial agreement is a violation of Section 5(l) of the FTC Act and may result in civil penalties of up to USD46,517 per day of non-compliance as well as injunctive and other equitable relief. In 2020, Alimentation Couche-Tard Inc and CrossAmerica Partners LP settled allegations that the two had violated a 2018 consent order for USD 3.5 million. The DOJ recently established the Office of Decree Enforcement and Compliance to monitor and enforce consent decree compliance.

5.7 Issuance of Decisions

The Agencies do not affirmatively approve proposed mergers. They simply allow the HSR waiting period to expire, or terminate the waiting period early. Occasionally, for significant transactions, the Agencies will issue a press release when closing an investigation and/or a "closing statement" explaining the reasons for closing the investigation, such as the DOJ's July 2020 statement on the closing of its investigation of London Stock Exchange Group and Refinitiv.

Challenges to mergers are public. Complaints are filed in federal district court (or in the case of the FTC, Part 3), and appear on public court and agency dockets. In addition, the Agencies make press releases when challenging mergers. Court and Part 3 decisions in merger challenges are on the public record.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Agencies may seek remedies or challenge foreign-to-foreign transactions where the transactions impact US markets.

For example, in June 2021, the DOJ filed suit to block UK firm Aon PLC's proposed USD30 billion acquisition of UK company Willis Tower Watson, alleging the transaction would eliminate competition in US markets by merging two of the "Big Three" global insurance brokers. The DOJ rejected Aon and Willis' proposed US-focused divestitures as "wholly insufficient" to address the DOJ's concerns, and noted that it also viewed divestitures accepted by other international competition authorities in connection with the proposed transaction as inadequate. Shortly after the DOJ filed suit to block the transaction, Aon and Willis abandoned the merger.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Parties must submit the transaction agreement as well as any agreements not to compete and any other agreements between the parties with their HSR filings. The Agencies will review the transaction as a whole, and may raise concerns about ancillary restraints in the review process. Recently, employment-related non-compete agreements have been a particular focus of review. Typically, parties amend ancillary agreements rather than jeopardise clearance of the entire transaction. Even if no concerns are raised during the merger review process, the Agencies maintain the discretion to challenge any ancillary restraints or collateral agreements at a later time.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Complaints and Agency-solicited input from customers, suppliers, competitors, and other industry participants often meaningfully inform merger review. Customer complaints are typically most influential; however, input from other industry participants can also be important in identifying non-reportable transactions or causing the Agencies to look more closely at certain aspects of a transaction.

Information can be obtained from third parties informally through phone calls and meetings, as well as through formal Civil Investigative Demands (CIDs). Third parties may be identified by the merging parties in responses to a voluntary access letter or otherwise. The confidentiality of the identity of third parties and information provided by third parties under either process is statutorily protected. The extent of these protections varies depending on which Agency obtained the information, and how and for what purpose the information was obtained. When information submitted to the Agencies is not statutorily protected from disclosure, parties can request and typically receive assurances from the Agencies that information provided will not be publicly disclosed or disclosed without advance notice.

7.2 Contacting Third Parties

The Agencies routinely seek input from customers, suppliers, competitors, and other third parties to confirm or complement staff's competitive analysis of proposed transactions or remedies. The Agencies frequently interview customers, suppliers and competitors. The Agencies may also issue subpoenas for depositions (DOJ) or investigational hearings (FTC) and frequently request documents and information from third parties either voluntarily or through CIDs and subpoenas.

7.3 Confidentiality

All materials submitted by the Acquiring and Acquired Persons under the HSR Act are confidential under the Freedom of Information Act, subject only to public disclosure if the transaction is challenged by one of the Agencies. The "fact of filing" is also confidential, unless disclosed by the parties themselves, or unless early termination is requested and granted, in which case the parties' names are published in the Federal Register and on the FTC's website. Additionally, such confidential information may be disclosed to a committee or subcommittee of Congress.

7.4 Co-operation With Other Jurisdictions

The USA has bilateral co-operation agreements including commitments to consult and co-operate on competition matters and to properly maintain the confidentiality of shared information with 11 jurisdictions: Germany, Australia, the EU, Canada, Brazil, Israel, Japan, Mexico, Chile, Colombia, and Peru. The Agencies have also entered into less formal, non-binding memoranda of understanding with competition agencies in Russia, the People's Republic of China, India, and South Korea.

When competition issues span multiple jurisdictions, the Agencies may exchange views and information with their foreign counterparts; however, to share information submitted by the parties, the Agencies must first obtain a waiver of confidentiality. Parties typically agree to such waivers to appease enforcers and potentially avoid incompatible remedies. The Agencies have released a joint model waiver of confidentiality.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere With Transactions** and **5.7 Issuance of Decisions**, the Agencies must seek a preliminary or permanent injunction in federal district court to stop a proposed transaction from closing after the expiration of the HSR waiting period. The parties or the Agencies may appeal this decision to the federal court of appeals. The parties may also appeal adverse FTC Part 3 decisions to the full Commission and appeal Commission decisions to the federal court of appeals.

8.2 Typical Timeline for Appeals

Appeals can take many months to conclude. For example, in 2022, Hackensack Meridian Health, Inc and Englewood Healthcare Foundation abandoned their proposed merger after spending over six months unsuccessfully appealing a preliminary injunction that blocked their proposed merger before the US Court of Appeals for the Third Circuit.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have the right to appeal an Agency's decision not to challenge a transaction. Third parties with standing may, however, bring a private action against the merging parties under the Clayton Act or Sherman Act. See **1.3 Enforcement Authorities**.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The HSR thresholds are adjusted annually, and changes in the interpretations of the HSR Act and its regulations – issued by the Premerger Notification Office of the FTC – are common.

Policy Changes

As noted in **3.11 Accelerated Procedure**, in February 2021, the Agencies announced they would temporarily stop granting early termination during the initial HSR waiting period.

In October 2021, the FTC announced a policy of requiring all merging parties subject to a Commission remedy order to obtain prior approval for a minimum of ten years before closing any future transactions affecting any relevant markets for which a violation was alleged. Prior approval requirements may extend beyond the narrow markets affected by the original transaction, and the FTC has claimed they may pursue prior approval requirements even if a transaction is abandoned. Transactions subject to prior approval will not benefit from HSR Act review timelines or the ability to force the FTC to sue to block a deal, and accordingly prior approvals may take significantly longer than traditional HSR review. Additionally, all buyers of divested assets must seek prior approval before selling assets acquired through consent decrees for a minimum of ten years.

Legislation

Recent years have spawned multiple proposals and bills to reform the merger review process.

- The SMARTER Act, having been passed by only the House in 2018 (H.R. 5645), was reintroduced in the Senate in 2020 (S. 4876) by Senator Mike Lee. It would subject the FTC to the same standards as the DOJ when seeking to block proposed mergers and prohibited the FTC from continuing administrative litigation after seeking a preliminary injunction in federal court.
- In March 2022, Senator Warren and Representative Jones introduced the Prohibiting Anti-Competitive Mergers Act (S.3847, H.R.7101), which would prohibit deals valued over USD5 billion; deals resulting in market shares above 33% for sellers or 25% for employers; and deals resulting in highly concentrated markets under the Agencies' 1992 Merger Guidelines, which relied on the Herfindahl-Hirschman Index (HHI) to measure market concentration.
- In February of 2021, Senator Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (S.225), which would amend Section 7 of the Clayton Act to prohibit mergers that "materially" (rather than "substantially") lessen competition or otherwise unfairly lower wages by creating monopsony power. Sufficiently large deals would also shift the burden of proof onto the merging parties.
- In 2021, Senators Klobuchar and Cotton and Representative Jeffries introduced the Platform Competition and Opportunity Act (S.3197, H.R.3826), which would prohibit certain large online platforms (measured by their active user base, the size of the parent company, and the platforms' sales or supply of products on their own platform) from engaging in acquisitions, among other reforms.

9.2 Recent Enforcement Record

Remedies

Under the Biden administration, both Agencies have noted that they prefer to block transactions outright rather than accept remedies that do not fully preserve competition. The Agencies have expressed scepticism that remedies effectively preserve competition and have increasingly rejected the use of behavioural remedies.

In 2021, all accepted consent agreements contained some form of divestiture. For example, in US v S&P Global, Inc, the DOJ conditioned S&P's USD44 billion acquisition of IHS Markit Ltd on the divestiture of three of its price-reporting agencies and the waiver of certain non-compete contracts. In 2022, for In the Matter of JAB Consumer Partners, the FTC conditioned a USD1.1 billion acquisition of a competing veterinary clinic operator on the divestiture of certain clinics and the promise to seek prior approval before further qualified acquisitions.

The Agencies have rejected numerous offers for behavioural remedies, leading to the abandonment of multiple transactions including Nvidia's USD40 billion proposed acquisition of Arm, and Lockheed Martin's proposed USD4 billion acquisition of Aerojet.

Enforcement Actions

Between 1 January 2021 and 25 June 2022, the FTC and DOJ publicly announced 34 new challenges to proposed transactions. Of these:

- 19 complaints were filed as part of a negotiated consent decree package;

- one deal (involving two non-US entities) was restructured in response to DOJ concerns and prior to the issuance of a complaint;
- seven transactions were abandoned before a preliminary injunction hearing; and
- seven challenges are ongoing as of June 2022.

During the same period, the FTC and DOJ also continued to pursue 13 challenges initiated prior to 2021. Of these:

- seven complaints were filed as part of a negotiated consent decree agreement;
- two transactions were abandoned prior to a preliminary injunction hearing (Visa/Plaid and Proctor & Gamble/Billie);
- an ALJ dismissed one FTC challenge (In the Matter of Altria Group/Juul Labs);
- one transaction was abandoned after a preliminary injunction was granted (FTC v Hackensack Meridian Health & Englewood Healthcare Foundation);
- one closed after a preliminary injunction was denied (Jefferson/Einstein); and
- one case is ongoing (Facebook).

Fines

As discussed in **2.2 Failure to Notify**, the FTC routinely seeks penalties for repeat offenders who fail to file a required HSR Notification. In 2021 in US v Clarence L Werner and US v Biglari Holdings, Inc, the DOJ settled claims that the defendants had unlawfully failed to report their acquisitions for USD486,900 for 4,708 days of non-compliance and USD1.4 million for 126 days of non-compliance, respectively.

9.3 Current Competition Concerns

The Biden administration has taken an aggressive stance on antitrust enforcement and sought to embolden federal antitrust agencies in challenging mergers and other potentially anti-competitive conduct. President Biden issued a sweeping executive order in July 2021 addressing competition issues across the economy and embraced reformists pushing for more vigorous and unorthodox enforcement.

The Agencies have also advocated for a departure from the economic analysis and principles that have driven case law over the last 40 years that sought to analyse or predict actual market effects from mergers and other business conduct. Instead, Agency leadership has signalled a focus on the impacts of overall consolidation on workers and small businesses and scepticism of claimed pro-competitive benefits such as economies of scale or elimination of double marginalisation.

Continuing trends towards more aggressive enforcement and risk-taking that began during the last administration, the Agencies have also challenged vertical deals (rejecting offers for behavioural remedies) and acquisitions of nascent competitors.

DOJ

At the DOJ, Assistant Attorney General Kanter's enforcement agenda includes: championing a move away from the consumer welfare standard (which focuses on a transaction's effects on output, price, and quality) towards an approach that focuses on rivalry and competition; reassessing "outdated" precedents in light of "new market realities"; litigating rather than settling cases with the intent to establish new case law; and bringing more monopolisation cases.

Under Kanter's leadership, the DOJ has challenged or threatened to challenge multiple transactions, causing several deals to be abandoned, including Verzatec/Crane, Cargotec/Konecranes, and US Sugar/Imperial Sugar.

FTC

At the FTC, Chair Khan has set out an aggressive enforcement agenda. Her broad vision for the Commission calls for a strategic approach that, among other things, targets "root causes" of harm, focuses on "structural incentives that enable unlawful conduct", and implements forward-looking action, particularly regarding next-generation innovation and nascent industries. Under Chair Khan, the FTC has implemented wide-ranging policy changes designed to discourage mergers. The agency has challenged multiple transactions, causing several deals to be abandoned, including NVIDIA/Arm and Lockheed Martin/Aerojet Rocketdyne.

Limits to US Enforcement Efforts

The Agencies' aggressive and emboldened enforcement approach will be constrained by the courts. Previous administrations' enforcement decisions were heavily influenced by litigation risk and the strength of a case on the merits. The Agencies may face significant obstacles in the courts if they attempt to assert unconventional theories of harm that run counter to modern antitrust precedents.

Axinn, Veltrop & Harkrider LLP combines the skills, experience and dedication of the world's largest firms with the focus, responsiveness, efficiency and attention to client needs of the best boutiques. The firm was established in the late 1990s by lawyers from premier Wall Street firms with a common vision: to provide the highest level of service and strategic acumen in antitrust, intellectual property and high-stakes litigation. Axinn's lawyers have served as lead or co-lead counsel on nearly half a trillion dollars in transactions and, in the last ten years alone, have handled more than 250 litigations.

AUTHORS

Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations, and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice, and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican, and Japanese competition regulators.

Lisl J. Dunlop has 30 years of experience in antitrust and competition issues, including counselling, litigation, and transactions. Lisl guides clients through the antitrust-related aspects of mergers and acquisitions, joint ventures and other combinations, and sales and distribution matters. She also represents clients in antitrust agency investigations, and has represented major corporations in complex antitrust litigations. Lisl has significant experience advising leading US and multinational companies in a broad range of industries, including the media, technology, cannabis, and healthcare sectors.

Megan Walden focuses her practice on merger analysis, government investigations, and antitrust counselling. She has previously assisted national and multinational companies across a variety of industries, including the life sciences, transportation, and retail sectors.

Axinn, Veltrop & Harkrider LLP

114 West 47th Street
New York
NY 10036
USA

Tel: +1 212 728 2200
Fax: +1 212 728 2201
Web: www.axinn.com

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Law and Practice

Contributed by:
Patrick Jonhera and Oswald Marondedze,
AnesuBryan & David (AB & David) see p.762

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The relevant merger control legislation in Zimbabwe is as follows:

- the Competition Act (Chapter 14:28);
- the Companies & Other Business Entities Act (Chapter 14:23);
- the Competition (Notification of Mergers) (Amendment) Regulations, 2022 (No. 1), Statutory Instrument 55 of 2022;
- the Competition (Advisory Opinion) Regulations, Statutory Instrument 26 of 2011;
- the Competition (Notifiable Merger Thresholds) (Amendment) Regulations, Statutory Instrument 126 of 2020;
- the Competition (Advisory Opinion) Regulations, Statutory Instrument 125 of 2020;
- the Competition (Anti-Dumping and Countervailing Duty) (Investigation) Regulations, Statutory Instrument 266 of 2002;
- the Competition (Fees for Inspection and Copying of Documents) Regulations, Statutory Instrument 266 of 2001;
- the Exchange Control (Special Provisions for Securities Listed on Victoria Falls Stock Exchange) Regulations, Statutory Instrument 196 of 2020; and
- the Zimbabwe Stock Exchange Amendment Rules 2019.

1.2 Legislation Relating to Particular Sectors

The Indigenisation Act reserves up to a 49% shareholding for foreign investors in mining transactions relating to the mining of platinum and diamonds.

The Postal and Telecommunications Act requires persons licensed by the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) to inform the authority of any transfer of more than 10% of the shares in the licensee.

The Zimbabwe Energy Regulatory Authority Act (Chapter 13:23) gives the energy regulator (Zimbabwe Energy Regulatory Authority) the power to regulate competition in the energy sector.

All other "general" foreign investments are regulated by the Zimbabwe Investment Development Agency Act.

1.3 Enforcement Authorities

The Competition and Tariff Commission (the Commission) regulates competition.

The following authorities regulate sector-specific competition:

- POTRAZ regulates sector-specific mergers involving telecommunications companies; and
- the Zimbabwe Energy Regulatory Authority regulates competition issues that are specific to the energy industry.

2. JURISDICTION

2.1 Notification

Notification is compulsory if a transaction reaches or exceeds the notification threshold.

The new threshold for a notifiable merger applies to merging parties whose combined annual turnover in Zimbabwe is USD1.2 million or whose combined assets in Zimbabwe are USD1.2 million.

There are no exceptions to notification.

2.2 Failure to Notify

Parties to a notifiable merger may not implement a transaction without having first notified and obtained approval from the Commission. Penalties for failure to notify are levied up to a maximum of 10% of either or both of the merging parties' annual turnover or assets in Zimbabwe. The penalties are made public by the Commission.

2.3 Types of Transactions

Merger control legislation generally regulates vertical and horizontal mergers and conglomerations. The framework targets transactions involving direct or indirect acquisitions of a "controlling interest" only. Therefore, a transfer of shares that does not result in a "controlling interest" is not caught by the merger regulations.

2.4 Definition of "Control"

The Competition Act qualifies "control" and defines a "controlling interest" as any interest in an asset that enables the holder to exercise control over the activities or an asset of another, through direct or indirect means.

2.5 Jurisdictional Thresholds

The jurisdictional threshold is USD1.2 millionof assets or annual turnover in Zimbabwe, applicable to all sectors. The threshold was previously set in Zimbabwe dollars, but this has been changed to US dollars by a recent statute. There are no sector-specific jurisdictional thresholds.

2.6 Calculations of Jurisdictional Thresholds

Annual turnover is calculated in accordance with the International Accounting Standards (standards set by the International Accounting Standards Association and adopted by the Zimbabwe Public Accountants and Auditors Board) and the statement of Comprehensive Income of the entity concerned for the immediate previous financial year.

The asset value of any of the merging parties is calculated using the International Accounting Standards and the International Financial Reporting Standards.

The asset value of the party at any time will be based on the gross value of its assets as recorded on the party's Statement of Financial Position as at the end of the immediate previous financial year. Previously, any sales or assets booked in foreign currency were converted at the prevailing exchange rate. However, now that the threshold has been set in US dollars, there may not be any need for conversion, except in situations where sales are realised in Zimbabwe dollars, which may need to be converted to US dollars at the prevailing Dutch Auction rate for the purposes of determining turnover.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

A seller's turnover is included with that of the target.

The threshold is calculated by combining all the merging parties' annual turnover or assets in Zimbabwe; if such combined turnover or assets exceed the threshold, then the transaction becomes a notifiable merger.

For group companies, where one of the merging companies is a subsidiary company, the combined turnover of the group of companies in which the acquiring party is a subsidiary is also included.

2.8 Foreign-to-Foreign Transactions

The current legislative framework has no extra-territorial application, except in respect of mergers with an "effect" in Zimbabwe – eg, change in control of an asset or entity in Zimbabwe. The competition legislation incorporates the "effects test", which empowers the regulator to "regulate" any foreign transaction(s) that may have an economic "effect" in Zimbabwe regardless of a lack of presence. However, no guidelines have been issued on how the "effects test" will be applied to foreign mergers. In practice, such notifications result from co-operation between competition authorities, especially with those from the neighbouring countries.

2.9 Market Share Jurisdictional Threshold
There is no market share jurisdictional threshold.

2.10 Joint Ventures
Joint ventures are subject to merger control.

The competition framework requires parties to any agreement or arrangement – including a joint venture involving a transaction that is prohibited, restricted or affected by the Competition Act – to apply for authorisation from the Commission. There are no special rules for determining whether joint ventures and any similar arrangements meet the jurisdictional threshold.

2.11 Power of Authorities to Investigate a Transaction
The Commission is empowered to conduct any investigations it deems necessary into any merger or monopoly situations, to discourage and prevent restrictive practices.

There is no statute of limitations on the authorities' ability to investigate a transaction.

2.12 Requirement for Clearance Before Implementation
Parties cannot implement a transaction unless the Commission has approved and cleared said transaction. The Commission can prohibit and penalise a party for implementing a transaction without its approval.

Parties may, however, seek a dispensation to implement a transaction pending assessment by the Commission. Such matters are dealt with on a case-by-case basis.

2.13 Penalties for the Implementation of a Transaction Before Clearance
The Commission may prohibit a transaction that is implemented before it has been cleared and/or may impose a penalty, which may not exceed 10% of the parties' combined annual turnover or assets in Zimbabwe.

The penalties are made public in the Commission's annual reports, which are published annually or quarterly after board resolutions.

2.14 Exceptions to Suspensive Effect
There are no exceptions to suspensive effect. However, parties to a merger may seek a waiver to implement a transaction pending assessment by the authorities.

2.15 Circumstances Where Implementation Before Clearance Is Permitted
Closing prior to clearance is not permitted. The Competition Act empowers the Commission to impose a penalty on merging parties that proceed to implement a merger before it has been cleared.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification
Notification must be made within 30 days of concluding the merger agreement between the

parties or within 30 days of the conclusion of the acquisition of a controlling interest.

Failure to notify attracts a penalty, which may not exceed 10% of the merging parties' annual turnover in Zimbabwe.

The penalties are public and are published by the Commission on its public platforms, such as its website.

3.2 Type of Agreement Required Prior to Notification

A formal and written agreement is required prior to notification.

Notably, the Companies and Other Business Entities Act requires the merging parties to provide notification of a provisional contract of merger to shareholders, accompanied by a copy of the contract of merger.

The contract of merger to be submitted to the shareholders on notification must include the following details:

- the name of the registered office and company secretary of each company that will merge;
- the terms and conditions of the proposed merger;
- the manner and basis of converting the shares of each merging company into cash or property;
- the full text of the surviving company's constitutive documents;
- the date upon which all transactions of the non-surviving company shall be treated as those of the surviving company; and
- the rights conferred by the surviving or new company on the holders of securities other than shares and any other provisions relating to the merger.

The Commission is expected to use this standard in cases where no formal agreement has been reached by the parties before notification.

3.3 Filing Fees

The notification is accompanied by a notification fee, calculated at 0.5% of the combined annual turnover or assets in Zimbabwe of the merging parties.

The minimum and maximum fees payable are USD10,000 and USD40,000, respectively.

3.4 Parties Responsible for Filing

Either the acquiring or the target party to a notifiable merger can make the transaction notification.

3.5 Information Included in a Filing

A standard notification form is provided by the Commission, setting out the information to be included in a filing.

The general information to be included is as follows:

- the names and official addresses of the merging parties;
- all undertakings directly or indirectly controlling the merging parties;
- the full name, address and contact details of the person authorised to make the notification;
- the address and designated office to which the Commission should send any correspondences;
- specific details on the nature or quantity of assets being acquired or transferred;
- purchase consideration;
- estimated timelines for concluding the transaction;
- the pre- and post-merger structure of ownership and control of the merging parties;

- the rationale and future plans of the proposed merger; and
- the anticipated benefits of the merger to the consumers or any other third parties.

Documents from foreign countries must be notarised by a notary public, whilst those from Zimbabwe must be certified as true copies of the original. The filing must be in the English language; a document in any other language must be accompanied by a translation into English.

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties or consequences for incomplete notifications. In practice, the Commission may request further information upon realisation that the notification is incomplete.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Commission is empowered to either amend or revoke any authorisation if it realises that said authorisation was granted based on erroneous or misleading information.

The party that submitted the erroneous or misleading information may be called to correct, justify or explain the information thought to be erroneous or misleading.

The party responsible for the submission of misleading information may be fined or imprisoned for a period not exceeding one year. There have been no reports of any instances where the authority has had to utilise this power.

3.8 Review Process

The review phases are as follows:

- filing a notification accompanied by the notification fee;
- scrutiny of the submitted forms by the Commission;
- initial screening committee;
- stakeholder consultation;
- case analysis and report drafting;
- consideration of the report by the draft committee;
- consideration of the report by the Commission board's sub-committee;
- consideration of the report by the Commission's main board; and
- notification of the board's decision to the merging parties.

There is no set timeline within which this process must be completed. However, in practice, the Commission takes up to 120 days to review complex transactions, while less complex transactions take about 60 days.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions with the Commission, which is empowered by the Competition Act to enter into such negotiations with parties at "any time". Pre-notification discussions are encouraged by the authorities but are not mandatory.

Any discussions with the Commission will be deemed to be confidential, and such confidentiality is binding on all members of the Commission.

3.10 Requests for Information During the Review Process

The Commission may request any information it deems necessary; since there is no timeline within which a review must be completed, the request for information has no effect on the time for completion of review. Parties are encouraged to submit comprehensive documents to avoid requests for documents, which may delay the review process. Where a party submits erroneous or misleading information, it may be called to correct, justify or explain the information thought to be erroneous or misleading.

3.11 Accelerated Procedure

All merger review procedures follow the channels set by the Commission. As such, there is no method through which to accelerate any of the review procedures.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

The Competition Act does not specifically define the substantive test used in reviewing a merger. A reading of the different sections in the statute gives the impression that "public interest" is the substantive test applied by the authorities, which is defined to cover any transaction that is likely to lessen the degree of competition or create a monopoly in all or part of the country.

4.2 Markets Affected by a Transaction

The Commission largely considers the geographical/location points for the distribution of the product/service sold by the merging parties.

4.3 Reliance on Case Law

Authorities frequently rely on case law. However, case law from other jurisdictions is persuasive rather than binding. Case law from South Africa is heavily relied on because of the common Roman Dutch law heritage.

4.4 Competition Concerns

The Commission is mostly concerned with investigating effects which in their nature are restrictive practices. Such restrictive practices include anything that has or is likely to have the following effects:

- restricting, preventing or limiting the production or distribution of any commodity or service;
- enhancing the price of any commodity or service;
- preventing or retarding the development of any technical improvements in regard to a commodity or service;
- preventing or retarding the expansion of the existing market; and
- limiting the availability of the commodity or service.

4.5 Economic Efficiencies

Economic efficiencies are regularly considered. The Commission largely considers economic efficiencies for mergers having a higher risk of stifling competition. It requires the merging parties filing the notification to justify the merger transaction and suggest how they intend to mitigate the anti-competitive effects of the merger concerned.

A consideration of the economic efficiencies of the merger may result in the merger being approved with conditions.

4.6 Non-competition Issues

The Commission is allowed to take non-competition issues such as public interest into consideration. The Competition Act specifically makes reference to the Commission's power to restrict any practice that is against public interest. The test for whether an act is contrary to public interest is open to contextual/circumstantial definition. However, non-competition issues may include:

- the creation of employment;
- consumer protection;
- the promotion of indigenisation;
- the dismantling of market entry barriers;
- brand development; and
- the promotion of foreign investment.

Foreign direct investment is regulated by the Zimbabwe Investments Authority. Rules for foreign direct investment are separate from merger control rules. Foreign direct investment does not require filings, but rather compliance with the Zimbabwe Investment Authority's framework, such as obtaining an Investment Licence and complying with exchange control rules.

4.7 Special Consideration for Joint Ventures

The Commission makes special considerations for joint ventures that are long term in nature. No competition issues may arise for short-term joint ventures.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Commission can:

- conditionally approve a merger;
- approve the merger without conditions; and/ or
- prohibit the merger in its entirety if it is likely to lessen or remove competition, or result in unfair business practices.

In making the above orders, the Commission considers the following factors:

- maintaining and promoting effective competition;
- promoting the interests of consumers, purchasers and other users; and
- promoting, through competition, the reduction of costs and the development of new techniques and commodities.

5.2 Parties' Ability to Negotiate Remedies

The Commission may enter into negotiations with the parties concerned with the intention of making an arrangement that will ensure the discontinuance of any restrictive practice and terminate, prevent or alter any merger or monopoly situation.

5.3 Legal Standard

All enforcement orders and remedies must be reasonable and justifiable.

5.4 Typical Remedies

Typical remedies include "conditional approval" of a merger, divesting or dissolution in cases of a monopoly or prohibiting the acquisition, in whole or in part, of an undertaking or assets that raises competition issues.

5.5 Negotiating Remedies With Authorities

The remedies imposed on the merging parties cannot be varied or negotiated by the parties once they have been imposed by the Commission. In practice, an affected party is given an opportunity to make representations before a remedy is issued by the Commission.

5.6 Conditions and Timing for Divestitures

The conditions and timings for divestitures or other remedies are determined on a case-by-case basis. Parties cannot implement a transaction where the remedies have not been complied with.

5.7 Issuance of Decisions

All decisions are issued to the parties, explaining, if necessary, the reasons for the decision if the merger is prohibited.

The Commission makes all decisions public in its annual reports.

The information provided for in the public reports includes:

- the names of merging parties;
- the date of notification;
- the merger details (specifics of transaction);
- the relevant market;
- the type of merger (conglomerate/vertical/horizontal); and
- the decision of the Commission (approval or disapproval).

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Where foreign-to-foreign parties have a local asset or branch, remedies are imposed on the local entity. There is no recent record of any remedies being enforced in a foreign-to-foreign transaction.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Clearance decisions cover related arrangements.

Separate notifications are not required for ancillary transactions, since all related transactions are treated as one.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are notified of a proposed merger through a publication in the government gazette.

The Commission gives third parties the right to submit written representations regarding mergers.

7.2 Contacting Third Parties

Communications to third parties or the general public are usually made by way of publication in the government gazette.

However, where authorisation is sought, the Commission may not publish the notice if it considers that publication of the notice may prejudice the parties to the merger and if the notification will not materially assist the Commission in gathering the information it seeks to gather from the public.

7.3 Confidentiality

A notification is not confidential: after notification is made, a notice of the proposed merger is published in the government gazette, calling on third parties to make any submissions regarding the merger.

The description of the transaction itself is confidential unless it is disclosed by members of the Commission in their official capacity, and only when they are required by law to do so. Failure to maintain the confidentiality of information bears penalties against members of the Commission.

7.4 Co-operation With Other Jurisdictions

The Commission co-operates with competition authorities from other jurisdictions for transactions involving foreign entities. It shares information relating to specific transactions without authorisation from the parties involved. The co-operation extends to the development of policy, practice and regulation.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Any person who is aggrieved by a decision of the Commission may appeal against it to the Administrative Court.

8.2 Typical Timeline for Appeals

An appeal is supposed to be lodged within 30 days of the original decision being made by the Commission.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The framework does not provide for the right of appeal by third parties against clearance decisions.

However, third parties have the right to recover damages for any loss, suffering, injury or harm resulting from any arrangement, undertaking or conduct that constitutes unfair business practise or any conduct in contravention of the Competition Act.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The most recent change is Competition (Notification of Mergers) (Amendment) Regulations, 2022 (No.1), Statutory Instrument 55 of 2022, which provides for new monetary thresholds for notification.

The Statute pegs the monetary threshold in US dollars, which is a material change as the previous instrument pegged the monetary threshold in local currency (the Zimbabwean dollar).

Furthermore, principles for a new, modernised Competition Act are being discussed. The new Act is expected to address some of the short-comings of the current Act and bring it into line with developments in the regulation of competition.

The authorities are also in the process of drafting merger guidelines to simplify the law and practice of merger regulation in Zimbabwe.

9.2 Recent Enforcement Record

There have been two cases involving enforcement, both relating to late notification:

- in the merger of Sub-Sahara Tourism Investment & Shearwater Legends of Africa with Zambezi Tourism Investment, the merging parties were penalised 1.27% of their revenue; and
- in the merger of Takura Ventures P/L and New Health 263 P/L, the merging parties were penalised 2.8% of their turnover.

9.3 Current Competition Concerns

Generally, a trend has emerged in which the authorities will approve conglomerate mergers without conditions and vertical mergers with conditions to avoid concentrations and competition being harmed.

AnesuBryan & David (AB & David) was established in Zimbabwe in 2017 as a specialist pan-African business and projects law firm. The firm is a member of the AB & David Africa network of business and projects law firms. It has quickly established itself as a go-to firm in commercial transactions, with a team of three senior and two junior multi-skilled lawyers in the M&A team focusing on legal due diligence, creative deal structuring, acquisition and disposal programmes, competition law, auctions and exchange control. The firm advises clients across industries including mining, telecoms, banking and finance, insurance, manufacturing, agriculture, fintech, infrastructure, private equity and real estate.

AUTHORS

Patrick Jonhera is a partner at AB & David. His practice focuses on commercial transactions in the energy, infrastructure, manufacturing and mining industries. Patrick advises clients on cross-border M&A, competition, divestures, shareholder disputes and joint ventures. He is also a lecturer in Corporate Law at the University of Zimbabwe, and a member of the Law Society of Zimbabwe. Major clients include the Infrastructure Development Bank of Zimbabwe (IDBZ), the Enerfin Elecnor group, Tetrad Investment Bank, Tianze Tobacco Limited and Waica Re Zimbabwe Limited.

Oswald Marondedze is a junior associate in AB & David's corporate practice group. He focuses on antitrust, legal due diligence and compliance issues in commercial transactions. Oswald is a graduate from the Midlands State University.

AnesuBryan & David (AB & David)

2nd Floor, Engen House
Corner R.Mugabe & Kaguvi Street
Harare
Zimbabwe

Tel: +263 242 756 551/2
Email: admin.zw@abdavid.com
Web: www.abdavid.com

AB & David
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